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Case No. 72818-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON AND KRISTINE NORTON, et al.,
Plaintiffs-Appellants,

vs.

GRAHAM & DUNN, P.C., a Washington professional corporation
Defendant-Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

Plaintiffs John and Kristine Norton and their company, Northland Capital, LLC (collectively, "Norton"), were defrauded in 2008 in a sophisticated Ponzi scheme operated by Jose Nino de Guzman through his company, NDG Investment Group, LLC. In 2013, four years after learning of the fraud, Norton sued Graham & Dunn, former outside counsel to NDG. Norton's lawsuit was filed too late. His claims are all barred by the applicable statutes of limitations, and the trial court properly dismissed this case.

NDG had hired Graham & Dunn as its outside counsel, primarily to help form limited liability companies. Graham & Dunn also provided advice to NDG about private securities offerings. NDG told its investors and Graham & Dunn that the money invested in the LLCs would be used to build real estate projects in Lima, Peru. Unbeknownst to everyone, de Guzman used the money to fund his lavish lifestyle and pay fake returns to investors in previous projects.

Norton learned of de Guzman's fraud in March 2009. By June 2009, he had targeted Graham & Dunn as a potential source of recovery. He discussed bringing claims against Graham & Dunn and, together with a group of other NDG investors led by the "NDG Investors Steering Committee," hired lawyers to investigate those claims.

By July 2009, those lawyers had obtained copies of Graham & Dunn documents, including nearly every Graham & Dunn document referenced in Norton's complaint.

However, Norton and the other investors could not agree about how to divide the money they hoped to recover. As a result, Norton left the Steering Committee. He initially chose not to pursue Graham & Dunn. Instead, he sued de Guzman, NDG, and NDG's bank, U.S. Bank. He also sued his advisor and business partner, Bill Prater, who introduced him to NDG.

In April 2013, Norton commenced this lawsuit against Graham & Dunn. He copied much of his complaint from a complaint filed nine months earlier by the Steering Committee investors. Norton filed his complaint almost four years after he first discussed claims against Graham & Dunn, hired lawyers to investigate those claims, and those lawyers received copies of Graham & Dunn documents forming the basis of those claims.

This court should affirm the trial court's dismissal of this lawsuit because all of Norton's claims are barred by the applicable statutes of limitations.

II. STATEMENT OF ISSUE ON APPEAL

Should the Court affirm summary judgment dismissal of Norton's claims because those claims were barred by the applicable statutes of limitations?

III. STATEMENT OF THE CASE

Norton omits or mischaracterizes many of the undisputed facts that led the trial court to dismiss his claims. Graham & Dunn will clarify the record here.

A. Graham & Dunn Provided Legal Services to NDG for a Period of Two Years.

De Guzman and NDG were referred to Graham & Dunn by another lawyer in May 2007. CP 508-09. NDG engaged Graham & Dunn as its outside counsel on May 9, 2007, a role in which the firm continued until May 2009. CP 509, 514. The firm stopped performing legal work for NDG in May 2009, and formally terminated its representation on June 15, 2009. CP 514. Graham & Dunn's legal services for NDG consisted primarily of forming the limited liability companies NDG used for its investment program. CP 509. Graham & Dunn also advised NDG on compliance with securities laws. *Id.*

B. Graham & Dunn Did Not Know of de Guzman's Ponzi Scheme.

Throughout his brief, Norton repeatedly and brazenly states that Graham & Dunn knew of de Guzman's Ponzi scheme and intentionally assisted in it. *E.g.*, Brief at 1 ("[De Guzman's] Ponzi scheme that could not have been perpetrated or concealed without the active participation of respondent Graham & Dunn, P.C."); 2-3 ("[Graham & Dunn]'s active involvement in, and concealment of, the Ponzi scheme. . . ."); 13 ("[Graham & Dunn] actively supported [de Guzman's] fraud, providing critical support and cover for de Guzman's Ponzi scheme.").

These statements are false, offensive, and not supported by any evidence in the record. Norton cites only to the allegations in his own complaint and those in a complaint filed by the Steering Committee investors (the "*Aggen* complaint") as support for his statements. Brief at 13-14 (citing to CP 517-54 and CP 8, 11). But the trial court could only consider *admissible facts* when ruling on the summary judgment motion.[1] The allegations in those complaints do not suffice.[2] Norton fails to cite (and the record lacks) *any* admissible facts suggesting that Graham & Dunn knew of de Guzman's Ponzi scheme.

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[1] *See* CR 56(e); *see also Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988).

[2] CR 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, *an adverse party may not rest upon mere allegations* or denials of his pleading . . . ") (emphasis added).

The undisputed facts in the record show that Graham & Dunn did not learn of suspicions that de Guzman might be engaged in fraud until April 10, 2009. CP 139-44. The firm promptly advised de Guzman to cooperate fully with the investigation undertaken by NDG's employees. CP 514-15. Graham & Dunn ceased to provide legal services to NDG in May 2009. CP 514.

C. NDG's Untimely Filing of Form Ds Did Not Constitute Fraud.

Because Graham & Dunn did not know of de Guzman's Ponzi scheme during the course of the firm's representation, Norton and NDG's other investors have created an alternative theory of "fraud" based on NDG's alleged violations of securities laws. CP 6-11, 534-35, 539. The focus of this alternative theory of liability is NDG's late Form D[3] filings, based on privileged communications between Graham & Dunn and NDG in which Graham & Dunn repeatedly reminded NDG that it was late in filing and urged NDG to file the forms. CP 6-7 (allegations in Norton's

[3] Form Ds are notifications to be filed with securities regulators in connection with Regulation D offerings. *See* 17 C.F.R. § 230.503. The Securities and Exchange Commission ("SEC") adopted Regulation D in 1982 to enable small businesses to raise investor funds without registering the offering with the SEC. Electronic Filing and Revision of Form D, 73 Fed. Reg. 10592, 10592 (February 27, 2008). The SEC intended Form D to serve primarily a data collection objective. *Id.* Although the SEC initially required the Form D filing as a condition of obtaining the Regulation D exemption, the SEC eliminated this condition in 1989. *Id.* at 10593. After this change, the SEC recognized that some lawyers advised their clients not to file Form Ds, and proposed eliminating the Form D filing requirement entirely. *Id.* However, the SEC ultimately decided to leave the filing requirement in place because it was "still useful in conducting economic and other analyses of the private placement market." *Id.*

complaint regarding Form D filings), 539-40 (allegations regarding Form D filings in the *Aggen* complaint, upon which Norton based his complaint), CP 677-713 (copies of privileged communications quoted in the *Aggen* complaint and referenced in Norton's complaint). Although Graham & Dunn had been concerned about NDG's failure to timely file Form Ds, the firm attributed NDG's delays to NDG's disorganization, not to any kind of fraudulent scheme. CP 509-510, 515.

Form Ds are not disclosure documents, and the late filing or even a complete failure to file Form Ds does not suggest—much less establish—the existence of a Ponzi scheme or fraud. Form Ds merely provide notice to securities regulators and the public that a private offering is taking place.[4] Issuers should file Form Ds within 15 days of the first sales of securities.[5] However, the Regulation D exemption is not lost if a Form D is filed late or not filed at all.[6]

Form Ds are publicly available documents, copies of which may be obtained online or by request to the Washington State Department of Financial Institutions ("DFI") or to the SEC. CP 658. Members of the public can search DFI's website to determine whether an issuer has filed

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[4] *See* 73 Fed. Reg. at 10592 ("Form D serves as the official notice of an offering of securities made without registration under the Securities Act in reliance on an exemption provided by Regulation D.").

[5] 17 C.F.R. § 230.503.

[6] *See Chanana's Corp. v. Gilmore*, 539 F. Supp. 2d 1299, 1303-4 (W.D. Wash. 2003).

Form Ds and, if so, when those forms were filed. CP 658-59. Moreover, members of the public may obtain copies of filed Form Ds by calling DFI. CP 659. Members of the public may similarly obtain copies of Form D filings from the SEC.[7]

D. Norton Learned of de Guzman's Fraud in March 2009.

Norton alleges that Graham & Dunn aided and abetted or conspired with NDG to commit "fraud" because Graham & Dunn knew NDG had not yet filed Form Ds, but nonetheless continued to help NDG form new limited liability companies as vehicles for NDG's investment program. CP 8-9. Even if Norton's theory had any merit, the record shows that Norton learned of facts giving rise to his claims nearly four years before he filed his lawsuit against Graham & Dunn.

In March 2009, Norton learned that de Guzman had defrauded investors, including him, by taking investor money for personal use. In his March 11, 2009 email, Bill Prater told Norton:

> Glenn [Fulton, the Vice President of NDG] has confirmed that Jose [Nino de Guzman] has admitted to have been running a financial house of cards. . . . **Jose has used [investor] funds in a variety of ways. These have ranged from financing his personal extravagant lifestyle to repaying investors in previous deals.** Very sad and I wish it was not true. The number of disclosures from Jose

[7] 73 Fed. Reg. at 10593 (SEC's website encourages potential investors to check with SEC to determine if Form Ds have been filed).

> keep [sic] growing and none are good. **He has proven himself to be a very accomplished liar and con man.**

CP 1019 (emphasis added).

NDG's employees waited another month before expressing concerns regarding de Guzman to Graham & Dunn through their attorney, Chris Wells. CP 1312-16, 1012-17. On April 10, 2009, Wells wrote a letter to Graham & Dunn informing the firm of the NDG employees' concerns. CP 1012-17. In the letter, Wells noted that the NDG employees had engaged the firm of Blank Law + Tech to copy the contents of the NDG employees' computer hard drives. CP 1015. Norton's lawyers, Jay Hadley and Roger Mellem at the firm of Ryan Swanson & Cleveland, were copied on the letter. CP 1017 (relevant page of letter), 960 (Hadley's representation of Norton).

E. Norton Discussed Suing Graham & Dunn in June 2009.

After NDG's employees disclosed the existence of de Guzman's fraud to investors, some of NDG's investors organized to form the NDG Investors Steering Committee to lead recovery efforts. CP 495. Norton accepted an invitation to join the Steering Committee as one of its members. CP 965, 495.

In June 2009, Norton and other members of the Steering Committee discussed their options to recover the money the investors lost in de Guzman's scheme. CP 1021-23. Norton proposed suing Graham &

Dunn. *Id.* In his June 11, 2009 email to the Steering Committee, Norton stated:

> It doesn't make sense to try to recover monies from [NDG's Peruvian affiliate Grupo] Innova (gross sent down) if they have already returned some to the US. The monies already returned to the US have to be claimed against the US defendants and Innova should be held accountable for the money they retained and used. In turn the "Innova" monies returned from Peru to the US should be **added to the US claim against** Jose/NDG/**G&D** and US Bank, as those funds were mishandled/misused "after" they returned to the US.

CP 1021 (emphasis added). In the spreadsheet he attached to his email, Norton listed "Claims Against G&D" among the "Recovery Opportunities" for NDG's investors. CP 1022. Norton admits that "G&D" referred to Graham & Dunn. CP 496 ("I included Graham & Dunn in an email to the Steering Committee listing all potential defendants . . . .").

F. The Steering Committee (Including Norton) Investigated Claims Against Graham & Dunn.

Norton and the Steering Committee did far more than merely plan to sue Graham & Dunn. The Steering Committee organized an investor fund to finance recovery efforts. CP 1333, CP 496. The Steering Committee engaged attorney Steve Sirianni of the firm Sirianni Youtz Meier & Spoonemore to represent the investors. CP 496. As one of the Steering Committee's members, Norton participated in interviewing and retaining Steve Sirianni. *Id.* On July 2, 2009, the Steering Committee

directed investors to contribute money to the recovery fund. CP 999. On July 10, 2009, Norton paid $24,000 to the Sirianni firm as his contribution. CP 968, 1001, 1003. Although Norton later claimed in an October 2014 declaration that the purpose of the fund was to investigate the responsibility of U.S. Bank (CP 496), in a statement Norton prepared in August 2010 he described the purpose of the recovery fund as follows:

> I had originally invested in a U.S. recovery investor fund that was put together by the Steering Committee to finance an investigation and recovery effort, **primarily focused on the responsibility of U.S. Bank and NDG's attorneys Graham & Dunn**, a law firm in Seattle.

CP 1334 (emphasis added).

Other documents in the record confirm that Norton's recollection in August 2010 was accurate and more candid than his October 2014 declaration. Throughout the summer of 2009, the Sirianni firm cooperated with attorney Chris Wells and NDG's employees to obtain copies of Graham & Dunn's documents. In late June 2009 Steve Sirianni drafted a letter to Graham & Dunn's Nick Drader (to be signed by NDG Vice President Glenn Fulton) and an email to Drader (to be sent by Wells) requesting copies of NDG-related documents from Graham & Dunn. CP 1025-27, 1029-31.

Sirianni's request for Graham & Dunn documents included emails, other correspondence, internal memorandums, research, opinions, attorney

notes, and all relevant files. CP 1039. Graham & Dunn provided copies of many of its emails regarding NDG to Wells on July 17, 2009. CP 670-73. Wells forwarded copies of the documents to Sirianni on July 20, 2009. CP 715. Included in these documents were ten of the attorney-client privileged communications between Graham & Dunn and NDG quoted in the *Aggen* complaint and incorporated by reference by Norton in his complaint against Graham & Dunn. CP 2, 539-40, 543-45, 548, 674-713. Six of these privileged communications show the lateness of NDG's Form D filings. CP 674-697, 710-13. And when reviewing Graham & Dunn documents, the Sirianni firm targeted emails between Graham & Dunn and NDG about NDG's late Form D filings. *See, e.g.*, CP 1043-59, 1072-77 (copies of Graham & Dunn emails printed by lawyers at the Sirianni firm and produced in response to a subpoena). A number of other emails between Graham & Dunn and NDG relating to the late Form D filings—including the November 14, 2008 email Norton makes so much of—were in the NDG employees' computer hard drives preserved by Blank Law + Tech. *See* CP 509-10 (NDG Director of Operations Darin Donaldson copied on the November 14 email); CP 1322 (Donaldson's testimony regarding his use of Blank Law + Tech to copy NDG computer hard drives); *see also* CP 549 (allegation that the *Aggen* plaintiffs obtained the November 14 email from NDG's files).

G. Norton Left the Steering Committee and Made No Effort to Obtain the Graham & Dunn Documents.

Norton and the Steering Committee could not reach an agreement about a fair division of any monetary recovery that might be achieved by suing the target defendants. CP 497. Norton therefore left the Steering Committee. Norton could not recall precisely when he left the Steering Committee (*see* CP 497, 965-66), but he received checks refunding his financial contribution to the recovery fund by letter dated September 9, 2009 (CP 1005-1010). When Norton and the Steering Committee parted ways, the Committee told Norton he might wish to file a parallel lawsuit, and offered to cooperate with him to maximize recoveries. CP 1005-06.

Norton claims he never saw any of the documents Graham & Dunn provided to Wells, and that Sirianni never shared the results of his investigation with Norton. CP 496. Thus, according to Norton, he discussed suing Graham & Dunn in June 2009, paid $24,000 to the Sirianni firm in July 2009 to finance an investigation focused on Graham & Dunn's responsibility, knew that the Sirianni firm received documents from Graham & Dunn, knew that documents from NDG employees' computer hard drives had been retrieved by a forensic firm, and then *never* sought the documents or the results of the Steering Committee's

investigation after he left the Steering Committee. CP 1021-23, 1001, 1003, 1334, 1015, 496-97.

H. Norton Pursued Claims Against Other Parties Associated with NDG.

Instead of pursuing claims against Graham & Dunn as he had originally contemplated, Norton elected to pursue claims against the other parties he listed in his June 11, 2009 email. Norton recovered $6,000,000 from an arbitration award against NDG's Peruvian affiliate, Grupo Innova, and $750,000 from the sale of an additional property recovered in Peru. CP 14 (alleging arbitration against Grupo Innova), 1345-46 (brief discussing Norton's recoveries), 1336-41 (judgment accounting for Norton's recoveries). In October 2010, Norton commenced a lawsuit against U.S. Bank, de Guzman, and NDG, asserting claims for breach of fiduciary duty, fraud, violation of the Washington State Securities Act, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and other claims. CP 206-24. In August 2011, Norton commenced a lawsuit against Prater for his role in their investments in NDG's projects and properties. CP 226-45. In that lawsuit, Norton asserted claims for breach of fiduciary duty, fraud, violation of the Washington State Securities Act, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, and other claims. *Id.*

During the course of litigating these cases, Norton apparently never used the tools of discovery to obtain documents or other information from (1) the NDG employees who discovered de Guzman's Ponzi scheme and preserved NDG documents, (2) the Steering Committee investors, or (3) his former lawyers at the Sirianni firm. *See* CP 490-503 (Norton's declaration, making no mention of any effort to obtain documents or information from those sources); CP 504-644 (same regarding Norton's lawyer). All of these obvious sources of information had documents relevant to Norton's claims, including emails between NDG and Graham & Dunn.

I. The Investors Led by the Steering Committee Filed a Lawsuit Against Graham & Dunn in July 2012.

While Norton pursued these other recovery opportunities, the Steering Committee diligently used the documents provided by Graham & Dunn in July 2009 to prepare the *Aggen* complaint against the firm. *See* CP 517-54 (the *Aggen* complaint); CP 674-713 (ten documents quoted in the *Aggen* complaint that were provided by Graham & Dunn in July 2009). The *Aggen* plaintiffs obtained additional documents, including the November 14 email, from NDG's employees' computer hard drives. S*ee* CP 549; *see also* CP 1322, 509-510. The *Aggen* plaintiffs filed their complaint on July 23, 2012, asserting claims for violation of the

Washington State Securities Act, aiding and abetting fraud, aiding and abetting breach of fiduciary duty, conspiracy to commit fraud, and conspiracy to breach fiduciary duties. CP 517, 550-54.

J. Norton Waited Until April 2013 to Commence His Lawsuit Against Graham & Dunn.

Norton commenced this lawsuit nine months later by filing his complaint on April 11, 2013. CP 1-29. His complaint borrows heavily from the *Aggen* complaint, thus belatedly becoming the "parallel lawsuit" contemplated when he left the Steering Committee in September 2009. *See* CP 1005-06; *cf.* CP 1-29 *and* CP 517-54. As he did in his other lawsuits, Norton asserted claims for breach of fiduciary duty, violation of the Washington State Securities Act, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and other claims. *Id.*

Graham & Dunn moved for summary judgment to dismiss all of Norton's claims as barred by the three year statutes of limitations. CP 42-52. The trial court determined that the limitation period on Norton's claims began to run when he obtained copies of Graham & Dunn documents upon which his claims were based, and granted summary judgment dismissing Norton's claims. CP 717-28. Norton moved for reconsideration, arguing for the first time that his claims were timely under the doctrine of equitable tolling. *Compare* CP 471-89 (brief

opposing summary judgment) *with* CP 729-40 (motion for reconsideration). The trial court denied reconsideration. CP 741-42. Norton commenced this appeal. CP 743-59.

IV. ARGUMENT

Norton does not contest the trial court's determination that a three year limitation period applied to all of his claims. The issue on appeal is whether the trial court properly concluded that his claims accrued almost four years before he filed his lawsuit in April 2013.

A. Norton's Claims Accrued By September 2009.

Norton argues that his claims did not accrue until July 2012 when the *Aggen* complaint was filed. Brief at 17. However, a claim accrues when a plaintiff knows or should have known of a factual basis for a cause of action. *Allen v. State*, 118 Wn.2d 753, 758, 826 P.2d 200 (1992). Once the plaintiff learns that he has suffered some actual, appreciable harm, the statute of limitations begins to run and he must exercise due diligence to discover the extent of the harm. *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000). Due diligence also requires the plaintiff to investigate all of the causes of his harm, including the identity of the persons who may be responsible for the harm. *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 114, 802 P.2d 826 (1991). The plaintiff bears the burden of establishing that he exercised due diligence. *Douglass v.*

Stanger, 101 Wn. App. 243, 256, 2 P.3d 998 (2000); *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 518, 728 P.2d 597 (1986) ("[T]he burden is upon the plaintiff to show that the facts constituting the fraud were not discovered or could not be discovered until within 3 years prior to the commencement of the action.") (citing *Bay City Lumber Co. v. Anderson*, 8 Wn.2d 191, 209-11, 111 P.2d 771 (1941)). And although the exercise of due diligence may raise issues of fact, such factual questions should be decided on summary judgment if reasonable minds can reach but one conclusion on them. *Allen*, 118 Wn.2d at 760.

For example, in *Allen v. State* the plaintiff sued the State for paroling two men who later killed her husband. 118 Wn.2d at 754. The men were convicted of the husband's murder in May 1982, but the plaintiff claimed she did not learn the identity of her husband's murderers until September 1985. *Id.* at 755-57. She filed suit in October 1985. *Id.* at 757. The Supreme Court affirmed the summary judgment dismissal of her wrongful death claim, stating:

> [T]he discovery rule will postpone the running of a statute of limitations only until the time when a plaintiff, through the exercise of due diligence, should have discovered the basis for the cause of action. A cause of action will accrue on that date even if the *actual* discovery did not occur later. The key consideration under the discovery rule is the factual, not the legal, basis for the cause of action. The action accrues when the plaintiff knows or should know the

> relevant facts, whether or not the plaintiff also knows that these facts are enough to establish a legal cause of action.

Id. at 758 (emphasis in original) . Consequently, the plaintiff's claims accrued in May 1982 when information about the circumstances of her husband's murder was available to her, even though she did not *actually* learn of those circumstances until September 1985.

Douglass v. Stanger applies this principle in the context of fraud. The plaintiff invested in a partnership in 1989 to develop a shopping center in Colville, Washington. 101 Wn. App. at 246. His business partners purchased the property upon which the shopping center would be built, but did so in their names only. *Id.* at 248, 255. They then sold the property in 1992 to their profit. *Id.* The plaintiff did not learn of these actions until 1996. *Id.* at 248. In November 1996 he filed suit against his partners for breach of fiduciary duty, fraud, violation of the Washington State Securities Act, and other claims. *Id.* The Court of Appeals affirmed summary judgment dismissal of the plaintiff's common law fraud and securities fraud claims because those claims accrued in September 1992 when information about the defendants' conduct was made available to him in the public property records. *Id.* at 257. The plaintiff's claims were therefore barred by the statutes of limitations even though he did not *actually* discover the fraud until 1996.

Here, Norton had *actual* knowledge of the "fraud" in which he alleges Graham & Dunn participated by July 2009. He learned that he had lost his investments on March 11, 2009, when Prater told him of de Guzman's Ponzi scheme. CP 1019. He discussed bringing claims against Graham & Dunn with the Steering Committee on June 11, 2009, and paid $24,000 to the Sirianni firm on July 2, 2009 to finance investigation of those claims. CP 1001, 1003, 1021, 1334. By collaborating with NDG employees and their lawyers, the Sirianni firm received copies of Graham & Dunn emails on July 21, 2009. CP 670-73, 715. Included in these documents were ten attorney-client privileged communications, all of which were quoted in the *Aggen* complaint and referenced in Norton's complaint. CP 2, 517-54, 674-713. These documents establish Graham & Dunn's knowledge of NDG's securities offerings and late Form D filings. According to Norton, it was Graham & Dunn's knowledge of delinquent Form D filings, combined with the fact that the firm continued for help NDG form new LLCs, which make the firm liable to him.[8] *See* CP 1-29.

[8] Graham & Dunn vigorously disputes that it may be held liable for the legal services it provided to NDG. Like NDG's officers, employees, and investors, Graham & Dunn had no knowledge that de Guzman was operating a Ponzi scheme. CP 515. However, the focus of this appeal is Norton's knowledge and diligence, not the merit of Norton's theories of liability.

Norton complains that he did not *actually* learn of the Graham & Dunn documents his lawyers received in July 2009 until July 2012. Brief at 17-18. But regardless of when Norton actually learned of the contents of the Graham & Dunn documents, he had constructive knowledge of them in 2009. Like criminal trials and real estate transactions, Form Ds are a matter of public record. CP 658-59. Norton therefore had constructive knowledge of the fact that NDG was late in filing its Form Ds when NDG failed to file Form Ds within 15 days of each of Norton's investments. *See* CP 491, 493 (dates of Norton's investments in 2008).

Moreover, a party who hires lawyers to perform an investigation is charged with knowledge of the facts discovered during the course of that investigation. *See Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) ("The attorney's knowledge is deemed to be the client's knowledge, when the attorney acts on [the client's] behalf."); *see also West v. Thurston Cnty.*, 168 Wn. App. 162, 183, 275 P.3d 1200 (2012) (the attorney-client relationship is an agent-principal relationship); *Stevens v. Sec. Pac. Mortg. Corp.*, 53 Wn. App. 507, 519, 768 P.2d 1007 (1989) (an agent's knowledge is imputed to the principal). Here, knowledge of the facts discovered by the Sirianni firm during its investigation in July 2009 is imputed to Norton, the firm's client.

Even if this knowledge were not imputed to him, the Graham & Dunn documents were readily available to Norton. He knew the Sirianni firm had been hired to investigate claims against Graham & Dunn and had obtained documents from Graham & Dunn. CP 496, 1334. Yet he made no effort to obtain those documents while he was a member of the Steering Committee or after he left the Committee. He did not ask the Sirianni firm for copies of the documents. He did not ask the Steering Committee for copies of the documents in their possession. He did not seek copies of the documents from the NDG's employees who had preserved documents when they discovered de Guzman's scheme.

In short, although Norton identified Graham & Dunn as a "recovery opportunity" (his words) in June 2009, he did not pursue them until after he had pursued other recovery opportunities against de Guzman, NDG, Grupo Innova, U.S. Bank, and Prater. He then "discovered" his claims against Graham & Dunn (again) nine months after the Steering Committee investors sued the firm in the *Aggen* lawsuit. The trial court did not err when it determined that Norton's claims accrued by September 2009 when Norton left the Steering Committee. CP 717-28. By then he either knew or should have known of facts which he alleges support his claims. Because he waited until April 2013 to commence his lawsuit, his claims are barred by the three year statutes of limitations.

B. Norton's Reliance on the November 14, 2008 Email Is Misplaced.

Norton makes much of the November 14, 2008 "smoking gun" email inadvertently left out of the documents Graham & Dunn provided in July 2009. *See* Brief at 25. According to Norton, this email was "the piece of evidence that demonstrated Graham & Dunn's active participation in the Ponzi scheme and its cover up." *Id.* (emphasis in original). Oddly, Norton asks the Court to take his word for the contents of that email, because he did not submit a copy of the email to the trial court for consideration. Consequently, *there is no copy of the email in the record.* Instead, Norton relies upon allegations about select portions of that email in his complaint and the *Aggen* complaint. *See* Brief at 13 (citing to Norton's complaint and the *Aggen* complaint); *see also* Brief at 25 (no citation to the record). This is convenient for Norton, because a complete copy of the email in admissible form would show that the email is not as he portrays it.

However, Norton may not rely on mere allegations to defeat a summary judgment motion. CR 56(e). If Norton relies on a document to defeat summary judgment, he must put a complete copy of it in the record; he cannot rely on mere statements about its substance or effect. *Melville v. State*, 115 Wn.2d 34, 36, 793 P.2d 952 (1990). To create a genuine issue

of material fact, he must use evidence that would be admissible at trial. *Id.*; *see also* CR 56(e); *Grimwood*, 110 Wn.2d at 359. The trial court properly granted summary judgment because Norton knew of facts supporting his claims by September 2009. But if the November 14 email were essential to establish Norton's case, then dismissal was also appropriate because he did not introduce the email to the trial court. *Melville*, 115 Wn.2d at 36 (affirming summary judgment dismissal where the plaintiff failed to introduce copies of documents he relied upon).

Even if the November 14 email were a smoking gun, a smoking gun is not required to start the running of the statute of limitations. As this Court has already stated, all that is required is reasonable suspicion:

> **A smoking gun is not necessary to commence the limitation period. An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken.** At that point, the potential harm with which the discovery rule is concerned—that remedies may expire before the claimant is aware of the cause of action—has evaporated. The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitation period begins to run, many claims would never be time-barred.

Beard v. King Cnty., 76 Wn. App. 863, 868, 889 P.2d 501 (1995) (emphasis added).

Norton attempts to distinguish *Beard* by arguing that he did not actually know of the specific wrongs he alleges against Graham & Dunn until July 2012. Brief at 31-33. But Norton ignores the allegations he made in his own complaint. Norton alleged that Graham & Dunn owed a duty to timely file Form Ds (paragraph 25), that Graham & Dunn breached that duty by filing Form Ds late (paragraph 26), that Graham & Dunn advised NDG to make misrepresentations to investors about the status of Form D filings, including the filings related to the companies in which Norton invested (paragraphs 27 and 28), and that Graham & Dunn's failure to disclose the status NDG's Form D filings were "material violations of the securities laws" (paragraph 29). CP 6-7. According to Norton, "The Nortons and Northland would not have invested in any of the NDG Investments if they had known the information which should have been disclosed in the Form Ds that Graham & Dunn failed to timely file." CP 7.

Norton knew of facts relating to *these specific allegations* in July 2009. The attorney-client privileged emails provided by Graham & Dunn in July 2009 showed that the firm knew NDG was not filing Form Ds throughout 2008, and yet continued to help NDG form new LLCs as vehicles to raise investments for new projects. *See, e.g.*, CP 677 697. Norton also knew in July 2009 that NDG purportedly put Graham & Dunn in charge of drafting NDG's offering

materials, including the offering materials for one of the deals in which Norton invested. *See* CP 694 (request by NDG that Graham & Dunn prepare offering materials for the Shell La Paz project); CP 491 (Norton's investment in the Shell La Paz project). The trial court properly determined that the limitation period for Norton's claims began to run when his lawyers possessed documents forming the basis of his claims. *See* CP 717-28.

Not only did Norton's lawyers possess Graham & Dunn documents, but the Steering Committee also offered to cooperate with Norton after he left the committee. CP 1005-06. Norton contends that this was an "empty" offer. Brief at 30. Nothing in the record supports this contention. Instead, the record shows that the relationship between Norton and the Steering Committee did not become adversarial until July 2010 at the earliest. CP 1325. And even if the Committee's offer were not genuine, Norton offers no explanation for why he failed to use the tools of discovery available to him to obtain documents from the Committee, any of the investors it represented, or NDG's employees. *See Beard*, 76 Wn. App. at 868.

C. Norton Relies Upon Inapposite Precedent.

Norton proffers several cases to support his arguments, but none offers guidance for the circumstances here. For example, Norton cites cases where the plaintiffs were unaware of their injuries at the time the injuries occurred, but filed suit shortly after they discovered their injuries. *See 1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 579-81, 146 P.3d 423 (2006) (latent construction defects); *Samuelson v. Cmty. College Dist. No. 2 (Grays Harbor College)*, 75 Wn. App. 340, 345-46, 877 P.2d 734 (1994) (eligibility for employment benefits). However, Norton knew in March 2009 that he had lost his investments, and yet he waited almost four years (until April 2013) to file his complaint against Graham & Dunn. These cases offer no help to Norton.

Norton also cites cases in which the record did not reveal whether diligence would have led to discovery of facts giving rise to claims. *See Young v. Savidge*, 155 Wn. App. 806, 823-25, 230 P.3d 222 (2010); *Busenius v. Horan*, 53 Wn. App. 662, 668, 769 P.2d 869 (1989). But Norton did know of facts giving rise to his claims in July 2009. *See* Section IV.B., *supra*. And even if he did not, the record shows that diligent inquiry would have led to the actual discovery of such facts before the limitation period would have run. *E.g.*, CP 517-54 (the *Aggen* complaint); CP 674-713 (ten documents quoted in the *Aggen* complaint

that Graham & Dunn provided to Norton's lawyers in July 2009). Here, Norton's failure to conduct a diligent inquiry is indisputable because 91 other investors defrauded by de Guzman did in fact assert their claims within the three year limitations period. CP 517-54. The same documents and facts obtained by these other investors were also available to Norton.

Norton cites cases where the plaintiffs did not discover facts giving rise to their claims until shortly after the plaintiffs hired attorneys to help them investigate claims. *See Adcox v. Children's Orthopedic Hosp. and Med. Ctr.*, 123 Wn.2d 15, 35, 864 P.2d 921 (1993); *Allyn v. Boe*, 87 Wn. App. 722, 737-38, 943 P.2d 364 (1997). However, in July 2009 Norton hired lawyers for the purpose of investigating claims against Graham & Dunn, and those lawyers discovered documents giving rise to Norton's claims. These cases also do not help Norton.

Finally, Norton cites cases in which genuine issues of fact precluded summary judgment on statute of limitations grounds. *See August v. U.S. Bancorp*, 146 Wn. App. 328, 346, 190 P.3d 86 (2008); *Price v. State*, 96 Wn. App. 604, 617, 980 P.2d 302 (1999). Here, there are no genuine issues of fact. The uncontroverted evidence in the record establishes that Norton was on notice of the facts constituting his claims against Graham & Dunn by September 2009.

D. Norton Was Not Misled by the Documents Graham & Dunn Provided in July 2009.

Norton talks from both sides of his mouth about the Graham & Dunn documents obtained by Norton's lawyers in July 2009. On the one hand, Norton argues that the contents of those documents misled him into believing that Graham & Dunn could not be liable for NDG's conduct. Brief at 23-24. On the other hand, Norton argues that because he never knew about those documents, he cannot be held responsible for failing to act on their content. Brief at 26-27. He also claims Graham & Dunn purposefully omitted the November 14, 2008 "smoking gun" email from the documents to conceal its "active involvement in perpetrating and concealing de Guzman's Ponzi scheme." Brief at 26. Obviously, Norton could not have been misled by the absence of the November 14 email from the Graham & Dunn documents provided in July 2009 because he claims he was not even aware of the contents of those documents.

E. Equitable Tolling Does Not Apply.

Norton also argues that his claims were timely under the doctrine of equitable tolling. Brief at 33-38. Norton first raised this legal theory in his motion for reconsideration. *Compare* CP 471-89 (Norton's brief opposing summary judgment) *with* CP 729-40 (Norton's motion for reconsideration). However, Norton may not use a motion for

reconsideration to propose a new legal theory that he could have raised before the trial court entered summary judgment against him. *Wilcox v. Lexington Eye Inst,*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005) (affirming denial of motion for reconsideration after the trial court granted motions to dismiss because "CR 59 does not permit a plaintiff to propose new theories of the case that could have been raised before entry of an adverse decision.").

Even if Norton had argued equitable tolling in his brief opposing summary judgment, it would not have affected the outcome. The doctrine applies only when justice requires. *Finkelstein v. Sec. Props., Inc.*, 76 Wn. App. 733, 739, 888 P.2d 161 (1995). And application of the doctrine must be consistent with both the purpose of the statute governing the cause of action and the purpose of the statute of limitations. *Id.* at 740 (citing *Douchette v. Bethel School Dist. No. 403*, 117 Wn.2d 805, 812, 818 P.2d 1362 (1991)).The predicates for equitable tolling are (1) bad faith or deceptive or false assurances by the defendant to the plaintiff, and (2) diligence by the plaintiff. *Finkelstein*, 76 Wn. App. at 739-40; *see also Douchette*, 117 Wn.2d at 812. Diligence requires more than

minimal effort; the plaintiff must make every effort to promptly enforce his rights.[9]

Neither predicate for equitable tolling is present here. The record is devoid of any evidence of bad faith or false or deceptive assurances made by Graham & Dunn to Norton. For example, Norton does not describe *any* communications between him and Graham & Dunn. *See* CP 490-503. Neither does Norton's lawyer. *See* CP 504-644. To support his argument that Graham & Dunn acted deceptively, he once again cites to statements in pleadings, not admissible evidence. Brief at 34-36. One of those statements refers to a tolling agreement between Graham & Dunn and the *Aggen* plaintiffs. Brief at 36 (citing to CP 565). However, Norton failed to put a copy of the tolling agreement into the record. If he had done so, the Court would see that the agreement was not what Norton portrays it to be

[9] *Compare Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 176-77, 937 P.2d 565 (1997) (no equitable tolling where plaintiff waited more than 60 days to challenge L&I decision denying plaintiff widow benefits, even though plaintiff persistently sought disclosure of incorrect autopsy report for more than seven years), *and Douchette*, 117 Wn.2d at 812 (no equitable tolling where plaintiff waited more than three years after employment discharge to bring unlawful discharge and discrimination claims, even though plaintiff timely filed EEOC complaint and then heard nothing from EEOC), *and Leschner v. Dep't of Labor & Indus.*, 27 Wn.2d 911, 927-28, 185 P.2d 113 (1947) (no equitable tolling where plaintiff waited four years before filing worker's compensation claim, even though plaintiff relied upon former doctor's misrepresentation that he had timely filed the claim), *with Millay v. Cam*, 135 Wn.2d 193, 206, 955 P.2d 791 (1998) (equitable tolling *may* apply where plaintiff filed declaratory judgment action one day before expiration of redemption period instead of paying grossly exaggerated redemption amount), *and State v. Duvall*, 86 Wn. App. 871, 875, 940 P.2d 671 (1997) (equitable tolling permitted court to promptly enter new order of restitution after 60-day limitation period had passed upon learning that defendant's lawyer had signed order fixing restitution without defendant's consent).

(according to Norton, evidence of a secret conspiracy between Graham & Dunn and the *Aggen* plaintiffs to deny Norton his day in court). And had Norton not waited until his motion for reconsideration to first raise his equitable tolling argument, Graham & Dunn would have had an opportunity to put admissible evidence in the record explaining the circumstances of that agreement.

Without any evidence of bad faith or deceptive assurances made by Graham & Dunn to Norton, the doctrine of equitable tolling cannot apply. *See Douchette*, 117 Wn.2d at 812 (affirming determination that doctrine of equitable tolling does not apply in the absence of evidence of bad faith or deceptive or false assurances by the defendant to the plaintiff).

Moreover, the record contains *no* evidence of diligence by Norton. It is undisputed that Norton targeted Graham & Dunn as a potential source of recovery in June 2009. It is also undisputed that Norton (as a member of the Steering Committee) hired the Sirianni firm to investigate claims against Graham & Dunn in July 2009. As part of its investigation, the Sirianni firm received Graham & Dunn documents in July 2009. Norton referred to at least ten of these documents in his complaint against Graham & Dunn. CP 2 (allegation referring to Graham & Dunn correspondence quoted in the *Aggen* complaint). Norton ceased being represented by the Sirianni firm by September 2009 when he received the letter from the

Steering Committee promising cooperation in parallel lawsuits. At this point, Norton was required to exercise diligence.

However, Norton did not exercise diligence. He never asked his lawyers for copies of the Graham & Dunn documents they received in July 2009. He never asked the Steering Committee for the evidence in its possession, despite the Steering Committee's offer of cooperation. He never asked the NDG officers who blew the whistle on de Guzman for the evidence they had preserved. In short, Norton failed to exercise *any* diligence with regard to Graham & Dunn as a "recovery opportunity" between September 2009 and April 2013. Absent diligence, the doctrine of equitable tolling cannot apply. *See Douchette*, 117 Wn.2d at 812 (affirming determination that doctrine of equitable tolling does not apply in the absence of evidence of diligence by the plaintiff).

Finally, applying the doctrine of equitable tolling here is not consistent with the purpose of statutes of limitation. *Finkelstein*, 76 Wn. App. at 740. "Statutes of limitations are designed to shield defendants and the judicial system from stale claims. Evidence may be lost and **witnesses' memories may fade if plaintiffs sleep too long on their rights**." *Hudson*, 101 Wn. App. at 872 (emphasis added) (citations omitted) (citing *Douchette*, 117 Wn.2d at 813). In this case, Norton provides evidence of his own faded memories. Norton's 2009 and 2010 written statements

contravene his now poor memory of his discussions with the Steering Committee regarding Graham & Dunn. *Compare* CP 496 *with* CP 1021-23, 1334. Applying the doctrine here would be inconsistent with the purpose of the statute of limitations. This Court should affirm the trial court's denial of Norton's motion for reconsideration.

V. CONCLUSION

Norton was defrauded by de Guzman and NDG in 2008. He discovered the fraud in March 2009. He then joined the Steering Committee and discussed suing Graham & Dunn in June 2009. He participated in retaining the Sirianni firm to represent the Steering Committee investors, including him. In July 2009, he paid $24,000 to the Sirianni firm to investigate claims against Graham & Dunn. Within weeks, the Sirianni firm had sought and received privileged communications between Graham & Dunn and NDG. Those communications contained facts forming the basis of Norton's (and the Steering Committee investors') claims against Graham & Dunn.

Norton left the Steering Committee in August or September 2009. He claims he never saw the Graham & Dunn documents, but he has offered no evidence that he sought them from the Sirianni firm, the Steering Committee, or NDG's employees, or that he did anything else to

exercise the diligence required of him. Instead, he pursued his other "recovery opportunities."

In the meantime, the Steering Committee investors diligently used the documents provided by Graham & Dunn and NDG's employees to assert timely claims against Graham & Dunn in the *Aggen* complaint in July 2012. Norton could have done the same. Instead, Norton waited until April 2013 to file his complaint against Graham & Dunn, which was based entirely on the allegations in the *Aggen* complaint. Norton waited too long. His claims accrued by September 2009, and unlike the *Aggen* plaintiffs he did not exercise diligence. The trial court properly dismissed his claims as barred by the statutes of limitations, and this Court should affirm.

RESPECTFULLY SUBMITTED this 15th day of June, 2015.

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By _____

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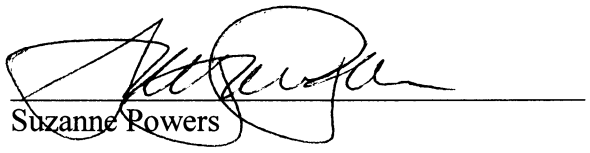
CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused a copy of this document to be served via electronic and U.S. mail to the last known address of all counsel of record.

I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

DATED this 1ST day of June, 2015, at Seattle, Washington.



Suzanne Powers