

71902-5

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NO. 71902-5

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

VELOCITY CAPITAL PARTNERS, LLC, an Oregon Limited Liability
Company,

Petitioners.

v.

LASHER, HOLZAPFEL, SPERRY & EBBERSON, P.L.L.C., a
Washington Limited Liability Company, and EUGENE WONG, an
individual,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

This case involves a legal malpractice claim arising from Appellant/Plaintiff Velocity Capital Partners' ("VCP") alleged inability to enforce a commercial promissory note, deed of trust and two personal guarantees for a \$560,000 "hard money" bridge loan to K & S Development, LLC (K & S). CP 3-10. VCP filed suit on December 12, 2012. CP 1.

Respondent/Defendant Eugene Wong, of Lasher Holzapfel Sperry & Ebberson, PLLC ("Lasher Holzapfel") prepared the loan documents as attorney for VCP and emailed them to officers of lender VCP, borrower K & S, and the disbursement escrow agent acting on VCP's behalf, TRH Lenders, LLC ("TRH" or "TRH Lenders"). His email requested that the parties "Please return the original executed documents to me for processing and recording." CP 188; 1009. No loan documents were ever returned to Mr. Wong, the deed of trust was not recorded, and the personal guarantees of K & S's principals, Gerald Kingen and Scott Switzer, were never executed. Despite this fact, and unbeknownst to Mr. Wong, VCP advanced the loan funds for the July 2008 loan to TRH, and TRH disbursed those loan proceeds K & S.

In January 2009, VCP entered into a "Loan Maturity Extension" agreement with K & S whereby VCP allowed K & S to extend the due

date of the July 2008 loan in exchange for an “extension fee.” CP 242-43. It is undisputed that VCP prepared the Loan Maturity Extension agreement without any consultation with Mr. Wong. VCP specifically recited that copies of the July 2008 signed loan documents were “attached” to the Extension, but VCP made no effort to actually locate the documents, or ask Mr. Wong whether he had copies.

When K & S later defaulted on the loan obligation, VCP was unable to enforce its rights under the July 2008 loan documents because executed copies could not be located by VCP. VCP sued Mr. Wong and Lasher Holzapfel alleging that Mr. Wong had breached a duty to ensure the “loan was properly documented and all agreements signed and properly recorded,” *see* CP 6 at ¶ 14, before VCP advanced loan funds, or allowed for their disbursement by TRH.

It is undisputed that Mr. Wong did not act as the escrow agent for funding or disbursement of the July 2008 loan. Instead, the funding and disbursement of the loan were the responsibility of TRH, the loan disbursement escrow. It is also undisputed that VCP advanced the loan funds to TRH and permitted TRH to disburse loan proceeds to K & S without notifying Mr. Wong and indeed before Mr. Wong had even been requested to draft the loan documents.

Mr. Wong owed no duty to VCP with respect to loan funding or

disbursement. His role in the transaction was to draft the loan documents and send them to the parties for execution and return. Appellant did not attempt to argue that Mr. Wong failed to meet the standard of care regarding the limited duties actually assumed. If VCP suffered a loss on the July 2008 loan because of its inability to locate the executed loan documents, that loss was proximately caused by VCP's failure to instruct TRH not to advance loan proceeds prior to closing, and/or by TRH's breach of its duties to VCP as escrow agent to refrain from disbursing loan proceeds to K & S until the loan documents were signed and deed of trust was recorded.

On April 14, 2014 King County Superior Court Judge Joan DuBuque heard oral argument on Defendants' Motion for Summary Judgment Dismissal and held that:

...[T]here was no duty that was breached and even assuming if there was a duty, it was discharged by the provision of the documents to the various individuals that were involved and there is no proximate cause in law or as a matter of fact that anything that Mr. Wong did with regard to this transaction was the cause of damages to the plaintiff. The fact that there had been pre-disbursements [*sic*] of money, preinvestment [*sic*] of monies by the plaintiffs themselves, [and] the fact that it's undisputed that Mr. Sakamoto [VCP's principal] testified that he did not advise Mr. Wong of any of these activities intervenes to alleviate any legal liability on behalf of this defendant.

With regard to the Statute of Limitations, I would think that it's the safest thing for this court to say that no later than

January of 2009 the plaintiffs were clearly put on notice that a reasonable person would know or should have known by the exercise of reasonable diligence that they had a potential claim for malpractice given the nonexistence of the loan documents upon which their damages claim fundamentally rests.

Verbatim Report at 77-78. Judge DuBuque accordingly held that: “...based on my review of the record that reasonable minds could not differ with regard to the issue of granting summary judgment on proximate cause, duty and statute of limitations.” Verbatim Report at 79-80.

Judge DuBuque’s order granting Defendants’ Motion for Summary Judgment was correct and should be affirmed in its entirety on appeal.

II. ASSIGNMENTS OF ERROR

Mr. Wong and Lasher Holzapfel assign no error to the trial court’s decision.

Issues Pertaining to Appellant’s Assignments of Error

Mr. Wong and Lasher Holzapfel disagree with the Assignments of Error identified by VCP. Mr. Wong and Lasher Holzapfel submit that the issues on appeal are more properly stated as follows

Whether the trial court properly dismissed VCP’s legal malpractice and breach of fiduciary duty claims as a matter of law on summary judgment, where the undisputed evidence shows that:

1. At the very latest in January 2009, VCP knew or should

have known the facts supporting a legal malpractice and breach of fiduciary duty claim, when VCP drafted and signed the Loan Maturity Extension which recited that the executed July 2008 loan documents were attached, but failed to locate or attach them, and also failed to consult with Mr. Wong about either those loan documents or the Loan Maturity Extension which VCP prepared;

2. Mr. Wong exercised reasonable care in drafting the July 2008 loan documents and in sending them out for signature to the borrowers K & S, as well as disbursement escrow agent TRH and lender VCP;

3. Without notifying Mr. Wong, VCP advanced July 2008 loan proceeds to its disbursement escrow agent, TRH Lenders, and allowed or caused those loan proceeds to be disbursed without executed loan documents, and to a large extent before VCP even requested that the loan documents be drafted;

4. Mr. Wong was not the disbursement escrow agent, VCP never informed Mr. Wong that it was advancing loan proceeds to TRH or disbursing loan proceeds in the absence of executed loan documents, and VCP never consulted with Mr. Wong about its practice of advancing and disbursing loan funds to borrowers before receiving signed loan documents;

5. Mr. Wong owed no duty to VCP to ensure the July 2008 loan documents were executed and recorded before VCP advanced and authorized its agent TRH to disburse loan proceeds to borrower K & S, because he was not informed of those disbursements and had no knowledge of VCP's practice in this regard. The scope of his representation never included acting as disbursement escrow agent or monitoring the disbursement escrow agent, or ensuring that VCP did not advance or disburse loan proceeds in the absence of executed loan documents;

6. Mr. Wong was not the proximate cause of any of VCP's alleged damages where VCP voluntarily, and without informing Mr. Wong, advanced and disbursed loan proceeds for the July 2008 loan in the absence of drafted, executed, or recorded loan documents;

7. But for VCP's practice of advancing loan funds to its disbursement escrow agent, TRH, and allowing or causing for the disbursement of loan proceeds all in the absence of executed loan documents, VCP would have suffered no damages.

III. STATEMENT OF THE CASE

A. Background.

Velocity Capital Partners, LLC was formed in early 2007 by Jeff Sakamoto. CP 86; CP 565-66 at 28-32. VCP was managed by Bridgeport

Capital Group, which was owned and managed by Jeff Sakamoto. *Id.*; CP 262. At all relevant times, Mr. Sakamoto, through Bridgeport, was the managing member of VCP. *Id.*¹

Prior to founding VCP, Mr. Sakamoto worked as an investment advisor for a company called The Partners Group in Portland, Oregon. *Id.*, CP 565-66 at 27-29. Mr. Sakamoto held himself out as a Registered Financial Planner and Certified Mortgage Planning Specialist. CP 771 at 11-12. Prior to founding VCP, Mr. Sakamoto had taken, and passed, the Series 7, 63 and 65 securities licensing exams. CP 270 at 9, ll. 9-15. After leaving The Partners Group, Mr. Sakamoto formed VCP for the purposes of engaging in high interest, short term, real estate development lending, otherwise known as “hard money” loans. CP 565-66 at 27-30.

Mr. Sakamoto testified that he was introduced to the industry by Tom Hazelrigg and Joe Kimm. CP 253-54. Mr. Hazelrigg and Mr. Kimm were both extremely active in the area of hard money lending, and Mr. Hazelrigg owned or managed a number of lending related entities, including Centurion Financial Group (CFG) and TRH. *Id.*; *see also* CP 257, ll. 5-25. CFG brokered and ultimately serviced VCP’s loans, including the July 2008 loan to K & S, and TRH served as disbursement

¹ The Appendix to this brief identifies the key players in the loan transactions involved in this case, and also provides a summary chronology of events.

escrow agent for several VCP loans, including the July 2008 loan to K & S. *Id.*, see also CP 255, ll. 8-20; CP 265, ll. 24-25; CP 266, ll. 1-10; CP 275 at 28, ll. 2-5. Prior to the July 2008 K & S loan, Mr. Sakamoto, Bridgeport and/or VCP engaged in several other hard money lending deals. CP 895-98.

VCP engaged Mr. Wong to serve as lender's attorney in early 2007. CP 253-54 at 84; CP 576 at ¶ 2. In all, Mr. Wong served as VCP's attorney on six loans, including the loan that is the subject matter of this lawsuit. CP 577 at ¶ 3. Mr. Wong never served as disbursement escrow agent for any VCP loans, and never received loan funds from VCP or disbursed them to any borrower. *Id.* at ¶¶ 3-4; CP 581 at ¶ 15; CP 277 at 35, ll. 12-23; CP 283 at 59; CP 358-62; CP 368-71; CP 289 at 84-85.

The undisputed evidence at summary judgment demonstrated that, when representing VCP on a loan transaction, Mr. Wong's practice was to inform VCP when a loan "closed" or when the deed of trust securing the loan was recorded. CP 577-78 at ¶ 5; CP 163; CP 1177-1184; CP 923-25. The only time Mr. Wong did not inform VCP of closing or the recording of its deed of trust was with respect to the subject July 2008 loan. *See id.* On that loan, Mr. Wong did not inform VCP of deed of trust recording or loan "closing" because executed loan documents were never returned to him. CP 580-81 at ¶ 12-13.

B. March 2008 VCP loan to K & S.

A March 2008 loan by VCP to K & S provides background for the July 2008 loan transaction giving rise to VCP's claims in this case. In March 2008, Mr. Wong was informed that VCP intended to make a \$560,000 loan to K & S for use in connection with K & S's development of a project in SeaTac (hereinafter referred to as the SeaTac Property). CP 577-78 at ¶ 5; CP 113-115. The undisputed evidence introduced at summary judgment by VCP established that on March 13, 2008 Mr. Sakamoto emailed Mr. Hazelrigg informing him that VCP had "\$150k coming in tomorrow in the Kingen SeaTac deal" with another "\$220k" the following week. CP 1036; Verbatim Report at 34-35. Mr. Sakamoto went on to ask Mr. Hazelrigg whether he had "any ideas" because Mr. Sakamoto knew that Mr. Kimm "is in need of the full \$300k." *Id.* Mr. Wong was not contacted regarding the March 2008 loan until the following day, March 14. CP 113.

On March 17, 2008 Mr. Wong prepared and emailed draft loan documents to K & S for review, with a copy to CFG and Mr. Sakamoto. CP 577-787 at ¶ 5; CP 117-161. The loan documents included a Loan Disbursement Summary and Authorization, which itemized the disbursements to be made by TRH as disbursement escrow agent in connection with the loan closing. *Id.*; CP 588-89 at ¶ 10. Mr. Wong

obtained signatures on the loan documents and submitted the deed of trust to the title company for recording and issuance of a lender's title policy. CP 117-161; 163; 577-78 at ¶ 5. When Mr. Wong received notice of recording of the deed of trust on April 4, 2008, he informed VCP, K & S and TRH of that recording later the same day. *Id.*

C. Loan Funding and disbursement for the March 2008 loan.

Mr. Wong had no involvement in disbursement of the March 2008 loan proceeds to K & S, and was not notified when that occurred. CP 578-79 at ¶¶ 6-8; 581 at ¶ 15; CP 275 at 27, ll. 1-22; 275-76 at 29-32; 277-78 at 35-38. Generally, if loan funds are pre-advanced by the lender, that information would be set forth in the Disbursement Authorization and Summary, as well as the Promissory Note to identify that interest on those funds accrued from the date of the advancement. CP 578 at ¶ 6. Here, unbeknownst to Mr. Wong, VCP began funding the March 2008 loan to TRH as early as February 25, 2008, more than two weeks before Mr. Wong was asked to draft the loan documents. CP 578-79 at ¶¶ 6-8; 581-82 at ¶ 15; CP 165-75; 275-76 at 29-31; 277 at 36-37.

VCP documented its loan advances through interest statements from CFG reflecting the loan funds received by TRH from VCP investors. *Id.*; *see also* CP 281-83; 287 at 76-77. Mr. Sakamoto admitted the interest statements accurately reflect the dates when VCP sent money to TRH, the

amounts advanced, and the VCP loans for which they were to be used. *Id.* According to the monthly interest statements provided by CFG to VCP, VCP funded approximately \$345,000 of the March 2008 loan to TRH before Mr. Wong was ever contacted to draft loan documents. CP 165-75; 1036. The entire loan was funded by VCP to TRH by April 3, 2008, which is the day before the deed of trust was recorded and Mr. Wong provided notice to TRH and VCP of that recording. *Id.*; *see also* CP 163; 277 at 36-37. VCP caused or allowed TRH to disburse at least \$300,000 of the loan proceeds on April 1, 2008, which was three days before the deed of trust was recorded. *Id.*; *see also* CP 165-75; 358-62; 368-71; 1036; Verbatim Report at 34-35. VCP never informed Mr. Wong that it was causing or allowing TRH to disburse any loan proceeds prior to loan document execution and recording. CP 276 at 30-32; 578-79 at ¶ 6-7.

In its opening brief, VCP draws this Court's attention to Mr. Wong's deposition testimony in VCP's underlying collection lawsuit, King County Cause No. 11-2-17591-0, *Velocity Capital Partners, LLC v. K & S Developments, LLC Velocity v. K & S*. It argues that Mr. Wong knew that VCP was advancing loan proceeds to TRH and causing or allowing loan proceeds to be disbursed prior to execution of the loan documents. Appellant's Brief at 10. However, the deposition testimony cited by VCP says nothing about VCP's practice of advancing or

disbursing loan proceeds in the absence of drafted or executed loan documents, or Mr. Wong's alleged knowledge thereof. CP 636 at 154-155; 656-67 at 233-238; CP 658-59 at 244-248. Rather, the proffered testimony is further evidence that Mr. Wong was not involved in VCP loan funding or disbursement. *Id.*

D. July 2008 VCP loan to K & S.

On or about July 17, 2008 Mr. Switzer requested another \$560,000 loan from VCP to K & S with respect to the SeaTac Property. CP 181-82. This is the loan that serves as the basis for Appellant's claims. In response to Mr. Switzer's request, on July 23, 2008 Mr. Sakamoto sent an email to Mr. Hazelrigg asking for his input regarding the loan. CP 184. On or about July 30, 2008, pursuant to a request from Mr. Switzer, Mr. Wong prepared the loan documents and emailed them to Mr. Switzer and Mr. Sakamoto. CP 186. In the email, Mr. Wong requested that fully executed documents be returned to him for processing. *Id.* Shortly after Mr. Wong sent the July 30, 2008 email to Mr. Switzer and Mr. Sakamoto, Mr. Wong was contacted by Mr. Hazelrigg of TRH, who, just as with the March 2008 loan, was performing loan disbursement escrow services for the new July K & S loan. CP 580 at ¶ 11.

Mr. Hazelrigg informed Mr. Wong that VCP and K & S had waived obtaining lender's title insurance for the new July 2008 loan. *Id.*

Mr. Wong then prepared a revised set of loan documents, removing the requirement for title insurance, and emailed those documents to TRH, Mr. Switzer and Mr. Sakamoto on July 31. *Id.* at ¶ 12; CP 188-235.

In his July 31 email transmitting the redrafted loan documents, Mr. Wong informed the parties that the loan documents removed the requirement for title insurance, pursuant to Mr. Hazelrigg's instructions. CP 580 at ¶ 12; CP 188. He further wrote: "Please return the original executed documents to me for processing and recording." *Id.* In a separate email that Mr. Wong sent only to Mr. Sakamoto on the same day, Mr. Wong wrote: "Jeff – please confirm that VCP has agreed to, and is comfortable, waiving the title insurance on this new loan." Mr. Sakamoto replied: "Ok." CP 237.

1. The July 2008 K & S loan documents were not executed and returned to Mr. Wong for processing and recording.

No executed documents were ever returned to Mr. Wong for the July 2008 loan, as requested in his transmittal emails of July 30 and 31. CP 581 at ¶ 13. Neither TRH nor VCP ever confirmed to him that they had received loan documents executed by the borrower K & S. *Id.* In the area of commercial real estate lending, and hard money lending in particular, it is not uncommon for lenders and borrowers to close a loan transaction between themselves, or to handling loan funding and

disbursement internally. *Id.* at ¶ 14; CP 587-88 at ¶ 8. It was also not unusual for hard money loans, like the July 2008 K & S loan, to fall through and not close, particularly in the difficult financial environment which existed in the summer of 2008. *Id.* As a result, Mr. Wong did not think it unusual that he did not hear back from VCP, TRH, or the borrower, after sending them proposed loan documents at the end of July 2008. *Id.* Mr. Wong had no reason to believe that VCP had advanced any loan funds to K & S through TRH in the absence of executed and recorded loan documents. *Id.*; *see also* CP 587-88 at ¶¶ 8-9.

On August 11, 2008 Mr. Switzer emailed Mr. Hazelrigg asking when the second K & S loan would be finalized. CP 239-40. Mr. Hazelrigg responded, including Mr. Sakamoto on the response, stating: “Where are the final papers to send to Jeff?” *Id.* After Mr. Sakamoto received Mr. Hazelrigg’s email, he placed a call to Mr. Hazelrigg to discuss where the “final papers” were and the status of closing. CP 292 at 95-96. Neither Mr. Sakamoto, Mr. Hazelrigg nor Mr. Switzer called or emailed Mr. Wong to discuss those questions. *Id.* Instead, after his call with Mr. Hazelrigg, on August 12, 2008 Mr. Sakamoto responded to the email string by confirming that VCP could fund the remaining balance of the loan to TRH. CP 239-40; 292 at 95-96.

On August 14, 2008, Mr. Wong called Mr. Sakamoto to discuss a

reconveyance related to another VCP loan, and left a voice message informing Mr. Sakamoto that he (Mr. Wong) had not received executed loan documents for the July 2008 loan to K & S. CP 581 at ¶ 13. Mr. Sakamoto never called back. Mr. Sakamoto did not contact Mr. Wong again until 16 months later in December 2009, when he requested copies of the July 2008 loan documents. At that time Mr. Wong again informed Mr. Sakamoto that signed documents had never been returned to him. *Id.*

E. VCP's lending practices and funding for the July 2008 loan.

During his deposition, Mr. Sakamoto outlined VCP's normal lending process, explaining that VCP would receive a loan request, either formally in writing, or in a less formal fashion, e.g. email or verbally and would then inform VCP investors about the loan and collect loan funds from them. CP 281 at 50-52; *see also* Verbatim Report at 49-51. Mr. Sakamoto testified that VCP was not interested in holding its investors' money. CP 273 at 19-20; 276 at 30-31; 299 at 124-25; 165-75. When VCP received money from an investor, it immediately wired those funds to TRH, typically on the same day of receipt. *Id.* Mr. Sakamoto explained that this was done so that VCP investors could immediately start earning interest on their loans, payable by TRH at 15% per annum. *Id.*

According to the monthly interest statements, VCP sent money to TRH, which was then used to fund the July 2008 K & S loan, as early as

June 27, 2008. CP 173-75. By July 23, 2008, which is one week before Mr. Wong was first contacted about the loan, VCP had already funded approximately \$443,000 of the principal loan amount to TRH. *Id.* The loan was almost completely funded by or about August 12, 2008. *Id.*

The manner in which funding was completed for the July 2008 K & S loan is confusing. Mr. Sakamoto claims that he wired \$250,000 to TRH on or about August 12, 2008 to complete funding the July 2008 K & S loan. CP 240; 165-75. The interest statements, and TRH's bank records show that VCP wired \$57,221.38 to TRH on August 7, 2008 and \$57,661.76 on August 12, 2008, and that each amount was to be applied to the July 2008 K & S loan. *Id.* It is unclear whether Mr. Sakamoto did not realize what the remaining loan balance was, or whether VCP and TRH agreed to use some of the VCP loan funds for other loans being funded through TRH. In any event, it is clear that all but approximately \$1,754 was funded by VCP to TRH by August 12, 2008. *Id.*

F. Disbursements for the July 2008 loan.

VCP maintains that K & S received at least \$356,000 of the net loan amount, out of the \$501,915 that was to have been disbursed to K & S per the loan Disbursement Summary and Authorization. CP 177-78; CP 358-61; 368-72; 297 at 84-85. In support of this assertion, VCP identified two checks from TRH to K & S. *Id.* The first check was in the amount of

\$200,000 and was deposited by K & S on July 30, 2008. *Id.* The memo line on the check describes “Partial Disbursement \$560K loan.” *Id.* So, by July 30, 2008, VCP had already funded a substantial portion of the July 2008 K & S loan to TRH, and TRH had disbursed at least \$200,000 to K & S. *Id.* Recall that Mr. Wong was not contacted to draft the loan documents until July 30, 2008. CP 579 at ¶ 9; 180; 186. While Mr. Wong was waiting for executed loan documents to be returned pursuant to his email instructions, VCP and TRH disbursed an additional \$156,000 of VCP loan funds to K & S on or about August 21, 2008. CP 177-78; CP 358-61; 368-72; 297 at 84-85. VCP has failed to prove that the remaining net loan proceeds were ever disbursed to K & S.

Mr. Sakamoto testified that he never informed Mr. Wong when VCP advanced loan funds to TRH with respect to any VCP loan. CP 275 at 27-28; 276 at 30-32; 277-78 at 35-38, 40; 283 at 59; 296 at 16, ll. 14-22; 301 at 130-31; 263-64; CP 577 at ¶ 3; 578 at ¶ 6; 581-82 at ¶ 15-16. Mr. Sakamoto did not expect Mr. Wong, and it was not part of the services provided by Mr. Wong, to monitor the timing or amount of loan disbursements relative to any VCP loan, including the July 2008 loan. *Id.* Mr. Sakamoto specifically testified that it was TRH’s responsibility to handle loan disbursement. *Id.*; *see also* CP 256-57 at 68-69; 258-261; 272 at 16, ll. 13-16; 276 at 31-32; 277-78 at 35-36; 302 at 137, ll. 6-21; 358-

62; 368-71; 289 at 84-85. Mr. Sakamoto did not provide any instructions to TRH for disbursement of loans proceeds for the second K & S loan, and did not direct TRH to hold any loan funds until the loan documents were executed and recorded. *Id.*, see also CP 275 at 27, ll. 1-22; 276 at 31, ll. 19-22; 277 at 35-37. TRH and VCP simply proceeded on their own to disburse the loan proceeds to K & S, and failed to provide Mr. Wong with any information regarding their activities. *Id.*

G. In January 2009, VCP and K & S entered into a Loan Maturity Extension.

When it appeared that K & S would default, VCP and K & S entered into a Loan Maturity Extension in January 2009 with respect to the March and July 2008 SeaTac Property loans. CP 242; 296 at 111-112. There is no dispute that the Loan Maturity Extension was drafted entirely by VCP. CP 1040; Verbatim Report at 68-70. VCP did not tell Mr. Wong that an extension was being discussed, did not ask Mr. Wong to prepare the Extension agreement, nor did Mr. Sakamoto ever discuss its contents with Mr. Wong. *Id.*; CP 582 at ¶ 16. Mr. Sakamoto never informed Mr. Wong that the July 2008 loan had been disbursed to K & S, or that K & S had subsequently defaulted on both loans. *Id.*

The Extension specifically states that: “K & S executed a Commercial Promissory Note dated July 31, 2008 in an additional amount of FIVE HUNDRED AND SIXTY THOUSAND DOLLARS (\$560,000),

in favor of VELOCITY, its “Holder,” **a copy of which shall be attached hereto as Exhibit B (the “Note II”)**. CP 242. The Extension is signed by both Mr. Kingen and Mr. Switzer. *Id.* Though VCP has not produced a copy signed by Mr. Sakamoto, he testified that VCP entered into the Extension, and that a signed copy does exist. CP 296 at 110, ll. 14-25; 111-112. During his deposition Mr. Sakamoto admitted that he did not insist that signed copies of the two notes be attached to the Extension before signing it. *Id.*²

H. The Foundation suit has no relevance here.

From its opening brief, VCP appears eager to relitigate a prior suit between VCP and Foundation Management as plaintiffs, and Mr. Wong and Lasher Holzapfel as defendants (the “*Foundation*” suit). Even a cursory review of the findings and conclusions from the *Foundation* suit demonstrates that the facts and issues here are unrelated. *See* Appellant’s Opening Brief, *generally*. VCP made this same effort to relitigate the *Foundation* suit in opposition to Defendants’ Motion for Summary Judgment. CP 1042-1065. Judge DuBuque was quick to point out that the *Foundation* suit, and the purposes for which VCP relied upon the facts and findings from Judge Heller to oppose Defendants’ Motion for Summary

² Significantly, the Promissory Note drafted by Mr. Wong was dated July 30, 2008. CP 188-93. In its Recital C, VCP’s Loan Maturity Extension states that “K & S executed a Commercial Promissory Note dated July 31st, 2008. CP 242.

Judgment, bear no relevance to the issues here. Verbatim Report at 36-38; 39, ll. 18-23; 49-51; 24; *see also* CP 791-812.

Unlike the *Foundation* suit, the dispositive issues in this case are: (a) whether Mr. Wong owed any duty to control or monitor loan funding or disbursement; (b) whether Mr. Wong breached the standard of care by not ensuring that loan documents were executed and recorded before VCP and its agent TRH disbursed the loan proceeds to the borrower; and (c) whether Mr. Wong's acts or omissions were the proximate cause of VCP's damages. CP 29-52; 568-75; 576-82; 583-91; *compare* CP 791-812.

VCP's practice of advancing loan funds and directing or allowing disbursements by TRH were not at issue in the *Foundation* suit. *See id.* Mr. Wong's knowledge of VCP's practice in that regard was not at issue in the *Foundation* suit. *Id.* TRH's duty as disbursement escrow agent was not at issue in the *Foundation* suit. *Id.* VCP's reliance on Mr. Hazelrigg or TRH to provide VCP with executed loan documents was not at issue in the *Foundation* suit. *Id.* VCP's and TRH's decision to fund and disburse loan proceeds in the absence of executed loan documents and the consequences of that decision were not at issue in the *Foundation* suit. *Id.* In short, none of the facts from the *Foundation* suit address any of these issues in the current case, and there have been no findings, conclusions or judgments entered with respect to any of those matters. *Id.*; Verbatim

Report at 36-38; 39, ll. 18-23; 49-51; 24.

Judge DuBuque agreed with Defendants that if the *Foundation* suit, the “common business model,” or Judge Heller’s ruling bore any significance here, it was only to support the Defendants’ claim that VCP engaged in a number of hard money lending deals with Mr. Hazelrigg, financed and closed through a number of different ways, and that the “model” **did not include informing Mr. Wong that VCP ever advanced loan proceeds or caused or allowed the disbursement of loan proceeds all in the absence of drafted or executed loan documents.** *Id.*; CP 277 at 37; 278 at 40; 283 at 59; 301 at 131; CP 577 at ¶ 3; 578 at ¶ 6; 581-82 at ¶ 15-16.

I. There are no facts supporting a “conflict of interest” vis-a-vis the July 2008 K & S loan.

As evidence that Mr. Wong was allegedly taking direction from Mr. Hazelrigg to the detriment of VCP, VCP points to two emails between Mr. Wong and Mr. Hazelrigg. The first is an April 10, 2008 email from Mr. Wong to Mr. Switzer and CFG wherein Mr. Wong describes his understanding that funding for the March 2008 K & S loan would be handled “internally” by “Tom.” Appellant’s Brief at 10-11, 28-29. The second is a July 31, 2008 email from Mr. Wong to all the parties, including TRH, wherein he informed informs the parties that “Pursuant to

instructions from Tom” [Hazelrigg], VCP had agreed to waive title insurance for the July 2008 loan, and where Mr. Wong requested that executed loan documents be returned to him for processing. Appellant’s Brief at 13-14, 30-31.

As of the date of the April 10, 2008 email, VCP had already funded the entire amount of the March 2008 loan to TRH, without informing Mr. Wong. CP 165-75; 275-75 at 29-31; 277 at 36-37; 282-83 at 57-58; 577-79 at ¶¶ 3-8. There is no dispute that Mr. Wong never knew that VCP funded or allowed disbursement of loan proceeds by TRH, before Mr. Wong drafted loan documents and/or before the documents were executed. *See supra* at 17. As for the July 31, 2008 email regarding title insurance, immediately after sending that email to the parties, recall that Mr. Wong sent an email to Mr. Sakamoto asking that he confirm VCP’s waiver of title insurance. CP 237. Mr. Sakamoto responded “Ok.” *Id.*

IV. SUMMARY OF ARGUMENT

VCP has premised its claims against Mr. Wong and Lasher Holzapfel in this action on the assertion that it was unable to collect its July 2008 loan to K & S because the loan proceeds were advanced to the borrower without signed loan documents, and that the Defendants had not “ensured that the second loan was properly documented.” CP 568-75;

Verbatim Report at 40, ll. 6-10. The required “duty” and “proximate cause” elements of such claims are simply missing.

VCP does not dispute the facts that: (1) Mr. Wong prepared the loan documents for the transaction as requested, without any claim that they were defective; (2) Mr. Wong emailed the loan documents to VCP, its agent TRH Lenders, and the borrower K & S with the stated expectation that they (not Mr. Wong) would obtain signatures and return the signed originals to Mr. Wong for recording; (3) VCP relied on TRH (not Mr. Wong) to act as disbursement escrow agent for the loan; and (4) VCP provided loan funds to TRH and allowed TRH to disburse them to K & S, without notifying Mr. Wong or confirming whether the loan documents had been signed and the deed of trust recorded. Indeed, to a large extent the loan was funded and disbursed to K & S before the loan documents had even been drafted by Mr. Wong.

VCP’s experts did not opine that the standard of care required Mr. Wong to counsel VCP not to disburse loan proceeds to K & S in the absence of executed loan documents. VCP does not address, and therefore concedes, that it would have suffered no damages but for its practice of advancing loan proceeds to TRH and allowing TRH to disburse those loan proceeds, without regard to whether loan documents were signed and recorded, and without informing Mr. Wong of its practice or requesting

his advice thereon.

Despite VCP's misguided efforts to relitigate the *Foundation* suit, there is no evidence that a "common business model" existed in this case through which Mr. Wong had any notice of VCP's irresponsible lending practices, or owed any duty to monitor those practices. VCP does not dispute the fact that the scope of Mr. Wong's services excluded monitoring loan funding and disbursement, nor that the loan documents for the July 2008 K & S loan were never returned to Mr. Wong for recording or processing. The *Foundation* suit, and the facts and circumstances addressed therein, have no relevance here, and VCP's repeated efforts to retry that case should be disregarded.

Similarly, there are no material facts supporting VCP's claims that Mr. Wong violated RPC 1.4 or 1.7. Even assuming, for the sake of argument that an RPC violation was established by the evidence, there are no material facts showing any causal relationship between any alleged ethical violation and VCP's alleged damages. VCP's irresponsible lending practices and its reliance on TRH proximately caused its damages; and nothing else.

Finally, there is no dispute that as of January 2009, at the very latest, VCP knew or in the exercise of reasonable diligence should have known the facts supporting its claims against the Defendants, (however

unfounded they may ultimately be). It is undisputed that VCP drafted and entered into a Loan Maturity Extension with K & S in January 2009. CP 242; 1040. VCP's Extension agreement stated that the July 2008 loan documents were attached to the agreement, even though VCP claims that it never saw the signed documents, never asked Mr. Wong for the loan documents, and never informed Mr. Wong about the Extension. *Id.* Had VCP exercised even the minimal amount of diligence before entering into the Extension, it would have learned that executed loan documents could not be located, and would have therefore known the facts that formed the bases for its claims against the Defendants. VCP did not file or serve its complaint until 3 years and 11 months later in December 2012, and so all of its claims against the Defendants are barred by the applicable statute of limitation RCW 4.16.080.

V. ARGUMENT

A. Summary judgments are reviewed *de novo*.

The purpose of a summary judgment motion is to examine the evidence supporting the formal allegations, so that unnecessary trials may be avoided where there are no factual issues to be tried. *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 136, 566 P.2d 972 (1977). On appeal the court reviews summary judgment rulings *de novo*. *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 300, 174 P.3d 1142 (2007). The

nonmoving party may not rely on “speculation, bald argumentative assertions that unresolved factual issues remain, or on having its affidavits considered at face value.” *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). The court may affirm a judgment on any ground established by the pleadings and supported by the evidence. *Green v. Am. Pharm. Co.*, 136 Wn.2d 87, 94, 960 P.2d 912 (1998).

B. The trial court’s order should be affirmed because Defendants owed no duty of care to VCP to act as disbursement escrow agent or monitor loan funding or disbursement.

In order to establish its claim for negligence against Defendants, VCP must show: (1) the existence of a duty owed to VCP by Defendants; (2) a breach of that duty; (3) injury; and (4) that Defendants’ breach was the proximate cause of VCP’s injuries. *Folsom v. Burger King*, 135 Wn.2d 658, 671, 958 P.2d 301 (1998); *Hansen v. Friend*, 118 Wn.2d 476, 479, 824 P.2d 483 (1992). “Since a negligence action will not lie if a defendant owed a plaintiff no duty of care, the primary question is whether a duty of care existed.” *Id.*

To prove breach of the standard of care in a legal malpractice action, the plaintiff must establish that the attorney failed “to exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in Washington.” *Geer v. Tonnon*, 137 Wn. App. 838, 850–51, 155

P.3d 163 (2007) (quoting *Hizey v. Carpenter*, 119 Wn.2d 251, 261, 830 P.2d 646 (1992)). “[I]n a malpractice action, the standard of care is the particular duty owed the client under the circumstances of the representation....” *Barrett v. Freise*, 119 Wn. App. 823, 842–43, 82 P.3d 1179 (2003).

Similarly, to establish breach of fiduciary duties VCP must prove (1) existence of a duty owed, (2) breach of that duty, (3) resulting injury, and (4) that the claimed breach proximately caused the injury. *Miller v. U.S. Bank of Wash.*, 72 Wn. App. 416, 426, 865 P.2d 536 (1994). Expert testimony is required to describe the relevant standard of care, and to determine if an attorney’s conduct fell below that standard of care, whether the claim sounds in legal malpractice or breach of fiduciary duty. *Geer*, 137 Wn. App. at 851 (quoting *Lynch v. Republic Publ’g Co.*, 40 Wn.2d 379, 389, 243 P.2d 636 (1952)); 4 R. Mallen & J. Smith, *Legal Malpractice* § 37:23 at 1651-52 (2013) (footnotes omitted); *Hizey*, at 265. The determination of whether a duty exists is a question of law. *Folsom*, at 671 (citing *Pedroza v. Bryant*, 101 Wn.2d 226, 228, 677 P.2d 166 (1984)).

VCP has not alleged that the loan documents themselves were deficient, and indeed there are no facts suggesting that the documents for the July 2008 loan, which in substance mirrored the terms of the

enforceable March 2008 loan documents, were deficient in any way. CP 568-75. Rather, at summary judgment VCP argued that Mr. Wong owed a duty to “document the transaction and to get signed documents back and to record them,” Verbatim Report at 40, ll. 6-10, and that “but for [Mr. Wong’s] failure to get us a signed document back, we would have at least been able to enforce it against Kingen...”. Verbatim Report at 41, ll. 8-10. On the issue of duty then, the relevant questions are (a) whether Mr. Wong discharged an alleged duty to VCP to obtain signed and recorded loan documents when he sent them out for signature; and (b) if not, what additional duty did Mr. Wong owe to VCP to obtain signed and recorded documents?

1. Judge DuBuque held that Mr. Wong met the standard of care and discharged his duties to VCP when he sent the loan documents out for signature.

VCP’s position that Mr. Wong owed it a duty to ensure documents were executed and recorded in this case necessarily rests on the unsupported assumptions that (a) Mr. Wong’s duties included monitoring disbursement of loan proceeds or, at a minimum, (b) that Mr. Wong knew VCP would advance loan funds and cause or allow TRH to disburse them before loan documents were drafted or executed. But, on these points, the undisputed material facts demonstrate that:

- Mr. Wong sent the draft July 2008 loan documents to Mr. Sakamoto, the borrowers, and TRH, and asked that the documents be executed and returned to Mr. Wong for processing and recording, CP 126; 188-235; 580 at ¶ 12;
- Executed copies of the July 2008 loan documents were never returned to Mr. Wong, CP 581 at ¶ 13;
- TRH was the disbursement escrow agent for VCP's March and July 2008 loans to K & S and was charged with receiving loan funds from VCP and disbursing loan proceeds to K & S, CP 358-62; 368-71; 256-57; 258-61; 272; 276-78; 302; 289 at 84-85; CP 588-90;
- TRH disbursed loan proceeds to K & S in the absence of any executed loan documents and in the absence of a recorded deed of trust, *Id.*; CP 581 at ¶ 13; 165-75; 177-7;
- Defendants never served as disbursement escrow agent for any VCP loan, including the July 2008 K & S loan, *Id.*; CP 579 at ¶ 8; 581-82 at ¶¶ 15-16; 588-89 at ¶ 10;
- Mr. Sakamoto never informed Mr. Wong when VCP was advancing loan funds to TRH with respect to any loan, including the July 2008 K & S loan, CP 275 at 27-28; 276 at 30-32; 277-78 at 35-38, 40; 283 at 59; 296 at 16, ll. 14-22 301 at 130-31; 236-64; CP 577 at ¶ 3; 578 at ¶ 6; 581-82 at ¶¶ 15-16;
- Neither VCP nor TRH ever informed Mr. Wong with respect to the disbursement of proceeds to K & S on either the March or July

loans made by VCP through TRH as disbursement escrow agent, *Id.*; and

- VCP never requested or instructed Mr. Wong to monitor loan funding by VCP to TRH, or to monitor loan disbursement by TRH to K & S. *Id.*

Mr. Wong met the standard of care when he prepared the loan documents as requested and sent copies to the borrower, lender and escrow agent for signature, and asked that the executed originals be returned to him. CP 587-88 at ¶¶ 6, 7, 9; 591 at ¶ 15; Verbatim Report 77-78. Mr. Wong had no reason to know that VCP would advance funds or allow disbursement to K & S in the absence of executed loan documents, and owed no duty to obtain executed loan documents, rather than wait for the parties to return them to him for processing and recording, as his transmitting emails requested. *Id.* Therefore the standard of care did not require Mr. Wong to ensure that the loan documents were executed before VCP advanced loan proceeds and TRH disbursed them to the borrower.

While Mr. Wong agreed to “process and record” the original loan documents if they had been returned to him, he was not instructed to undertake or assume the duties of a disbursement escrow agent. *See supra* at 17 and 29. Instead, those duties were to be performed by TRH. TRH’s duties included receiving and holding loan proceeds, and not disbursing

any loan funds until (a) the note, guaranty, deed of trust and other loan documents were signed, and (b) the deed of trust was recorded. CP 589-90 at ¶ 12; Washington Real Property Deskbook, 3d. Ed, Vol. III, Ch. 42, § 42.2 at 42-3; CP 358-62; 368-71.

2. VCP lacks the requisite expert testimony needed to establish the applicable standard of care.

As described above, VCP must demonstrate a failure by the Defendants to “exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the practice of law in this jurisdiction.” *Hizey*, 119 Wn.2d at 260-62. Generally, this must be established through expert testimony, because the law is a “highly technical field beyond the knowledge of the ordinary person.” *Walker v. Bangs*, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979) (citing *Lynch v. Republic Publishing Co.*, 40 Wn.2d.379, 389, 243 P.2d 636 (1952)).

While VCP’s experts haphazardly stated that Mr. Wong had a duty to ensure closing, neither of VCP’s experts has offered any opinions as to the scope of Mr. Wong’ alleged duty in this case, and/or what actions Mr. Wong should have taken to obtain signed documents, beyond the measures he in fact took. There is no basis in law or fact for a “heightened duty” in this case. Verbatim Report at 64-66; *see also* 45, ll. 5-17. VCP’s experts did not opine that the standard of care required Mr. Wong to

counsel VCP not to disburse loan proceeds to K & S in the absence of executed loan documents. VCP does not address, and therefore concedes, that it would have suffered no damages but for its practice of advancing loan proceeds to TRH and allowing TRH to disburse those loan proceeds, without regard to whether loan documents were signed and recorded, and without informing Mr. Wong of its practice or requesting his advice thereon.

VCP's expert Paul Brain opined that Mr. Wong owed a duty to draft escrow instructions to TRH, and to "protect VCP's interests in 'closing' the hard money loan before moneys were disbursed." CP 74 at ¶ 15. Those opinions would only make sense if Mr. Wong knew that VCP was advancing loan funds to TRH and allowing TRH to disburse loan proceeds in the absence of drafted or executed loan documents. Yet it is undisputed that Mr. Wong had no knowledge of that practice, and that the loan documents were not returned to Mr. Wong for processing and recording before loan proceeds were funded and disbursed. Under these circumstances, escrow instructions were irrelevant, and Mr. Wong could not ensure "closing" before loan funds were advanced or disbursed. Without the expert testimony identifying the relevant standard of care or the scope of the duties associated therewith, this court should affirm the trial court's dismissal of VCP's complaint.

- a. **There is no evidence of notice to Mr. Wong of VCP's practice of advancing and disbursing loan proceeds in the absence of drafted or executed loan documents.**

VCP and its expert Paul Brian allege that Mr. Wong knew that funding might occur before loan documents were executed or recorded. CP 1074 at ¶ 13; Appellant's Brief at 9, *citing* CP 657-58. In support of this position, they each rely on excerpts from Mr. Wong's 2012 deposition testimony in the *Foundation* case, wherein he testified that, depending on the transaction, it could be "days...weeks...[or]...months" between the time he prepares loan documents and when the loan finally closes and documents are recorded. *Id.* However, the proposition for which VCP and Mr. Brain rely on this testimony is incongruent with, and in fact completely misrepresents Mr. Wong's testimony. Mr. Wong **did not** testify that "days...weeks...[or]...months" can pass "after funding before the final documents are recorded" as Mr. Brain suggests at paragraph 13 of his declaration. *See* CP 1074.

Indeed Mr. Wong's undisputed declaration testimony, and Mr. Sakamoto's unambiguous deposition testimony establish that, when VCP provided funds before loan documents were executed and recorded, Mr. Wong never knew about it and VCP did not inform Mr. Wong of the practice. VCP did not expect Mr. Wong to monitor TRH to ensure loan proceeds were not disbursed in advance of receiving executed loan

documents or a recorded deed of trust. CP 256-61; 272 at 16, ll. 13-16; 276 at 31-32; 277-78 at 35-38; 278 at 40; 283 at 59; 289 at 84-85; 301 at 131; CP 577 at ¶ 3; 302 at 137, ll. 6-21; CP 358-62; 368-71; CP 578 at ¶ 6; 581-82 at ¶ 15-16.

3. TRH was the disbursement escrow agent, and owed VCP a duty of care not to disburse loan proceeds in the absence of executed loan documents.

There is no dispute that TRH was the escrow agent responsible for disbursement of the July 2008 K & S loan. *See id.* As disbursement escrow agent, TRH stood in a fiduciary relationship with VCP, and owed VCP (and K & S) certain duties that Mr. Wong did not, including the duty to VCP to ensure proper funding, and that loan documents were executed prior to disbursement. CP 589-90 at ¶ 12; *National Bank v. Equity Investors*, 81 Wn.2d 886, 506 P.2d 20 (1973); *Delson Lumber Co, Inc. v. Washington Escrow, Co., Inc.*, 16 Wn. App. 546, 558 P.2d 832 (1976); Washington Real Property Deskbook, 3d. Ed, Vol. III, Ch. 42, § 42.2 at 42-3; RCW 18.44.301; *Bronx Inv. Co. v. National Bank of Commerce*, 47 Wash. 566, 92 P. 380 (1907); *see also Lechner v. Halling*, 35 Wn.2d 903, 216 P.2d 179 (1950) (allowing parol evidence to establish terms of escrow).

VCP presented no evidence or expert testimony rebutting defense expert Chris Brain's opinion that, in the absence of a specific request or

direction from VCP (which was not given), Mr. Wong owed no duty as VCP's attorney to: act as disbursement escrow agent for VCP's loans to K & S; to monitor disbursement of loan proceeds; or to ensure that disbursement did not occur prior to the execution of loan documents. CP 589-81 ¶¶ 10-12; 14.

The relevant duty at issue here, and the duty that was breached, proximately causing VCP's alleged damages, was the duty of the disbursement escrow agent, TRH to hold loan funds until the loan documents were executed and the deed of trust was recorded. CP 588-91 ¶¶ 9-15. In the absence of instructions from VCP, Mr. Wong had no duty to act as the disbursement escrow agent, or monitor loan disbursement by TRH. *Id.* There is no dispute that the scope of Mr. Wong's services did not include monitoring disbursement for any VCP loan funds by TRH. *Id.*; *see also* CP 278 at 40, ll. 2-6; 283 at 59; 297 at 116, ll. 14-22; 301 at 131-32; 263-64; 84. Mr. Sakamoto did not seek Mr. Wong's advice regarding loan funding or disbursement. *See id.*; CP 578-79 at ¶ 7. Mr. Sakamoto did not ask Mr. Wong whether VCP should advance funds to TRH or authorize TRH to release them to the borrower in advance of receiving signed loan documents. Nor did VCP ask Mr. Wong to confirm that executed loan documents existed before it advanced funds to TRH or allowed TRH to disburse them to K & S. *Id.* Mr. Wong simply owed no

duty to VCP which he did not perform. If there is any basis for a claim by VCP arising out of the second loan transaction, that claim should have been asserted against TRH, the disbursement escrow agent selected and relied upon by VCP.

C. Defendants did not breach any duty owed to VCP.

As described above, Mr. Wong did not violate the relevant standard of care in this case. Mr. Wong was not the escrow agent responsible for receiving and disbursing loan proceeds. He cannot be charged with the duty of a disbursement escrow agent to hold loan proceeds until the loan documents were executed. CP 588-91 at ¶¶ 9-15. This court should affirm the trial court's ruling dismissing VCP's complaint with prejudice.

D. There was no ethical violation by Mr. Wong and there is no evidence of any causal relationship between any alleged ethical violation and VCP's alleged damages.

VCP alleges that Mr. Wong violated RPC 1.4 regarding communication and RPC 1.7 regarding conflict of interest. Appellant's Brief at 27-33. As a result of these alleged violations, VCP asserts that Defendants breached a duty to VCP and proximately caused VCP's alleged damages. However, VCP's reliance on the RPCs as a basis for liability is prohibited by Washington case law. *Hizey*, 119 Wn.2d 261-62; *see also* Rules of Professional Conduct, Preamble and Scope, [20]

(“Violation of a Rule should not itself give rise to a cause of action against a lawyer, nor should it create any presumption in such a case that a legal duty has been breached.”). In any event, the evidence does not support VCP’s allegations related to RPC 1.4 or 1.7.

1. There is no violation of RPC 1.4 and no causal relationship between any alleged violation and VCP’s alleged damages.

To justify VCP’s theory that Mr. Wong violated RPC 1.4 by failing to communicate that the loan documents had not been signed before VCP advanced and disbursed loan proceeds, it directs this Court to the “past pattern and practice of the parties.” Appellant’s Brief at 31. In reality the “past pattern of practice of the parties” reveals the following undisputed material facts: (a) Mr. Wong provided notice to VCP when prior loans closed and/or loan documents were recorded, CP 163; 577-78 at ¶ 5; 1177-87; (b) Mr. Wong was never told that VCP advanced and disbursed loan proceeds through TRH in the absence of drafted or executed loan documents, *supra* 17 and 29; (c) VCP never expected Mr. Wong to monitor the disbursement escrow agent TRH, *Id*; (d) VCP’s practice was to send investor money to TRH in order to start collecting interest, regardless of the existence of a fully documented loan, *supra* 10-11; 14-17; (e) Mr. Sakamoto looked to Mr. Hazelrigg, not Mr. Wong, for advice related to loan funding and disbursement, *Id*; 239-40; 292 at 95-96;

and (f) Mr. Sakamoto looked to Mr. Hazelrigg, not Mr. Wong, for confirmation that the loan documents were executed and recorded. *Id.*

The undisputed evidence demonstrates that there are no failures in communication on the part of Mr. Wong that violates RPC 1.4. Rather, VCP's "pattern of practice" in excluding Mr. Wong from the funding and disbursement escrow process, deliberately not informing Mr. Wong about VCP's habit of advance loan funding and disbursement, and never informing Mr. Wong that VCP advanced or disbursed loan proceeds in the absence of drafted or executed loan documents, are the relevant failures of communication in this case.

Even assuming, *arguendo*, that there was some violation of RPC 1.4 by Mr. Wong, VCP never presented evidence or argument supporting a causal connection to the alleged violation and its alleged damages. The fact of the matter is that, even if Mr. Wong had a duty to inform VCP (within some unidentified period of time) that executed loan documents were not returned to him, VCP had already funded and disbursed loan proceeds for the July 2008 loan. Recall that by July 23, 2008, which is one week before Mr. Wong was contacted about the loan, VCP had funded approximately \$443,000 of the principal loan amount to TRH. CP 177-78; 165-75. The loan was almost completely funded by or about August 12, 2008. *Id.* At least \$200,000 of the loan was disbursed before loan

documents were even drafted. *Id.* Any alleged failure to communicate the lack of executed loan documents by Mr. Wong could not have caused VCP to fund and disburse nearly the entire loan amount **before** loan documents were drafted or executed.

2. There is no violation of RPC 1.7 and no causal relationship between any alleged violation and VCP's alleged damages.

VCP spends a considerable amount of time in its brief arguing that Mr. Wong had a conflict vis-à-vis his representation of VCP and Mr. Hazelrigg. *See* Appellant's Brief at 12-15, 27-33; CP 895-914; CP 1076-1090. However, neither Mr. Sakamoto nor VCP's expert Profession Strait point to any fact demonstrating: (a) that an actual conflict existed with respect to the July 2008 K & S loan; (b) that Mr. Wong made any decision related to the July 2008 K & S loan at the behest of Mr. Hazelrigg that was detrimental to VCP's interests; (c) that Mr. Wong took any "marching orders" from Mr. Hazelrigg regarding the July 2008 K & S loan **that was not also approved by VCP**; or (d) that even if a conflict existed, how such a conflict proximately caused any damage to VCP. *See id.*

As described above, *see supra* at 19-22, VCP relies on the *Foundation* suit, the April 10, 2008 email, Mr. Wong's related deposition testimony regarding "Tom" handling funding "internally," and the July 31, 2008 email regarding waiver of title insurance, as evidence of a "conflict

of interest.” But clearly the proffered evidence does not help VCP’s position. Rather, the proffered evidence (together with other undisputed facts) supports Defendants’ position that VCP routinely advanced loan proceeds to TRH, and caused or allowed TRH to disburse those proceeds to the borrowers, all in the absence of drafted or executed loan documents. VCP’s proffered evidence establishes that Mr. Wong knew absolutely nothing about VCP’s practice in this regard, Mr. Wong was never consulted about it, and he did not know that VCP was allowing loan disbursements in the absence of enforceable loan documents.

There is simply no evidence establishing the existence of any conflict of interest **relative to the July 2008 K & S loan**, or any causal relationship between any alleged conflict and VCP’s alleged damages. *See* Verbatim Report at 24-25. VCP’s “conflict of interest” argument is a red herring and should be disregarded.

E. Defendants were not the proximate cause of VCP’s alleged damages.

In legal malpractice or breach of fiduciary duty matters, just as in cases of regular negligence, proximate cause must be established by proving two elements: cause in fact and legal causation. *Daugert v. Pappas*, 104 Wn.2d 254, 260, 704 P.2d 600 (1985). “Cause in fact refers to the ‘but for’ consequences of an act, that is, the immediate connection between an act and an injury.” *City of Seattle v. Blume*, 134 Wn.2d 243,

251, 947 P.2d 223 (1997). “The ‘but for’ test requires a plaintiff to establish that the act complained of probably caused the subsequent disability.” *Daugert*, 104 Wn.2d at 260. “Legal causation rests on policy considerations determining how far the consequences of a defendant's act should extend. It involves the question of whether liability should attach as a matter of law, even if the proof establishes cause in fact.” *Blume*, 134 Wn.2d at 252. A defendant’s negligence is the proximate cause of the injury only if such negligence, unbroken by any new independent cause, produces the injury complained of. *Schooley v. Pinch’s Deli Market, Inc.*, 134 Wn.2d 468, 482, 951 P.2d 749 (1998). Here, VCP fails to prove either element.

1. But for VCP’s practice of advancing and disbursing loan proceeds in the absence of executed loan documents, it would not have lost any money on the second K & S loan.

VCP argues that its damages were caused by its inability to enforce the July 2008 loan documents against K & S or Kingen, for which it blames Mr. Wong’s alleged negligence. Verbatim Report at 41, ll. 8-14. VCP’s position puts the cart before the horse. If TRH had held VCP’s loan funds in escrow until loan documents were executed and the deed of trust was recorded, VCP would have suffered no damage. Its ability to enforce the loan documents would have been a non-issue.

VCP admits that TRH disbursed at least \$200,000 of the July 2008

loan proceeds to K & S before Mr. Wong ever drafted a loan document, and then another \$156,000 on August 21, 2008. CP 177-78; 165-75. VCP cannot account for the remainder of the loan proceeds, and does not know whether K & S received them or not. *Id.* But for VCP's practice in advancing funds to TRH, and allowing or causing TRH to disburse loan proceeds in the absence of executed loan documents, and without recorded deeds of trust, VCP would not have suffered any loss on the July 2008 K & S loan. CP 590 at ¶ 13.

VCP's claim, if any, is against TRH for disbursing loan proceeds improperly. Mr. Wong's services did not include performing or monitoring loan disbursement, and he was provided no information regarding those disbursements by either TRH or VCP. There is simply no breach by Mr. Wong that proximately caused VCP's alleged inability to collect the second loan to K & S. CP 588-89 at ¶¶ 9-10, 12, 14; 577-79 at ¶¶ 4-7. Moreover, VCP's claim against Mr. Wong presumes that the loan documents were not in fact executed, an assumption that is directly contrary to the allegations of its verified Complaint in the underlying lawsuit. CP 568-75. If the loan documents were executed and then misplaced by the parties, VCP's inability to find them later for use in the underlying lawsuit has no causal connection with any act or omission on the part of Mr. Wong.

In its opening brief, without citing to the record, any Clerk's Paper, or deposition testimony, VCP baldly states that Mr. Wong knew and followed a "common business model" whereby VCP regularly advanced loan proceeds to TRH for disbursement, in the absence of executed loan documents. Appellant's Brief at 36. However there is no evidence of any kind that Mr. Wong ever knew about advanced funding and disbursement. CP 256-61; 272 at 16, ll. 13-16; 276 at 31-32; 277-78 at 35-38; 278 at 40; 283 at 59; 289 at 84-85; 301 at 131; CP 577 at ¶ 3; CP 302 at 137, ll. 6-21; 358-62; 368-71; CP 578 at ¶ 6; 581-82 at ¶ 15-16.

Thus, even if VCP's own "common business model" included loan funding and disbursement through TRH in the absence of drafted or executed loan documents, it is undisputed that Mr. Wong knew nothing of this practice, and the scope of his services never included monitoring TRH or loan funding or disbursement. *Id.* Therefore, VCP's argument that "but for [Mr. Wong's] failure to get [VCP] a signed document back," Verbatim Report at 41, it would have suffered no damage, necessarily assumes facts not in evidence. The proximate cause of VCP's damages was VCP's advancement and disbursement of loan proceeds before Mr. Wong drafted loan documents and before the borrowers executed the loan documents.

2. Defendants were not the legal cause of VCP's alleged damages.

A defendant's actions are the legal cause of a plaintiff's injuries only where they are not too attenuated from the alleged injury, and as a matter of policy, precedent, justice, common sense and logic, the defendant should be held responsible. *Schooley*, 134 Wn.2d at 478-79. TRH breached its duties as disbursement escrow agent and VCP failed to perform even the most basic functions as a commercial lender.³ *Id.* Any prudent lender would have ensured that the escrow agent withheld disbursement of loan funds until of the loan documents had been executed and the deed of trust recorded. CP 590 at ¶ 13.

The undisputed evidence establishes that Mr. Wong did not know that VCP had allowed pre-closing disbursements and/or that TRH was making pre-closing disbursements. The undisputed evidence shows that the scope of Mr. Wong's services did not include monitoring escrow, or providing escrow instructions to TRH. A determination that Mr. Wong's alleged negligence caused VCP's damages would require expansion of the scope of his duties to VCP well beyond the parties' contemplation or

³ The standard of care for a disbursement escrow agent required that TRH ensure that such execution and recording had been completed before disbursing loan proceeds. CP 589-90 at ¶ 12; *Delson Lumber*, 16 Wn. App. at 550. Moreover, TRH may have been the agent of VCP for the purposes of loan disbursement, and thus TRH's negligence with respect to premature loan disbursement is imputed to VCP as the principal. *Pourte v. Saunders*, 19 Wn.2d 561 143 P.2d 554 (1943) ("The negligence of the agent is imputed to the principal because he has the right to control the acts of the agent.").

agreement. Mr. Wong was not charged with ensuring that TRH held funds until loan documents were executed and recorded, and could not have been the legal cause of any of VCP's alleged damages.

F. VCP's reliance on TRH to obtain and maintain signed loan documents and act as disbursement escrow agent breaks any chain of causation from Mr. Wong's alleged negligence.

A defendant's negligence is the proximate cause of the injury only if such negligence, unbroken by any new independent cause, produces the injury complained of. *Schooley*, 134 Wn.2d at 482. On or about August 11 or 12, 2008 Mr. Sakamoto called Mr. Hazelrigg to discuss the status and/or existence of the executed loan documents for the July 2008 loan. Mr. Sakamoto's call was prompted by an email from Mr. Hazelrigg to Mr. Sakamoto and Mr. Switzer, wherein Mr. Hazelrigg asks "Where are the final papers to send to Jeff?" CP 239-40. After receiving this email, Mr. Sakamoto did not call or email Mr. Wong to talk about the existence of signed loan documents. CP 292 at 95-95.

However, following his call with Mr. Hazelrigg, Mr. Sakamoto continued to fund the July 2008, completing such funding by August 12, 2008. CP 239-40. By July 30, 2008, TRH had already disbursed at least \$200,000 of the July 2008 loan proceeds to K & S. CP 177-78; 165-75. VCP also took no action to stop TRH from disbursing an additional \$156,000 on August 21, 2008. *Id.* It is clear that after July 31, 2008, VCP

stopped relying on Mr. Wong for completion of the loan transaction, and instead relied solely on TRH, thereby breaking the chain of causation allegedly arising from Mr. Wong's alleged negligence.

G. VCP's collateral estoppel argument lacks merit and should be disregarded.

The elements of collateral estoppel are: “(1) identical issues; (2) a final judgment on the merits; (3) the party against whom the plea is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) application of the doctrine must not work an injustice on the party against whom the doctrine is to be applied.” *Reninger v. State Dept. of Corrections*, 134 Wn.2d 437, 449, 951 P.2d 782 (1998) (quoting *Southcenter Joint Venture v. National Democratic Policy Comm.*, 113 Wn.2d 413, 418, 780 P.2d 1282 (1989)). “The party seeking the application of collateral estoppel has the burden of proof and ‘[f]ailure to establish any one element is fatal to the proponent's claim.’” *Dillon v. Seattle Deposition Reporter LLC*, 179 Wn. App. 41, 65, 316 P.3d 1119 (2014) (quoting *Lopez-Vasquez v. Dep't of Labor & Indus.*, 168 Wn. App. 341, 345, 276 P.3d 354 (2012)). Here VCP fails to meet the first, second and fourth elements of its claim that Defendants are collaterally estopped from asserting that TRH and/or Mr. Hazelrigg's disbursement of the loan proceeds was the intervening cause of VCP's damages in this case.

VCP's practice of advancing loan funds and directing or allowing

disbursements by TRH were not at issue in the *Foundation* suit. *Supra*, 19-22; CP 791-813. Mr. Wong's knowledge of VCP's practice in that regard was not at issue in the *Foundation* suit. *Id.* TRH's duty as disbursement escrow agent was not at issue in the *Foundation* suit. *Id.* So, while Mr. Hazelrigg ultimately played significant roles in both the *Foundation* and K & S transactions, the issues involved in this case bear no resemblance to the issues involved in the *Foundation* suit. *Id.*

Similarly, because the issues in this case bear no resemblance to those at issue in the *Foundation* suit, there has been no judgment on the merits as to Mr. Wong's alleged duty to ensure loan documents are executed and recorded before VCP advanced or disbursed loan proceeds. In *Foundation*, Judge Heller did not determine the issues decided at summary judgment by Judge DuBuque in this case.

Finally, it takes little imagination to see that it would be an extreme injustice to find that Defendants were collaterally estopped from arguing that: TRH was the disbursement escrow agent for the July 2008 loan and therefore owed certain duties to VCP; TRH disbursed loan proceeds in the absence of executed loan documents; and such disbursement in the absence of drafted or executed loan documents was the proximate cause of VCP's alleged damages. Mr. Wong was not involved in and knew nothing about VCP's practice of loan advances and

advanced loan disbursement. The fact that some of the “players” are the same makes absolutely no difference. VCP’s argument should be disregarded by this court just as it was disregarded by Judge DuBuque.

H. VCP’s claims are barred by the statute of limitation.

Claims for legal malpractice and breach of fiduciary duty are governed by the three year statute of limitation imposed by RCW 4.16.080. *Cawdrey v. Hanson Baker Ludlow Drumheller*, P.S., 129 Wn. App. 810, 120 P.3d 605 (2005); *Bertelsen v. Harris*, 459 F. Supp.2d 1055 (E.D. Wash. 2006). Under the discovery rule, the statute of limitations in a legal malpractice or breach of fiduciary duty action accrues from the date the plaintiff discovers, **or in the exercise of reasonable diligence should have discovered, the facts which gave rise to its claim.** *Id.* In this case, the undisputed evidence establishes that VCP knew, or should have known, on August 11, 2008 that loan documents had not been executed and the deed of trust had not been recorded when Mr. Sakamoto discussed the missing loan documents with Mr. Hazelrigg. CP 239-40; 292 at 95-96. Mr. Sakamoto knew, or could have known, all of the facts that support his claims against Defendants herein as of August 11 or 12, 2008. He failed to file his suit until December 12, 2012. His claim is therefore barred by three year statute of limitation imposed by RCW 4.16.080.

Alternatively, by January 5, 2009 at the very latest, VCP knew, or through the exercise of reasonable diligence should have known, that the July 2008 K & S loan documents had not been executed, (or that signed documents could not be located), and that the deed of trust had not been recorded. CP 242. The Loan Maturity Extension dated January 5, 2009, **which was drafted by VCP**, specifically references that it modifies the executed March and July 2008 K & S loan documents, and identifies them as attachments. CP 242; 1040; Verbatim Report at 69. Mr. Sakamoto entered into this Extension on behalf of VCP, but now claims he never saw the July 2008 loan documents, and made no effort to confirm that they existed or were attached to the Extension. CP 296 at 110-112. If Mr. Sakamoto had exercised even the minimal amount of care and diligence before he entered into the Extension, he would have been aware of all of the facts alleged to support his claims against Defendants herein. VCP failed to file his suit until December 12, 2012. Its claims are therefore barred by three year statute of limitation imposed by RCW 4.16.080.

VCP alleges that it could not have known what its damages were until December 14, 2009, when VCP “confirmed” that executed July 2008 loan documents did not exist. Appellant’s Brief at 21. By that logic, if in January 2009 VCP had simply asked for the loan documents, which, again were identified as attached to the document it drafted, VCP would have

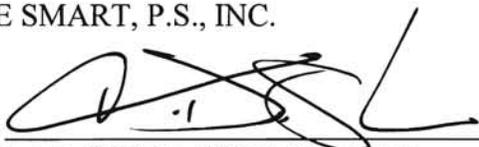
“confirmed” that the loan documents did not exist, and thus been aware of its potential damages. The discovery of the missing loan documents is a critical issue, and clearly VCP should have, in the exercise of reasonable diligence, discovered that the documents could not be located when it drafted the January 2009 Loan Maturity Extension. Verbatim Report at 68-69; 78.

VI. CONCLUSION

For the reasons set forth herein, this Court should affirm Judge DuBuque’s dismissing VCP’s Complaint on summary judgment.

Respectfully submitted this 29th day of October, 2014.

LEE SMART, P.S., INC.

By: 

Joel E. Wright, WSBA No. 8625

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Of Attorneys for Defendants/Respondents

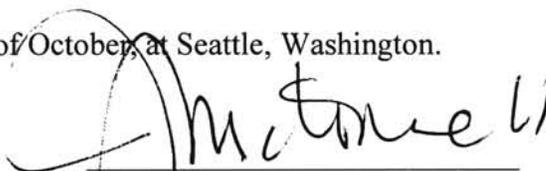
CERTIFICATE OF SERVICE

I, the undersigned, certify under penalty of perjury and the laws of the State of Washington that on October 29, 2014, I caused service of the foregoing on each and every attorney of record herein:

VIA LEGAL MESSENGER

Mr. Brian H. Krikorian
Law Office of Brian H. Krikorian
4100 - 194th Street SW, Suite 215
Lynnwood, WA 98036

DATED this 29th day of October, at Seattle, Washington.



Jennifer L. McConnell
Legal Assistant

APPENDIX

In an effort to assist this Court with its review, below is a table identifying the relevant parties and their relationship to the subject transaction. Please also find below a timeline of events related to the March 2008 K & S loan and the July 2008 K & S loan.

Relevant Parties:

Velocity Capital Partners, LLC (“VCP”):	Lender for both the March 2008 and July 2008 loans to K & S Development, LLC for borrower’s SeaTac Property. Plaintiff below and appellant here.
Bridgeport Capital Group: Jeff Sakamoto:	Managing member of VCP Owner, member and manager of Bridgeport Capital Group
K & S Development, LLC (“K & S”):	Borrower for both the March 2008 and July 2008 loans from VCP for the SeaTac Property.
Gerald Kingen:	Member of K & S
Scott Switzer:	Member of K & S
TRH Lenders, LLC (“TRH”):	Disbursement escrow agent for VCP’s March 2008 and July 2008 loans to K & S
Tom Hazelrigg: Centurion Finance (“CF”):	Owner, managing member of TRH Broker for the March 2008 loan. Sold SeaTac Property following K & S default. Members included Joe Kimm, Tom Hazelrigg and Scott Switzer
Centurion Financial Group (“CFG”):	Broker for the July 2008 K & S loan, and the loan servicer for both the March 2008 and July 2008 loans. Members included Scott Switzer and Tom Hazelrigg.

Eugene Wong:

Attorney at Lasher Holzapfel
Sperry & Ebberson, PLLC.
Attorney for lender VCP on the
March 2008 and July 2008 K & S
loans. Defendant below and
respondent here.

Timeline related to March 2008 loan:

February 25, 2008 VCP funds \$50,000 to TRH, which is applied to the March 2008 K & S loan. CP 169, 173.

March 12, 2008 VCP funds \$20,000 to TRH, which is applied to the March 2008 K & S loan. *Id.*

March 10, 2008 Joe Kimm contacts Jeff Sakamoto regarding K & S loan. CP 1035.

March 13, 2008 VCP informs TRH that it has \$150,000 available for the “Kingen SeaTac deal.” CP 1036.

March 14, 2008 VCP funds \$140,000 to TRH, which is applied to the March 2008 K & S loan. CP 169, 173.

March 14, 2008 Denise Tallman of CFG or CF sends Mr. Wong the “executive summary” for the March 2008 SeaTac loan and requests that he draft the loan documents. CP 113.

March 17, 2008 VCP funds \$100,000 to TRH, which is applied to the March 2008 K & S loan. CP 169, 173.

March 17, 2008 Mr. Wong sends draft loan documents for the March 2008 loan via email to Joe Kimm, Scott Switzer, Denise Tallman and Jeff Sakamoto. CP 117-161

March 18, 2008 VCP funds \$35,000 to TRH, which is applied to the March 2008 K & S loan. CP 169, 173.

March 21, 2008 Gerald Kingen and Scott Switzer of K & S execute the loan documents and personal guarantees. Mr. Wong notarizes the same. CP 117-161.

March 27, 2008 VCP funds \$200,000 to TRH, which is applied to the March 2008 K & S loan. CP 169, 173.

April 1, 2008 VCP caused or allowed TRH to disburse at least \$300,000 of the loan proceeds to Joe Kimm which was three days before the deed of trust was recorded. CP 360.

April 3, 2008 VCP funds \$15,000 to TRH, which is applied to the March 2008 K & S loan. CP 169, 173. March 2008

April 4, 2008 K & S loan fully funded by April 3, 2008.
Chicago Title records the deed of trust, securing VCP's loan, and title insurance is obtained. CP 163.

April 4, 2008 Mr. Wong informs Mr. Sakamoto/VCP, TRH, Joe Kimm and Denise Tallman that the deed of trust recorded. *Id.*

Timeline related to July 2008 loan:

June 27, 2008 VCP funds \$65,000 to TRH, which is applied to the July 2008 K & S loan. CP 173, 175.

July 9, 2008 VCP funds \$64,507.84 to TRH, which is applied to the July 2008 K & S loan. *Id.*

July 16, 2008 VCP funds \$13,855 to TRH, which is applied to the July 2008 K & S loan. *Id.*

July 17, 2008 Scott Switzer requests an additional \$560,000 loan from VCP to K & S for the SeaTac Property. CP 181-82.

July 18, 2008 VCP funds \$100,000 to TRH, which is applied to the July 2008 K & S loan. CP 173, 175.

July 23, 2008 Mr. Sakamoto emails Mr. Hazelrigg to receive Mr. Hazelrigg's input concerning the loan. CP 184.

July 23, 2008 VCP funds \$200,000 to TRH, which is applied to the July 2008 K & S loan. *Id.* \$443,000 of loan funded by July 23, 2008.

July 30, 2008 K & S (the borrower) cashes check from TRH for \$200,000 as "Partial Disbursement \$560K loan." CP 177-78, 358-61.

July 30, 2008 Scott Switzer/CFG asks Mr. Wong to prepare loan documents for a second VCP to K & S loan for the SeaTac Property. Mr. Wong prepares the loan documents and emails them to Mr. Sakamoto and Mr. Switzer. Mr. Wong asks that all documents be signed and returned to him. CP 186.

July 30, 2008 Mr. Hazelrigg informs Mr. Wong that the lender (VCP) has waived title insurance. CP 580 at ¶ 11.

July 31, 2008 Mr. Wong prepares and sends new draft loan documents for the July 2008 K & S loan to TRH, Mr. Switzer and Mr. Sakamoto describing that the new set waives title insurance. He asks that the loan

documents be executed and returned to him for processing. CP 188.

July 31, 2008 Mr. Wong emails Mr. Sakamoto to confirm that VCP approves waiving title insurance. Mr. Sakamoto responds "Ok." CP 237.

August 7, 2008 VCP funds \$57,221.38 to TRH, which is applied to the July 2008 K & S loan. CP 173, 175.

August 11, 2008 Mr. Switzer emails Mr. Hazelrigg asking about the status of the July 2008 K & S loan. Mr. Hazelrigg responds, with a "cc" to Mr. Sakamoto, "Where are final papers to send to Jeff?" CP 239-40.

August 11 or 12, 2008 Mr. Sakamoto calls Mr. Hazelrigg to discuss the status of "final papers." Mr. Sakamoto did not call Mr. Wong. CP 292.

August 12, 2008 Mr. Sakamoto emails Mr. Hazelrigg informing him that he (Mr. Sakamoto) can fund the remainder of the K & S loan. CP 240.

August 12, 2008 VCP funds \$57,661.78 to TRH, which is applied to the July 2008 K & S loan. CP 173, 175.

August 14, 2008 Mr. Wong calls, and leaves a voice message for Mr. Sakamoto concerning a different VCP loan, but also informs Mr. Sakamoto that Mr. Wong has not heard from K & S concerning the July 2008 loan. CP 581 ¶ 13.

August 21, 2008 K & S cashes check from TRH for \$156,000 and the memo line reads: "K & S Development." CP 177-78, 358-61.

January 5, 2009 VCP enters into Loan Maturity Extension with K & S concerning the March and July 2008 loans. VCP drafted Loan Maturity Extension and identified March and July 2008 loan documents as "attached." CP 242-43, 1040.

December 14, 2009 Mr. Sakamoto emails Mr. Wong asking for executed copies of the March 2008 and July 2008 K & S loans. CP 247.

December 12, 2012 VCP files suit against Mr. Wong and Lasher Holzapfel. CP 1.