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DIVISION II

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STATE OF WASHINGTON

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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

SCOTT A. WALKER and FRED WAGNER,

Appellant,

v.

SCOTT SERVEN, a single person,

Respondent.

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

This case comes before this Court on Plaintiffs' appeal from the trial court's order granting Defendant Serven's two motions for partial summary judgment. (See Appendix A and B) Plaintiffs' suit arises from monetary advances made to Serven over the course of approximately six years. Defendant Serven had acquired a hotel in Loreto, Mexico. Serven planned to renovate and operate the hotel. Two of the initial investors wished to withdraw from business and Serven sought out participation from the Plaintiffs.

Defendant has claimed that the interests of Walker and Wagner were acquired from two of the other investors and not from Serven. This was disputed by Plaintiffs.

Serven attempts to characterize the advances made by Plaintiffs as options to acquire a stock interest in a Mexican corporation—overlooking the fact that Plaintiffs made the advances *directly to Serven's accounts* rather than to the Mexican entity. Defendant also overlooks the fact that most of the advances were made long after two of the initial investors had withdrawn.

From the beginning of the business plan, the Plaintiffs wished to have the property owned by a U.S. entity. They did not wish for their

interests to be regulated by Mexican law. Over time, it became clear that the Defendant would not agree to transfer the hotel property to a U.S. based entity. Plaintiffs then sought a return of their advances, which the Defendant refused.

Plaintiffs claimed the right to recover their advances under two theories. First, Plaintiffs contend that they are entitled to recover the advanced funds since the parties were unable to reach a final agreement on the terms of the business arrangement. This was characterized in the Amended Complaint as a demand for money due or as a loan.

Second, Plaintiffs claim that if the money was not recoverable as an advance made in contemplation of an agreement on a form of business entity, then the advances constituted a purchase of a security which Serven sold in violation of the Washington State Securities Act (“WSSA”).

It is clear that the trial court failed to recognize that there were genuine issues of fact as to whether the payments were made to acquire stock from the two withdrawing investors or from Serven. It is also clear that the trial court failed to recognize that there were genuine issues of material fact as to whether there was a commitment from Serven to place the title to the Mexican property in a U.S. entity and whether there was a breach, and the legal effect of that breach. Similarly, there were genuine

issues of fact that should have been resolved by the trier of fact concerning the timing of the discovery of the misrepresentations by Serven.

For these and other reasons it is also clear that the trial court failed to recognize that the issues of material fact and the application of the law to those facts precluded this matter from being resolved on summary judgment. Appellants Walker and Wagner now respectfully request that this Court reverse each of the trial court's orders granting summary judgment and remand this case for trial.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err when it granted Defendant's motion for summary judgment on Plaintiffs' claims for violations of the Securities Act of Washington?
2. Did the trial court err when it granted Defendant's motion for summary judgment on Plaintiffs' claim for money due?
3. Did the trial court err when it granted Defendant's motion for summary judgment on Plaintiffs' claim for common law fraud?
4. Did the trial court err when it held that the Plaintiffs' claims are barred as a matter of law?

III. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Plaintiffs Wagner and Walker advanced funds to Defendant Serven with the parties could not agree on a form of the entity to hold title to the property, the funds would be recoverable by Walker and Wagner. Serven has refused to repay these

advances. Does the failure of the parties to agree on the final parameters of a business arrangement allow Plaintiffs to recoup the advances as a form of a loan? (Assignment of Error 1 and 2).

2. The trial court determined that there were no genuine issues of material fact that precluded summary judgment as to the claims for money due, common law fraud and securities fraud. Did the trial court fail to recognize that there were genuine issues of material fact as to each cause of action? (Assignment of Error 1, 2, 3 and 4).
3. Plaintiffs Wagner and Walker advanced funds in excess of one million dollars each to Defendant Serven with the understanding that those funds were for the acquisition of securities in a newly formed U.S. entity. Serven never transferred the securities as promised. Does receiving money under the promise to sell unregistered securities, and the failure to follow through with that promise constitute a violation of the Securities Act of Washington? (Assignment of Error 1).
4. Plaintiffs Wagner and Walker maintained communication with Defendant Serven regarding the creation of a new U.S. entity and the accompanying issuance of securities until late 2010, early 2011. Did Plaintiffs know, or should Plaintiffs have known that Serven had violated or would violate his promise to form a U.S. entity to hold title to the Mexican property, prior to July 14, 2008—to trigger the statute of limitations—when these business negotiations were ongoing? (Assignment of Error 1, 3 and 4).

IV. STATEMENT OF THE CASE

This matter comes before this Court on the Plaintiffs' appeal of two orders granting summary judgment in favor of Defendant Serven. CP

130-144 and CP 515-549. The trial court found that there was no genuine issue as to any material fact and dismissed Plaintiffs' claims for money due, for common law fraud and for securities fraud.

In 2005, Scott Griffin, Chris Johnston, Rick Seddon, and Scott Serven agreed to purchase a Mexican Hotel as a business enterprise. Griffin, Seddon, Johnston and Serven had all been involved, in various ways, in Serven's real estate development and home building business. CP 466. In relatively short order, Johnston and Seddon decided that they could not fund their portion of the endeavor and told Serven that they wished to withdraw. CP 300 - 90:3-25; CP 301 - 93:6-13.¹

Serven sought to have Plaintiffs come into the business endeavor. Walker was then employed by Serven's company and Wagner and Serven had been engaged in multiple other business pursuits. *See e.g.* CP 334 – 222:18-21; CP 343 – 258:8-11; CP 346 – 272:10-17.

Plaintiffs insisted from the outset that they would be interested in the investment in a U.S. entity, but not in a Mexican entity. CP 34:5-9; CP 375:5-9; 18-21. Serven initially agreed to that approach and directed his attorney to draft documents for a U.S. based limited liability company.

¹ Citations to deposition testimony are cited to the Clerk's Papers, then the deposition page and line number in the following format: CP page – deposition page: line number.

CP 175-179; CP 261- 44:11-17; CP 316- 155:10-13. At about this point in time Plaintiffs made an initial advance for the project. CP 378. Initial payments were made to Serven's bank accounts, which were in turn paid to Johnson and Seddon for the surrender of their interests. CP 376 ¶13; CP 381 ¶ 14; CP 344 – 262:11-25. Additional advances were made over a period of years, also to Serven's bank accounts. *See e.g.* CP 342 – 253:2-13.

Over the same period of time that the advances were made, Serven, Wagner and Walker continued to discuss the formation of the U.S. based entity to own the Mexican hotel. *See generally* CP 202-249. They had further discussions with tax counsel and with Mexican counsel. *See e.g.* CP 305 - 112:22-24; CP 308 – 122:11-25; CP 316- 153: 6-15. The parties determined that there was no legal impediment to the use of a U.S. based entity to own the hotel, and no legal impediment to using a U.S. based entity to manage the hotel. Nor was there a problem in setting up a U.S. based entity to handle reservations from U.S. based patron. In fact, that was actually created and used by Serven. CP 194-196; CP 327 – 196: 1-25.

After the initial renovation of the hotel, Serven alone, decided to expand the project by building an additional floor to the hotel building.

CP 217; CP 299 – 86:5-5; CP 338 – 237:18-20; CP 376:4-7. In order to do this, Serven made what he termed as additional capital calls. In 2008, Griffin could not make additional contributions. *See* CP 282 -17:23; CP 338- 237:1-3. Wagner and Serven contributed an additional two hundred thousand dollars each. There is a question of fact as to whether this was to cover Griffin’s shortfall, or if it was for their own contributions. CP 340 – 246:5-7.

The Plaintiffs made additional cash transfers to Serven apart from the initial advance, and the loan by Wagner to cover the shortfall when Griffin could no longer contribute. (*See* CP 36., table of capital transfers by Plaintiffs to Scott Serven). The nature of these advances remains disputed. In total, Walker and Wagner have contributed respectively \$1.2 million and \$1.35 million dollars to Serven’s accounts. *Id.*

At no time did Serven offer to distribute stock in the company managing the hotel or in the U.S. based entity that handled reservations and funds from U.S. patrons. *See e.g.* CP 328 – 197: 2-25; 198:1-14. On or about February 2010, Serven did offer to distribute stock in the Mexican entity that owned the hotel. CP 487-90; CP 330 – 206:1-24; CP 340 – 247:2-20. This offer was refused by Plaintiffs, as they did not wish to own shares in a Mexican entity.

Serven argued at summary judgment that the cash advances were for ownership interest in the Mexican corporation, which do not constitute the purchase of securities or money due on loans. CP 133; CP 519. However, this characterization of the advances ignores the fact that the payments were made to Serven's accounts and were made both contemporaneously and long after the withdrawal of Johnston and Seddon. *See e.g.* CP 36.

At various points in time, Serven has made contrary claims concerning the ownership interests in one of the Mexican corporations. In one pleading Serven claimed that after Wagner and Walker advanced funds, the ownership interest was comprised of Serven with 55% ownership; Griffin with 25 % ownership; and Walker and Wagner each with 10% ownership. *See* CP 133. On other occasions these percentages changed solely at the election of Serven.

CP 318 – CP 319.

In his deposition testimony Serven claimed that Wagner and Walker only acquired an option to acquire stock in one of the Mexican corporations. CP 289- 45:10-15; CP 358 – 319:11- 20. He also claimed that the option payments were to be forfeited if the option was not

exercised. CP 301 – 94:2 -17; CP 358 – 319:21-25. 320:1-9. There is no documentation for such an agreement. *Id.*

At the hearing on the second motion for summary judgment, Serven attempted to characterize the agreement of the parties as one of a joint venture or partnership, or for the purchase of their interest in the Mexican corporation. However, throughout 2011, Serven repeatedly led the Plaintiffs to believe that he would agree that the parties would jointly form a U.S. entity to hold the ownership of the Mexican entity that in turn owned the hotel. *See e.g.* CP 203; CP 206; CP 222. He also led Plaintiffs to believe that they would have an interest in the other two entities (the management entity and the U.S. based reservation entity). *See* CP 327 – 193:19-24; CP 327:194-197.

E-mail correspondence between the parties shows how Serven led the Plaintiffs to believe through early 2011 that a new entity would be formed. Serven wrote in an e-mail to Wagner in October, 2010: “You have the option to hold the stock in a us corp [sic] on your own even if I choose to do otherwise with my stock. I am proceeding to have the transfers done, please let me know what entity you would like the stock vested in.” CP 206. Any assertion that there was no intention of creating a U.S. entity is disingenuous. *See* CP 210-12.

The deposition testimony of Serven and the e-mail exchange between the parties also shows that Plaintiffs did not intend to acquire additional interests of the Mexican hotel, and that their capital transfers were treated differently. Wagner wrote to Serven in 2010: “I do not want, or intend to acquire any more hotel ownership beyond the 10% when I put the \$200,000 extra in. I believe that this money less the \$20,000 used as capital contribution, should be booked as a loan to the hotel, and repaid to me by the hotel.” CP 216-17. He later responded in the same e-mail chain: “I do not wish to own additional stock or equity in the hotel.” *Id.* Serven supported the notion that there were different classifications of funds: “It looks like we have three tiers of funding.” CP 240. Serven identifies the first tier as money used to acquire the initial interests; the second as loans after the economic downturn and Griffin’s dilution; and the third as additional, separate contributions. *Id.* Yet, in his deposition, Serven disputed his own comments about three tiers of funding. CP 352 - 295:23-25.

Throughout the course of the renovation and operation of the hotel, the parties discussed forming a new U.S. corporation to hold the shares of the Mexican corporation. *See e.g.* CP 310 - 130-31. They met with attorneys and accountants in Mexico and the U.S. to discuss the legal and

tax ramifications of holding the Mexican corporate shares this way. *See e.g.* CP 272 – 88; CP 273 – 93. During this time, the parties agreed to form other U.S. entities, including a Wyoming LLC, relating to the operations of the hotel. CP 328 - 199:17-23. Serven remains the only investor holding the interest in that entity. *Id.* at 197:18-22.

The parties clearly recognized that there was a difference between the \$200,000 to cover the shortfall after Griffin could not contribute, and the remaining portion of the more than \$2,000,000 contributed by Walker and Wagner. CP 240. The payments made to Serven’s accounts were not for acquisition of an interest in a Mexican entity. Rather the payments were made on the belief that a new entity would be formed, without any agreement on the forfeiture of the advances if the U.S. entity was not formed.

V. ARGUMENT

A. Standard of Review Is De Novo.

Appellate review of an order granting summary judgment is *de novo*. *Reynolds v. Farmers Ins. Co.*, 90 Wn. App. 880, 884, 960 P.2d 432 (1998). Under this standard, the appellate court engages in the same inquiry as the trial court. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A court may only grant summary judgment when there

is no genuine issue as to any material fact and judgment is appropriate as a matter of law. CR 56; *Olympic Fish Products, Inc. v. Lloyd*, 93 Wn.2d 596, 611 P.2d 737 (1980). A material fact for the purpose of a motion for summary judgment is one upon which the outcome of litigation depends. *Ohler v. Tacoma General Hospital*, 92 Wn.2d 507, 598 P.2d 1358 (1979). Facts must be considered in the light most favorable to the nonmoving party. *Reynolds*, 90 Wn. App. at 884.

In this case, there are genuine issues of material fact such as what was the nature of the transfers to Serven: advancement as a loan, or a purchase of an interest in a security.

B. The trial court erred by granting summary judgment on the Plaintiffs' money due claims because genuine issues of material fact exist.

In order to grant summary judgment to the Defendant, the trial court had to determine that there was a complete agreement between Plaintiff and the Defendants to have Plaintiffs invest in a Mexican entity. *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 223 P.3d 513 (2009). Without such an agreement, Plaintiffs would have been entitled to the return of the funds advanced. *Losli v. Foster*, 37 Wn.2d 220, 222 P.2d 824 (1950).

The *Yates* case is also instructive to show how a court should deal with a fact pattern where the parties never reached a final agreement. The Court in *Yates* awarded damages to the Plaintiff to reflect her contributions to a duplex unit owned by her parents. *Yates v. Taylor*, 58 Wn. App. 187, 194, 791 P.2d 924 (1990). The court applied a contract implied in law where there is not mutual assent, but an implied duty. *Id.* (citing *Heaton v. Imus*, 93 Wn.2d 24, 252, 608 P.2d 631 (1980)). *See also, Dravo Corp. v. L.W. Moses Co.*, 6 Wn. App. 74, 492 P.2d 1058 (1971) (granting recovery under *quantum meruit* to allow a party burdened by partial performance to recover the value of his performance absent a final contract). “There are two elements necessary for the imposition of a quasi-contractual obligation: (1) the enrichment of the defendant must be unjust and (2) the plaintiff cannot be a mere volunteer.” *Id.* (citations omitted). This case meets both elements. Plaintiffs transferred substantial capital to Serven without receiving a corresponding interest in any entity, as promised by Serven. By retaining these funds, Serven is unjustly enriched.

The record shows that Plaintiffs believed that there was an agreement between the parties that if the parties could not agree on the terms for a U.S. based entity, the advances would be returned. *See* CP 34

¶ 3; CP 380 ¶ 3. Plaintiffs continued to advance cash to Serven on the understanding that these transfers would be documented as a purchase of an interest in a U.S. entity, or as a loan. *See* CP 380 ¶ 10; CP 375 ¶ 4. Despite Serven's characterization of the transaction as an agreement to agree, viewing the facts in the light most favorable to the non-movant, the parties had reached an understanding that the funds would be returned to Walker and Wagner if a U.S. entity was not established.

Additionally, there are disputes to the effect of certain actions by the parties. For example, it is undisputed that Plaintiffs, made a series of advances to Scott Serven from 2005-2010. However, it is disputed whether these advances were made to invest in a U.S. entity, or to invest in a Mexican corporation; or whether these advances were made for an option to purchase stock in a Mexican entity. Plaintiffs maintain that they believed that they were making advances to Serven, with the understanding that these advances were for the purposes of becoming a shareholder in a U.S. based entity. CP 34 ¶3; CP 380 ¶ 3. There was a clear understanding that these advances were for the purpose of buying into a U.S. entity and not for the purchase of shares in a Mexican entity. It is also clear that Wagner and Walker believed that if they were not to be

allowed to invest in a U.S. entity, that the terms of the advances would have been unsatisfied and they would be entitled to recover the advances.

Plaintiffs testified that they believed that the funds would be loans to Serven, if they were unable to reach agreement on the structure of the U.S. based entity. CP 375 ¶ 4; CP 380 ¶ 5. Serven testified at his deposition that if the options to purchase shares in the Mexican entity were not exercised, then the advances would be retained by Serven, without repayment. There is clearly an issue of fact that should have been resolved by the trier of fact and not by the trial court on a motion for summary judgment.

In addition to the questions of fact raised above, there are factual determinations which may only be made at trial. These include, but are not limited to the issue of when the Plaintiffs should have known that Serven did not intend to form a new U.S. entity to own the Mexican hotel. Therefore, summary judgment was inappropriate as a matter of law.

C. The trial court erred by granting summary judgment on the Plaintiffs' securities fraud claims because genuine issues of material fact exist.

There was adequate evidence in the record for the trial court to conclude that Plaintiffs transferred money to Serven for the acquisition of a security, in a U.S. based entity, which was never formed and where the

title to the property was never transferred. However, the trial court disagreed and granted summary judgment on this point.

The Washington State Securities Act (“WSSA”) contained in Chapter 21.20 governs generally the purchase and sale of securities, in this state. Because WSSA closely mirrors the federal securities laws, Washington courts often look to the federal law to achieve harmony in application. *Cellular Engineering v. O’Neill*, 118 Wn.2d 16, 24, 820 P.2d 941 (1991). However, Washington’s blue sky laws have a different purpose than the federal statute: “while the purpose of the federal securities laws is to maintain the integrity of the secondary securities markets and to enforce disclosure, WSSA is intended to protect investors.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 125-26, 744 P.2d 1032 (1987). To achieve this purpose, the court construes WSSA broadly. *Id.* at 126.

1. There was evidence in the record to show that the transactions between Serven and the Plaintiffs constituted an offer to sell a security under Washington law.

RCW 21.20.005(17) defines the term security to include many different vehicles of investment. A security means:

any note; stock; treasury stock; bond; debenture; evidence of indebtedness; certificate of interest or participation in any profit-sharing agreement; collateral-trust certificate;

preorganization certificate or subscription; transferable share; investment contract; investment of money or other consideration in the risk capital of a venture with the expectation of some valuable benefit to the investor where the investor does not receive the right to exercise practical and actual control over the managerial decisions of the venture; voting-trust certificate; ...any put, call, straddle, option, or privilege on any security, certificate of deposit, or group or index of securities, including any interest therein or based on the value thereof; or any put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, any interest or instrument commonly known as a "security," or any certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase, any security under this subsection. This subsection applies whether or not the security is evidenced by a written document.

RCW 21.20.005 (17)(a). Under this statute and based on Serven's own deposition testimony, which was before the trial court, it is clear that the transactions conducted by Serven with the Plaintiffs constitute a proposed sale of a security. Under Serven's own interpretation of the events, the advances by the Plaintiffs were made under an investment contract, or alternatively for an option. CP 358 - 319:18-20. Case law interpreting the meaning of an "investment contract" further supports that Serven engaged in the sale of a security to the Plaintiffs.

Serven's own deposition testimony highlights that the transactions meet the definition of the sale of a security. At a minimum, an investment contract existed.

The Court of Appeals adopted the United States Supreme Court's definition of an investment contract as "a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." *State v. Argo*, 81 Wn. App. 552, 915 P.2d 1103 (1996) (citing *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 298-299, 66 S.Ct. 1100, 1103, 90 L.Ed. 1244 (1946)). The definition of a security is not rigid, but "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *W.J. Howey Co.*, 328 U.S. at 299. The purpose of security laws is to regulate investments, and "form should be disregarded for substance and the emphasis should be on the economic reality" whatever the name parties call the transaction. *Reves v. Ernst & Young*, 494 U.S. 56, 61, 108 L.Ed.2d 47, 57, 110 S.Ct. 945(1990); *Tcherepnin v. Knight*, 389 U.S. 332, 336, 19 L.Ed.2d 564, 88 S.Ct. 548 (1967).

Washington's Supreme Court adopted the three-part test in *Howey* to establish an investment contract as: (1) an investment of money; (2) a common enterprise; and (3) an expectation of profits deriving primarily from the efforts of the promoter or a third party. *Cellular Engineering*, 118 Wn.2d at 26. The record establishes that the transaction at issue constituted securities under this definition. The Plaintiffs invested money with Serven with the understanding that they were establishing a new entity (rather than contributing funds to the existing Mexican corporation), and there was an expectation of profits. *See* CP 375 ¶ 4; 380 ¶ 4.

A transaction does not need to occur at a public offering to constitute a security. *See Argo*, 81 Wn. App. at 566; *Aspelund v. Olerich*, 56 Wn. App. 477, 481 (1990). Despite the absence of a formal written agreement between the parties, the Plaintiffs operated based on their understanding of the agreement, by transferring funds to establish a new entity, and the e-mail correspondence between the parties supports that. *See e.g.* CP 206. The absence of form should not preclude the proper characterization of these transactions: capital transfers for a security.

Even under Serven's own interpretation, this is a security. In his deposition, Serven not only described the capital contributions in a way that classifies them as an investment contract, but also explicitly uses the

word “option.” Even as Serven attempts to re-categorize the nature of these advances to disguise their intended purpose of forming a U.S. entity, he does so by classifying the Plaintiffs’ contributions as options, an investment vehicle specifically under the definition of securities for the purposes of WSSA. The trial court erred by holding that the capital advances by Plaintiffs were not a security, and should be reversed.

2. There was evidence in the record to create a genuine issue of material fact as to the intended nature of the business arrangement.

It is undisputed that Plaintiffs provided more than two million dollars to an account controlled by Serven. The issues of fact concern the purpose and the terms of the payments. Defendant argues that the payments were either for options to purchase shares in a Mexican entity, or for the purchase of stock in the Mexican entity. CP289 – 45:10-15; 358 – 319:11-20. Plaintiffs contend that the payments were for an investment in a U.S. entity. If the parties were unable to reach agreement on the terms of the U.S. entity, then the agreement to agree failed and the funds should have been returned to Plaintiffs. CP 375 ¶ 4; CP 380 ¶ 4.

At a minimum, there is a genuine issue of material fact as to whether the funds transferred were to Serven or to a Mexican entity. There is also an issue of fact as to whether the transfers were intended to

purchase an interest in a U.S. entity or were to purchase an interest in a Mexican entity. The factual dispute was properly before the court in the form of the deposition testimony of Serven on the one hand and the declarations of Wagner and Walker on the other.

Because there were factual disputes the trial court should not have resolved this claim on summary judgment.

3. Serven committed securities fraud when he misrepresented that he would carry out an agreement to form a U.S. entity as Plaintiffs expected and refused to refund the payments made for the purchase of a U.S. based security.

WSSA places special emphasis on protecting investors from fraudulent schemes. *Kinney v. Cook*, 159 Wn.2d 837, 154 P.3d 206 (2007). A claim of securities fraud is based in RCW 21.20.010:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

This statute has two essential elements: “(1) a fraudulent or deceitful act committed (2) in connection with offer, sale, or purchase of any security.” *Kinney*, 159 Wn.2d at 842 (internal citation omitted).² To establish liability under WSSA, the purchaser of a security must prove that the seller and/or others made material misrepresentations or omissions about the security, and the purchaser relied on those misrepresentations or omissions. *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 264, 93 P.3d 919 (2004) (emphasis added), *review denied*, 153 Wn.2d 1022 (2005).

The record shows that Serven induced Plaintiffs to believe that he would transfer the Mexican hotel to a U.S. based entity and then refused to do so. It was based on the understanding of the Plaintiffs, as bolstered by Serven’s own representations that Walker and Wagner made and continued to make advances to Serven.

Serven held himself out as the seller or promoter of the sale of securities in both the new entity and in the Mexican entity. *See e.g.* CP 36. Clearly, the only contact for the issuance of the stock in either a U.S. or Mexican entity was Scott Serven. *See* CP 354 - 304:18-21.

² Additionally, it is unlawful for a person to sell unregistered securities unless the security or transaction is exempted under RCW 21.20.310 or 21.20.320, the security is covered by a federal security and required fees are paid. RCW 21.20.140. The securities at issue in this case were not properly registered for purposes of this statute.

This brings us to Serven's scheme or device to defraud. Clearly, there was evidence in the record to create a genuine issue of material fact as to whether Serven misrepresented to the Plaintiffs his intention to create the U.S. entity. Emails establish that Serven had agreed to such a formation, and later recanted. *See e.g.* CP 227 (Serven: "I agree with Fred about having stock in a US Corp..."); CP 230; CP 232. There was also evidence in the record to show that the Plaintiffs relied on this representation. CP 380 ¶ 4; CP ¶ 8.

Insiders must fully disclose material facts to a prospective purchaser. *Guarino v. Interactive Objects, Inc.* 122 Wn. App. 95, 86 P.3d 1175 (2004). This is an on-going duty, which exists because of "the relationship between an insider and shareholders, and endures through the securities transaction." *Id.* at 129. *See* CP 376 ¶ 11. Thus, a failure to disclose material information, during the course of the advances may also provide a basis for a securities fraud claim.

In this regard, it is clear from the record before the trial court that Serven failed to disclose his intent to expand the scope of the project, prior to moving forward with the expansion. The record shows that the expansion was not part of the original scope of the investment. CP 376 ¶ 10.

Serven also failed to provide supporting financial documents to record the capital transfers made by Plaintiffs. Moreover, the withholding of documents to provide financial information to Plaintiffs during the course of these discussions was a deceitful act in violation of Serven's duty to Plaintiffs. *See Guarino*, 122 Wn. App. at 112 (WSSA imposes a duty to disclose material information or abstain from the stock transaction).

Serven engaged in several other deceitful acts over the course of the business relationship. For example, Serven refused to document the parties' agreement despite continued discussions between the parties where they decided to form the U.S. entity.

Serven asked the plaintiffs to sign and backdate proxies with regard to the Mexican corporation that were materially false and deceptive. CP 330 - 207:20-25; *Id.* 208:1-25. It was also deceitful to accept the advances knowing that the Plaintiffs believed there would be a new U.S. entity, but refusing to document the transactions in that manner. In *Wharf (Holdings) Ltd. v. United Intern. Holdings, Inc.*, 532 U.S. 588, 121 S.Ct. 1776, 149 L.Ed.2d 845 (2001) the U.S. Supreme Court was asked to consider a securities fraud action involving an action to buy stock. The court held that:

This securities fraud action focuses upon a company that sold an option to buy stock while secretly intending never to honor the option. The question before us is whether this conduct violates § 10(b) of the Securities Exchange Act of 1934, which prohibits using “any manipulative or deceptive device or contrivance” “in connection with the purchase or sale of any security.” 48 Stat. 891, 15 U.S.C. § 78j(b); see also 17 C.F.R. § 240.10b-5 (2000). We conclude that it does.

Using this same analysis, the trial court should have determined that there was an issue of fact as to whether Serven ever intended to honor the “option” that he believed that the Plaintiffs had acquired. If there was never an intent by Serven to honor the option, then that is securities fraud.

Viewed in the light most favorable to the non-moving party, there was ample evidence to support a claim of securities fraud. At a minimum genuine issues of material fact exist and the trial court erred by granting summary judgment.

Defendant argues that Wagner and Walker knew how Serven was managing the company in Mexico and that such knowledge constitutes a form of estoppel. That argument was rejected in this state in *Go2Net, Inc. v. Freeyellow.com, Inc.*, 126 Wn. App. 769, 109 P.3d 875 (2005). In the *Go2Net* case the Court Of Appeals held that “[W]e are persuaded that the better rule is to bar the defenses of estoppel and waiver in an action alleging violation of a securities regulation.” *Id.* at 783.

D. The trial court erred when it dismissed Plaintiffs common law fraud claim as there were genuine issues of material fact.

The elements of common law fraud are:

(1) A representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; (9) his consequent damage.

Sigman v. Stevens-Norton, Inc., 70 Wn.2d 915, 425 P.2d 891 (1967). Here Plaintiffs provided evidence in the record before this court to show that Serven made representations to Plaintiffs that he would form the U.S. entity. Serven knew of the materiality of the representation; knew that he did not intend to do so; the Plaintiffs did not know of Serven's intention until late in 2010; Serven intended that the Plaintiffs act on his representation; Serven knew of the Plaintiffs' reliance on the representation by virtue of their continued involvement in the project; Plaintiffs had the right to rely on Serven's statements; Plaintiffs were damaged as result of the misrepresentation.

The only legal question is whether Serven's promise as to a future act could constitute fraud. In a similar case, our Supreme Court held that a promise to perform a future undertaking within the control of the promisor

was an existing fact for the purpose of the first element of fraud. *Markov v. ABC Transfer & Storage Co.*, 76 Wn.2d 388, 457 P.2d 535 (1969). In the *Markov* case, a landlord had promised to renew a lease but instead sold the property and sought to evict the tenant. The Court held:

We said in *Hewett v. Dole*, 69 Wn. 163, 124 P. 374 (1912), if a promise is made for the purpose of deceiving and with no intention to perform, it constitutes such fraud as will support an action for deceit. Closely related to that rule is the corollary that if the promise is made without care or concern whether it will be kept, and the promisor knows or under the circumstances should know that the promisee will be induced to act or refrain from acting to his detriment, the promise will likewise support an action by the promisee.

Markov, at 396. Based on this concept and in view of the evidence that was before the trial court at the time of the hearing on the Defendant's second motion for summary judgment, it was improper for the trial court to grant summary judgment dismissing the common law fraud claim.

E. The trial court erred when it held that Plaintiffs' claims are barred by the statute of limitations.

The trial court held that the statute of limitations bars Plaintiffs' claims for securities fraud. *Verbatim Report at 2:13-15*. Actions for securities fraud must be commenced within three years of when a person either discovers the fraud, or it would have been discovered had the person exercised reasonable care. RCW 21.20.430(4)(b). The party asserting that

the statute of limitations has run bears the burden of proof. *Rivas v. Eastside Radiology Assocs.*, 134 Wn. App. 921, 925, 143 P.3d 330 (2006) (citing *Haslund v. City of Seattle*, 86 Wn.2d 607, 620-21, 547 P.2d 1221 (1976)). The statute of limitations does not begin to run simply because the parties have reached an agreement to buy/sell securities:

[W]here a party engages in fraudulent misrepresentations or conduct in connection with an agreement to buy or sell securities, the agreement is executor, and continuing fraudulent conduct affects the underperformed part of the agreement, a court may consider both the pre-and post-agreement representations and conduct to determine whether there is a violation of RCW 21.20.010.

Helenius v. Chelius, 131 Wn. App. 421, 452-53, 120 P.3d 954 (2005).

The statute of limitations for claims of securities fraud does not begin to toll until the *aggrieved party discovers* or should have discovered by due diligence the fact of fraud or securities fraud and sustains some actual damage as a result. RCW 4.16.080(4); *Ives v. Ramsden*, 142 Wn. App. 369, 174 P.3d 1231 (2008). *See also Young v. Savidge*, 155 Wn. App. 806, 230 P.3d 222 (2010) (holding that a fraud action accrues when the aggrieved party discovers or should have discover the fact of fraud).

The Plaintiffs could not have reasonably discovered that Serven had made material misrepresentations to them until he informed them in late 2010 that he would not establish a U.S. entity. *See CP 355 - 305*. The

parties continued to explore the viability and structure of a U.S. entity with attorneys late into 2010. *See* CP 262 - 47. Moreover, Plaintiffs' belief that securities would be issued is bolstered by their continued payments to Serven from 2005 to 2010. *See* CP 36. The advances were made by the parties on the basis of an agreement with Serven to form a new U.S. entity, and not as contribution to an existing entity. *See* CP 380 ¶ 3; CP 34 ¶3.

Serven's arguments at the trial court that Walker should have been aware of the fraud in 2006 when he took over the accounting of the Mexican entity ignores the repeated representations by Serven throughout 2010. In addition, Serven continued to represent that there would be a U.S. based entity, throughout 2010. CP 248. Clearly, questions of fact exist which should be resolved by the trier of fact and not by the trial court, on summary judgment.

If Serven never intended to form a U.S. entity, then there is an issue of fact as to when the Plaintiffs should have known that Serven never intended to form such an entity. Alternatively, if Serven changed his mind as to the formation of a U.S. entity, that occurred in 2010 or 2011 as is reflected in Serven's email dated December 9, 2010. CP 248.

Our courts have held that intent is a factual determination. Whether

a party intended, at a specified time, to defraud another of his property is a question of fact to be resolved by the trier of the fact. *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 225 P.3d 266 (2009). In addition, under Washington case law it is for the trier of fact (and not the trial court) to determine when a party should have known of the fraud. *Imus v. Reeder*, 119 Wn. 699, 205 P. 380 (1922).

In *August v. U.S. Bancorp*, 146 Wn. App. 328, 190 P.3d 86 (2008)

the Court of Appeals said:

“Unless the evidence is undisputed or unless reasonable minds cannot differ, what a person knew or should have known at a given time is a question of fact.” *Gillespie v. Seattle–First Nat’l Bank*, 70 Wn. App. 150, 170, 855 P.2d 680 (1993). Whether a plaintiff has exercised due diligence under the discovery rule is a question of fact. *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000). The issue of whether a plaintiff has suffered actual damages triggering the statute of limitations “can be decided as a matter of law if reasonable minds could reach but one conclusion.” *Hudson v. Condon*, 101 Wn. App. 866, 875, 6 P.3d 615 (2000). Because the statute of limitations is an affirmative defense, the burden of proof is on the defendant. *Mayer*, 102 Wn. App. at 76, 10 P.3d 408.

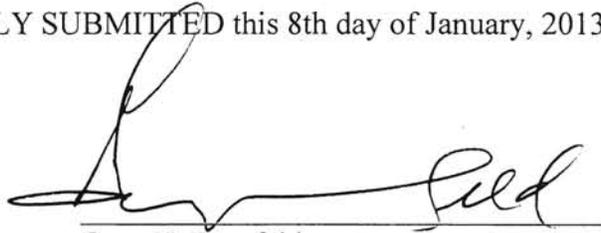
Id. at 343. Based on these lines of cases, the trial court erred in determining that Defendant was entitled to summary judgment on the issue of the running of the statute of limitations.

V. CONCLUSION

For the reasons set forth herein, the Appellants respectfully request that this Court reverse the trial court and hold that genuine issues of material fact existed at the time of the hearing on each summary judgment motion; and hold that summary judgment was inappropriate as a matter of law.

Plaintiffs ask that this court reverse the orders granting summary judgment in favor of the Defendant and remand this matter for trial on the merits.

RESPECTFULLY SUBMITTED this 8th day of January, 2013.

A handwritten signature in black ink, appearing to read "Branfeld", is written over a horizontal line.

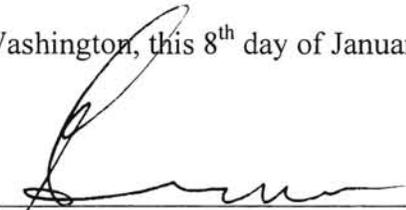
Gary H. Branfeld
WSBA No. 6537
Attorney for Appellants, Scott A.
Walker and Fred Wagner

DECLARATION OF SERVICE

That on the 8th day of January, 2013, I hand delivered a true and correct copy of the Appellants' Opening Brief to the Respondent's attorneys at their respective addresses:

Daniel R. Kyler, WSBA No. 12905
Rush, Hannula, Harkins & Kyler, L.L.P.
4701 S. 19th St., Ste. 300
Tacoma, WA 98405

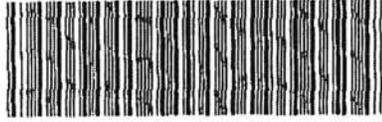
DATED at Tacoma, Washington, this 8th day of January, 2013.



Gary H. Branfeld

FILED
COURT OF APPEALS
DIVISION II
2013 JAN - 8 PM 2: 13
STATE OF WASHINGTON
BY SMD
DEPUTY

APPENDIX A



11-2-11321-9 38897123 ORGPSJ 07-23-12

FILED
DEPT. 9
IN OPEN COURT
JUL 20 2012
BY *[Signature]*
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE.

SCOTT A. WALKER and FRED
WAGNER,

Plaintiffs,

vs.

SCOTT SERVEN and JANE DOE
SERVEN,

Defendant and Third Party Plaintiff

vs.

LYNAE WALKER,

Third Party Defendant.

NO. 11-2-11321-9

ORDER GRANTING DEFENDANT
SERVEN'S MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL OF
PLAINTIFFS' CLAIMS OF MONEY DUE
ON LOAN

HONORABLE EDMUND MURPHY

ORIGINAL

This matter having come on regularly before the undersigned judge of the above-entitled court upon defendant Scott Serven's motion for summary judgment on plaintiffs' claims of money due on loan and defendant Scott Serven being represented by Daniel R. Kyler of Rush, Hannula, Harkins & Kyler, LLP, and plaintiffs Walker and Wagner represented by Gary H. Branfeld of Smith, Alling, PS, and the court having considered the files and records contained herein, and having specifically considered the following

ORDER GRANTING DEFENDANT SERVEN'S
MOTION FOR SUMMARY JUDGMENT
OF DISMISSAL OF PLAINTIFFS' CLAIMS
OF MONEY DUE ON LOAN - 1

RUSH, HANNULA, HARKINS & KYLER, L.L.P.
4701 South 19th Street, Suite 300
TACOMA, WA 98405
TELEPHONE: (253) 383-5388
FAX: (253) 272-5105

ORIGINAL

1 documents and materials:

2 1. Defendant's Motion for Summary Judgment on Plaintiffs' Claims of Money

3 Due on Loan;

4 2. Declaration of Scott Walker in Opposition to Defendant's Motion for
5 Summary Judgment;

6 3. Declaration of Gary H. Branfeld in opposition to Motion for Summary
7 Judgment, including transcript A, the Deposition of Barton L. Adams, Transcript B,
8 portions of the deposition testimony of Scott Serven, and exhibits as set forth in the
9 declaration of Gary H, Branfeld;

10 4. Declaration of Daniel R. Kyler in Support of Plaintiffs' Motion for Partial
11 Summary Judgment;

12 5. Declaration of Scott Serven in Support of Defendant Serven's Motion to
13 Quash and for Protective Order;

14 6. Reply Memorandum in Support of Defendant Serven's Motion for
15 Summary Judgment on Plaintiffs' Claims of Money Due on Loan.
16

17 And the Court having heard the argument of counsel, and being fully advised in
18 the premises, now, therefore it is:

19 ORDERED, ADJUDGED AND DECREED that defendant Scott Serven's Motion
20 for Summary Judgment of Dismissal of Plaintiff's First Cause of Action, Money Due on
21 Loan, be and the same hereby is granted; and it is further
22

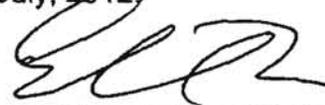
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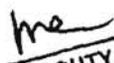
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1 ORDERED, ADJUDGED AND DECREED that plaintiffs' claims of money due on
2 loan be, and they hereby are, dismissed, with prejudice.

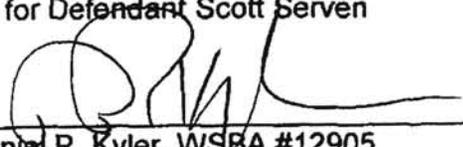
3 DONE IN OPEN COURT this 20 day of July, 2012.

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5 
6 JUDGE EDMUND MURPHY

FILED
DEPT. 9
IN OPEN COURT
JUL 20 2012
BY  DEPUTY

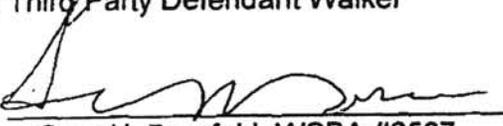
7 Presented by:

8 RUSH, HANNULA, HARKINS & KYLER, LLP
9 Attorneys for Defendant Scott Serven

10 By: 
11 Daniel R. Kyler, WSBA #12905

12 Approved as to form, Notice of Presentment
13 Waived:

14 Smith Alling, P.S.
15 Attorneys for Plaintiffs Walker and Wagner
16 And Third Party Defendant Walker

17 By: 
18 Gary H. Branfeld, WSBA #6537

APPENDIX B



11-2-11321-9 39241108 ORGSJ 09-25-12



ORIGINAL

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

SCOTT A. WALKER and FRED
WAGNER,

Plaintiffs,

vs.

SCOTT SERVEN and JANE DOE
SERVEN,

Defendant and Third Party Plaintiff

vs.

LYNAE WALKER,

Third Party Defendant.

NO. 11-2-11321-9

ORDER GRANTING DEFENDANT
SERVEN'S MOTION FOR SUMMARY
JUDGMENT OF DISMISSAL OF
PLAINTIFFS' CLAIMS FOR VIOLATION
OF THE WSSA AND COMMON LAW
FRAUD

This matter having come on regularly before the undersigned judge of the above-entitled court upon defendant Scott Serven's motion for summary judgment on plaintiffs' claims for violation of the Washington State Securities Act ("WSSA") and for common law fraud, and defendant Scott Serven being represented by Daniel R. Kyler of Rush, Hannula, Harkins & Kyler, LLP, and plaintiffs Walker and Wagner represented by Gary

ORDER GRANTING DEFENDANT SERVEN'S
MOTION FOR SUMMARY JUDGMENT OF
DISMISSAL OF PLAINTIFFS' CLAIMS FOR
VIOLATION OF THE WSSA AND COMMON LAW
FRAUD

RUSH, HANNULA, HARKINS & KYLER, L.L.P.
4701 South 19th Street, Suite 300
TACOMA, WA 98405
TELEPHONE: (253) 383-5388
FAX: (253) 272-5105

1 H. Branfeld of Smith, Alling, PS, and the court having considered the files and records
2 contained herein, and having specifically considered the following documents and
3 materials:

- 4 1. Defendant Serven's Motion for Summary Judgment on Plaintiffs'
5 Claims Violations of the Securities Act;
- 6 2. Defendant Serven's Memorandum in Support of Motion for Summary
7 Judgment of Dismissal of Plaintiffs' Claims for Violation of the
8 WSSA and Common Law Fraud;
- 9 3. Affidavit of Daniel R. Kyler in Support of Defendant Serven's
10 Motion for Summary Judgment of Dismissal Based on Statute of
11 Limitations;
- 12 4. Declaration of Scott Walker in Opposition to Defendant's Motion
13 for Summary Judgment dated July 9, 2012;
- 14 5. Declaration of Gary H. Branfeld in Opposition to Motion for
15 Summary Judgment, dated July 9, 2012;
- 16 6. Declaration of Scott Serven in Support of Defendant Serven's Motion
17 to Quash and for Protective Order dated November 8, 2011;
- 18 7. Memorandum of Authorities in Opposition to Defendant's Motion for
19 Summary Judgment;
- 20 8. Declaration of Scott Walker in Opposition to Defendant's Motion
21 for Summary Judgment;
- 22 9. Declaration of Fred Wagner in Opposition to Defendant's Motion
23 for Summary Judgment;
- 24 10. Declaration of Gary H. Branfeld in Opposition to Motion for Summary
25 Judgment;
11. Defendant Serven's Reply Memorandum in Support of Summary
Judgment on Dismissal of Claims for Violation of the WSSA and
Common Law Fraud;
12. Declaration of Daniel R. Kyler in Support of Defendant Serven's Motion
for Summary Judgment of Dismissal of Securities and Fraud Claim;

1 13. Declaration of Scott Serven in Support of Defendant Serven's Motion
 2 for Summary Judgment of Dismissal of Plaintiffs' Claims of Sale
 3 of an Unregistered Security, Securities Fraud and Common Law Fraud.

4 And the Court having heard the argument of counsel, and being fully advised in
 5 the premises, now, therefore it is:

6 ORDERED, ADJUDGED AND DECREED that defendant Scott Serven's Motion
 7 for Summary Judgment of Dismissal of Plaintiffs' second cause of action, the sale of an
 8 unregistered security be, and the same hereby is, GRANTED; and it is further

9 ORDERED, ADJUDGED AND DECREED that defendant Scott Serven's Motion
 10 for Summary Judgment of Dismissal of Plaintiffs' claims of security fraud, plaintiffs' third
 11 cause of action, be and the same hereby is, GRANTED; it is further

12 ORDERED, ADJUDGED AND DECREED that defendant Scott Serven's Motion
 13 for Summary Judgment of Dismissal of plaintiffs' claims for common law fraud be and
 14 the same hereby is, GRANTED; and it is further

15 ORDERED, ADJUDGED AND DECREED that defendant/third party plaintiff
 16 Serven, by voluntary non-suit, without prejudice, based upon the dismissal of plaintiffs'
 17 claims herein, the defendant Scott Serven's counterclaim against the plaintiff Scott
 18 Walker and defendant Scott Serven's third party complaint against third party defendant
 19 Lynae Walker may be dismissed, without prejudice, as the claims are moot, given the
 20 Court's preceding order; and it is further

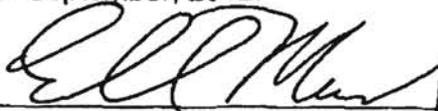
21 ORDERED, ADJUDGED AND DECREED that with the dismissal of plaintiffs'
 22 claims and defendant's counterclaim and third party plaintiff's complaint, all claims and
 23 causes of action by plaintiffs herein are hereby dismissed, with prejudice and
 24 defendant's counterclaims and defendant/third party plaintiff's counterclaims are
 25

ORDER GRANTING DEFENDANT SERVEN'S
 MOTION FOR SUMMARY JUDGMENT OF
 DISMISSAL OF PLAINTIFFS' CLAIMS FOR
 VIOLATION OF THE WSSA AND COMMON LAW

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 FAX: (253) 272-5105

1 dismissed, without prejudice and this matter is now concluded.

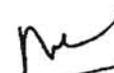
2 DONE ~~IN OPEN COURT~~ this 21st day of September, 2012.

3
4 
5 JUDGE EDMUND MURPHY

6 Presented by:

7 RUSH, HANNULA, HARKINS & KYLER, LLP
8 Attorneys for Defendant Scott Serven

9 By: 
10 Daniel R. Kyler, WSBA #12905

FILED
DEPT. 9
~~IN OPEN COURT~~
SEP 21 2012
BY 
DEPUTY

11 Approved as to form, Notice of Presentment
12 Waived:

13 SMITH ALLING, P.S.
14 Attorneys for Plaintiffs Walker and Wagner
15 And Third Party Defendant Walker

16 By: _____
17 Gary H. Branfeld, WSBA #6537

1 dismissed, without prejudice and this matter is now concluded.

2 DONE IN OPEN COURT this _____ day of September, 2012.

3

4

JUDGE EDMUND MURPHY

5

6 Presented by:

7 RUSH, HANNULA, HARKINS & KYLER, LLP
8 Attorneys for Defendant Scott Serven

9

By: _____
Daniel R. Kyler, WSBA #12905

10

11 Approved as to form, Notice of Presentment
12 Waived:

12

SMITH ALLING P.S.
13 Attorneys for Plaintiffs Walker and Wagner
14 And Third Party Defendant Walker

13

14

15

By: _____
Gary H. Branfeld, WSBA #6537

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ORDER GRANTING DEFENDANT SERVEN'S
MOTION FOR SUMMARY JUDGMENT OF
DISMISSAL OF PLAINTIFFS' CLAIMS FOR
VIOLATION OF THE WSSA AND COMMON LAW

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