

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

William Newcomer,
Plaintiff and Respondent,

v.

Michael Cohen and Julie McBride,
Defendants and Appellants.

APPELLANTS' REPLY BRIEF

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INTRODUCTION

The challenge of any respondent's brief filed in response to a serious, significant demonstration of error is to refute at least as much of the appellants' arguments as is necessary to carve a path to affirmance. Newcomer's brief does not meet that challenge. Instead, it spins pointless arguments about things that don't matter, while leaving wholly unrefuted Cohen's demonstration of multiple reasons why the judgment must be reversed, including: the statute of limitations; multiple reasons why Newcomer failed to prove the fundamental requirement to every securities claim—that the omission or misstatement be *material*; that his claimed reliance on the misstatements or omissions was unreasonable; and his failure to prove damages. Newcomer's failure to respond substantively to *any* of these grounds for reversal is not an oversight: he has not because he cannot.

Newcomer's lack of answers confirms that he recovered a substantial judgment based upon a contrived claim. He conjured up his failure-to-disclose theory as a way to recover his investment in a real estate venture that—along with many others—was savaged by the 2008 financial debacle. His WSSA theory rests largely upon a misstatement of an inconsequential detail of the transaction about which no reasonable

investor could possibly have cared—much less relied upon—and that had nothing whatever to do with Newcomer’s investment loss.

The judgment awards Newcomer the return of his entire investment based on a finding that Cohen told Newcomer that Cohen would invest \$800,000 entirely in cash when in fact Cohen’s investment was partly in cash and the remainder in the form of a commitment (which was honored) to provide \$350,000 worth of construction management services in the succeeding months. This commitment, which the parties refer to as “deferred equity” or “sweat equity,” was functionally equivalent to the contribution of cash that would necessarily have had to be used within a discrete period of time to pay for needed construction management services that Cohen was to provide for a \$350,000 fee.

An accurate disclosure would have told investors (as indeed the Offering Introduction (“OI”) did) that Cohen would contribute \$450,000 in cash and \$350,000 in construction management services. An even more complete statement would have assured investors that if the \$12 million construction phase needed additional funds, Cohen would loan the venture up to \$360,000 interest-free. The difference between these truthful facts and what Newcomer claims Cohen represented to him is financially and commercially inconsequential. There was no “undercapitalization,” as Newcomer asserts: within 16 months, Cohen had provided the promised

construction management services, \$350,000 of which was already “paid” from Cohen’s “deferred equity” contribution. Consequently, *the venture’s balance sheet at that point looked exactly as it would have had Cohen’s investment been entirely in cash* and the additional \$350,000 of cash invested had been used to pay for those construction management services.

As for interim liquidity, any cash needs that the venture had during that construction period were met by the no-interest loan of \$360,000 from Cohen. No testimony demonstrated “undercapitalization” or illiquidity, not a single bill went unpaid and the construction was completed without delay. No wonder, then, that Newcomer does not even attempt to explain why a reasonable investor would, in these circumstances, have cared that Cohen invested \$450,000 in cash, committed to provide management services of \$350,000, and lent the venture \$360,000 interest-free rather than investing \$800,000 in cash. Nor does he contest in any relevant way that he failed to prove his reasonable reliance on the representations.

Perhaps the inconsequentiality of the claimed misrepresentation explains why Newcomer waited to sue for several years after learning more than enough to alert him to what he now claims were securities violations. Instead of making a prompt claim, he continued to invest money in the venture in the hope that the economic catastrophe visited on

the real estate market by the 2008 meltdown would abate in time to salvage the project. Only when that bet did not pay off did he claim foul and invoke the WSSA as a form of investment insurance to seek rescissionary relief. His delay is fatal: his claims are barred by the statute of limitations.

These deficiencies—the lack of materiality or reasonable reliance and the bar of the statute of limitations—were exposed in Cohen’s opening brief, where he showed why, on multiple grounds, the judgment must be reversed. Newcomer has filed a lengthy but largely irrelevant brief in response. Again and again, a comparison of the opening brief and Newcomer’s responsive brief shows that on each of the dispositive arguments Cohen made, Newcomer has failed to respond at all.

ARGUMENT

I.

THE STATUTE OF LIMITATIONS BARRED NEWCOMER’S CLAIM AS TO COHEN’S INITIAL CONTRIBUTION AND THE NO-INTEREST LOAN.

A. Cohen’s Appeal Presents Exclusively Legal Questions, Not Factual Disputes As Newcomer Contends.

Newcomer begins with a confusing and incorrect analysis of the standard of review. He incorrectly asserts that Cohen’s opening brief re-litigates factual disputes properly submitted to the jury. Respondent’s

Brief (“RB”) 21–22. But he admits that the denials of Cohen’s CR 50 and 56 motions are reviewed *de novo*, with the facts construed in the light most favorable to the non-moving party. RB 21 n.4. That is exactly Cohen’s point: whether those motions should have been granted, and judgment entered for Cohen, presents legal questions that are reviewed *de novo*.

Newcomer has identified no factual dispute raised in Cohen’s opening brief—and for good reason: Cohen has not asked this court to revisit *any* factual disputes. To the contrary, Cohen has respected the standard of review and played by the rules. For instance, solely because of the standard of review, Cohen’s argument on appeal accepts the jury’s finding that he told Newcomer he would make his initial contribution entirely in cash despite the strong evidence that Cohen said no such thing. Any other factual dispute must likewise be deemed resolved in Newcomer’s favor so long as substantial evidence exists. But that is of no aid to Newcomer, because the facts upon which Cohen’s arguments are based were undisputed. Accordingly, whether a reasonable juror could have found that Newcomer was not on inquiry notice more than three years before he filed this action is a question of law.

As for review of the verdict, the standard for reviewing factual issues is, of course, substantial evidence. But whether substantial evidence was

admitted to support a claim or defense is—notwithstanding Newcomer’s confusing argument—reviewed *de novo*. Cohen has argued *the legal significance* of undisputed facts, a matter that is of course reviewed *de novo*. Appellants’ Opening Brief (“AOB”) 20, 29 (quoting *Richardson v. Denend*, 59 Wn. App. 92, 95, 795 P.2d 1192 (1990) and *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006), *as amended* (Feb. 13, 2008)).

B. Newcomer Was On Inquiry Notice Of Cohen’s Deferred Equity Contribution More Than Three Years Prior To Filing This Action.

1. Newcomer Does Not Refute Cohen’s Showing That He Was On Inquiry Notice In 2005.

Cohen’s opening brief showed that, since 2005, Newcomer was on inquiry notice that—just as the OI had informed prospective investors—Cohen had contributed some of his initial contribution in the form of future services, which the parties also called “deferred equity” or “sweat equity.” AOB 31–33. In particular, Cohen showed that Newcomer signed a commitment letter to the project lender that represented that the project’s funding included as much as \$750,000 of “contributed equity,” which Newcomer admitted meant “sweat equity.” AOB 31. In addition, the final loan documents that Newcomer received included another schedule reflecting \$750,000 in deferred equity. AOB 31–32.

These Spring 2005 loan documents put Newcomer on inquiry notice that any earlier oral representation that Cohen’s initial investment was not all-cash was not correct and that the deferred equity contribution described in the OI remained a part of the transaction. Accordingly, the opening brief concluded, the three-year limitations period expired no later than 2008, several years before Newcomer filed this action. AOB 32–35 & n.6. Newcomer has no response—literally none—to this contention. *This unanswered point is dispositive of the entire case and requires that the judgment be reversed.*

While ignoring the 2005 documents, Newcomer argues that a spreadsheet Cohen’s bookkeeper provided to Newcomer years later, on May 15, 2009, was “objectively false and specifically omits the \$350,000 non-cash journal entry that Cohen misrepresented had been paid in cash.” RB 24. But, as Cohen’s opening brief explained, that spreadsheet is of no consequence because the limitations period had already expired before Newcomer reviewed it (AOB 34–35 n.6), a point Newcomer does not refute (or even acknowledge). Accordingly, Cohen’s argument that Newcomer’s claim was time-barred as of 2008 stands unrefuted.¹

¹ Newcomer cites *Ives v. Ramsden*, 142 Wn. App. 369, 385, 174 P.3d 1231 (2008), in support of the proposition that the limitations period does not begin to run until a buyer has discovered “some actual damage as a result” of the misrepresentation. RB 20, 22.

(continued . . .)

2. Newcomer Also Does Not Refute That He Was On Inquiry Notice By 2009.

Cohen’s opening brief also established an independent, alternative ground why Newcomer’s claim was time barred: he was put on inquiry notice repeatedly during 2009 and certainly no later than October 14, 2009, by which time he had stated in an email his continuing concern that the financial information provided to him was incomplete, inconsistent and unintelligible, and as a result his conclusion that an audit was needed. AOB 33–34 (quoting Newcomer’s email). Newcomer knew that Cohen had been making his capital contributions with a combination of deferred equity and by writing off loans he made to the venture. In Newcomer’s email, he related that he had been “shocked” many months earlier—in December 2008—to learn that Apex I had taken out loans—including loans from Cohen—and that investors needed to put in more capital. AOB 33 (quoting Newcomer’s email). *Newcomer’s brief makes no response to this showing.*

(. . . continued)

That is the test for a common-law fraud claim, not a WSSA claim. *First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 287, 864 P.2d 17 (1993) (“[t]he language of RCW 21.20.430(4)(b) [WSSA] differs significantly from RCW 4.16.080(4) [fraud]”). In any event, Newcomer does not apply that rule to the facts at bench, and for good reason: at all relevant times, he had incurred “actual damages” because he had made the investment payments of which he sought a refund.

And, if that were not enough, Newcomer’s own brief highlights his statement in 2013 that he had “*always* had a concern” whether Newcomer “actually [had] put in [his] money in cash” RB 25 (quoting RP 588–89; emphasis added). Newcomer’s admission that he had “always” been concerned that Cohen’s initial contribution was not all-cash confirms that Newcomer was on inquiry notice all along. *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000) (“Once the plaintiff has notice of facts sufficient to prompt a person of average prudence to inquire into the presence of an injury, he or she is deemed to have notice of all facts that reasonable inquiry would disclose”).

3. Evidence About What Others Knew Is Irrelevant To When Newcomer Was On Inquiry Notice.

Newcomer argues that two of the “small” investors who contributed only 10 percent of what Newcomer did, Fierst and Eckstein, also thought Cohen’s initial contribution was all-cash. RB 25. But what those investors knew and when is irrelevant to what *Newcomer* knew (or should have known) and when, which are the relevant inquiries. RCW 21.20.430(4)(b) (“No person may sue . . . more than three years after a violation . . . either was discovered *by such person* or would have been discovered *by him or her* in the exercise of reasonable care”) (emphasis added); *In re Estates of Hibbard*, 118 Wn.2d 737, 746–47, 826

P.2d 690 (1992) (“this court continues to emphasize the exercise of due diligence *by the injured party*”) (emphasis added). Newcomer’s contention that his “testimony [was] corroborated” by what Fierst and Eckstein “believed” is logically incorrect and entirely irrelevant to whether Newcomer was on inquiry notice more than three years before filing this action.²

4. Newcomer Did Not Establish Any Impediment To Timely Investigation.

Because Newcomer was put on inquiry notice twice, first in 2005 (*see* Part I(B)(1), *supra*) and again by October 2009 (*see* Part I(B)(2), *supra*), it was his burden to prove an impediment to discovering the information that would have allowed him to bring this action beyond the three-year limitations period. AOB 29. Newcomer does not contest that he bore that burden. And the parties agree that an October 2013 meeting between them resulted in Newcomer receiving records that confirmed what Newcomer had “always” been “concerned” about: that “Mike had not put in the full \$800,000 in cash.” AOB 36 (quoting RP 498); RB 13–14, 25.

² Neither Fierst nor Eckstein claimed that Cohen made a misrepresentation to them. They testified that they relied on the Apex I formation documents for their understanding of how the parties would contribute capital. RP 637, 644, 648, 654.

For his action to be timely, Newcomer had to prove an impediment to discovering that information sooner. He failed to do so.

On appeal, Newcomer asserts that an impediment existed because “Cohen repeated this false representation [that his initial contribution was all-cash] many times” (RB 24; *see also* RB 2, 15), as if a continuous stream of representations from 2005 all the way to 2013 dissuaded Newcomer from investigating. That is untrue. Other than the alleged misstatements in 2005 at the inception of Apex I, Newcomer testified at trial to only two additional “misstatements”: one in the 2013 meeting between Newcomer and Cohen and the second in the May 2009 spreadsheet that Cohen gave to Newcomer. RP 327–28, 588–90. Because events in 2013 are irrelevant to whether the limitations period began running no later than 2009, and accordingly had expired in 2012, we need only discuss the 2009 spreadsheet (Ex. 17).

That spreadsheet nowhere states that Cohen made his initial contribution all in cash. It says nothing about the 2005 capital contributions at all; none of the entries on that spreadsheet are even dated 2005. The spreadsheet shows that, as of the date of its preparation, Cohen’s company, C&M, had earned \$994,884 in fees with regard to Phase I, which correlated approximately with the agreed-upon formula of 10 percent of Phase I hard costs. *Id.* The spreadsheet further shows that

Apex I had paid \$400,000 of those fees to C&M and that the remaining \$594,884 of unpaid fees plus \$113,221.80 in interest had not been paid, but instead applied to Cohen's capital account.

And in addition, to a reasonably prudent person in Newcomer's position, the spreadsheet should have raised a red flag, not allayed concern. During the 2008-09 period, Newcomer was concerned that his partners were putting in less cash than he was. He "expressed concern to Mike Cohen about the accounting of capital contributions" and "found out that [Cohen] wasn't putting in the cash and he was using different fees and so on, and as well, I found out—this was after the [December 2008] meeting." RP 363. Newcomer's concerns could only have been amplified by the spreadsheet, which showed that Cohen had applied \$679,330.80 of fees due him to his capital contributions rather than paying cash. Ex. 17. That figure was not itself shown on the face of the spreadsheet, but Newcomer was so on top of the issue that he used the information on the spreadsheet to make his own calculation. Ex. 17; RP 479.

Indeed, the 2009 spreadsheet actually *overstated* Cohen's total deferred equity in Phase I. That was because the spreadsheet overstated the amount of the fee C&M actually charged for its work on Phase I and, therefore, the amount of the fee that was deferred. The spreadsheet stated that C&M was entitled to take a fee of \$994,884, based on 10 percent of

hard costs, and noted that all but \$400,000 already paid in cash had been deferred and applied to Cohen's capital account. Ex. 17. But C&M actually charged less, \$750,000, because Cohen set C&M's fees based on the pre-construction estimate of the projected hard costs rather than the higher costs actually incurred. RP 1007. Accordingly, the spreadsheet overstated Cohen's total deferred equity in Phase I *by almost two times* at \$679,330.80 (including interest), rather than the actual total of \$350,000 in deferred fees. *Compare* Ex. 17 (October 2009 spreadsheet), *with* Ex. 44 (accurate spreadsheet prepared for discovery).

Consequently, the spreadsheet, far from impeding investigation, should have goaded Newcomer into action given his concern at the time about non-cash forms of contribution. That is especially so given Newcomer's view that deferred equity contributions violated the LLC Agreement. RB 36. But he did not investigate, and he did not sue. He instead continued investing in hopes of realizing a profit.

5. Newcomer Held On To His Investment Despite His Concerns And Complaints, Hoping To Profit While Using The WSSA As Investment Insurance.

Newcomer half-heartedly denies that he invoked the WSSA as a form of investment insurance because he "filed this lawsuit [in early 2014] . . . about three and half [sic] *months* before the property sold at a loss." RB 28 (emphasis altered). That is no answer at all to Newcomer's failure to

investigate *for years* beginning in 2005 and again in 2009. Nor does it address Newcomer's admission that he "held on," despite his concerns, in the hope of realizing a profit. AOB 37. That he filed this action in 2014, a few months before the entire project was sold at a loss, does not change his decision to "hold on" in hopes of profiting rather than promptly investigating his concerns and filing a timely action to rescind his investment after it became clear (or at least likely) that the investment would produce a loss.

Tardy claims like Newcomer's are an impermissible means of using the WSSA as "investment insurance" by "wait[ing] to see whether a poorly performing stock recover[s], reap[ing] investment profits if it [does], and su[ing] for damages if it [does] not." See *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 499 (6th Cir. 2003).

Newcomer's argument boils down to a contention that a person who is on notice to investigate but fails to do so can nonetheless bring a tardy action if that person is on notice of alleged wrongful activity (*e.g.*, using deferred equity as capital) but not on actual notice of a particular fact—here Cohen's application of \$350,000 in deferred equity at the outset of the project—that the plaintiff *could* have discovered through inquiry but did not. Acceptance of that reasoning would eviscerate the doctrine of

inquiry notice, an outcome that would be particularly dangerous in the context of a WSSA claim. *See New England Health Care*, 336 F.3d at 499 (“If actual discovery were required, investors could extend the time for filing suit simply by refusing to investigate possible fraud”).

C. By 2009, Newcomer Was Also On Inquiry Notice Of The Zero-Interest Loan.

Newcomer also fails to respond to Cohen’s showing that he was on inquiry notice of the short-term, zero-interest loan of \$360,000 to Apex I from Cohen’s company, Point Ruston. Newcomer tosses around arguments that do not address the fact that he was on inquiry notice of the \$360,000 loan by October 2009.

He first argues that “[a]s a result of Cohen’s failure to invest the \$350,000 in cash . . . , Apex was underfunded.” RB 26. That has nothing do with when he was on notice of the loan and is a repetition of his materiality theory regarding the \$350,000 deferred equity contribution. *See Part II, infra*. He next contends that the July 2006 interest-free loan “was intentionally omitted [from the financial documents listing interest-bearing loans] because it covered up Cohen’s failure to make his capital contribution in cash.” RB 26. Once again, that has nothing to do with *when* Newcomer was on inquiry notice of the \$360,000 loan. Newcomer’s argument bears on *intent* to allegedly conceal the loan, which

is not relevant to when Newcomer was on inquiry notice. And intent, of course, is not an element of Newcomer's WSSA claim, as he emphasizes. *See* RB 19.

Newcomer ignores the reasons why he was on inquiry notice of the \$360,000 loan by October 2009, including:

- Cohen told Newcomer in February 2008 that a cash deficit in Phase I had been “floated” by member loans and financing for Phase II (AOB 39–40);
- In December 2008, Newcomer was, in his own words, “shocked” to learn that Point Ruston had made a number of interest-bearing loans to Apex I, and Newcomer “knew [then] that there were a whole bunch of Point Ruston loans” (AOB 40 (citing Ex. 74; RP 622–23));
- In May 2009, he received a spreadsheet showing that Cohen had accepted more than \$3.2 million in interest-bearing loans from Point Ruston on behalf of Apex I and its successor entities (AOB 40 (citing Ex. 77; RP 621–22));
- In October 2009, he emailed Cohen complaining about Apex I loan statements he had received days earlier and demanding an audit because there were “just too many figures floating around” and he “couldn't make heads or tails out of it.” AOB 33–34, 40 (citing Ex. 74).

Newcomer does not challenge any of these undisputed facts in the record and does not explain why they did not put him on inquiry notice of a much smaller, interest-free loan that he could have learned about with further inspection of Apex I's records. *See* RB 26; RP 343–44 (discussing a check produced in discovery).

While ignoring his inquiry notice of the loan—which is the issue on appeal, Newcomer focuses on when he claims to have *actually* discovered it. RB 26 (“Newcomer did not discover the existence of the \$360,000 debt until after this lawsuit was filed . . .”). But the question is what Newcomer is *deemed* to have known because he was on inquiry notice. AOB 29, 39–41; *see also, e.g., Robert L. Kroenlein Trust ex rel. Alden v. Kirchhefer*, 764 F.3d 1268, 1280 (10th Cir. 2014) (“A plaintiff is on inquiry notice whenever circumstances exist that would lead a reasonable [plaintiff] of ordinary intelligence, through the exercise of reasonable due diligence, to discover his or her injury”) (citation and internal quotation marks omitted). Having been “shocked” to learn of \$3.2 million in multiple, interest-bearing loans from Point Ruston, Newcomer had ample information to file suit on the theory that Cohen had failed to tell him about loans between Apex I and Point Ruston. Yet he waited more than three years before commencing this action based on allegations, among

others, that the \$3.2 million in interest-bearing loans that he had known about since October 2009 constituted a WSSA violation. *See* AOB 40.

During the litigation, Newcomer dropped his claim based on the \$3.2 million in loans after Cohen showed those claims were time-barred. *See* AOB 40. But because he claimed to have discovered the \$360,000 interest-free loan for the first time through discovery, he asserted at trial that Cohen had violated the WSSA by not disclosing *that* loan. However, there is a fatal flaw in his approach: had Newcomer brought his action within three years of being put on notice of the \$3.2 million in interest-bearing loans, he would have discovered the \$360,000 loan. That means he was on inquiry notice of that loan.

In short, Cohen sat on his rights, and as a result his claim is time-barred. *See Hibbard*, 118 Wn.2d at 745 (“society benefits when it can be assured that a time comes when one is freed from the threat of litigation,” in part because “stale claims may be spurious and generally rely on untrustworthy evidence”). And by sitting on his rights, Newcomer improperly sought to transform the WSSA into a form of investment insurance in the event his investment did not pan out. *See Tregenza v. Great Am. Commc’ns Co.*, 12 F.3d 717, 722 (7th Cir. 1993).

II.

NEITHER THE FORM OF COHEN'S INITIAL CONTRIBUTION NOR THE NO-INTEREST LOAN WAS MATERIAL.

A. No Reasonable Investor Would Have Viewed Cohen's Deferred-Equity Contribution As Material.

As with the limitations issue, Newcomer does not engage Cohen's materiality argument in any meaningful way. He asserts in conclusory fashion that reasonable investors would "want to know that Cohen's claim that he was investing \$800,000 in cash was false [*i.e.*, \$350,000 of his capital contribution was a commitment to provide management services] before investing themselves" (RB 31) without ever explaining *why*. For that reason, his argument begs the question of whether the representation was actually material.

Newcomer argues that Cohen's reliance on an obligation to provide future services as part of his capital contribution "resulted in the project being undercapitalized at the beginning and required Cohen [to] borrow \$360,000 from Point Ruston, LLC in early 2006." RB 32. Newcomer is wrong about that.³ And in any case, the ultimate question is—as

³ As noted in the opening brief (without challenge by Newcomer), not one witness testified that Apex I was "undercapitalized"; indeed, Newcomer's expert expressly disclaimed any such opinion. AOB 44; RP 801. And no evidence showed that a bill went unpaid or the project was delayed or hindered in any way due to lack of cash on
(continued . . .)

Newcomer agrees—what a reasonable investor would want to know *at the time of investment*. See AOB 43, RB 31; *Go2net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006) (materiality is judged at the time of the investment). Newcomer never grapples with that question, and his failure to do so demonstrates the fatal weakness of his theory.

Apex I, like most real estate development projects, was highly leveraged and presented to Newcomer as such. Of the \$12 million in projected costs to build Phase I, \$9.4 million—or 78 percent—was to be borrowed, and the investors would provide the remainder. Materiality should be judged by asking: if full disclosure had been made, would a reasonable investor have cared? See *United States v. Bingham*, 992 F.2d 975, 976 (9th Cir. 1993) (per curiam) (“Materiality must be judged in the context of the ‘total mix’ of information available to investors”).

Full disclosure in this instance would have been: “Of Cohen’s \$800,000 initial capital contribution, \$350,000 will be in the form of ‘deferred equity’—namely, a commitment to provide construction management services in that amount over the next 16 months. If the partnership needs additional funds prior to the promised services being

(. . . continued)
hand.

fully performed, Cohen will loan Apex I money interest-free up to the amount of his remaining deferred equity [\$350,000].” Obviously, no reasonable investor would care one whit. That is because a reasonable investor would know that Apex I would never be “undercapitalized” following that plan. If Apex I needed cash, Cohen would provide it on an interest-free basis. And Newcomer does not dispute that there was no misrepresentation about the value of the services (*see* AOB 43), which confirms that the \$350,000 in cash that Newcomer claims he thought Cohen was going to put in would only have been on hand temporarily, to be consumed by payment of the fees for Cohen-provided management services. That cash was not to be held as a reserve and was not intended to provide liquidity after the initial period of construction and provision of construction management services.

Newcomer’s after-the-fact testimony that, as a subjective matter, *he* would not have invested had he known of the deferred equity contribution (RB 32) is irrelevant to the legal question on appeal: whether a *reasonable investor* would have cared. That is a question of law for the court: whether a reasonable jury could conclude that a reasonable investor would have found material the substitution of a commitment to provide construction management services worth (without dispute) \$350,000 in lieu of \$350,000 in cash, which would be used to pay \$350,000 for those

services over the next several months. The court's gatekeeping function cannot be overridden by the plaintiff's self-serving testimony of his subjective opinion as to the importance of these facts.

As he did below, Newcomer compares this case to *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940 (9th Cir. 2005), but fails to address Cohen's argument that *Livid* involved sums vastly greater in absolute terms as well as in proportion to the overall investment: a \$10 million investment in a company that was represented to have \$25 million in cash but actually had a negative balance. AOB 44. Nor does Newcomer engage Cohen's point that "[h]ere, there was no shortfall *at all*. Apex received the benefit of \$350,000 in construction services without having to shell out cash to pay for them." AOB 44–45 (emphasis in original).

While Newcomer's materiality argument wholly fails to respond to Cohen's opening brief, it relies on a rhetorical sleight of hand: Newcomer consistently suggests that the \$350,000 in deferred equity was material to Cohen's total initial contribution of \$800,000. But that is not the issue. The question is whether the misrepresentation would have been material to a reasonable investor at the time of the investment, considering the investment opportunity in its totality. To assess *that*, the proper frame of

reference is to view the \$350,000 deferred equity contribution as part of a \$12 million project funded mostly by loans.

That leaves the conclusory opinion of Newcomer's expert witness, accountant W. Cary Deaton, as the last possible basis for finding substantial evidence to support the jury's finding of materiality. *See* RB 31–32. Newcomer again ignores all the reasons in Cohen's opening brief as to why that opinion cannot support the jury's verdict. Specifically, he has *no response* to any of the following points:

- An expert opinion contrary to law or based on speculation is not substantial evidence (AOB 47–48);
- Deaton believed that a misrepresentation would be material regardless of the amount involved, which is contrary to law (AOB 47); and
- Deaton's testimony that cash would be preferable because it can be "flexibly applied" did not establish materiality, because Newcomer admitted that if Cohen had contributed the \$350,000 in cash, that cash would have been used for construction or management services, not held as a reserve or available for other purposes

(AOB 45, 48).⁴

B. The \$360,000 Loan Was Not Material.

Newcomer offers *no response* to Cohen’s arguments demonstrating the immateriality of the interest-free loan from Point Ruston. He instead rebuts an argument that Cohen’s opening brief *did not make*. Compare AOB 54–55, *with* RB 33–34.

Cohen argued that the LLC Agreement satisfied the WSSA’s disclosure requirement because that agreement expressly gave him discretion to accept loans from members or member-controlled entities like Point Ruston. AOB 54–55. That disclosed to Newcomer that Cohen had been delegated full authority to make the loans he did without reporting each transaction to Newcomer or any other member. While Newcomer contends that Cohen could not “contract away” the WSSA’s disclosure obligation, that is a mischaracterization of Cohen’s argument. Cohen did not need to argue that Newcomer contracted away the disclosure requirement because Cohen complied with his obligation to

⁴ Newcomer does not even attempt to defend his position below that, had he known Cohen had misstated the amount of cash that he contributed, then Newcomer would not have invested out of distrust. AOB 45. As Cohen’s opening brief explained, to accept this argument would be to eliminate WSSA’s materiality component because *any* misrepresentation—however immaterial—would be a violation. AOB 45; *see also Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 659–660 (4th Cir. 2004); *see also Grigsby v. CMI Corp.*, 765 F.2d 1369, 1376 (9th Cir. 1985) (“that the new buyer might be a nicer person to deal with is likewise immaterial”).

disclose. See *In re Refco Capital Mkts., Ltd. Brokerage Customer Sec. Litig.*, 586 F. Supp. 2d 172, 189 (S.D.N.Y. 2008) (no securities claim where agreement expressly authorized hypothecation of securities), *aff'd sub nom. Capital Mgmt. Select Fund Ltd. v. Bennett*, 680 F.3d 214 (2d Cir. 2012). Cohen's ability, at his discretion and without additional notice, to accept on the venture's behalf loans from entities related to Cohen was indisputably disclosed in writing.

But, Newcomer says, "the fact that Apex Apartments, LLC had an undisclosed debt was a fact a reasonable person would want to know before investing in the company." RB 34. This conclusory argument once again begs the question of whether the extension of a \$360,000 interest-free loan was material. For the reasons explained in Cohen's opening brief, which Newcomer completely ignores, it was not. The short-term (about four to six weeks) and *interest-free* loan benefitted Apex and was immaterial to a \$12 million project funded mostly by a \$9.4 million loan. AOB 55.

III.

NEWCOMER COULD NOT REASONABLY RELY ON REPRESENTATIONS THAT COHEN'S INITIAL CONTRIBUTION WOULD BE ALL-CASH.

A. The OI And The LLC Agreement Contradicted Cohen's Oral Statements.

The opening brief argued that (1) Newcomer could not have reasonably relied on the oral statements about Cohen's initial contribution being all in cash because the OI stated that only part of that contribution would be in cash; (2) Newcomer agreed that any changes to the OI should be put in writing; (3) the LLC Agreement is distinct from the OI and represented the final agreement of the parties; and (4) accordingly, any substantive changes in the OI should have been reflected in the LLC Agreement. AOB 49–52. Newcomer does not challenge any of those points. His sole relevant response is to contend that the LLC Agreement actually did conform to his understanding because that agreement prohibited the contribution of services (RB 36–37), but his legal analysis is incorrect.

Newcomer admits that former RCW 25.15.190 (2015) established a “default rule[]” that a capital contribution may consist of future services. RB 36; *see* AOB 49–50. But, he contends, the LLC Agreement overrode that default rule by prohibiting any capital contribution of future services. He bases this interpretation of the contract on a negative implication he

would have the Court draw from Section 8.3.1 of the agreement, which states that each owner's capital account will be increased by the amount of "money" or "property" contributed. RB 36 (quoting Ex. 2); *see also* RB 37 (the "LLC Agreement . . . *conspicuously omits* services as a form of allowed contribution") (emphasis added). But, unsurprisingly, he cites no authority for the illogical proposition that the default statutory rule *allowing* the contribution of future services is trumped by the agreement's *silence* on the subject.

Moreover, Newcomer's argument is based on a flawed assumption that contractual rights are not a form of property. They are: "An enforceable contract right is property." *See, e.g., In re Marriage of Estes*, 84 Wn. App. 586, 590, 929 P.2d 500 (1997) (dividing community property); *accord Tyrpak v. Daniels*, 124 Wn.2d 146, 155 n.1, 874 P.2d 1374 (1994) (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n. 16 (1977) ("[c]ontract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid")); *In re Freeborn*, 94 Wn.2d 336, 340, 617 P.2d 424 (1980) (for purposes of

assessing UCC Article 9 priority, “the right to receive contract payments under a contract for the sale of real property is personal property”).⁵

B. Newcomer Signed Loan Documents That Contradicted The Oral Statements Upon Which He Claimed To Rely.

Cohen’s opening brief established that, after Newcomer was told that Cohen’s initial contribution would be all-cash, Newcomer signed two documents making contrary representations to the lender. For that reason, Cohen argued, Newcomer could not reasonably rely on the claimed oral representations. AOB 51–52; *see also* AOB 31–33.

Cohen pointed to two documents that Newcomer signed in connection with the loan: Exhibit 109, part of an April 22, 2005, commitment letter, and Exhibit 4, which was part of the final loan documents signed on May 20, 2005 (and was substantially identical to Exhibit B of Exhibit 109). Each document presents a financial summary or pro forma of the project. Cohen demonstrated in his opening brief that each one stated that up to \$750,000 (not just \$350,000) could be contributed in the form of non-cash “[c]ontributed equity” such as “Developer’s Fees & Overhead.” AOB 51. Newcomer’s testimony and the documents themselves

⁵ The rest of Newcomer’s contentions consist of an irrelevant tangent based on his misconstruction of Cohen’s argument to be that former RCW 25.15.190 (2015) “precludes the members of an LLC from specifying the form [in which] capital contributions may be made.” RB 36–38. Cohen does not so argue; to the contrary, the parties agree that the statute establishes a default rule subject to change by agreement.

unmistakably show that the \$750,000 of future fees was part of the total \$2,602,560 contributed by investors, in contradiction to the claimed oral representations that Cohen would invest all in cash. *See, e.g.*, Ex. 109, Exs. A & B; Ex. 4.

Newcomer denies that these loan documents had “anything to do with the concept of sweat equity or deferred capital contributions.” RB 38. He asserts that they referred only to “borrower equity.” *Id.* In fact, however, the documents distinguished between cash contributions and “contributed equity” in the amount of \$750,000—and also referred to that \$750,000 as “Developer’s Fees & Overhead.” AOB 51 (citing Ex. 4). And Newcomer admitted on the stand that the reference to \$750,000 meant “sweat equity.” AOB 31–32, 51.

Newcomer’s remaining points are *non sequiturs*. He first states that “the Construction Loan Agreement governs the relationship between [Apex I] and the lender,” not the relationship among Apex I members. RB 39. That is irrelevant to Cohen’s reasonable reliance point, which turns on the fact that Newcomer was asked to, and did, sign a representation to the lender that contradicted the oral representations he claimed to rely upon. Newcomer’s lack of reasonable reliance was demonstrated by his own testimony that any material change to the project terms should be put in writing and that, as he reviewed documents, he was alert to material

changes in the project terms. AOB 49, 51–52; *see* p. 26, *supra*; *see also* *Stewart v. Estate of Steiner*, 122 Wn. App. 258, 266 n.9, 93 P.3d 919 (2004) (rejecting the argument that “mere reliance, not *reasonable reliance*, on a misrepresentation or an omission is sufficient under the WSSA”) (emphasis in original).

Newcomer goes on to assert that “[n]othing in Exhibit 4 provides that Cohen or his entity . . . would receive additional benefit by the bank not also given to the other members” RB 39. But Cohen’s point has nothing to do with a “benefit” granted by the bank. The point is what information was provided to Newcomer—and vouched for by him to the bank—about what amount of future services could be deemed borrower equity in lieu of cash. Given that Newcomer claims to have believed that the initial contributions of all investors would be entirely in cash, his suggestion that he reasonably could have believed that the \$750,000 in deferred equity could be contributed equally by all the members is nonsensical and contrary to the record. It was undisputed that the only member who would provide services to Apex I was Cohen, through his separate company. *See* AOB 7–10.⁶

⁶ At trial, Newcomer sought to change the topic from what the documents he signed actually said to what he thought was appropriate. For instance, when cross-examined, he testified that he understood the documents to refer to credits against capital for work once (continued . . .)

IV.

NEWCOMER'S CLAIM REGARDING THE \$400,000 SERVICES CONTRACT WAS UNSUPPORTED BY THE EVIDENCE, IMMATERIAL, AND UNTIMELY.

Newcomer's approach to the \$400,000 services contract that he claims Cohen failed to disclose (RB 7–8, 27) warrants separate discussion, and in a different order than in the opening brief, because Newcomer's response is based entirely on a factual premise that defies the record: that Cohen took an undisclosed fee of \$400,000.

The written contract records an agreement that C&M, Cohen's construction company, would supervise the construction of Apex I, as the OI disclosed. Newcomer testified that when he first saw the written contract in 2013, he thought "Mike had agreed to pay Mike a \$400,000 consulting fee," and that "it look[ed]" like that was an additional, unauthorized fee. RP 472–73; AOB 38–39. But Newcomer had no basis for his testimony other than reviewing the document (RP 472–73), and he never even attempted to establish that any additional fee actually was paid

(. . . continued)

it was performed. *E.g.*, RP 526. But that conflicts with the documents, and Newcomer's testimony about his subjective beliefs has no bearing on what a reasonable investor who signed those documents would be on notice of. The documents state that the total amount of capital contributed would be approximately \$2 million, of which \$750,000 could be contributed in the form of services. Since those services had yet to be performed, no reasonable investor could read Exhibits 4 and 109 to provide that only fees for completed services could be credited to capital. *See pp. 28–29, supra*; AOB 31–33, 51–52.

beyond what the OI disclosed. Indeed, undisputed testimony demonstrated that *no additional fee was actually paid*. AOB 10, 52 (citing Ex. 40 at 4; RP 1007).

On appeal, Newcomer has transformed his argument into a contention that an “opportunity fee” *and* the related “contract” was not disclosed to him until 2014, in violation of the WSSA. RB 27. But this argument misstates the record insofar as it suggests that any Apex entity paid an additional fee to C&M beyond the authorized and disclosed construction fees. The record affirmatively shows that no such extra fee was paid. Newcomer’s own accounting expert did not identify any fees beyond the agreed-upon construction management fees. Accordingly, there could be no failure to disclose an extra fee because no such fee existed.

As Cohen explained in his opening brief, undisputed evidence showed that while the \$400,000 contract referred to compensating Cohen for delivering the Apex opportunity to the investors, the contract in fact documented the agreed-upon arrangement whereby C&M would provide services to Apex I in return for a management fee worth 10 percent of the hard costs of construction. *See* AOB 7, 9–10, 38–39, 52–53. The \$400,000 management fee was the only fee actually paid to C&M in connection with Phase I. RP 685, 1006–07. Indeed, an accounting that

Newcomer describes as “accurate” (RB 24) confirms that C&M was paid a total of \$400,000 in fees in connection with Phase I. Ex. 44.

Newcomer’s argument, then, is just as it was described in Cohen’s opening brief: a claim that this particular piece of paper, which included a reference to the agreed-upon \$400,000 fee as representing in part an “opportunity” fee, was material. This is a preposterous argument—so much so that Newcomer *does not argue in his brief that the services contract itself was material*. See RB 28–34. He focuses instead on the supposed “extra fee,” even though the record establishes that no such extra fee was paid.

V.

NEWCOMER DID NOT ESTABLISH DAMAGES.

The Court need reach this argument (and the ones that follow) only if it has not decided to reverse the judgment based on the arguments in Parts I through IV, *supra*.

Cohen’s opening brief established a further, independent ground for reversal: the award of rescissionary damages to Newcomer was error because Newcomer no longer owned the securities and could not tender them; and Newcomer failed to prove actual damages under the statutory damages formula applicable to plaintiffs who no longer own the securities

in question. AOB 56–61. The Court need decide only two points to conclude that the judgment must be reversed on this ground.

First, as Newcomer himself points out (RB 14 n.2), RCW 21.20.430 requires that the securities at issue be tendered to obtain rescissionary damages. But Newcomer failed to present any evidence of such a tender. There was, therefore, a complete failure of proof as to an essential element of a claim for rescissionary damages. Accordingly, Newcomer has failed to rebut Cohen’s point that the award of rescissionary damages was error. AOB 58. The rescissionary—*i.e.*, refund—measure of damages cannot apply in this case because Newcomer did not tender (*i.e.*, return) what he purchased. AOB 56–58.

Newcomer asserts—without any authority—that “[e]vidence of tender need not be filed with the trial court” (RB 14 n.2), a point that defies elementary principles of appellate review. He also claims, without citation to the evidentiary record, that he “properly tendered all securities he owned before judgment.” *Id.* No evidence supports this assertion, which therefore must be disregarded. This simple point renders moot the parties’ debate over whether Newcomer owned the securities in question because, even if he *did* own them, he still had to tender them to obtain rescissionary damages. If, as Newcomer now claims, he had the power to do so, he was required to establish the tender at trial.

Second, the award cannot be supported as an award of actual damages to a plaintiff who sold his securities. Such a plaintiff must demonstrate the value of the securities at the time of transfer in order to establish the statutory measure of damages, which is “the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.” RCW 21.20.430(1); AOB 57. Cohen pointed out that Newcomer did not establish the value of the securities on the date they were transferred. In response, Newcomer claims that the “actual price” he received for the securities—zero—is deemed the value of the securities, relying on *Garretson v. Red-Co, Inc.*, 9 Wn. App. 923, 929, 516 P.2d 1039 (1973). RB 48–50. But as Newcomer’s own brief establishes, that is only the case when the sale “establish[es] the existence of a market for the purpose of fixing . . . damages.” RB 49 (quoting *Garretson*, 9 Wn. App. at 929). Newcomer did not establish that he sold his securities in a market (or even in a private, arm’s length) transaction; instead, he exchanged his interest in Apex I for a roughly one-third interest in the improved Phase I real estate. RB 12, 49–50; AOB 12–13. He does not contest that he testified at trial that the real estate he received was worth the \$800,000 he initially invested in Apex I (RP 428–29; AOB 57), which means his damages were zero as to that security; the record contains no other

evidence from which damages could be calculated as to Apex I. There is no evidence of any sale of Newcomer's interest in Apex II or Newcomer TIC, and therefore no valuation of the securities on a date of sale. Accordingly, the statutory measure of damages for a plaintiff who sold securities cannot apply to those securities. Because Newcomer failed to prove his entitlement either to restitutionary damages or actual damages, the judgment must be reversed.

VI.

COHEN DID NOT VIOLATE THE WSSA IN CONNECTION WITH NEWCOMER'S 2008 AND 2009 CONTRIBUTIONS.

In the alternative,⁷ the opening brief demonstrated that, at the least, the judgment must be reduced because none of the three alleged misrepresentations or omissions were (1) material to investments made after 2006 or (2) made "in connection with" (RCW 21.20.010) Newcomer's 2008 and 2009 investments. *See* AOB 62–65. Newcomer fails to address Cohen's materiality argument substantively (as with so

⁷ As noted in the opening brief, the alternative arguments discussed here and in Part VII need not be reached if the Court agrees that the judgment must be reversed for any of the reasons discussed in the preceding sections. AOB 62.

many of Cohen's other arguments), again revealing that Newcomer has no good response. *See* RB 55–58.⁸

A. The Judgment Should Be Reduced Because Representations Made In 2005 Were Not Material To Investments Made In 2008 And 2009.

The opening brief explained that Cohen's deferred equity contribution and the no-interest loan were immaterial to Newcomer's investments in 2008 and 2009 because, by then, all of the services had been provided and the loan had been repaid. *See* AOB 62–63. By 2008, the previously "deferred" \$350,000 in fees was no longer for future work but represented work that had been performed, and Newcomer had no problem with the application of fees for *completed* work to Cohen's capital account. RP 335–36, 357. Accordingly, the claimed misrepresentation about Cohen's initial capital contribution application was not material to Newcomer's 2008 and 2009 contributions.

Newcomer argues that even if the claimed misrepresentations about Cohen's initial contribution were no longer pertinent, he would not have continued to invest had he learned about them. RB 56–57. But that assertion ignores the unanswerable point from Cohen's opening brief: "If

⁸ Newcomer cites cases discussing the standard of review for challenges to the amount of damages and to whether rescission is an appropriate remedy. RB 55. None of that has any pertinence to Cohen's argument based on a lack of materiality, which is a question of law.

an investor could invoke the WSSA for an otherwise immaterial misrepresentation by claiming that the misrepresentation impeached the promoter's honesty, then materiality would be written out of the statute." AOB 45.

Because the alleged misrepresentations and omissions were immaterial as to Newcomer's contributions in 2008 or thereafter, the judgment must at a minimum be reduced to eliminate a return to Newcomer of the investments he made in 2008 and 2009.

B. The Judgment Should Be Reduced For The Independent Reason That Misrepresentations And Omissions In 2005 And 2006 Were Not In Connection With Newcomer TIC Or Apex II.

Cohen demonstrated that Newcomer's 2008 and 2009 contributions were in connection with Newcomer's purchase of securities in two entities other than Apex I: Newcomer TIC and Apex II, and that none of the alleged misrepresentations or omissions in 2005 and 2006 were in connection with those entities. AOB 63-64.

In response, Newcomer contends that his 2009 contributions were to Newcomer TIC, not Apex II. RB 56. That is a distinction without a difference because he concedes he contributed funds to a different entity than Apex I. But he goes on to argue that nonetheless "the Apex project continued as a single project," apparently intending to suggest he

purchased securities only in Apex I. RB 56. But that is inconsistent with the record and with Newcomer's own contentions at trial.⁹

Newcomer's contention that his 2008 investment was a purchase of securities in Apex I, rather than Apex II, is impossible because Newcomer was not a member of Apex I at that time. AOB 12–13. It is immaterial that Newcomer wrote his 2008 check to Apex I because Apex I continued as Newcomer TIC's manager, giving it the authority to receive and transfer money on that entity's behalf. Ex. 13 §5.1; Ex. 15.

Newcomer cannot now complain that the individual character of these entities was a sham, when he neither sought such a finding below nor offered evidence to support this theory. Such a ruling would be particularly inappropriate in light of the undisputed facts showing that Newcomer intended to use the separate identities of the entities to his own advantage, if his investments yielded a return. *See Wilson v. Westinghouse Elec. Corp.*, 85 Wn.2d 78, 81, 530 P.2d 298 (1975) (equitable estoppel).

⁹ Newcomer's trial brief stated he purchased "investments in the form of membership in Apex [I]; Apex [II]; and Apex Penthouse Condos LLC." CP 758; *see also* AOB 12-13 (at Newcomer's request, he exchanged his interest in Apex I for an interest in Newcomer TIC).

Newcomer concludes his rebuttal by rehashing other points about materiality that have nothing to do with whether the 2005 and 2006 misrepresentations and omissions were in connection with his 2008 and 2009 purchases of securities in Newcomer TIC and Apex II. RB 57–58.

VII.

THE TRIAL COURT ERRED IN GRANTING JUDGMENT AGAINST JULIE MCBRIDE BECAUSE HER LIABILITY WAS NEVER PROPERLY BEFORE THE JURY.

The Opening Brief showed that neither the jury instructions nor the special verdict form named Ms. McBride as a co-defendant, and the court did not instruct the jury on the legal standard for finding community liability. AOB 65–67. In short, neither Newcomer nor the court asked the jury to find McBride liable for Cohen’s actions, and for that reason the trial court could not enter judgment against her. AOB 66 (quoting *Swenson v. Stoltz*, 36 Wash. 318, 324, 78 P. 999 (1904)). None of Newcomer’s three arguments distinguishes this case from *Swenson*.

Newcomer relies primarily on the presumption that obligations incurred during marriage are presumed to be for the benefit of the marital community. RB 58–60. McBride does not dispute that Washington law establishes such a presumption, and the jury could have been instructed on it *if* the issue of McBride’s liability for her husband’s torts had been raised at trial and submitted to the jury. But that did not happen. The

presumption (which is not conclusive) is therefore irrelevant. Because, as in *Swenson*, the jury “did not pass upon the subject, . . . the verdict contains no finding concerning it.” *Swenson*, 36 Wash. at 324.¹⁰

Newcomer’s attempts to distinguish this case from *Swenson* are feeble. RB 60–61. He points out that the answer admitted Cohen and McBride were “husband and wife,” but ignores the remainder of that paragraph “deny[ing] the remaining allegations” and the specific denial of his allegation that “all acts taken by Cohen were made for the benefit of the marital community.” Compare CP 12 ¶1.5 with CP 21 ¶1.5; see also *Swenson*, 36 Wash. at 324 (“The complaint alleges and the answer denies that the obligation was for the benefit of the community”).

Newcomer notes that part of the special verdict form uses the plural “defendants” (see CP 1660), but the caption of the special verdict form lists only Cohen’s name above the identification “Defendant(s).” CP 1659. Thus, reasonable jurors would presume that the continued use of

¹⁰ Newcomer insinuates that *Swenson* is distinguishable because it preceded Washington’s adoption of the presumption that an obligation incurred during marriage benefits the community. RB 60. This is factually incorrect. Several cases applying that presumption were decided before, and even cited by, *Swenson*. See, e.g., *McDonough v. Craig*, 10 Wash. 239, 244, 38 P. 1034 (1894). Newcomer’s own authorities rely on cases that pre-date *Swenson*. See *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn. App. 351, 353, 613 P.2d 169 (1980) (citing *Or. Improvement Co. v. Sagmeister*, 4 Wash. 710, 30 P. 1058 (1892)). In short, the *Swenson* court was familiar with the presumption on which Newcomer relies and reached its holding in spite of it.

the plural referred to Cohen—the only defendant named in the jury instructions or the special verdict form. *See Diaz v. State*, 175 Wash. 2d 457, 474, 285 P.3d 873 (2012) (jury is presumed to follow instructions). This discrepancy on the verdict form is insufficient to distinguish this case from *Swenson*; that case controls and requires reversal.

CONCLUSION

For the reasons set forth in Cohen’s opening brief and in Parts I through V above, the judgment should be reversed with directions to enter a defense judgment. Alternatively, for the reasons discussed in Part VI, the judgment should be reduced to \$1,941,516.01, the fee and cost award vacated, and the matter remanded for reconsideration of appropriate fees and costs.

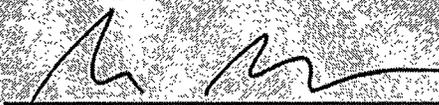
And, if the judgment is not reversed as to all Defendants for all the reasons set forth in Parts I through V, then it should be reversed as against Julie McBride and the marital community for reasons stated in Part VII.

DATED: October 14, 2016.

Respectfully,

ARNOLD & PORTER LLP
JEROME B. FALK, JR.
SEAN M. SELEGUE

By



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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on October 14, 2016 I did serve via electronic mail, true and correct copies of the foregoing by directing for delivery to the following counsel of record:

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Transmittal Letter

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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