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Division II
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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 50247-0-II

MICHAEL COHEN, et al.,

Appellants,

v.

WILLIAM NEWCOMER, et al.,

Respondents.

**REPLY BRIEF OF APPELLANTS MICHAEL COHEN, JANE DOE
COHEN, AND MC APEX, LLC**

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I. INTRODUCTION

Despite Respondents' attempts to distort the record, the contracts and securities at issue in this case were not at issue in *Newcomer I*. That case involved capital contributions to two different companies governed by two specific contracts. The securities at issue in *Newcomer I* were William Newcomer's investments in Apex Apartments, LLC (governed by the Apex Apartments, LLC Agreement) and Apex Apartments II, LLC (governed by the Apex Apartments II, LLC Agreement). CP 992 (requesting capital "contributions from Apex Apartments, LLC Members" in 2006); CP 1520-21 (alleging that "[r]elying on false information Plaintiff made capital contributions to Apex Apartments, II, LLC"). The only parties to that judgment were Mr. Cohen, Ms. McBride, and Mr. Newcomer. CP 898.

This case involves a post-judgment capital call issued by three different companies pursuant to three different contracts. CP 656-59. The securities at issue in this case are investments in Apex Apartments I TIC, LLC (governed by the Apex Apartments I TIC, LLC Agreement), Newcomer Apex I TIC, LLC (governed by the Newcomer Apex I TIC, LLC Agreement), and Apex Penthouse Condos, LLC (governed by the

Apex Penthouse Condos, LLC Agreement).¹ CP 191; CP 225; CP 454; CP 659. None of these contracts or these securities were at issue in *Newcomer I*. In addition to Mr. Cohen, Ms. McBride, and Mr. Newcomer, the parties to this case include two respondents, Eckstein Investments, LLC and RB&F Property Management, LLC, that were not parties to *Newcomer I*. Compare CP 64–65, with CP 898. The parties also include numerous Appellants that were not subject to the judgment in *Newcomer I*, including MC Apex LLC, AMC Family, LLC, Jess Thomsen, Inc., Ken Thomsen, Apex Apartments I TIC, LLC, Apex Penthouse Condos, LLC, and Newcomer Apex I TIC, LLC. CP 49.²

In their opening brief, Appellants Michael Cohen, Julie McBride (sued as “Jane Doe Cohen”), and MC Apex LLC showed that the Superior

¹ Mr. Newcomer is the sole member of Newcomer Apex I TIC, LLC, while respondents Eckstein Investments, LLC and RB&F Property Management are members of Apex Apartments I TIC, LLC. Although the Superior Court’s Decision and Order did not focus on Apex Apartments I TIC, LLC, the Eckstein Respondents’ joinder and supplemental brief seeks to expand, inappropriately, the Superior Court’s reasoning to their investments in that entity. For that reason, the Cohen Appellants also address Apex Apartments I TIC, LLC in this reply.

² Neither of the two contracts at issue in *Newcomer I* are applicable to the post-judgment capital call under dispute in this case. As Mr. Newcomer freely admits, he gave up all interest in Apex Apartments, LLC to create Newcomer Apex I TIC, LLC and obtain favorable tax treatment through a 1031 exchange. CP 627–28. The other entity at issue in *Newcomer I*—Apex Apartments II, LLC—is not a party to the post-judgment capital call (or a defendant in this case) because it was wound-up and dissolved without any losses after a third-party investment. CP 659.

Court's February 14, 2017 memorandum decision (the "Decision") and February 24, 2017 order (the "Order") suffer from five critical errors, each constituting sufficient reason to reverse and remand the Decision and Order below. First, the Superior Court committed reversible error by rescinding and voiding all of the relevant LLC agreements based on an incorrect belief that the jury verdict and judgment in *Newcomer I* awarded Mr. Newcomer the equitable remedy of rescission, rather than monetary damages. Second, the Superior Court committed reversible error by expanding the relief that Mr. Newcomer was awarded in *Newcomer I*, contrary to the rule of merger and bar. Third, the Superior Court committed reversible error by applying the judgment in *Newcomer I* against numerous third parties that were not part of that litigation. Fourth, the Superior Court committed reversible error by ruling on the basis of an affirmative defense that Mr. Newcomer waived by failing to comply with CR 8(c). Fifth, the Superior Court committed reversible error by expanding the scope of RCW 21.20.430(5) beyond the only two contracts that were subject to the securities claim in *Newcomer I*. Neither Mr. Newcomer's answering brief nor the joinder and supplemental brief by respondents Eckstein Investments, LLC and RB&F Property Management, LLC ("Eckstein Br.") provides sufficient reason to affirm the erroneous Decision and Order.

The Eckstein Respondents' attempt to extend the Superior Court's ruling to their own investments is patently insufficient, for the same reasons as the arguments raised by Mr. Newcomer. Moreover, it would be inappropriate for the Court to grant on appeal the additional summary judgment relief requested by the Eckstein Respondents, which they did not brief below. As a result, this Court should reverse and remand the Decision and Order.

II. REBUTTAL STATEMENT OF FACTS

The Court should disregard the numerous misstatements of the record in Respondents' briefs, which are missing many mandatory "references to relevant parts of the record." RAP 10.3(a)(6). Respondents' inability to cite the record is reason enough to reject their incorrect version of events. *City of Bremerton v. Sesko*, 100 Wn. App. 158, 162, 995 P.2d 1257 (2000).

Mr. Newcomer's pejorative statement that "[a] jury found Cohen committed securities fraud" is a distortion of the record designed to prejudice this Court against Mr. Cohen. Newcomer Br. at 5. Unlike a claim under Section § 10(b) of the Securities Exchange Act of 1934, WSSA is a regulatory statute based on a strict liability standard that "does not require scienter." *Wade v. Skipper's, Inc.*, 915 F.2d 1324, 1329 (9th Cir. 1990). While the jury in *Newcomer I* did find Mr. Cohen violated

WSSA, that is a far cry from intentional securities fraud under the federal securities statutes.³

Among other misstatements, Mr. Newcomer claims that the Apex development “enriched Cohen at the expense of all other investors.” Newcomer Br. at 5. Nonsense: the record confirms Mr. Cohen and his affiliated investment entities lost over \$4 million after the project struggled during the Great Recession. CP 656; CP 1764–69. In a second misstatement, Mr. Newcomer claims that he qualifies for rescission because the verdict and judgment in *Newcomer I* recognize that he “tendered his entire interest in all Apex Entities.” Newcomer Br. at 20. He relies on a letter that was never entered into evidence or presented to the jury in *Newcomer I*, so it would have been impossible for this letter to inform the verdict and judgment in that case. CP 1095; CP 1691 at n.2.

Likewise, the record contradicts the Eckstein Respondents’ assertion that “Mr. Cohen was a proponent of creating multiple entities throughout the life of the apartment development project and transferred assets between such entities for his administrative convenience.” Eckstein Br. at 1. In fact, it was Mr. Newcomer, not Mr. Cohen, who requested that the investments be restructured and the Phase I Property be transferred

³ *Newcomer I* is also the subject of a pending petition for review by the Washington Supreme Court, No. 48223-9-II (Aug. 28, 2017).

into a TIC so that he could qualify for tax benefits through a 1031 exchange. CP 627–28 at 31:13–32:14; CP 632 at 36:3–11. Similarly, it was the parties’ lender, not Mr. Cohen, who insisted that the second phase of the property be held by a separate entity that came to be known as Apex Apartments II, LLC. CP 857 at 964:15–19.⁴

Mr. Newcomer also misstates the record when he claims that all four of his capital contributions involved in *Newcomer I* “were made on behalf of Apex Apartments, LLC only.” Newcomer Br. at 4.⁵ In fact, Mr. Newcomer’s *Newcomer I* briefing conceded that his 2008 and 2009 investments were “capital contributions to Apex Apartments II, LLC (‘Apex II’)”—not Apex Apartments, LLC. CP 1520–21.⁶ Mr. Newcomer’s inconsistencies aside, there is no dispute that Mr. Newcomer’s capital contributions in 2005 and 2006, the earliest

⁴ For the convenience of the Court, the relationship between each of these entities is shown in a table attached hereto as Appendix A.

⁵ Mr. Newcomer’s misstatement could initially be explained by the fact that although he wrote his checks to Apex Apartments, LLC (manager for the other Apex entities), he had no personal knowledge about where these payments were booked. CP 1323 at 297:5–21. But, having seen the record repeatedly cited by Defendants in this action and related litigation, Mr. Newcomer’s repeated assertion of this misstatement in his appellate brief is puzzling at best.

⁶ In this same briefing, Mr. Newcomer also claimed that his 2006 capital contribution was an investment in Apex Apartments II, LLC. *Id.* That is not possible, because Apex Apartments II, LLC did not exist until March 10, 2008. CP 163. Rather, Mr. Newcomer’s 2006 capital contribution was an investment in Apex Apartments, LLC.

securities at issue in *Newcomer I*, were investments in Apex Apartments, LLC. However, the later securities at issue in *Newcomer I*, Mr. Newcomer's capital contributions in 2008 and 2009, were investments in Apex Apartments II, LLC. As Mr. Newcomer admits in his brief, he withdrew from Apex Apartments, LLC on March 5, 2008. *Newcomer Br.* at 3–4; CP 158. All of his subsequent monetary investments went to the new company, Apex Apartments II, LLC, created on March 10, 2008. CP 163.⁷

Not one of Mr. Newcomer's monetary contributions was invested in Apex Apartments I TIC, LLC, *Newcomer Apex I TIC, LLC*, or Apex Penthouse Condos, LLC. According to Mr. Newcomer himself, “[t]he original members of Apex Apartments, LLC did not make any new contributions for their interests in the TIC entities.” CP 1689; *see also* CP 1369 (admitting there was not “any initial capital call for *Newcomer Apex I TIC, LLC*”). Apex Penthouse Condos, LLC was not even created until February 1, 2011. CP 1064.

Mr. Newcomer is equally incorrect when claiming this case concerns the Appellants' attempt “to enforce a fifth capital call of Apex Apartments, LLC.” *Newcomer Br.* at 2. In fact, the capital call at issue in

⁷ However, Apex Apartments, LLC was not dissolved, and it became manager of *Newcomer Apex TIC, LLC* and *Apex Apartments I TIC, LLC*. CP 196; CP 230.

this case is the first and only capital call issued by three other entities: Newcomer Apex TIC, LLC, Apex Apartments I TIC, LLC, and Apex Penthouse Condos, LLC. CP 656–59. As explained in the capital call itself, Mr. Newcomer owes a \$943,195.39 contribution to Newcomer Apex TIC, LLC and a \$943,195.39 contribution to Apex Penthouse Condos, LLC. CP 659. The Eckstein Respondents each owe a \$153,563.13 contribution to Apex Apartments I TIC, LLC and a \$93,209.46 contribution to Apex Penthouse Condos, LLC. *Id.*

In addition to misstating which entities issued this capital call, Respondents repeatedly (and confusingly) ignore the distinctions between the unique securities, contracts, and defendants at issue in this case and in *Newcomer I*. In just the first two pages of Mr. Newcomer’s brief, he refers indiscriminately to unspecified “membership interests in LLCs,” Newcomer Br. at 1, “the very same LLCs,” *id.* at 1, “membership interest in the LLCs,” *id.* at 1, “the Apex entities,” *id.* at 1, “all Apex entities,” *id.* at 1, “two of the Apex Entities,” *id.* at 2, “Cohen and the Apex entities,” *id.* at 2, and “the Apex Entity LLC Agreements.” *Id.* at 2.⁸ This blurring

⁸ The Respondents’ attempt to avoid the differences between unique securities, contracts, and defendants continues throughout their briefs. *See, e.g.*, Newcomer Br. at 10 (“Apex through Cohen as manager, seek[s] review.”); *id.* at 11 (Newcomer “invest[ed] in the Apex Entities.”); *id.* at 11 (“Cohen controlled each and every Apex related LLC.”); *id.* at 13 (“[T]he

of the record obscures the unique roles, assets, and identities of the Apex entities. In fact, Respondents **must** ignore these distinctions to prevail, because the record contains no support, whether in the law or in the evidence, for their attempt to disregard bedrock principles regarding corporate form. Respondents never made any arguments or obtained any order—whether in this case or in *Newcomer I*—that could justify ignoring the foundational rule of corporate separateness, such as arguments about successor liability, alter ego, or corporate veil piercing. As such, there is nothing in the record to support the Superior Court’s conflation of the unique securities, contracts, and defendants in this case with those at issue in *Newcomer I*.

Just like Mr. Newcomer, the Eckstein Respondents pretend the entities, contracts, and securities at issue in *Newcomer I* are the same as the entities, contracts, and securities at issue before the Superior Court. *See, e.g.*, Eckstein Br. at 13 (“**the Apex Entities** is barred [sic]”) (emphasis added). However, they do not, and cannot, deny that not one of the Newcomer Apex TIC, LLC Agreement, the Apex Apartments I TIC, LLC Agreement, and the Apex Penthouse Condos, LLC Agreement was subject to the jury verdict and judgment in *Newcomer I*.

Cellular court prohibits enforcement of the LLC Agreements.”); *id.* at 13 (*Newcomer I* applied to “every single sale of securities.”).

III. ARGUMENT

Defendants' opening brief explained that the Superior Court committed reversible error by finding that the Apex Apartments, LLC Agreement was "rendered void and unenforceable" in *Newcomer I*, CP 2598, for numerous independent reasons: (a) the judgment in *Newcomer I* awarded Mr. Newcomer only damages, not rescission; (b) a plaintiff may obtain only rescission or damages under WSSA, not both; (c) the rule of merger bars Mr. Newcomer from using a second suit to obtain additional remedies for the same claim adjudicated in *Newcomer I*; and (d) rescission is an inappropriate remedy because it would adversely affect innocent third parties. The Superior Court also committed reversible error by applying the ruling in *Newcomer I*, which only involved the Apex Apartments, LLC Agreement and Apex Apartments II, LLC Agreement, to invalidate independent agreements—the Apex Apartments I TIC, LLC Agreement, Newcomer Apex I TIC, LLC Agreement, and Apex Penthouse Condos, LLC Agreement—that were not subject to the *Newcomer I* judgment. Respondents' arguments, like the incorrect reasoning of the Superior Court, fail to acknowledge these agreements were independent contracts governing unique securities sold by distinct entities.

Finally, the Superior Court erred by holding that RCW 21.20.430(5) makes every appellant unable to enforce Mr. Newcomer's

capital contribution obligations under the Apex Apartments I TIC, LLC Agreement, the Newcomer Apex TIC, LLC Agreement, and the Apex Penthouse Condos, LLC Agreement, because: (a) Mr. Newcomer failed to plead RCW 21.20.430(5) as an affirmative defense; (b) Mr. Newcomer submitted no evidence at summary judgment in this action that the three contracts at issue in this case violate WSSA; (c) the judgment in *Newcomer I* did not relate to these agreements or the distinct securities and companies at issue in this case; and (d) the affirmative defense in RCW 21.20.430(5) only bars suits by a party that violated WSSA—not the seven other appellants attempting to enforce their contractual rights against Mr. Newcomer.

A. **The Cohen Defendants’ Opening Brief Shows That Because Mr. Newcomer Received Damages in *Newcomer I*, Both WSSA and the Rule of Merger Bar the Superior Court from Providing Him an Additional Award of Rescission.**

The Cohen Defendants’ opening brief explained that because Mr. Newcomer received an award of damages in *Newcomer I*, both WSSA and the rule of the rule of merger prevent the Superior Court from granting him an additional award of rescission in this suit. The answering briefs by Mr. Newcomer, Eckstein Investments, LLC, and RB&F Property

Management, LLC do not present any reason to affirm the erroneous Decision and Order of the Superior Court.⁹

1. WSSA Allows a Plaintiff to Receive Rescission or Damages, But Not Both.

As the Cohen Defendants showed in their opening brief, the plain language of RCW 21.20.430(1) allows a plaintiff to recover rescission or damages, but not both. According to RCW 21.20.430(1), a plaintiff:

may sue either at law or in equity **to recover the consideration paid for the security, together with interest** at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, **upon the tender** of the security, **or for damages if he or she no longer owns the security.** Damages are 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.

Because the statute's plain language awards damages **or** rescission, the Superior Court erred in finding that "[t]he contract relative to the Apex

⁹ In his answering brief, Mr. Newcomer claims that RCW 21.20.430(5) applies regardless of whether he received rescission in *Newcomer I*. Newcomer Br. at 18. However, for the reasons shown in Section III.B, *infra*, RCW 21.20.430(5) does not allow Mr. Newcomer to avoid his capital call obligations. Because RCW 21.20.430(5) does not apply, and because Mr. Newcomer did not receive rescission in *Newcomer I*, the Superior Court erred in finding that "all transfers subsequent to the origination of Apex Apartments, LLC are void as a consequence of the securities action[, *Newcomer I*]." CP 2598.

Apartments LLC was rendered void and unenforceable” in *Newcomer I*. CP 2598. The jury verdict and judgment confirm that Mr. Newcomer was awarded monetary damages in that case, and not the equitable remedy of rescission. CP 1098, 1112 (“[J]udgment is entered ... in the total amount of \$4,060,987.46”). Neither the jury verdict nor judgment purport to void the Apex Apartments, LLC Agreement, let alone the LLC agreements governing numerous other entities that were not at issue in that case.

The fact that Mr. Newcomer was awarded monetary damages, rather than rescission, is also shown by his inability to tender the securities at issue in *Newcomer I* back to their original sellers—Apex Apartments, LLC and Apex Apartments II, LLC—because he had already conveyed the securities to another party.¹⁰ Although Mr. Newcomer claims he “tendered his entire interest in all Apex Entities,” *Newcomer Br.* at 20, he cites a letter that was never entered into evidence in *Newcomer I* and

¹⁰ Despite Mr. Newcomer’s arguments to the contrary, the doctrine of collateral estoppel is irrelevant to whether he tendered the securities at issue. *Newcomer Br.* at 21. In *Newcomer I*, the jury awarded Mr. Newcomer monetary damages, which RCW 21.20.430(1) provides when a plaintiff does not tender the relevant securities. Tender is not a prerequisite for monetary damages, so whether Mr. Newcomer tendered his securities was not “actually litigated” in the prior suit, which is a prerequisite for collateral estoppel to apply. *McDaniels v. Carlson*, 108 Wn.2d 299, 305, 738 P.2d 254 (1987).

therefore could not have had any role in the verdict and judgment in that case. CP 1095; CP 1691 at n.2.¹¹

In his answering brief, Mr. Newcomer claims that WSSA awards both rescission and “rescissory damages,” an alternate remedy defined as “the economic equivalent of rescission in a circumstance in which rescission is warranted, but not practicable.” *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 855 A.2d 1059, 1072 (Del. Ch.), *aff’d*, 840 A.2d 641 (Del. 2003); *see, e.g.*, Newcomer Br. at 19 (claiming it is “clear rescission was awarded” because *Newcomer I* “awarded Newcomer **recessionary damages** of \$2,309,552.”) (emphasis original). However, rescissory damages are entirely different from rescission. “Rescission is the unmaking of a contract.” *Kriegel v. Donelli*, No. 11 CIV. 9160 ER, 2014 WL 2936000, at *15 (S.D.N.Y. June 30, 2014). On the other hand, “[r]escissory damages, which are governed by restitution principles, seek to restore the reasonable value of any benefit conferred upon the defendant by the plaintiff.” *Id.* (citation omitted).

¹¹ Even if this letter had been part of the record before the jury, it shows Mr. Newcomer **did not** attempt to tender any interest in Newcomer Apex TIC, LLC, one of the companies now enforcing its independent capital call rights in this case. *Id.* Thus, regardless of whether Mr. Newcomer could have tendered his other securities, Newcomer Apex TIC, LLC never lost the right to enforce its capital call obligations against Mr. Newcomer.

Rescissory damages do not void a contract. Rather, “[r]escissory damages are an established remedy where rescission, the voiding of a contract, may not be a valid form of relief.” *Syncora Guarantee Inc. v. Countrywide Home Loans, Inc.*, 36 Misc.3d 328, 343, 935 N.Y.S.2d 858, 869 (Sup. Ct. 2012). Consistent with these longstanding principles of law, RCW 21.20.430(1) awards damages, not rescission, when a plaintiff “no longer owns the security,” because it would be impossible to award rescission. *See, e.g., In re Washington Public Power Supply System Sec. Litig.*, 650 F. Supp. 1346, 1355 (W.D. Wash. 1986) (awarding damages, instead of rescission, where it would be inappropriate to void the contract).

Although Mr. Newcomer omits unfavorable language and cherry-picks quotes out of context, all of his authorities correctly distinguish between the remedies of rescission and rescissory damages. *See Randall v. Loftsgaarden*, 478 U.S. 647, 655–56, 106 S.Ct. 3143 (1986) (The Securities Act of 1933, like WSSA, “prescribes the remedy of rescission **except where the plaintiff no longer owns the security.**”); *Go2Net, Inc. v. Freeyellow.com, Inc.*, 126 Wn. App. 769, 775, 109 P.3d 875 (2005), *aff’d*, 158 Wn.2d 247, 143 P.3d 590 (2006) (Rescission is only “[t]he sole remedy for a buyer **who still holds the security.**”); *Wigand v. Flo-Tek, Inc.*, 609 F.2d 1028, 1035 (2d Cir. 1979) (“If plaintiff no longer owns the stock, he is entitled to damages **but not rescission.**”). Because

Mr. Newcomer obtained damages in *Newcomer I*, he did not—and could not—obtain rescission.

2. The Rule of Merger Bars the Superior Court From Expanding the Remedies Awarded in *Newcomer I*.

Mr. Newcomer’s answering brief ignores—and therefore concedes—the Cohen Defendants’ argument that because Mr. Newcomer received a damages award in *Newcomer I*, the rule of merger and bar prevents the Superior Court from issuing an additional award of rescission, on the same claims, through this suit. *See Caine & Weiner v. Barker*, 42 Wn. App. 835, 837, 713 P.2d 1133 (1986). Mr. Newcomer’s attempt to obtain a rescission award in this suit, after obtaining a damages award in *Newcomer I*, is exactly what the rule of merger and bar is designed to prevent. Restatement (Second) of Judgments § 18 Judgment for Plaintiff—The General Rule of Merger (1982), Comment B, illustration 3. Mr. Newcomer has ignored and therefore conceded this dispositive argument. Even without more, this provides ample reason to reverse the erroneous Decision and Order of the Superior Court. *See, e.g., State v. E.A.J.*, 116 Wn. App. 777, 789, 67 P.3d 518 (2003) (“By its failure to address E.A.J.’s contention ..., the State apparently concedes the issue.”); *Oliver v. Ocwen Loan Servs., LLC*, No. C12–5374 BHS, 2012 WL 5207548, at *1 (W.D. Wash. Oct. 22, 2012) (“If a party fails to

respond to a portion of a motion, the Court may consider such failure as an admission that the motion has merit.”).

B. RCW 21.20.430(5) Does Not Allow Respondents to Avoid Their Capital-Call Obligations, Because They Did Not Plead This Affirmative Defense and It Does Not Apply to Contracts or Parties That Were Not Subject to *Newcomer I*.

Although Respondents attempt to confuse this Court about which contracts were at issue in *Newcomer I*, they do not deny that RCW 21.20.430(5) prohibits only a person who has violated WSSA from suing on “such contract” violating WSSA. This statute does not bar claims by innocent third parties enforcing their own rights under the same contract, and it does not bar claims relating to subsequent, valid contracts.

1. The Superior Court Should Not Have Awarded Mr. Newcomer Relief Under RCW 21.20.430(5) Because He Failed to Plead, and Therefore Waived, This Affirmative Defense.

In their opening brief, the Cohen Defendants showed that the Superior Court erred by allowing Mr. Newcomer to assert RCW 21.20.430(5) as an affirmative defense, providing just three business days and five pages for the Cohen Defendants to respond, without complying with CR 8(c). In his answering brief, Mr. Newcomer openly admits he failed to plead RCW 21.20.430(5) as an affirmative defense, arguing it is somehow **Defendants’** fault he did not assert this affirmative defense in the timely fashion required by CR 8(c). *Newcomer Br.* at 28. In fact, on

February 10, 2016, just days before the Superior Court's Decision and Order and the close of discovery, Mr. Newcomer moved for leave to plead an amended answer raising RCW 21.20.430 as an affirmative defense. CP 2736. The Court should reject Mr. Newcomer's attempt to shift blame through the doctrine of invited error, as Mr. Newcomer's belated attempt to file an amended answer confirms that the original was insufficient. *Id.*

Mr. Newcomer's answering brief misinterprets language in RCW 21.20.430(5) voiding "[a]ny condition, stipulation, or provision" waiving compliance with WSSA. Newcomer Br. at 27. That provision applies to private agreements seeking a release of claims under WSSA, not the civil rules for litigation. It does not trump the consequences of Mr. Newcomer's failure to comply with CR 8(c).

The Court should also reject Mr. Newcomer's argument that Defendants waived the protections of CR 8(c) because they "briefed and argued" this issue before the trial court. Newcomer Br. at 26. Rather than acquiesce to Mr. Newcomer's untimely affirmative defenses, the Cohen Defendants of course objected to his too-late attempt to raise "new arguments, never before pled, raised or briefed." CP 2491; *see also* CP 2891 (opposing Mr. Newcomer's motion for leave to amend); CP 2896 (same). It is clear the Cohen Defendants, after objecting at every relevant opportunity, "did not litigate the case in a way that could be construed as a

waiver of the affirmative defense requirement.” *Henderson v. Tyrrell*, 80 Wn. App. 592, 625, 910 P.2d 522 (1996). As a result, the Superior Court erred by allowing Mr. Newcomer to assert an affirmative defense that he waived through his failure to comply with the Civil Rules. *See, e.g., Harting v. Barton*, 101 Wn. App. 954, 962, 6 P.3d 91 (2000).

2. RCW 21.20.430(5) Does Not Allow Respondents to Avoid Contracts That Were Not at Issue in *Newcomer I*.

The Superior Court committed reversible error by allowing Respondents to assert RCW 21.20.430(5) as an affirmative defense against contracts there were not at issue in *Newcomer I*, misconstruing WSSA’s plain language. According to this provision:

No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder, or who has acquired any purported right under any **such contract** with knowledge of the facts by reason of which **its** making or performance was in violation, may base any suit **on the contract**.

Id. (emphasis added). The capital call at issue in this suit is not based “on the contract[s]” at issue in *Newcomer I*, which were the Apex Apartments, LLC Agreement and Apex Apartments II, LLC Agreement governing Mr. Newcomer’s purchase of securities between 2005 and 2009. *See* Section II, *supra*. RCW 21.20.430(5) is inapplicable because this proceeding concerns a post-judgment capital call under three **different**

contracts—the Apex Apartments I TIC, LLC Agreement, Newcomer Apex I TIC, LLC Agreement, and Apex Penthouse Condos, LLC Agreement—governing securities that were not at issue in *Newcomer I*. CP 656–59.¹²

The Respondents’ answering briefs completely ignore the ample authority explaining that parties may enforce subsequent, valid contracts even if a prior contract was illegal. *See, e.g., Brougham v. Swarva*, 34 Wn. App. 68, 80, 661 P.2d 138 (1983); *see also* Apex Br. at 41, 46 n.36. Rather than address this authority, Respondents rely on inapposite cases such as *Cellular Engineering Ltd. v. O’Neill*, 118 Wn.2d 16, 820 P.2d 941 (1991). In *O’Neill*, the Court refused to enforce a single contract because it violated WSSA. *Id.* Similarly, the Eckstein Respondents misconstrue *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386–87, 90 S.Ct. 616 (1970), which, in their own words, held that “contracts violating the securities act were void as to the parties **to the contract.**” Eckstein Br. at

¹² Mr. Newcomer’s arguments on this point, like all of the other arguments in his answering brief, can only prevail by ignoring clear distinctions between these discrete agreements. For example, while Mr. Newcomer argues “Cohen cannot base any suit on the contractual LLC Agreement,” he does not point to any evidence acknowledging **which** agreements governed the securities at issue in *Newcomer I*. Newcomer Br. at 13 (emphasis added). Similarly, the Eckstein Respondents claim RCW 21.20.430(5) bars all of “the Apex Entities from basing any suit on the Apex Entities’ Operating Agreements,” without acknowledging that only the Apex Apartments, LLC Agreement and Apex Apartments II, LLC Agreement were subject to the verdict and judgment in *Newcomer I*. Eckstein Br. at 7.

13 (emphasis added). By contrast, the Superior Court’s erroneous Decision and Order in this case invalidated numerous independent contracts that were not disputed in *Newcomer I*.¹³

There is also no merit to Respondents’ argument that RCW 21.20.430(5) prevents Defendants from enforcing any contract because “each and every Apex related LLC ... ‘acquired’ the ‘purported right’ to capital calls with knowledge of Cohen’s fraud.” *Newcomer Br.* at 11; *see also Eckstein Br.* at 11–12.¹⁴ By its plain terms, RCW 21.20.430(5) applies only to a successor “who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation.”¹⁵ The reference to “such contract” means a successor is barred from enforcing only the same

¹³ RCW 21.20.430(5) says nothing about *other* contracts entered after violating WSSA, nor could it, because a party does not lose the right to enforce all contracts, no matter the topic, after a WSSA violation.

¹⁴ As a threshold matter, the Court should entirely disregard this argument because Respondents failed to raise it before the Superior Court. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011) (“[A] party’s failure to raise an issue at trial waives the issue on appeal.”); *see also Eckstein Br.* at 6 (“[A]ppellate courts will consider only evidence and issues called to the attention of the trial court.”) (citation omitted).

¹⁵ The Legislature’s decision to limit RCW 21.20.430(5) to a successor “with knowledge” of a violation confirms that the statute does not automatically rescind every contract that violates WSSA. By extension, a successor without knowledge of a violation must be able to enforce its rights regarding “such contract.” *Id.*

contract violating WSSA.¹⁶ Or, as stated by Mr. Newcomer, RCW 21.20.430(5) applies only to the “offending contract.” Newcomer Br. at 11. Because the securities in this case are governed by entirely different contracts than the securities in *Newcomer I*, the Superior Court committed reversible error by applying RCW 21.20.430(5) to this dispute.

3. RCW 21.20.430(5) Does Not Prevent Innocent Parties From Enforcing Their Capital-Call Rights Against Mr. Newcomer.

The Cohen Defendants’ opening brief showed that in voiding LLC agreements that were not used to issue the securities in *Newcomer I*, the Superior Court prejudiced innocent third parties that were not subject to the prior judgment. Under the correct interpretation of RCW 21.20.430(5), the Apex Apartment, LLC Agreement is not voided as to everybody; it is rendered unenforceable by only Mr. Cohen personally against Mr. Newcomer, because they were the only parties to the *Newcomer I* judgment. Mr. Newcomer attempts to hide the unfair impact of the Decision and Order by claiming the Superior Court’s ruling voids the relevant contracts “as to Newcomer only.” Newcomer Br. at 24. Of

¹⁶ Despite the unsupported assertions by the Eckstein Respondents, there is no evidence or ruling stating that any corporate entity “acquired any purported right under any such contract” from Mr. Cohen. Because the Superior Court has never ruled on whether the Apex defendants are a successor of Mr. Cohen, that question is outside this Court’s jurisdiction on review. RAP 2.4(a).

course, even voiding the agreements for “Newcomer only” allows him to avoid liability to all of the innocent third parties with contractual rights against Mr. Newcomer.¹⁷ This is precisely why rescission is not awarded when it would impact an “innocent third party’s intervening rights.” *Yount v. Indianola Beach Estates, Inc.*, 63 Wn.2d 519, 525, 387 P.2d 975 (1964).¹⁸

There is no support in the record or the law for the Eckstein Respondents’ attempt to expand the Superior Court’s interpretation of RCW 21.20.430(5) into a judgment in their favor as well. As a matter of due process and fairness, there is no reason for this Court to rule in favor of the Eckstein Respondents based on the undeveloped record below. The

¹⁷ Rescinding all of Mr. Newcomer’s contracts would lead to numerous unanticipated negative consequences for all the lenders, residents, and other nonparties involved in this \$26.5 million real estate development. *See* Apex Br. at 9–15. Recognizing the vast problems that can result from unwinding a complex commercial reorganization, the Delaware Court of Chancery found that “many problems would arise and all would have to be resolved in plaintiff’s favor before the court could even try to ‘unscramble’ the sale of assets omelet.” *Cottrell v. Pawcatuck Co.*, 34 Del. Ch. 528, 532, 106 A.2d 709, 711 (1954).

¹⁸ Mr. Newcomer also argues, in the alternative, that this Court should affirm the Decision and Order based on the language in the relevant LLC agreements. However, the Superior Court has not ruled on the scope of the LLC agreements, which is a matter for the trial court to decide in the first instance. *See* RAP 2.4(a). Even the Eckstein Respondents admit that “any obligation for members of the Apex Entities to make an additional capital contribution is an undecided issue and, if this case were remanded, would remain in dispute for trial.” Eckstein Br. at 14.

Eckstein Respondents have separately filed their own litigation against the Cohen Defendants, which is currently pending as Pierce County Superior Court No. 17-2-04595-6. The parties to that case are in the midst of discovery, and this Court should wait for the trial court to develop the record rather than extend the erroneous decision of the Superior Court.

Moreover, issuing a judgment to the Eckstein Respondents would violate RAP 2.4. A Court “will grant a respondent affirmative relief by modifying the decision which is the subject matter of the review only (1) if the respondent also seeks review of the decision by the timely filing of a notice of appeal or a notice of discretionary review, or (2) if demanded by the necessities of the case.” The Eckstein Respondents have not even attempted to fulfill this rule’s requirements.¹⁹

¹⁹ Mr. Newcomer also claims, for the first time, that regardless of RCW 21.20.430(5), the LLC contracts are voidable and induced by fraud. This argument was not raised below, and “appellate courts will consider only evidence and issues called to the attention of the trial court.” Eckstein Br. at 6 (citation omitted). While this argument is outside the scope of this appeal defined by RAP 24, this doctrine also refers to common law fraud, not the statutory WSSA claims at issue in *Newcomer I*.

IV. CONCLUSION

For the reasons set forth herein and in the Appellants' opening briefs, this Court should reverse the Superior Court's February 14, 2017 memorandum decision and its accompanying February 24, 2017 order.²⁰

Respectfully submitted this 1st day of December, 2017.

DLA PIPER LLP (US)

/s/ Andrew R. Escobar

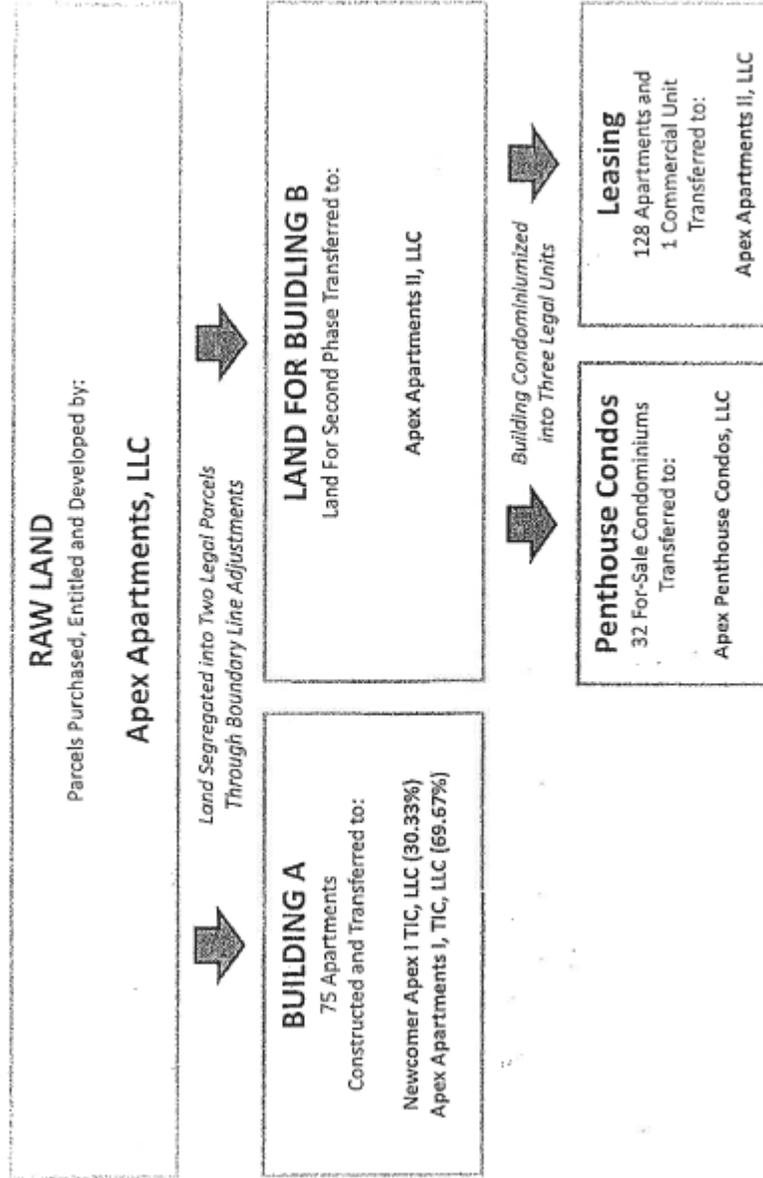
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²⁰ Consistent with RAP 18.1, the Court should also award Appellants the fees and costs incurred in this appeal. Because the Respondents' arguments are unavailing, there is no basis for an award of fees and costs to those parties.

APPENDIX A

PROJECT DEVELOPMENT PHASES
& DISTRIBUTION OF ASSETS INTO SINGLE-PURPOSE ENTITIES



CERTIFICATE OF SERVICE

I declare that on December 1, 2017, I caused a true and correct copy of the foregoing to be served on the following in the manner indicated:

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

Dated this 1st day of December, 2017.

/s/ Andrew R. Escobar
 Andrew R. Escobar, WSBA No. 42793

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DLA PIPER LLP (US)

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