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No. 72818-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON and KRISTINE NORTON, individually, and derivatively on behalf of LARCO-BOLIVAR INVESTMENTS, LLC, and SHELL LA PAZ, LLC; NORTHLAND CAPITAL, LLC, individually, and derivatively on behalf of NDG-BRYCON, LLC; and P.R.E. Acquisitions, LLC,

Appellants,

v.

GRAHAM & DUNN, P.C.,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BETH ANDRUS

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

A damaged party's general knowledge of a Ponzi scheme is not knowledge that a law firm knowingly and substantially assisted the scheme's architect in the perpetration of the fraud and its cover up. Respondent Graham & Dunn conflates John and Kristine Norton's knowledge of harm with knowledge of those responsible for that harm and denies entirely its role in actively concealing evidence that it was also to blame for the Nortons' substantial loss.

The Nortons diligently investigated those responsible for bilking them of more than $10 million, and, where the evidence supported claims, they sued the responsible parties, including the bank that laundered the funds. But the Nortons initially found no evidence that respondent Graham & Dunn, shielded by a qualified privilege from liability for a client's fraud and having withheld inculpatory email, stepped outside its role as mere legal counsel to the scheme's chief architect. To the contrary, the incomplete evidence Graham & Dunn produced suggested that the law firm was, like every other deceived party, "taken along for the ride." Graham & Dunn then further deprived the Nortons of evidence by entering into a tolling agreement with another group of investors, who were adverse to and pursued criminal claims against the Nortons in Peru,

that delayed that lawsuit until *after* the statute of limitations ostensibly ran on the Nortons' claims. The Nortons did not learn – and could not have learned – of Graham & Dunn's integral role in the Ponzi scheme until that other group of investors sued Graham & Dunn and publically disclosed Graham & Dunn's efforts to conceal the scheme.

The trial court erred in resolving the factual issue relevant to Graham & Dunn's statute of limitations defense – when did the Nortons discover or when should they have discovered that Graham & Dunn acted outside its role as Jose Nino de Guzman's legal advisor and knowingly lent substantial support to his Ponzi scheme? Further, the doctrine of equitable tolling prevents defendants such as Graham & Dunn from benefitting from their concealment of wrongdoing. This Court should reverse and remand for trial.

II. REPLY ARGUMENT

A. On summary judgment, Graham & Dunn bore the burden of showing that no issue of fact exists regarding its statute of limitations defense.

On summary judgment, "[d]efendants claiming the action is time-barred have the initial burden of showing the absence of an issue of material fact." *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 514, 983 P.2d 1193 (1999), *rev. denied*, 141 Wn.2d 1016 (2000). Graham & Dunn turns this evidentiary burden on its head by

asserting the Nortons must establish that they diligently pursued their claims. (Resp. Br. 16) Graham & Dunn bore the burden of showing – with the facts and all reasonable inferences viewed in the light most favorable to the Nortons – there was no issue of fact concerning when the Norton's discovered or could have discovered their claims. *Niven*, 97 Wn. App. at 509. Graham & Dunn has not met its burden, as set forth below.

B. Whether the Nortons discovered Graham & Dunn's active involvement in de Guzman's fraud more than three years before filing suit presents a question of fact precluding summary judgment.

1. Graham & Dunn conflates the Nortons' undisputed notice of de Guzman's fraud with the disputed issue of when the Nortons were first put on notice of Graham & Dunn's knowing and substantial assistance in concealing de Guzman's Ponzi scheme.

Graham & Dunn recites the evidence that led to the Nortons' discovery of de Guzman's fraud, and the investigation that revealed all the parties who might have had a role in it. But that is a far cry from *evidence*, and not a mere suspicion, that the Nortons knew or reasonably should have known that *Graham & Dunn* knowingly supported and concealed de Guzman's fraud. None of the evidence cited by Graham & Dunn, including its repetition of the obvious fact that the Nortons knew by July 2009 they had been victimized by de Guzman and that Graham & Dunn was de Guzman's law firm,

establishes *as a matter of law* that the Nortons knew or could have known of the facts giving rise to their aiding and abetting and conspiracy claims against Graham & Dunn more than three years before they filed suit. That issue of fact must be resolved by a jury.

The trial court held that the statute of limitations began to run in September 2009. The "uncontroverted" facts (Resp. Br. 27) that were available to the Nortons in September 2009 established that:

- The Nortons had lost more than $10 million in a Ponzi scheme architected by Jose de Guzman;
- Graham & Dunn had acted as counsel for de Guzman and his company NDG;
- Graham & Dunn had submitted incomplete security filings (never seen by the Nortons) on behalf of NDG.
- Graham & Dunn had produced documents (withholding others) that shed no light on its involvement with de Guzman's scheme or its cover-up.

These facts do not distinguish Graham & Dunn from the numerous other parties unaware of de Guzman's fraud – precisely as Graham & Dunn argued in the *Aggen* lawsuit. (CP 867 ("Graham & Dunn has presented compelling evidence that de Guzman was so charismatic

and his Ponzi scheme so sophisticated that he duped everyone, including the Graham & Dunn attorneys."))

The Nortons' causes of action did not accrue until they could "establish *each* element of the action." *Hudson v. Condon*, 101 Wn. App. 866, 874, 6 P.3d 615 (2000), *rev. denied*, 143 Wn.2d 1006 (2001) (emphasis added) (Resp. Br. 16). The Nortons thus needed to know more than the fact that Graham & Dunn served as counsel for a criminal before filing suit. In particular, the Nortons' aiding and abetting claim would have failed as a matter of law without evidence that Graham & Dunn "actively engage[d] in the [tortious] conduct." *Yong Tao v. Heng Bin Li*, 140 Wn. App. 825, 832, ¶ 14, 166 P.3d 1263 (2007), *rev. denied*, 163 Wn.2d 1045 (2008); *see Restatement (Second) of Torts* § 876 (1979). And the Nortons needed more than "[m]ere suspicion or commonality of interests . . . to prove a conspiracy." *Wilson v. State*, 84 Wn. App. 332, 351, 929 P.2d 448 (1996), *rev. denied*, 131 Wn.2d 1022, *cert. denied*, 522 U.S. 949 (1997).

The Nortons could not sue Graham & Dunn (and survive a Rule 11 motion) unless they had evidence that (1) de Guzman sought Graham & Dunn's services to enable him to commit a crime or fraud; and either (2) Graham & Dunn agreed to help him commit a crime

or fraud (conspiracy); or (3) Graham & Dunn knew de Guzman's conduct rose to the level of a crime or fraud and it substantially assisted de Guzman in the commission of the crime or fraud (aiding and abetting). *See El Camino Res., LTD. v. Huntington Nat. Bank*, 722 F. Supp. 2d 875, 905 (W.D. Mich. 2010) *aff'd*, 712 F.3d 917 (6th Cir. 2013) ("[T]o prevent banks, attorneys and others from incurring near-strict liability for the torts of their clients, a high degree of scienter is necessary to extend fraud liability on an aiding-and-abetting theory.") (quotation omitted). *Wilson*, 84 Wn. App. at 351. Graham & Dunn's insistence that it enjoyed a "qualified privilege" that could be pierced only upon proof that it "act[ed] outside the scope of the attorney-client relationship" underscores that the Nortons could not lightly accuse an established law firm of aiding and abetting a fraud or conspiring to commit one. (CP 625) *See Restatement (Second) of Torts* § 876 (1979).

The *Aggen* complaint, filed in July 2012, disclosed for the first time the November 14, 2008, email reflecting Graham & Dunn's complicity by counseling de Guzman to pay for the silence of an employee with intimate knowledge of his fraud:

> **As you know, we continue to be in violation of various state and federal securities laws with respect to most of our deals . . .** Although my instincts tell me that Nathan will not take it upon

> himself to disclose NDG's failures to the authorities or to NDG's investors, this causes a great deal of concern. We will, of course, incorporate a confidentiality agreement within the separation agreement that is being drafted. Unfortunately, the confidentiality agreement will only be worth anything so long as it is honored – because, **as soon as the "cat's out of the bag",** our ability to enforce this agreement really doesn't help us much. Because **this would be a HUGE issue for you if these violations were publicly known,** you may want to consider whether it makes sense to maintain Nathan's employment until the violations can be remedied.

(CP 519) (emphasis added)[1]

Graham & Dunn makes much of the Nortons' reliance on the *Aggen* complaint rather than the November 14, 2008 email itself. (Resp. Br. 22) But the Nortons learned of Graham & Dunn's active assistance by reading the *Aggen* complaint; Graham & Dunn did not produce the November 14, 2008 email or any additional inculpatory documents to the Nortons then or at any other time because discovery was ongoing when Graham & Dunn moved to dismiss on limitations grounds.

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[1] Without disputing the text of the November 14, 2008, email quoted in the *Aggen* complaint, Graham & Dunn incompletely paraphrased the email to ignore the firm's complicity in de Guzman's fraud. Graham & Dunn dismissed the inculpatory language – "**we** continue to be in violation of various state and federal securities laws with respect to most of **our** deals" (CP 519) – as the "excusable," "hyperbolic," "shrill," and "exaggerated" message from a lawyer who was just "earnestly trying to persuade his client to comply with his advice." (CP 608) (emphasis added)

In denying summary judgment in the *Aggen* case, the trial court itself recognized the importance of the November 14, 2008 email, which established that "in late 2008, [Graham & Dunn attorney Nicolas] Drader advised NDG to negotiate a confidentiality agreement with a departing employee to keep that employee from reporting NDG's securities law violations to the authorities or investors." (CP 872) Without this critical evidence, the Nortons could not establish Graham & Dunn's knowledge *and* substantial assistance of de Guzman's fraud – a critical element of their aiding and abetting and conspiracy claims.

Other than asserting it involved "genuine issues of fact," Graham & Dunn makes no effort to distinguish *Price v. State*, 96 Wn. App. 604, 980 P.2d 302 (1999), *rev. denied*, 139 Wn.2d 1018 (2000), which held that the limitations period did not begin to run until plaintiffs discovered that the State had proximately caused their damages by concealing information critical to their decision to adopt a child. (Resp. Br. 27) This Court should recognize, as *Price* did, that "[w]hen an aggrieved party discovered or could have discovered the facts to support a cause of action is a question of fact" ill-suited for summary judgment. 96 Wn. App. at 614.

As with their aiding and abetting and conspiracy claims, to assert a Washington State Securities Act claim the Nortons needed knowledge of "something more" than Graham & Dunn's "provision of routine professional services." *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 971, ¶ 32, 331 P.3d 29 (2014). The Nortons did not discover that "something more" until 2012, when they learned not only that Graham and Dunn knew of de Guzman's Ponzi scheme, but that de Guzman's lawyers *actively* participated in that scheme.

Ignoring the distinction between the Nortons' acknowledged notice of de Guzman's fraud and their ignorance of Graham & Dunn's knowledge and participation in that fraud, Graham & Dunn asserts the Nortons learned of an indivisible "fraud" by July 2009. (App. Br. 19) That the Nortons knew of their claims against de Guzman in 2009 (and timely pursued them) does not establish they had knowledge of their claims against Graham & Dunn. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 588-89, ¶ 43, 146 P.3d 423 (2006) (rejecting defendant's argument that because plaintiff "knew of its damage in 1994" it had notice of claims because plaintiff did not yet know those damages were connected to defendant). Likewise, that Mr. Norton listed Graham & Dunn, as

well as every other business associate of de Guzman, as a "recovery opportunity" – without alleging any specific wrongdoing by Graham & Dunn – does not establish *as a matter of law* that he knew Graham & Dunn was acting outside the scope of its attorney-client relationship with de Guzman. (Resp. Br. 21) *See Nelson v. Schubert*, 98 Wn. App. 754, 762, 994 P.2d 225 (2000) (plaintiff's "belief that [defendant] had killed her daughter had no evidentiary value" without supporting evidence and thus did not begin running of limitations period).

Under Washington law, "[s]uspicion is inadequate to support a lawsuit." *Nelson*, 98 Wn. App. at 762. The trial court's acceptance of Graham & Dunn's assertion that the Nortons were not diligent because they did not file suit and then use discovery to obtain the November 2008 email thus "puts the cart before the horse." (CP 726; Resp. Br. 25) The Nortons diligently pursued every legal remedy available to them as soon as they had the evidence to do so. They sued de Guzman, U.S. Bank, Mr. Norton's business partner (William Prater), and de Guzman's Peruvian business entity (Grupo Innova) based on evidence that these parties actively abetted de Guzman's fraud. (CP 14, 206-45, 497) For example, the Nortons sued U.S. Bank after uncovering evidence that U.S. Bank employees allowed

de Guzman to launder millions while receiving commissions for selling NDG securities. (CP 209-12, 497)

Graham & Dunn, as counsel for the perpetrator of the Ponzi scheme, stands in a markedly different position than these other parties. Graham & Dunn successfully concealed its role by "fixing" de Guzman's mishandling of funds in January 2009 (CP 494) and then by revealing six months later an incomplete set of internal emails that showed only its "efforts" to have de Guzman comply with applicable securities law. (CP 715) Whether the Nortons acted diligently in light of Graham & Dunn's concealment is a question of fact that must be resolved by a jury. *Price*, 96 Wn. App. at 617.

2. Incomplete Form Ds filed by Graham & Dunn did not reveal its complicity in covering up de Guzman's fraud.

Graham & Dunn's focus on the incomplete and late public securities filings ("Form Ds") that it filed on behalf of NDG and de Guzman is a red herring, designed to divert this Court's attention from the more damning allegations of the Nortons' lawsuit, including Graham & Dunn's participation in fraudulent securities offerings, advising NDG to negotiate a confidentiality agreement with or retain an employee to maintain his silence, its drafting of fraudulent LLC agreements, and other efforts designed to conceal de Guzman's

fraud. (CP 1-29) The Nortons' complaint did not assert that Graham & Dunn participated in technical securities violations. Instead, the Nortons alleged that Graham & Dunn's late and incomplete securities filings, were "not a mere oversight," but evidence of a "knowing[] and intentional[]" effort to conceal de Guzman's fraud. (*Compare* CP 7 *with* Resp. Br. 24)

Graham & Dunn's emphasis on the availability of the Form Ds is misplaced for an additional reason – even had the Nortons seen the securities filings, standing alone, they would not have provided notice of the claims against *Graham & Dunn*. This case is thus unlike *Douglass v. Stanger*, 101 Wn. App. 243, 2 P.3d 998 (2000) (Resp. Br. 18), where publically available documents revealing two partners' exclusion of the remaining partner by themselves established the basis for a fraud claim.

As Graham & Dunn has consistently argued (until now), the Form Ds established only that Graham & Dunn had been unable to obtain information from its client, not that it purposefully left that information out in an effort to deceive regulators. (CP 607 (Graham & Dunn's argument in *Aggen* that late Form Ds revealed only "NDG was slow to provide the information necessary to complete the forms")) Indeed, Graham & Dunn attempts to navigate the razor's

edge between its inconsistent Form D arguments, admitting in its brief that the Form Ds by themselves did not "suggest . . . the existence of a Ponzi scheme or fraud." (Resp. Br. 6) Regardless, the Form Ds certainly did not "irrefutably demonstrate" that the Nortons should have learned that Graham & Dunn knowingly lent substantial assistance to de Guzman's Ponzi scheme. *See In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1287 (E.D. Wash. 2007) (denying motion to dismiss securities claims on limitations grounds because "the information disclosed in the reports falls short of '*irrefutably demonstrating*' that the Plaintiffs should have discovered the alleged wrongdoing") (emphasis added).

3. Graham & Dunn did not produce evidence of its efforts to conceal de Guzman's Ponzi scheme to the Nortons or to anyone else.

Graham & Dunn admits that it produced a culled set of documents in July 2009 that did not include the November 14, 2008 email. (Resp. Br. at 2 and 11: Graham & Dunn produced "nearly every" and "many," but not all, of its emails regarding NDG) The selectively curated emails "disclosed" by Graham & Dunn in the summer of 2009 to the Steering Committee attorney, Steve Sirianni, but not to the Nortons, fail to provide evidence that Graham & Dunn

provided knowing and substantial assistance in concealing de Guzman's Ponzi scheme. (Resp. Br. 19-20)[2]

Graham & Dunn consistently hid its true role with NDG. Graham & Dunn disclosed to Mr. Sirianni only those emails (never seen by the Nortons) that supported its claim that Graham & Dunn did nothing more than press their client for the information necessary for securities filings, and not those that aided de Guzman's efforts to hide his fraud. (*see, e.g.*, CP 680, 683, 686, 694, 711) A Graham & Dunn attorney initially stated that "G&D only had some formation docs, like LLC agreements and initial resolutions [and] . . . G&D had only prepared a form PPM, and . . . that NDG drafted their own PPMs to specific offerings. . . ." (CP 156)

The sanitized emails Graham & Dunn disclosed to Mr. Sirianni in 2009 conflict starkly with the revelations of the *Aggen* complaint, in which the Nortons first learned that Graham & Dunn had provided "cover" for de Guzman's and NDG's securities violations, and that it was not innocently wringing its hands as it awaited more information from NDG. Graham & Dunn does not

[2] The Nortons did not assert that they were "misled" by these emails. (*Compare* App. Br. 23-33 *with* Resp. Br. 28). The Nortons argued that these emails could not provide notice of their claims both because Mr. Norton never actually saw them and, *even assuming he did,* their content did not establish a basis for suit against Graham & Dunn.

contest the fact that the *Aggen* plaintiffs only "later discovered" the November 14, 2008, email at some unspecified time before they filed suit in July 2012. (CP 549) That November 2008 email, disclosed in the *Aggen* lawsuit, for the first time put the Nortons on notice that Graham & Dunn knew of de Guzman's illegal activities. Thus, even if this Court imputes to Mr. Norton knowledge of the emails based on his single meeting with Mr. Sirianni, before Graham & Dunn "provided copies of many of its emails" to Sirianni in July 2009 (Resp. Br. 11), that imputed "knowledge" does not equate to notice of the Nortons' claims. (Resp. Br. 20)

Regardless, as the inapposite cases Graham & Dunn cites demonstrate, there is no precedent for its assertion that, by virtue of their short relationship with Mr. Sirianni through the Steering Committee, the Nortons are deemed to know all Mr. Sirianni may have known but never communicated to Mr. Norton. In *Haller v. Wallis*, 89 Wn.2d 539, 573 P.2d 1302 (1978) (Resp. Br. 20) a client was bound by her attorney's actions at a settlement hearing where the attorney "took affirmative steps to bind the client." *Mitchell v. Kitsap County*, 59 Wn. App. 177, 184, 797 P.2d 516 (1990) (distinguishing *Haller*); *see also Global Enterprises, LLC v. Montgomery Purdue Blankenship & Austin PLLC*, 52 F. Supp. 3d

1162, 1168 (W.D. Wash. 2014) (distinguishing *Haller* and refusing to impute attorney's knowledge to client for purposes of refuting existence of attorney-client relationship).[3]

The Nortons did not have access to the "same documents and facts obtained" by the *Aggen* investors with the assistance of experienced securities counsel, as Graham & Dunn asserts. (Resp. Br. 27) There was no cooperation between the *Aggen* parties and the Nortons. The *Aggen* investors removed Mr. Norton from the Steering Committee due to "irreconcilable conflicts of interests" with the Nortons that existed as of July 2009 (not July 2010, Resp. Br. 25). (CP 500) Those investors annulled their relationship with the Nortons and provided a full refund of the Nortons' contribution to the Steering Committee's legal fees. The *Aggen* investors then pursued claims against Mr. Norton in Peru. (CP 1325) They only "later discovered," sometime before filing their complaint in July 2012, the November 2008 email that gave all claimants the basis to sue Graham & Dunn for aiding and abetting, conspiracy, and securities fraud. (CP 549) But rather than share that email with the

[3] *West v. Thurston Cnty.*, 168 Wn. App. 162, 275 P.3d 1200 (2012) (Resp. Br. 20) and *Stevens v. Sec. Pac. Mortg. Corp.*, 53 Wn. App. 507, 768 P.2d 1007, *rev. denied*, 112 Wn.2d 1023 (1989) (Resp. Br. 20) likewise do not impute an organization's attorney's knowledge to an individual member for limitations purposes.

Nortons, the Steering Committee secretly negotiated a tolling agreement with Graham & Dunn that allowed them to sit on the evidence they had discovered, revealing it only after the limitations period had ostensibly run against the Nortons. (CP 565) The *Aggen* investors' offer to "cooperate to the extent possible" (CP 500) was "empty." (*Compare* Resp. Br. 25 *with* App. Br. 30)

As did the trial court, Graham & Dunn mistakenly relies on *Beard v. King Cnty.*, 76 Wn. App. 863, 889 P.2d 501 (1995) (Resp. Br. 23-24; CP 726). *Beard* addressed "the narrow issue of whether the discovery rule continues to toll the commencement of the limitation period after the injured party has *specifically alleged* the essential facts but does not yet possess proof of those facts." 76 Wn. App. at 867 (emphasis added). The *Beard* Court's statement that a "smoking gun is not necessary to commence the limitation period," was made in the context of a claimant *who already knew enough to allege the essential facts of its claims*, and did nothing to abrogate the established rule that the limitations period begins to run when the "injured party knows, or in the exercise of due diligence should have discovered, the factual bases of the cause of action." *Beard*, 76 Wn. App. at 867-68. Nothing in *Beard* (or any other case) changes the starting point for the limitations period as that point in time

when plaintiffs *first* are put on notice of the facts necessary to establish each element of their cause of action.

The other cases cited by Graham & Dunn are similarly distinguishable. In *Allen v. State*, 118 Wn.2d 753, 759, 826 P.2d 200 (1992) (Resp. Br. 16-18), "[t]he record reveal[ed] only one explanation for [plaintiff's] inaction" – her desire to put her husband's death behind her. Here, a jury could easily reject Graham & Dunn's "explanation" that the Nortons – despite their purported knowledge of Graham & Dunn's misfeasance and having sued every other party responsible for their losses – chose to take no legal action against Graham & Dunn. (CP 14, 206-45, 497) Likewise, in both *Hudson v. Condon,* 101 Wn. App. 866, 6 P.3d 615 (2000) (Resp. Br. 16); and *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 111, 802 P.2d 826 (1991) (Resp. Br. 16), the plaintiffs knew both of their harm *and* the party responsible for it. Here, by contrast, the Nortons knew of their losses in 2009 but did not know until 2012 that Graham & Dunn stepped outside its attorney-client relationship with NDG and de Guzman to help cause those losses.

The Nortons sued Graham & Dunn as soon as the Nortons learned they had a viable claim against the law firm. The law requires

nothing more. Whether the Nortons timely filed their suit presents a question of fact the trial court erroneously took from the jury.

C. The doctrine of equitable tolling provides an independent basis for preventing Graham & Dunn from profiting from its concealment of wrongdoing.

The record belies Graham & Dunn's insistence that there is no evidence of "bad faith or deceptive assurances made by Graham & Dunn." (Resp. Br. 31) To the contrary, this case is ripe for equitable tolling, because Graham & Dunn has consistently denied, concealed, and obscured any wrongdoing on its part.[4]

Graham & Dunn's assertion that it never misled Mr. Norton ignores that at a meeting held at its offices in January 2009, the firm's lawyers (in particular Mr. Drader) feigned ignorance of de Guzman's mishandling of the Nortons' PRE investments, giving Mr. Norton every impression that it would "fix" de Guzman's misappropriation of funds and never disclosing the firm had advised

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[4] Graham & Dunn erroneously asserts that the Nortons' motion for reconsideration did not preserve this issue for appellate review, ignoring that "[b]y bringing a motion for reconsideration under CR 59, a party may preserve an issue for appeal that is closely related to a position previously asserted and does not depend upon new facts." *NW Wholesale, Inc. v. PAC Organic Fruit, LLC*, 183 Wn. App. 459, 480, ¶ 49, 334 P.3d 63 (2014) *review granted sub nom. NW Wholesale, Inc. v. Ostenson*, 182 Wn.2d 1009, 343 P.3d 759 (2015). Because there were no "new facts" in the Nortons' motion for reconsideration, the Norton's motion did not prevent Graham & Dunn from submitting additional (unspecified) evidence relevant to equitable tolling. (*Compare* CP 733 *with* Resp. Br. 31)

de Guzman how to conceal securities violations from investors and regulators two months earlier. (CP 494) Graham & Dunn likewise ignores that its "disclosures" in July 2009 omitted any documents detailing its active involvement in the Ponzi scheme, including the November 2008 email. Indeed, Graham & Dunn has yet to explain why it omitted this email from its July 2009 productions. Finally, Graham & Dunn ignores the secret tolling agreement that allowed the *Aggen* investors to file suit only after the limitations period purportedly expired as to the Nortons, the investors who had lost the most.[5] Ample evidence exists of Graham & Dunn's "bad faith" and "deceptive assurances."

This case does not present the concerns of faded memories or lost evidence that underlie the statute of limitations. The Nortons filed their claims within six months from the date the trial court held the statute of limitations expired. As this case and *Aggen* demonstrate, Graham & Dunn's internal emails are the critical evidence and they have been well-preserved (after Graham & Dunn

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[5] Without denying the existence or effect of this secret tolling agreement, Graham & Dunn obliquely claims that "the agreement was not what [Mr.] Norton portrays it to be." (Resp. Br. 30) Because Graham & Dunn, not the Nortons, asserts the agreement is exculpatory, Graham & Dunn bore the burden of producing the agreement on summary judgment. *Niven*, 97 Wn. App. at 514.

finally disclosed them). Mr. Norton's written statements in 2009 and 2010 discussing his falling out with the Steering Committee are consistent with his statements in this case, contrary to Graham & Dunn's assertion that his memories are inaccurate. (Resp. Br. 32-33; *compare* CP 496-97 *with* CP 1021-23, 1334)

The Nortons diligently pursued more responsible parties in the U.S. and Peru than any other NDG investor – another fact that refutes Graham & Dunn's assertion they were not diligent. (Resp. Br. 31-32) At the time the Nortons filed suit against Graham & Dunn, the Nortons continued to pursue discovery in those other actions to obtain all facts relating to their losses. At no point during their pursuit of those other parties did the Nortons have any evidence that Graham & Dunn's role consisted of "something more" than the privileged actions of a law firm assisting a client.

Equitable tolling is designed precisely to prevent the manifest injustice that would result from barring the Nortons' claims where the Nortons diligently sought to uncover them and Graham & Dunn actively sought to conceal them. This Court should refuse to allow Graham & Dunn to benefit from its concealment of its misfeasance and should remand for a trial at which a jury will determine whether

the Nortons timely brought suit to recover the millions lost as a result of the fraud Graham & Dunn actively aided and concealed.

III. CONCLUSION

This Court should reverse and remand for a trial of the Nortons' claims.

Dated this 28th day of August, 2015.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 28, 2015, I arranged for service of the foregoing Reply Brief of Appellants to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 28th day of August, 2015.

Amanda K. Norman