

FILED

OCT 19 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By: \_\_\_\_\_

No. 291413

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IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION III

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SHOU SHIA WANG, *et al.*  
Respondents,

v.

TA CHI, INC., *et al.*  
Appellants.

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**APPELLANTS' BRIEF**

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Bradford J. Axel (WSBA #29269)  
Shelley M. Hall (WSBA #28586)  
Sarah L. Wixson (WSBA #28423)  
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Attorneys for Appellants Ta Chi, Inc.  
and Lotus Fruit Packing, Inc.

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## I. INTRODUCTION

Trust is the foundation of many relationships in our modern economy. Shareholders trust officers to manage their company, investors trust advisers to handle their money, and home owners trust agents to sell their homes. With this trust comes fiduciary responsibility. Justice Cardozo summed it up best when he wrote:

Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.

*Meinhard v. Salmon*, 249 N.Y. 458, 464, 164 N.E. 545, 546, 62 A.L.R. 1 (1928) (citation omitted). The courts of this state also have been careful to prevent the erosion of fiduciary duties. "Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd." *Kane v. Klos*, 50 Wn.2d. 778, 784, 314 P.2d 672 (1957).

The story of this case is far too common. Bound by a common religion, culture, and language, Ta Chi and Lotus' shareholders trusted Shou Shia Wang ("Wang") for many years and with a large amount of money, most of it invested at her recommendation. Wang betrayed their trust and placed her interests above those of Ta Chi and Lotus. There

were secret accounts, secret loans, secret lawsuits, secret entities, and secret payments. The trial court entered judgments against Wang and her entities for many of her breaches, but it also misapplied the law in several respects and made several unsupported findings which impacted its analysis. Ta Chi and Lotus appeal those errors.

## **II. ASSIGNMENTS OF ERROR & RELATED ISSUES**

1. The trial court erred in finding that Wang's secret loans to Ta Chi were not temporary demand loans for purposes of determining when the statute of limitations began to run. (Finding 85 (CP 1785); Conclusion 197 (CP 1797))

2. The trial court erred in finding that Ta Chi's use of borrowed money prevented it from relying on the statute of limitations defense. (Conclusion 198 (CP 1797))

3. The trial court erred in finding that Ta Chi ratified loans when Wang lied to Ta Chi about who the loans were from. (Findings 82, 86 (CP 1780-81); Conclusions 199-200 (CP 1797))

4. The trial court erred in concluding that a principal could ratify a transaction with its fiduciary while the fiduciary concealed that she was a party to the transaction.

5. The trial court erred by concluding that an agent could extend the statute of limitations on claims against her principal, while concealing from the principal the fact that her claims existed.

6. The trial court erred in finding that Wang did not have a personal financial interest in Ta Chi and Lotus buying and improving the Jong Seng facility and the apple line. (Findings 174-176 (CP 1794))

7. The trial court erred in concluding that rescission was the only equitable remedy that could be used to return Ta Chi and Lotus to the position they occupied prior to following Wang's self-interested advice.

8. The trial court erred in finding that Ta Chi first requested rescission of the Jong Seng transaction in December 2009. (Findings 30-31, 162 (CP 1772, 1792); Conclusion 209 (CP 1798))

9. The trial court erred in finding that Wang was not Ta Chi's agent for purposes of the transaction with Jong Seng. (Conclusion 207 (CP 1798))

10. The trial court erred in allowing parol evidence to contradict Jong Seng's express written promise to deliver 18,000 apple bins to Ta Chi. (Finding 163 (CP 1792))

11. The trial court erred by finding that Ta Chi was not damaged by Jong Seng's failure to deliver 18,000 apple bins. (Finding 165 (CP 1793))

12. The trial court erred by not measuring Ta Chi's damages as the market value of 18,000 apple bins.

13. The trial court erred by not reaching the question whether Wang and Fugachee were liable for Jong Seng's breach of contract.

14. The trial court erred by refusing to admit properly designated deposition testimony when it contained admissions of party opponents.

15. The trial court erred in finding that Wang and her entities did not divert apple handling revenue that was earned by Lotus prior to October 28, 2007. (Finding 190 (CP 1796))

16. The trial court erred in finding that Ta Chi knew that Wang was paying her Ta Chi management fee to Fugachee and that she made \$7,000 a month management fee from Fugachee. (Findings 43, 44 (CP 1774-75))

17. The trial court erred in concluding that Wang's breaches of loyalty did not provide a basis for the disgorgement of her management fee. (Finding 179 (CP 1794); Conclusion 215 (CP 1799))

18. The trial court erred in finding that there was no factual basis for Ta Chi to recover its payments to Summer Fruit in 2005, 2006, and 2007. (Findings 179, 189 (CP 1794, 1796))

19. The trial court erred by not awarding Ta Chi both the loss it sustained from the 2005 to 2007 Summer Fruit transactions and the benefit Wang and Summer Fruit received.

20. The trial court erred in implicitly finding that Ta Chi did not suffer a loss from Summer Fruit's handling of its apples in 2006.

21. The trial court erred in implicitly finding that Ta Chi did not suffer a loss from Wang's manipulation of grower returns in 2005 when it was her burden to prove why the reductions occurred.

22. The court erred in not awarding Ta Chi and Lotus their attorneys fees on their successful claims against Wang for breach of her duty of loyalty. (Conclusion 222 (CP 1800))

### **III. STATEMENT OF THE CASE**

Ta Chi exists because of a trip that the Buddhist Master Xin Tien ("Master") took to Wenatchee in the summer of 2001. During that trip, Wang showed the Master what would later become the Ta Chi orchard. (CP 1772-73 at ¶ 33-37). The Master asked Wang to negotiate the purchase of the orchard and to become its manager. (CP 1773-74 at ¶ 37, 39) He asked his long time friend Chung Guang Shen ("Mr. Shen"), who lived and worked in Taiwan and who had no experience in the tree fruit industry, to raise money for the acquisition, which Mr. Shen agreed to do. (CP 1773-74 at ¶ 38) A portion of the orchard's profit was to go to the

Master's temple in Seattle. (CP 1773 at ¶ 36) Ta Chi was formed in 2001, with Mr. Shen as president and Wang as manager, registered agent, and secretary. (RP 827-828, CP 1771 at ¶ 23, CP 1776 at ¶ 48)

Wang prepared an orchard development plan and later in 2006 a plan for entering the packing and storage business. (CP 1774 at ¶¶ 40-41, CP 1782 at ¶ 94; Ex. 112) Over the next six years — based on Wang's representations — Mr. Shen, his wife Li-Chu Feng ("Mrs. Shen" or "Judy"), their friends, and other followers of the Master invested roughly \$13 million in Ta Chi and its subsidiary Lotus Fruit Packing, Inc. ("Lotus"). (CP 1775 at ¶ 45; RP 432, 831-833, 1450-1452; Exs. 345-5, 358). None had experience in the tree fruit industry. (CP 1775 at ¶ 45) Almost all lived outside Washington. Wang was asked to invest at least twice but never became a shareholder, citing a lack of funds. (RP 872-874; 904-906; CP 5, 26).

But as Ta Chi's manager, Wang "was given *carte blanche* authority to do most anything that she felt was in [Ta Chi's] best interest," both financially and operationally. (CP 1775 at ¶ 46) She had discretion to spend Ta Chi's money as she saw fit. (*Id.*) She prepared Ta Chi's budgets, borrowed money on its behalf, set up its bank accounts, and kept its financial records. (CP 1775 at ¶ 46; Exs. 166-168) She also decided what to plant, when to harvest, and where to pack and sell Ta Chi's fruit.

(CP 1775 at ¶ 46) Wang's financial and operational control lasted from 2001 to October 2007.<sup>1</sup> (CP 1771 at ¶ 25, CP 1784 at ¶ 102) Although she frequently requested more money from the shareholders, she provided little in the way of detailed accounting records or tax return information to Ta Chi's officers and directors. (RP 487-488) Wang's *modus operandi* was that if specific information was not requested, it was not provided. (RP 417) But when Ta Chi's shareholders did request more information about its day-to-day operations in 2007, Wang bristled at the oversight. (CP 1788 at ¶ 133; Ex. 124)

Ta Chi paid Wang a management fee of \$3,000 per month. (RP 432-433) Over the course of her agency, these fees totaled \$207,000 (RP 1343-1345; Ex. 160(N)) However, instead of keeping the fee for herself, Wang paid the fee to Fugachee without Ta Chi's knowledge. (RP 433; CP 1426-1427).<sup>2</sup> After Lotus was formed in 2006, Wang also received a management fee from it. (Ex. 160(CC))

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<sup>1</sup> In addition to her management duties, Wang was also an officer for a time (CP 1776 at ¶ 48). Between 2001 and 2007, she signed Ta Chi's bylaws (Ex. 235), stock subscription agreements (Ex. 232), stock certificates (Ex. 249), and tax returns (Ex. 246), all as secretary of the corporation. (CP 1776 at ¶ 51)

<sup>2</sup> The Court found that Ta Chi and Wang agreed that the management fee would be paid to Fugachee. (CP 1774-75 at ¶¶ 43-44) That finding was not supported by substantial evidence. Wang admitted that she never told Ta Chi that she was paying her management fee to Fugachee. (RP 139-140, 433; CP 1426-1427)

Wang was a fiduciary of both Ta Chi and Lotus. (CP 1775 at ¶ 46; CP 1784 at ¶ 102; CP 1788 at ¶¶ 132-133; CP 1797 at ¶ 201; CP 1798 at ¶ 210)

**A. Wang's Entities Benefit from Ta Chi's Growth**

By the time she began managing Ta Chi in 2001, Wang already had over 20 years experience in the tree fruit industry. (CP 1769 at ¶ 14) She gained her experience through her close association with five brothers who lived in Taiwan and owned fruit importing business there. (RP 47-54) These brothers (the "Wang Brothers") have owned Fugachee Orchard since the 1990s and Jong Seng Cold Storage LLC since 2001.

During her management of Ta Chi and Lotus, Wang owned at least five entities involved in the tree fruit business: (1) Fugachee Orchard Partnership ("Fugachee"), a 570-acre apple orchard; (2) Jong Seng Cold Storage LLC ("Jong Seng"), a controlled atmosphere storage facility; (3) Summer Fruit Packers, Inc. ("Summer Fruit"), a cherry packer; (4) Standard Fruits, Inc. ("Standard"), an export company; and WLH Group U.S.A., Inc. ("WLH"), a second export company. (CP 1769-70 at ¶¶ 14-21; CP 1482) These entities generated substantial income for Wang. In 2006 Wang received \$84,000 from Fugachee, \$99,600 from Standard, and \$91,400 from WLH, just in salary. (Exs. 285, 292, and 300). Once she became Ta Chi's manager, and without disclosing her financial interest,

Wang arranged for her entities to store and market Ta Chi's fruit.

(Exs. 195 and 160(C)-(K); CP 1795 at ¶¶ 185-188) Later she formed Summer Fruit to pack Ta Chi's cherries. (RP 645; CP 1482)

While Ta Chi knew that Wang managed Fugachee's orchard (RP 432, 889) it did not know that she owned WLH, Standard, or Summer Fruit or that her entities were profiting from Ta Chi's production. (CP 1793 at ¶ 166; CP 1795 at ¶ 186; CP 1404)

Before the orchard was purchased Wang proposed a 90-acre orchard for \$2 million. (CP 1774 at ¶ 40) After Ta Chi had been formed and the orchard purchased, Wang proposed 350 acre orchard at a cost of \$5 million. (CP 1774 at ¶ 41) Because her entities made money from storing, packing, and exporting Ta Chi's fruit, Wang admitted to a personal interest in expanding Ta Chi's acreage. (CP 1384-1385)

**B. Wang Conceals the Highland Lease and Lawsuit**

In April 2002 Wang leased a 30-acre orchard from the Highland Partnership in Ta Chi's name and opened a secret bank account for the orchard's expenses and revenues, keeping them off Ta Chi's tax returns and accounting records. (CP 1789 at ¶¶ 136-138); RP 471-472; Exs. 204-205) The Highland orchard produced over 300 bins of Fuji apples in 2002, which Wang did not report to Ta Chi. (CP 1789 at ¶ 139; Exs. 166 and 212) Instead, she sold the apples using her entities (Ex. 226),

deposited the revenue into the Highland account (CP 1789-90 at ¶ 143), and later withdrew all the proceeds for herself. (Ex. 210; RP 476) Wang made a \$12,311 profit from the Highland orchard. (CP 1789 at ¶ 140; RP 1323-1327)

Ta Chi did not fare so well.

The Highland Partnership sued Ta Chi in September 2003, claiming that its trees had been damaged during the lease term. (Exs. 213 and 216) Wang concealed the *Highland* lawsuit from Ta Chi's officers and directors, but she had the litigation expenses paid with Ta Chi funds. (CP 1789-90 at ¶¶ 142-147; RP 471; Exs. 218, 220 and 160(P)). Wang then concealed the litigation expenses on her year end report to Ta Chi's shareholders.<sup>3</sup> The trial court found that Wang breached her fiduciary duty with respect to the Highland lease and lawsuit and awarded Ta Chi the litigation costs that it incurred in the lawsuit and the profit that Wang made from the lease. (CP 1797-98 at ¶¶ 203-206)

### **C. Wang Secretly Loans Money to Ta Chi**

Wang had authority to borrow money on Ta Chi's behalf (CP 1775 at ¶ 46; CP 1797 at ¶ 201), and on several occasions she worked directly with commercial banks to obtain loans for Ta Chi. (CP 1782 at ¶ 94; RP

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<sup>3</sup> In 2005 Ta Chi spent over \$90,000 in legal fees on the *Highland* case (Exs. 160(P) and 218), but Wang reported only \$28,752 in legal fees for 2005 in her report to shareholders. (Ex. 167)

645-646; 953; Exs. 120, 148, 157) In 2002 — to finance the expansion of the orchard — Wang began secretly loaning her own money to Ta Chi.<sup>4</sup> (CP 1776-77 at ¶ 52; CP 1779 at ¶ 69; CP 1781 at ¶ 87). None of Wang’s loans was evidenced by a promissory note or other written agreement. (CP 1779 at ¶ 68; RP 532; CP 1379) While Wang told Ta Chi after the fact that money had been borrowed (CP 1782 at ¶ 90), she concealed her identity as lender. (CP 1776-77 at ¶ 52) Indeed, Wang went so far as to tell Ta Chi that the loans were from individuals in Taiwan and to record them as such in Ta Chi’s financial records. (CP 1776-77 at ¶ 52; Ex. 105; RP 495-496, 504-508) But in her personal financial statements, Wang recorded the loans as being her assets. (RP 529-532; Ex. 304).

Wang continued this deception during the entire period of her management. In the *Highland* lawsuit, she concealed the loans by submitting false interrogatory answers. (Ex. 215) And at a 2007 Ta Chi shareholders meeting, she “continued to misrepresent that the loans were from third parties.” (CP 1781 at ¶ 87; Ex. 118) Because she intentionally concealed her identity as lender (CP 1776-77 at ¶ 52), Ta Chi did not discover that Wang had actually loaned it money until she sued the company January 2008. (CP 1779 at ¶ 69)

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<sup>4</sup> Exhibit 160(M) summarizes the loans from Wang to Ta Chi and the secret principal and interest payments that she made to herself.

Wang's transfers to Ta Chi were demand loans. (CP 1797 at ¶ 196, RP 508; Ex. 304). And in her only communications to Ta Chi about when the loans were due, Wang told Ta Chi that they were temporary and needed to be repaid whenever the creditors demanded. (CP 1779 at ¶ 70; Exs. 103 and 105)

For five years, Wang unilaterally determined the interest rate on her loans and when payments would be made. (RP 533-534; CP 1380-1381, 1386-1387) Between 2002 and 2007, Wang secretly paid herself over \$380,000 in principal and interest. (RP 533-538; CP 1386-1387; Ex. 160(M), 162, and 164).

These payments typically followed cash infusions by shareholders. For instance, on December 30, 2003, Mr. and Mrs. Shen deposited \$30,000 into Ta Chi's account, and the same day Wang paid herself \$25,575 in interest. (Exs. 160(M), 345-1; RP 1346-1347)

**D. Wang Forms Summer Fruit to Pack Ta Chi's Fruit**

Wang formed Summer Fruit in late 2004 to pack Ta Chi's cherries (RP 566; CP 1769-70 at ¶¶ 16-17). Its principal asset was a cherry line purchased for roughly \$400,000. (RP 762; Exs. 176, 179, 278) Wang concealed her ownership of Summer Fruit from Ta Chi and Lotus for the next three years. (CP 1784-86 at ¶¶ 103-114; Exs. 112, 125, and 126).

Wang estimated that Summer Fruit made a \$2 profit per box of cherries it packed. (RP 585, 680; Ex. 180)

In 2005 Wang had Ta Chi pay Summer Fruit \$39,271 for packing 4,574 boxes of cherries, or \$8.58 per box. (Exs. 160(C), 179, 195, 198; RP 296-297, 1371). Ta Chi's 2005 crop consisted of Lapin, Bing, Skeena, and Rainer cherries. (Ex. 198) That year it received a final grower return of \$28,613 from Summer Fruit for 886 Lapin cherries (Ex. 198), but Summer Fruit's initial grower statements showed that Ta Chi was due \$37,989 for 1174 boxes. (Ex. 201, p. WANG 12927) Similarly, the final Bing cherry return was \$38,704, but an initial report showed that Ta Chi should have received \$47,575. (Exs. 198 and 199) At trial, Wang could not recall why Summer Fruit reduced the return to Ta Chi. (RP 572-575).

In 2006 Wang had Ta Chi pay Summer Fruit \$166,949 for packing 7,473 boxes of cherries, \$22.34 per box. (Exs. 179, 160(C), 160(H); RP 1371). Also in 2006 Wang had Summer Fruit "handle" a portion of Ta Chi's Pink Lady and Fuji apple crops. (RP 586-597). According to Wang, "handling" included storing the apples before packing, receiving orders from marketers, arranging for the apples to be packed, and palletizing and shipping the packed apples. (RP 588-592). Wang had roughly half of Ta Chi's Pink Lady and Fuji crop "handled" by Summer Fruit and the other half packed and sold by McDougalls. (RP 596-598)

Ta Chi received a net return of \$322 per bin from the Pink Lady apples packed and sold by McDougalls but only \$129 per bin from the Pink Ladies handled by Summer Fruit. (RP 596-602, 1380-1387; Exs. 160(H), 197, and 309 at TC 1559; CP 1484) Similarly, Ta Chi received \$230 per bin for the Fuji apples packed and sold by McDougalls and only \$131 per bin for those handled by Summer Fruit. (Exs 197 and 309 at p. TC 1555) Had Ta Chi received the McDougalls returns for all its bins of Fujis and Pink Ladies, it would have received \$65,516 more in 2006. (RP 1380-1384; Ex. 160(H), 202, 309; CP 1484)

**E. Wang Recommends that Ta Chi Enter the Packing Business**

In April 2006 Wang proposed that Ta Chi vertically integrate into the fruit packing and storage business. (RP 673-675; CP 1772 at ¶ 28; CP 1782 at ¶ 94) Specifically, she recommended that Ta Chi:

- (1) purchase Jong Seng's storage facility;
- (2) expand the facility to house several packing lines;
- (3) buy a new apple packing line; and
- (4) purchase Summer Fruit's cherry line. (Ex. 112; RP 673)

According to Wang, these four steps only made sense if they were taken together. (Ex. 112; RP 656-657; CP 1447-1448) Over the next 18 months, Ta Chi and Lotus spent roughly \$8 million following Wang's advice. (CP 1485; Exs. 160(R)-(W) and 358; RP 1450-1451) Lotus was

formed in September 2006 to be the entity that would operate the packing business. (CP 1783 at ¶ 99; Ex. 250) Ta Chi was Lotus' majority shareholder and the remaining interest was owned by Tung-Cheng Wu, who invested \$1 million of his own money in Lotus. (Ex. 358) As with Ta Chi, Wang controlled Lotus' finances and operations from September 2006 through late October 2007. (CP 1784 at ¶ 102)

1. Purchase of the Jong Seng Facility (\$2.5 million)

In her April 2006 letter, Wang told Ta Chi that the "Wang brothers" wanted to sell the Jong Seng facility and that she believed that purchasing it was "a very good opportunity for Ta Chi Orchard." (Ex. 112) Wang also had Ta Chi look at a facility owned by Chelan Fruit. (CP 1782 at ¶ 94; Exs. 113, 189, 190, 192) But in the end, she recommended that Ta Chi buy the Jong Seng facility. (RP 893-895)

Wang admitted that Ta Chi trusted her advice about which facility to purchase (RP 703), and she claimed to be acting in Ta Chi's best interest. (RP 700) Although Ta Chi knew that Wang represented the Wang Brothers, it also considered Wang to be its representative. (RP 889-890, 902-903; Exs. 112, 113, 148)

Ta Chi and Jong Seng signed a purchase agreement in March 2007. (Ex. 183; RP 901-902) In the agreement, Jong Seng promised to transfer its real property, two forklifts, and 18,000 apple bins to Ta Chi for \$2.5

million. (Ex. 183) Wang testified that the promise to deliver the 18,000 bins was only included in the agreement to satisfy the bank. (RP 359-360) Mrs. Shen testified that she and Wang never discussed the bin provision. (RP 901-902)

Ta Chi had to borrow over \$2.1 million from Metro United Bank for the acquisition (Ex. 148), and Wang worked closely with the bank to help Ta Chi obtain the loan. (CP 1782 at ¶ 94); Exs. 148, 157; RP 900) One month before the May closing, a one-page amendment clarified that the entire \$2.5 million purchase price was attributed to the real property and none to the personal property. (Ex. 9(2)(b))

The loan funded and the deal closed in late May. (Exs. 186, 157) Fugachee received all of the net proceeds from the sale (RP 663), but neither it nor Jong Seng ever delivered the 18,000 bins to Ta Chi.<sup>5</sup> (CP 1793 at ¶ 164); Ex. 346; RP 1662-1664) Although Ta Chi never received the bins,<sup>6</sup> the same month that the agreement was signed, Wang had Ta Chi spend over \$12,000 fixing apple bins for the 2007 season. (RP 1459; Ex. 345-5) According to Wang, the market value of 18,000 apple bins

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<sup>5</sup> Ta Chi purchased 3,000 bins from Fugachee in 2002. (Ex. 158) In 2009 it had roughly 2,800 bins. (Ex. 346; RP 1662-1664) Fugachee had between 17,000 and 18,000 bins in 2009. (Ex. 187)

<sup>6</sup> Wang admitted that Jong Seng and Fugachee shared assets and that in 2005 Fugachee allowed Jong Seng to earn revenue by renting Fugachee's apple bins to Gebbers for \$5 per bin per year. (Ex. 182; RP 735-736)

was between \$45 and \$60 per bin and that the rental value was \$5 per bin per year. (Exs. 182 and 187; RP 735-736; CP 1434-1435, 1450)

2. Expansion of the Facility (\$2 million)

Wang began spending Lotus' and Ta Chi's money expanding the Jong Seng facility before Ta Chi had actually purchased the facility. (Exs. 160(R)-(W), 164, RP 1456-1459). Between October 2006 and October 2007, Lotus spent over \$3.3 million building a waste water pond, expanding the facility to house the apple and cherry packing lines, and buying related equipment. (Exs. 160(R)-(W)) Wang wrote large checks on Ta Chi and Lotus' accounts for these goods and services. (Ex. 163)

3. Purchase of Apple Line (\$1.2 million)

Wang negotiated the purchase of a new apple line from a Canadian manufacturer and made payments to the manufacturer on Lotus' behalf. (RP 782-787; Exs. 163 and 347) Between October 2006 and October 2007, Lotus spent over \$1 million for the apple line. (Ex. 160(S); RP 1454-1455) Despite these outlays, the apple line was not completed in time for Lotus to pack apples during 2007. (RP 911; Exs. 122, 134)

Even after Wang's departure in late October 2007, Lotus was never able to fully use the apple line. In 2008, Lotus used it to pack Ta Chi's apples and then rented it to another grower for a month. (RP 1661-1662) In 2009 the line was not used at all. (RP 977, 1662)

4. Purchase of Summer Fruit's Cherry Line (\$1 million)

The final element of Wang's plan was for Lotus to purchase Summer Fruit's cherry line and other equipment. In May 2007, Lotus and Summer Fruit signed a contract for Lotus to pay over \$1 million for Summer Fruit's assets. (Ex. 170) Wang continued to conceal her ownership of Summer Fruit prior to and following this transaction and even had a friend sign the agreement on behalf of Summer Fruit.(CP 1784-86 at ¶¶ 102-103, 109, 111-114, 118)

And, although the cherry line had been purchased by Summer Fruit two years prior for roughly \$400,000 (Exs. 176 and 278; RP 762), Summer Fruit charged Lotus over \$688,000 for it in 2007 (Ex. 170), which the court found to be unfair. (CP 1786-87 at ¶ 120)

After the contract was signed and Lotus was unable to pay the \$1.1 million contract price, Wang pretended to convey demands from Summer Fruit. For example, in an October 1, 2007 letter to Mrs. Shen, Wang wrote: "Summer Fruit called again to push for payment." (Exs. 125, 126) Then she had her attorney send a letter to Lotus, again concealing her ownership interest. (Ex. 350)

Because Wang concealed her ownership interest and charged an unfair price, the trial court rescinded the Summer Fruit/Lotus contract and

required Wang and Summer Fruit to pay Lotus for improvements to the line for which Lotus had paid. (CP 1798-99 at ¶¶ 210, 211 and 213)

Ta Chi and Lotus also requested that Wang be forced to step into their shoes and essentially purchase the expanded and improved facility and the apple line at the prices that Ta Chi and Lotus paid for them. (CP 1354) But the court concluded that it could not rescind the entire Lotus Fruit transaction because they involved transactions with third parties and not just Wang. (CP 1799 at ¶ 212)

**F. Ta Chi's March 2007 Shareholder Meeting**

As it and Lotus were spending millions following Wang's recommendations, Ta Chi's shareholders held an annual meeting, which Wang attended. (Ex. 118; RP 547, 904-905) At the meeting, Wang "continued to misrepresent that [her] loans were from third parties." (CP 1781 at ¶ 87) Based on her representations "Ta Chi believed that it owed third parties roughly \$850,000." (*Id.*) Ta Chi did not want to have debts to individuals (RP 904) so "Ta Chi and Wang resolved that Wang would assume all obligations to repay the 'third party' loans." (CP 1781 at ¶ 87) "In return, Wang would receive an equity interest in Ta Chi equal to the amount of the loans for which she was assuming responsibility." (CP 1781 at ¶ 87; Ex. 118; RP 904-906) Despite this resolution, Wang later

renege on the agreement, having a friend tell Mrs. Shen that Wang did not want to be responsible for repaying the loans. (RP 904-906)

At the same meeting, the shareholders resolved that “from now on, company checks shall be signed by two persons” except for payroll checks. (Ex. 118). Wang disregarded this resolution too. On April 16, 2007, Ta Chi shareholders invested \$420,000 in capital into Ta Chi’s account. (Ex. 345-1) By April 25, 2007, Wang had paid herself and her entities \$164,000 with checks signed only by her. (Ex. 164 and 345-1; RP 551-559, 1345-1350)

**G. Wang Diverts Handling Revenue from Lotus in 2007**

As mentioned earlier, Summer Fruit earned income in 2006 by “handling” apples. (RP 588-592; Ex. 160(AA)) According to Wang, handling included: (1) storing apples prior to packing; (2) taking orders from marketers; (3) arranging for the apples to be custom packed based on those orders; (4) taking possession of the packed apples and storing and palletizing them before shipping; (5) shipping the apples; and finally (6) paying the net proceeds to the grower. (RP 588-592)

After selling its assets to Lotus, from May 2007 until late October 2007, Summer Fruit had no employees, no expenses, and no assets. (RP 1399-1402; Ex. 170) Summer Fruit did not start doing business again until sometime after Wang left Lotus on October 24, 2007. (RP 398, 400-

402; 771-772; 1401-1402) During that five-month period, Lotus provided the same handling services that Summer Fruit had provided in 2006. (RP 400-402, 771-772) Lotus stored, arranged for packing, palletized, and shipped roughly \$2 million in apples prior to Wang's departure at the end of October 2007. (Ex. 345-4, 15; RP 1400-1407)

The bills of lading for all of these pre-October 28 shipments show that they left the Lotus facility. (RP 1403-1407, 1599; 1638-1643; Ex. 345-4; Ex. 15) However, Lotus did not receive income for handling these pre-October 28 shipments because Wang invoiced them under her entities' names.<sup>7</sup> (RP 1401-1408, 1638-1642; Exs. 15-16, 345-4) Therefore, instead of Lotus receiving sales proceeds from which it could deduct its handling charges, the proceeds went directly to Summer Fruit. (RP 771-774, Ex. 15, 16, 345-4; CP 1486)

Between August 1 and October 28, 2007, Lotus handled and shipped \$1,960,567 worth of fruit for which it received no revenue. (RP 1408-1419; Exs. 345-2, 345-3 and 345-4) Applying Summer Fruit's 2006 corrected gross profit percentage of 20.7%<sup>8</sup> to this \$1,960,567 in revenue meant that roughly \$405,837 in profit was diverted from Lotus to Wang

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<sup>7</sup> Wang created the invoices for the pre-October 28, 2007 shipments using Summer Fruit's QuickBooks after she left Lotus. (RP 1406-1407)

<sup>8</sup> Summer Fruit calculated its gross profit percentage as 39% in 2006 (Exh. 160(AA)), but Lotus' expert adjusted that amount to correctly calculate the gross profit percentage as 20.7%, which reduced the damages that Lotus sought from Summer Fruit and Wang.

and Summer Fruit. (RP 1414-1418; Exs. 345-2 and 345-3). Because Summer Fruit was collecting revenue for shipments it did not pay to handle, its 2007 financial statements show a dramatic jump in gross profit percentage compared to 2005 and 2006. (RP 1393-1396; Ex. 160(AA))

#### **H. Procedural History**

Wang left Lotus and Ta Chi in late October 2007. (RP 227, 402) Within a month Summer Fruit had sued Lotus in Okanagan County. (CP 1772 at ¶ 29) Two months later, Wang sued Ta Chi to recover amounts she had loaned. (CP 1-9) Lotus and Ta Chi denied liability. (CP 10-15)

In January 2009 Ta Chi requested leave to amend its answer and add third party claims. (CP 18-45) One was a claim to rescind the contract between Ta Chi and Jong Seng.<sup>9</sup> (CP 35-36, 42) The court granted most of Ta Chi's request, but in its order it would not allow claims by Ta Chi to rescind agreements with third parties. (CP 47-48) Based on that decision, Ta Chi removed its rescission claim against Jong Seng. (CP 50-69) Shortly before trial, Ta Chi renewed its request for leave to add the rescission claim in a teleconference with the Court. The court granted leave to include the claim and it was included in Ta Chi's answer to Wang's December 2009 amended complaint. (CP 720-739)

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<sup>9</sup> In its findings and conclusions the Court incorrectly found that Ta Chi had not requested rescission until December 2009 (CP 1798 at ¶ 209) when it had done so 11 months earlier.

*Summer Fruit v. Lotus* was transferred to Douglas County in mid-2009 and consolidated with *Wang v. Ta Chi*. (CP 91-96)

In October 2009, Ta Chi sought summary judgment that Wang's loan claims based on pre-2005 transfers were barred by the statute of limitations. (CP 151-159; 374-404) The trial court denied the motion on November 9, 2009. (CP 415-418).

Both sides designated deposition excerpts in December 2009 which were submitted to the Court prior to trial (CP 775-799). The cases were tried together from January 4 to January 13, 2010. (CP 1767) At the beginning of trial, Wang moved to exclude, among other evidence, the designations of her individual and CR 30(b)(6) testimony. (CP 744-762) The court reserved ruling on that portion of Wang's motion. (RP 17-23) On the last day of trial, the issue was addressed again. (RP 1534-1537) Because the case was a bench trial, the court suggested — and the parties agreed — that instead of reading testimony into the record, Ta Chi and Lotus could cite the deposition designations that they wanted the court to read in their post-trial brief and Wang and her entities could object to those designations in writing. (RP 1536-1537) Following this instruction, Ta Chi and Lotus attached a limited number of previously designated

excerpts to their post-trial brief.<sup>10</sup> (CP 1300-1492) Wang and her entities objected. At a post-trial hearing in April 2010, the trial court excluded these designations from evidence. (April 2010 Hearing Transcript pp. 16-17) The combination of the court's decision on the last day of trial and its April decision prevented Ta Chi and Lotus from reading the testimony into the record during trial.

The court issued a memorandum opinion in March 2010. (CP 1551-1574) The parties presented competing findings and conclusions in April 2010, and later Ta Chi and Lotus moved for reconsideration of several issues. (CP 1724-1738) That motion was partially granted in early May, (CP 1805-1809), and a final judgment was entered on May 20, 2010. (CP 1810-1818) Ta Chi and Lotus filed a notice of appeal on June 16, 2010 (CP 1844-1896) The verbatim report was arranged on July 14 and filed on August 26.

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<sup>10</sup> Appellants have cited portions of these designations in this brief.

## IV. ARGUMENT

### A. Standards of Review

Conclusions of law,<sup>11</sup> mixed questions of law and fact, summary judgment decisions, and legal conclusions drawn from factual findings are all reviewed *de novo*.<sup>12</sup>

Findings of fact are reviewed under a substantial evidence standard. *Clayton*, 168 Wn.2d at 62-63. Substantial evidence exists “if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise.” *King County v. State Boundary Review Bd.*, 122 Wn.2d 648, 675, 820 P.2d 1024 (1993) (quotations and citation omitted).

Evidentiary rulings and equitable remedies are reviewed for an abuse of discretion. “An appellate court will find an abuse of discretion only ‘on a clear showing’ that the court’s exercise of discretion was ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (citation omitted). A decision “is based ‘on untenable

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<sup>11</sup> “[I]f a term carries legal implications, a determination of whether it has been established in a case is a conclusion of law.” *Miebach v. Colasurdo*, 35 Wn. App. 803, 814, 670 P.2d 276 (1983).

<sup>12</sup> *Breuer v. Presta*, 148 Wn. App. 470, 475, 200 P.3d 724 (2009) (conclusions of law); *Clayton v. Wilson*, 168 Wn.2d 57, 62-63, 227 P.3d 278 (2010) (mixed questions); *Michak v. Transnation Title, Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003) (summary judgment).

grounds' or made 'for untenable reasons' if it rests on facts unsupported in the record or was reached by applying the wrong legal standard." *Id.* (citation omitted). In other words, "a decision based on an erroneous view of the law constitutes an abuse of discretion." *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

**B. Appellants' Designations Were Improperly Excluded**

Before trial, Ta Chi and Lotus submitted designations from Wang's depositions. (CP 775-799) On the last day of trial, the judge told Ta Chi and Lotus that they did not have to read these designations into the record but could attach them to their post-trial brief, which they did. (RP 1534-1537) Later, the court reversed course and said that these would be excluded because Wang was present to testify at trial. (April 2010 Hearing Transcript pp. 16-17) The judge erred in excluding these designations. All of the testimony were admissions of party opponents that could be used at the trial for any purpose.<sup>13</sup> There was no substantive reason to exclude them. Moreover, the inconsistent statements by the court on the last day of trial and the April hearing prejudiced Ta Chi and Lotus because Ta Chi and Lotus could have read the deposition

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<sup>13</sup> Civil Rule 32(a)(2) ("The deposition of a party . . . or a person designated under rule 30(b)(6) . . . may be used by an adverse party for any purpose"); Evidence Rule 801(d)(2) ("A statement is not hearsay if" it is "offered against a party and is (i) the party's own statement, in either an individual or representative capacity").

designations into the record during the bench trial had the court not suggested that they could attach excerpts to their post-trial brief.

**C. Wang Owed Ta Chi and Lotus a Duty of Undivided Loyalty**

As Ta Chi and Lotus' fiduciary,<sup>14</sup> Wang owed both an undivided duty of loyalty. *Moon v. Phipps*, 67 Wn.2d 948, 954, 411 P.2d 157 (1966); *Monty v. Petersen*, 85 Wn.2d 956, 962, 540 P.2d 1377 (1975). This duty demanded that she act solely for their benefit in all matters connected with her management.<sup>15</sup> It also prohibited her from using her relationship for her own benefit, even if she believed it would not harm Ta Chi or Lotus.<sup>16</sup> Similarly, the duty of loyalty required that Wang not enter into transactions with Ta Chi or Lotus without their knowledge.<sup>17</sup> And if she did deal with them directly, she was required to disclose all facts that she knew or should have known could affect their judgment regarding the transaction. RESTATEMENT (SECOND) AGENCY § 390 (1958); *Moon*, 67 Wn.2d at 954; *Monty*, 85 Wn.2d at 962.

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<sup>14</sup> (CP 1775 at ¶ 46; CP 1784 at ¶ 102; CP 1788 at ¶¶ 132-133; CP 1797-98 at ¶¶ 201 and 210).

<sup>15</sup> RESTATEMENT (SECOND) AGENCY § 387 (1958); *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 648 P.2d 875 (1982).

<sup>16</sup> RESTATEMENT (SECOND) AGENCY § 387 cmt. b (1958).

<sup>17</sup> RESTATEMENT (SECOND) AGENCY § 389 (1958); *Cogan*, 97 Wn.2d 658; *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 229, 437 P.3d 897 (1968).

**D. Wang's Pre-2005 Loan Claims Are Time Barred**

Under Washington law, if a lender makes a demand loan to a borrower under an oral agreement, the lender's claim will be time barred three years after the loan. *Nat'l Bank of Commerce of Seattle v. Preston*, 16 Wn. App. 678, 558 P.2d 1372 (1977). The same result obtains if there is no express contract and the action is for unjust enrichment. *Halver v. Welle*, 44 Wn.2d 288, 266 P.2d 1053 (1954). Here, a fiduciary loaned money to her principal, without any meeting of the minds, spent the money on the principal's behalf, and concealed her identity as the lender, misrepresenting that the loans were from third parties. (Exs. 105, 118, 304; CP 1776-77 at ¶ 52; CP 1779 at ¶ 69; CP 1781 at ¶ 87) On these facts, the trial court erred in concluding that the fiduciary extended the limitations period on her own claims. (CP 1797 at ¶¶ 197-200)

1. A Three-Year Limitations Period Applied

In the absence of a written agreement between Wang and Ta Chi (CP 417; CP 1779 at ¶ 68), the trial court correctly applied a three-year limitations period to Wang's claims. RCW 4.16.080(3); *Wallace v. Kuehner*, 111 Wn. App. 809, 819, 46 P.2d 823 (2002) (oral contracts); *Halver*, 44 Wn.2d 288 (unjust enrichment).

2. The Limitation Period Began on the Date of Each Loan

The court concluded that Wang's transfers to Ta Chi were demand loans. (CP 1779 at ¶ 70; CP 1797 at ¶ 196). The limitations periods on demand loans begin when the loans are made. *Hopper v. Hemphill*, 19 Wn. App. 334, 336, 575 P.2d 746 (1978); *Wallace v. Kuehner*, 111 Wn. App. at 819. An exception may apply if, "at the time of contracting, the parties contemplated delay in making the demand and where 'speedy demand would violate the spirit of the contract.'" *Nilson v. Castle Rock Sch. Dist.*, 88 Wn. App. 627, 630, 945 P.2d 765 (1997) (citation omitted).

The *Nilson* exception<sup>18</sup> could not apply to Wang's loans because she and Ta Chi never had an agreement. Wang told Ta Chi the loans were from other people. (CP 1776-77 at ¶ 52; CP 1779 at ¶ 69; CP 1781 at ¶ 87) This prevented any agreement from being formed between her and Ta Chi. *Kane v. Klos*, 50 Wn.2d 778, 784, 314 P.2d 672 (1957); *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 385-86, 391 P.2d 979 (1964). The *Nilson* exception is also inapplicable because Wang admitted that she intended the loans to be temporary. (CP 1779 at ¶ 70; RP 508, 518) In her 2002 letter, Wang wrote:

In principal, these temporary loans have already been used on the orchard, if the creditors should have any economic downturns in

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<sup>18</sup> This has also been referred to as the *Barer* exception from *Barer v. Goldberg*, 20 Wn. App. 472, 582 P.2d 868 (1978).

Taiwan and need to use this money, we have the obligation to pay them back at once, I hope all of you will share the understanding.

(Ex. 105) That was the only statement from Wang to Ta Chi about when the loans needed to be repaid.

Nevertheless, the trial court found that “when the money did not come in, Wang expected to be paid whenever the funds were available.” (CP 1779 at ¶ 70); *see also* CP 1781 at ¶ 85 and CP 1797 at ¶ 197) But Wang’s unilateral expectation was irrelevant for purposes of the statute of limitations. She could not delay the running of the limitations period simply by changing her expectations, particularly while she was concealing information from Ta Chi. Moreover, if Wang intended to extend the limitations on her own claims against Ta Chi, she had a new duty to disclose that fact to Ta Chi. At bottom, the *Nilson* exception does not apply, and the trial court erred in concluding that it did.

### 3. The Loans Were Never Ratified

Based on its factual findings, the trial court erroneously concluded that Ta Chi had ratified Wang’s loans.

#### a. Wang’s Concealment Made Ratification Impossible

A principal cannot ratify an act — particularly one involving self dealing — unless the agent provides the principal with all material facts. *Kane v. Klos*, 50 Wn.2d at 784-85; *Hayes Oyster*, 64 Wn.2d at 385-86; *Moon v. Phipps*, 67 Wn.2d 948, 954, 411 P.2d 157 (1966); *Thola v.*

*Henschell*, 140 Wn. App. 70, 86, 164 P.3d 524 (2007); RESTATEMENT (SECOND) AGENCY §§ 91, 381 cmt. d, 389 cmt. e and § 390 cmt. g (1958); *Cogan v. Kidder, Mathews & Segner, Inc.*, 97 Wn.2d 658, 663, 648 P.2d 875 (1982) (*quoting* RESTATEMENT (SECOND) AGENCY § 381 cmt. d (1958)). The court found that Wang lied to Ta Chi about the source of the loans. (CP 1776-77 at ¶ 52; CP 1779 at ¶ 69; CP 1781 at ¶ 87) Therefore, Ta Chi could not ratify any transaction with her as a matter of law. RESTATEMENT (THIRD) AGENCY § 8.06 (2006).

Wang's identity as lender was material because (i) it made the transactions a breach of her duty of loyalty,<sup>19</sup> (ii) she would not have gone to such great lengths to conceal it if it were not important, and (iii) there was undisputed evidence that if Wang was going to invest in Ta Chi, Ta Chi wanted the investment to be equity not debt. (RP 874, 902-904; Ex. 118; CP 1781 at ¶ 87).

b. Use Of The Money Did Not Ratify The Loans

The trial court erred in concluding that Ta Chi's use of the loaned money ratified the loans and estopped<sup>20</sup> it from denying them. (CP 1797 at ¶¶ 197-200).

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<sup>19</sup> If an agent has adverse interest in a transaction — as Wang did in her loans to Ta Chi — she is required to disclose it. RESTATEMENT (SECOND) AGENCY § 381 *cmt. d* (1958).

<sup>20</sup> The trial court's conclusion that using money estops a debtor from applying the statute of limitations has no legal support whatsoever. Indeed, were such a position to become

First, Wang spent the loaned money before she told Ta Chi it had been borrowed. (Ex. 105)

Second, “[t]he acceptance or retention of benefits derived from an agent’s unauthorized act does not amount to ratification of such act if the principal, in accepting such proceeds or benefits, does not have knowledge of all the material facts surrounding the transaction.” *Consumers Ins. Co., v. Cimoch*, 69 Wn. App. 313, 848 P.2d 763 (1993) (quoting 30 Am. Jur. 2d., *Agency* §195 (1986)); *Thola v. Henschell*, 140 Wn. App. 70, 86, 164 P.3d 524 (2007). As mentioned above, Ta Chi lacked knowledge of all material facts surrounding the loans.

Third, even if Wang had established ratification, her claims would still be barred if the alleged ratifying act occurred more than three years prior to her lawsuit. Here, Ta Chi never ratified the loans, but even if use of the money amounted to ratification, the court still erred by not applying the three-year limitations period from the date each loan was allegedly ratified. For instance, if the money was spent in 2002, then the limitations period would have run by 2005.

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law, it would effectively gut the statute of limitations. Most debtors use borrowed money at the time of the loan. That does not mean the limitations period goes out the window.

c. Receipt of Annual Reports Was Not Ratification

The trial court also erred in concluding that Ta Chi ratified the loans anew by receiving annual reports from Wang. (CP 1780-81 at ¶¶ 82, 86); CP 1797 at ¶ 199) After her initial misrepresentations (Ex. 103, 105), each new report, which failed to correct them, was itself a fraudulent act. *Oates v. Taylor*, 31 Wn.2d 898, 902-03, 199 P.2d 924 (1948); RESTATEMENT (THIRD) AGENCY § 8.11 *cmt. b* (2006). The trial court implicitly found that none of Wang's reports corrected her initial misrepresentations (CP 1779 at ¶ 69), and thus each was itself a new misrepresentation. It would be a truly absurd result if a fiduciary could extend the life of her claims simply by lying to her principal about their existence.

4. Ta Chi Never Acknowledged Owning Wang Money

Under RCW 4.16.280, the limitations period on a loan claim can be reset if the debtor gives the creditor a signed writing acknowledging the debt.<sup>21</sup> There was no such writing in this case. The court found that Ta Chi did not discover that Wang had loaned it money until she sued in January 2008. (CP 1779 at ¶ 69) Logically, Ta Chi could not acknowledge a debt of which it was unaware. And since it learned of the debt in 2008 Ta Chi has denied owing Wang anything.

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<sup>21</sup> For a writing to satisfy RCW 4.16.280, it must be delivered from the debtor to the creditor. *Rea v. Rea*, 19 Wn. App. 496, 499, 576 P.2d 84 (1978).

5. Ta Chi Never Voluntarily Paid Wang Principal or Interest

Under RCW 4.16.270, the limitations period on a loan claim may be reset when the debtor makes a voluntary payment of principal or interest to the creditor. There were no such payments in this case. Wang did pay herself principal and interest out of Ta Chi's account, but she concealed these payments from Ta Chi. (RP 502-503; CP 1386-87; Exs. 162, 164, 118) A creditor cannot unilaterally extend the limitations period on her claims by using the debtors assets to make payments to herself without the debtor's permission. *Easton v. Bigley*, 28 Wn.2d 674, 681-82, 183 P.2d 780 (1947) ("creditor cannot be made the agent of the debtor to such an extent as to make an act done by him operate as a new promise to himself, without which element a payment can never operate to remove the bar of the statute")(citation omitted).

**E. Ta Chi and Lotus Should Have Been Placed in the Same Position They Would Have Been Had They Not Followed Wang's Advice to Enter the Packing Business**

The trial court rescinded the Summer Fruit transaction because of Wang's egregious breach of loyalty. But it did not require Wang to reimburse Ta Chi and Lotus for (and take title to) the other assets purchased in following her advice to enter the packing business.<sup>22</sup> Instead, it erroneously found that those transactions did not involve the same

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<sup>22</sup> Ta Chi and Lotus requested this remedy before and after trial. (CP 473, 1928-1929, 1354)

element of bad faith present with the Summer Fruit transaction. And it concluded that it lacked the equitable power to provide a remedy. The court's findings were not supported by evidence and its legal conclusion was not supported by precedent.

1. Ta Chi and Lotus Would Not Have Made the Purchases But For the Disloyal Cherry Line Transaction

The cherry line transaction was one element of Wang's proposal for Ta Chi to enter the packing business. (Ex. 112; CP 1485) To house the line, Ta Chi and Lotus paid over \$4 million to buy and build out the Jong Seng facility. None of this money would have been spent but for Wang's breach of fiduciary duty.

Wang's April 2006 letter highlighted the need to offer both apple and cherry packing services. (Ex. 112) And during trial she was adamant that buying the facility only made sense if it would house a cherry line.

I don't suggest just buy the Jong Seng Cold Storage. I suggest them it's buy the Jong Seng Cold Storage and have the warehouse, have the apple line, have the cherry line, all in one package. I don't suggest just go buy Jong Seng that's it.

(RP 656-657; CP 1444-1448) She stood to make hundreds of thousands of dollars from selling the cherry line to Lotus. But she could not have persuaded Lotus to buy the line unless it had a place to house it. The court's findings that somehow Wang did not personally benefit from the purchase of the facility (of which she was a 1/6th owner), the build out,

etc. simply ignores this reality. (CP 1794 at ¶¶ 173-176) But for the tainted cherry line purchase, Ta Chi and Lotus would not have spent money on the other assets.

2. The Court Misconstrued Its Equitable Power

The court also abused its discretion by taking an overly narrow view of its equitable powers. Specifically, it concluded that it “could not rescind the entire Lotus Fruit transaction.” (CP 1799 at ¶ 212).

“Equity will not suffer a wrong to be without a remedy.” *Crafts v. Pitts*, 161 Wn.2d 16, 23, 162 P.3d 382 (2007) (citation omitted). And “trial courts have broad discretionary power to fashion equitable remedies.” *SAC Downtown Ltd. P’ship v. Kahn*, 123 Wn.2d 197, 204, 867 P.2d 605 (1994). Ta Chi and Lotus spent \$6 million buying a facility, expanding it, building a wastewater pond, and buying an apple line (Exs. 160(R)-(W)), all on the advice of Wang (CP 1782 at ¶ 94) and all so that she could unload her cherry line at a grossly inflated price. (CP 1793-94 at ¶¶ 166-171; CP 1798 at ¶ 210)

Lotus and Ta Chi asked the court to enter a judgment against Wang for the prices paid for these assets and to have them transferred to her subject to liens in their favor for the judgment amount. (CP 1354) This remedy would return them to their position before Wang’s disloyal recommendation and require Wang to sleep in the bed she made for them.

It would have the added benefit of placing the assets in the hands of someone more likely to profit from them.

This remedy was clearly within the court's equitable powers to grant and is one that occurs in the law of trusts regularly.<sup>23</sup> RESTATEMENT (FIRST) TRUSTS § 210 *illus 1* (1935). This "make whole" remedy has also been endorsed in Washington. *Gillespie v. Seattle-First Nat'l Bank*, 70 Wn. App. 150, 175-76, 855 P.2d 680 (1993). The trial court did not address this request for relief or explain why it was not appropriate. Instead it observed that it could not rescind the entire Lotus Fruit transaction because it involved third parties. That conclusion reveals the trial court's flawed view of its equitable powers.

**F. The Trial Court's Refusal to Rescind the Jong Seng Transaction Was Based on Erroneous Factual Findings**

The trial court's decision not to rescind the transaction between Ta Chi and Jong Seng rested on an erroneous findings that Ta Chi did not request rescission until December 2009 and an erroneous conclusion that Wang was not Ta Chi's agent for purposes of the purchase.

Ta Chi requested rescission in January 2009, shortly after deposing Wang in November 2008. (CP 42) Moreover, the evidence at trial was overwhelming that Wang was representing *both* Ta Chi and Jong Seng

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<sup>23</sup> It is also consistent with the notion that if an agent causes an injury to her principal from her breach of fiduciary duty, she is liable for any loss caused by the breach. RESTATEMENT (SECOND) AGENCY § 404 (1958).

with respect to the purchase. (Exs. 112, 113, 148; RP 699-701; 901-903) Indeed, she was making large payments for the apple line and the build out from Ta Chi's checking account at the very same time the that Jong Seng contract was being signed. (Ex. 163) The trial court erroneously concluded that Wang did not have a dual agency with respect to the purchase.

**G. The Court Erred In Reading An Express Promise Out of the Purchase Agreement Between Jong Seng and Ta Chi**

If Wang is not required to step into Ta Chi's shoes as purchaser of the Jong Seng facility, the purchase agreement should at least be enforced according to its terms. The trial court essentially read one of Jong Seng's promises out of the contract. In doing so, it made two legal errors.

1. Parol Evidence Cannot Contradict the Terms of the Purchase Agreement

Its first mistake was improperly relying on parol evidence to contradict the express terms of the agreement. The contract required Jong Seng to deliver 18,000 bins, but citing Wang's testimony, the court ruled that Jong Seng did not have to fulfill that promise. (CP 1792-93 at ¶¶ 163-165) But the parol evidence rule prohibits a court from using extrinsic evidence to contradict a term of a written contract. *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). Instead, "Washington courts focus on objective manifestations of the contract

rather than the subjective intent of the parties; thus, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Lamphiear*, 165 Wn.2d at 776; *Hearst Commc’ns, Inc. v. Seattle Times*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). As a matter of law, the trial court could not use Wang’s testimony to ignore the express promise in the agreement.

2. Ta Chi’s Damages Equaled the Market Value of the Bins

The trial court’s second error had to do with the proper measure of damages.<sup>24</sup> It concluded that Ta Chi was not entitled to any damages because the contract price for the personal property — including the bins — was essentially \$0. (CP 1793 at ¶ 165; Ex. 9(2)(b)) But the proper measure of Ta Chi’s damages from Jong Seng’s failure to deliver the bins was the market value of the bins, less any portion of the contract price that Ta Chi had not paid. *Pettaway v. Commercial Auto. Serv., Inc.*, 49 Wn.2d 650, 655, 306 P.2d 219 (1957). The only evidence presented at trial — evidence that came from Wang herself — was that the fair market value of an apple bin between 2005 and the present was \$45 to \$60 per bin. (RP 735-736; Exs. 182 and 187) Therefore, if the trial court did not require Wang to pay Ta Chi back for the purchase price, it should at least have

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<sup>24</sup> “[T]he appropriate measure of damages for a given cause of action is a question of law, reviewed de novo.” *Shoemaker ex rel. Guardian v. Ferrer*, 168 Wn.2d 193, 198, 255 P.3d 990 (2010) (citation omitted); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843, 726 P.2d 8 (1986).

entered a judgment against Jong Seng for between \$810,000 and \$1,080,000, plus prejudgment interest.

3. The Issue of Wang and Fugachee's Liability Should Be Remanded for Additional Findings and Conclusions

Because it erroneously concluded there was no breach and no damages, the trial court did not reach the issue of whether Wang and Fugachee are liable for Jong Seng's breach. That issue should be remanded to the trial court for decision in the first instance. *Groff v. Dep't of Labor & Indus.*, 65 Wn.2d 35, 395 P.2d 633 (1964).

**H. Wang Diverted The Profit Lotus Should Have Received From Its Pre-October 28, 2007 Handling Services**

The trial court found that Summer Fruit was entitled to collect revenue for handling services and therefore there was no damage to Lotus from the alleged diversion. (CP 1796 at ¶ 190) This finding was not supported by substantial evidence. The trial court failed to distinguish between handling services that Lotus provided before October 28, 2007 and those that Summer Fruit provided after that date. Through October 28, 2007, Summer Fruit had no employees or assets, and all apple shipments were made from the Lotus facility (Exs. 15, 345-4; RP 400-402, 771-772, 1399-1401, 1643)

Indeed, over \$1.9 million worth of apples were shipped from the Lotus facility before October 28. (Exs. 345-3 and 345-4) To have been

shipped by that date, the apples had to have been stored, packed, and palletized even earlier. Again, these services could only have been provided or arranged by Lotus, and Lotus' forensic accountant testified that it incurred handling expenses in 2007 but received no revenue for these shipments. (RP 1402, 1408-1419)

It was undisputed that Wang invoiced the buyers of these shipments using Summer Fruit letterhead. (Exs. 15-16; 345-4) In fact, Two of Wang's own exhibits show how she diverted income from Lotus. Exhibit 15 is a bill of lading for 98 boxes of Fuji apples that were shipped from Lotus on October 15, 2007, 10 days before Wang stopped managing Lotus. Wang should have sent a Lotus invoice to Honey Bear Tree Fruit Company for this shipment. But she did not. Instead Wang created a Summer Fruit invoice. (Ex. 16) Summer Fruit collected the handling, palletizing, and shipping revenue and presumably returned the difference to the grower.<sup>25</sup>

Assuming Lotus had the same gross profit margin in 2007 that Summer Fruit had in 2006, Lotus would have made a gross handling profit of over \$405,000 from pre-October 28 shipments. (RP 1414-1418)

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<sup>25</sup> Because it was receiving income for work that Lotus performed, Summer Fruit's gross profit jumped in 2007. (RP 1395-1396)

Despite this undisputed evidence, the trial court cited Exhibit 43 as showing that Summer Fruit actually performed handling services. (Finding 190) But that exhibit says nothing the pre-October 28 handling of apples and in fact only discusses industrial charges for the handling of soft fruit for some undisclosed time period. Nothing in it is inconsistent with Lotus' handling of apple shipments prior to October 28.<sup>26</sup>

When Wang had Summer Fruit receive the income from shipments that were handled by Lotus, she was essentially stealing Lotus' money. The majority of that \$1.9 million would have been returned to the apple growers, roughly \$405,837 would have been profit to Lotus. Wang and Summer Fruit took that profit for themselves (Exs. 15-16, 345-3, 345-4; RP 1414-1418), which is why Summer Fruit's gross profit jumped in 2007. (RP 1395-1396; Exs. 160(AA) and 345-3) Given all this, the trial court's implicit finding that Wang did not divert Lotus' pre-October 28, 2007 handling revenue was not supported by substantial evidence.

**I. Wang and Summer Fruit Are Liable to Ta Chi for the Revenue Summer Fruit Received for Packing and Handling Ta Chi's Fruit**

As Ta Chi's agent and fiduciary,<sup>27</sup> Wang had Ta Chi pay Summer Fruit \$244,958 for packing and handling services between 2005 and 2007,

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<sup>26</sup> Exhibits 345-3 and 345-4 both distinguish between shipments before and after October 28, 2007.

<sup>27</sup> CP 1795 at ¶ 185; CP 1797 at ¶ 201.

while concealing her ownership of Summer Fruit.<sup>28</sup> As a matter of law, this was a breach of Wang’s duty of loyalty to Ta Chi. RESTATEMENT (SECOND) AGENCY § 389 *cmt a* (1958). Having established Wang’s breach, Ta Chi should have recovered both its loss from the disloyal transactions and any benefit Wang and Summer Fruit received from them. RESTATEMENT (SECOND) AGENCY §§ 389 and 403 (1958); RESTATEMENT (THIRD) AGENCY § 8.01 *cmt d* (2006); RESTATEMENT OF RESTITUTION § 197 (1937); *Johns v. Arizona Fire Ins. Co.*, 76 Wash. 349, 136 P. 120 (1913); *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 229, 437 P.2d 897 (1968). As the Washington Supreme Court has observed, “[i]f damages were measured solely by the loss to the principal often there would be little disincentive to the agent for assuming conflicting responsibilities without disclosure.” *Cogan v. Kidder, Mathews & Segner*, 97 Wn.2d 658, 666-68, 648 P.2d 875 (1982). In finding no factual basis for Ta Chi to recover its packing charges to Summer Fruit (CP 1794 at ¶ 179), the trial court erroneously disregarded the benefit Wang and Summer Fruit received.

Once Ta Chi established that Wang and Summer Fruit received \$244,958 — which was not disputed (RP 1371, Exs. 160(C), 195) — the burden shifted to Wang to prove the costs that Summer Fruit incurred in

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<sup>28</sup> CP 1784-1787 at ¶¶ 103-122; CP 1793 at ¶¶ 166-68; Exs. 160(C), (H), 195-202.

providing services to Ta Chi. *Gomez v. Bicknell*, 302 A.D. 2d 107, 114-15, 756 N.Y.S.2d 209 (2002) (disloyal agent must demonstrate the amount of his direct costs in generating income from breach); *C&B Sales & Service, Inc. v. McDonald*, 177 F.3d 384 (5th Cir. 1999) (principal must show revenue received from breach and disloyal fiduciary must establish costs to be deducted); RESTATEMENT (SECOND) AGENCY § 403 *cmt c* (1958). But Wang did not present any evidence of Summer Fruit's costs to provide the services. The trial court erred in not awarding Ta Chi \$244,958.<sup>29</sup>

In addition, the trial court's implicit factual finding that Ta Chi did not suffer a loss from Wang's breach was not supported by substantial evidence. In 2006, Wang had roughly half of Ta Chi's Pink Lady and Fuji apple crop packed by McDougall & Sons and half handled by Summer Fruit. Ta Chi established that it received **\$193 less per bin** on the Pink Ladies that went to Wang's entity and **\$99 less per bin** on the Fuji apples, for a total loss of \$65,516. (CP 1484; Ex. 197, 160(H), 309, RP 1380-1384) Ta Chi also established that Wang reduced Ta Chi's 2005 cherry returns by \$20,575. Again, Wang had the burden of proving that these

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<sup>29</sup> Although the proper recovery is \$244,958, there is no way the trial court should have awarded less than \$38,284, the figure arrived at by multiplying the \$2 profit per box that Wang admitted to by the number of boxes Summer Fruit packed for Ta Chi. (CP 1326-1327)

reductions were for fair and justifiable reasons, *Wilkins v. Lasiter*, 46 Wn. App. 766, 777-78, 733 P.2d 221 (1987), which she failed to carry. The trial court should have found Wang and Summer Fruit liable on these specific claims for \$331,049, plus prejudgment interest.

**J. Wang's Disloyalty Warranted Disgorgement of Her Fee**

In Washington, as in other jurisdictions, a principal is not required to pay its agent to be disloyal, even if the agent's non-disloyal work provided some value. RESTATEMENT (SECOND) AGENCY § 469 (1958); *Cogan v. Kidder, Mathews & Segner*, 97 Wn.2d 658, 648 P.2d 875 (1982); *Kane v. Klos*, 50 Wn.2d 778, 789, 314 P.2d 672 (1957); *Murray v. Beard*, 102 N.Y. 505, 7 N.E. 553 (1886). The trial court found that Wang had been disloyal during the entire period of her agency but nevertheless concluded that there was not a "factual basis" for Ta Chi or Lotus to recover Wang's management fees. (CP 1799 at ¶ 215) That was a mistake of law.

Wang covered up the Highland lease and lawsuit for five years. (CP 1789-1790 at ¶¶ 136-147; CP 1797-98 at ¶¶ 203-206) She concealed her ownership of Summer Fruit for three years, used it to make money from packing Ta Chi's fruit, and then sold its assets to Lotus at an inflated price in 2007. (CP 1784-87 at ¶¶ 102-122; CP 1798-99 at ¶¶ 210-214) And, she lied to Ta Chi about her loans for six years while paying herself

\$380,000 in interest and principal. (CP 1776-77 at ¶ 52; CP 1779 at ¶ 69; CP 1781 at ¶ 87); Ex. 160(M)) In other words, she consistently put her interests above those of Ta Chi and Lotus. (CP 1795 at ¶ 183) This intentional and willful disloyalty warranted disgorgement of the \$207,000 in fees that Ta Chi paid and the roughly \$21,000 that Lotus paid. (Exs. 160(N)-(CC))

Disgorgement is particularly appropriate given that Wang's early breaches enabled her to perpetrate the much more costly breaches in 2006 and 2007. Thus, when Wang first breached her duty of loyalty in 2002, by lying to Ta Chi about her loans and the Highland lease, she had a new duty to disclose her wrongdoing, so that Ta Chi could consider it in deciding whether to keep her as manager. RESTATEMENT (THIRD) AGENCY § 8.11 *cmt b* & reporter's notes (2006) ("Information about an agent that the agent may have a duty to provide to the principal may include the fact that the agent has breached duties owed to the principal") (*citing Hadden v. Consol. Edison Co.*, 45 N.Y.2d 466, 382 N.E. 2d 1136, 1139 (1978)). If Wang had come clean before 2006, Ta Chi would not have invested another \$8 million following her advice to enter the packing business.

The trial court analyzed the issue under a faulty legal paradigm. It concluded that as long as Wang's management fee was reasonable (CP 1777-78 at ¶¶ 57, 60) — at least for a loyal manager — and as long as she

provided some benefit to Ta Chi (CP 1794-95 at ¶ 180) there was no “factual basis” for disgorgement. (CP 1799 at ¶ 215) But those considerations were irrelevant.

An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes willful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services . . . .

RESTATEMENT (SECOND) AGENCY § 469 (1958). Wang’s multiple willful breaches of loyalty warranted disgorgement.<sup>30</sup> *Monty v. Peterson*, 85 Wn.2d 956, 959, 540 P.2d 1377 (1975); *Cogan*, 97 Wn.2d at 667-68 (citing § 469) (“if the [fee] itself is subject to forfeiture, . . . agents will be disinclined to blithely assume conflicting responsibilities, without disclosure . . . and consent”). The trial court made an error of law and abused its discretion in concluding that there was no factual basis for disgorgement.<sup>31</sup>

#### **K. Ta Chi and Lotus Should Have Been Awarded Their Fees**

The decision not to award Lotus and Ta Chi their attorneys fees was an abuse of discretion.<sup>32</sup> When an agent breaches her duty of loyalty,

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<sup>30</sup> Because Wang paid her management fee to Fugachee, it should also have been liable because it was unjustly enriched by Wang’s breach. *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.*, 64 Wn.2d 375, 386-87, 391 P.2d 979 (1964).

<sup>31</sup> The trial court’s conclusion that there was no factual basis for disgorgement misunderstood the legal standard, which was an abuse of discretion. *State v. Kinneman*, 155 Wn.2d 272, 289, 119 P.3d 350 (2005).

<sup>32</sup> *Mahler v. Szucs*, 135 Wn.2d 398, 434-35, 957 P.2d 632 (1998).

she commits constructive fraud, which is an equitable basis for awarding attorneys fees. *Hsu Ying Li v. Tang*, 87 Wn.2d 796, 800, 557 P.2d 342 (1976); *Green v. McAllister*, 103 Wn. App. 452, 14 P.3d 795 (2000). Although required to, the trial court provided no explanation whatsoever for its denial of fees.

Also, because the Jong Seng agreement contains a fee provision, Ta Chi seeks its costs and fees on the claims related to that transaction. RCW 4.84.330; *Stryken v. Panell*, 66 Wn. App. 566, 572, 832 P.2d 890 (1992); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 692 P.2d 867 (1984).

**L. Appellants Request Their Attorneys Fees on Appeal**

For the same reasons that they requested fees at trial, Ta Chi and Lotus respectfully request them on appeal under RAP 18.1. Their claims all involve her breach of fiduciary duty, an equitable basis for fees. *Hsu Ying Li*, 87 Wn.2d at 800; *Green*, 103 Wn. App. 452. And the Jong Seng agreement contains a fee provision.

**V. CONCLUSION**

For the reasons set forth above, Ta Chi and Lotus respectfully request that this court:

1. Reverse the judgment in Wang's favor and against Ta Chi on Wang's loan claims and remand for entry of a judgment in Ta Chi's favor for between \$59,800.26 and \$137,785.26, plus interest;

2. Reverse the dismissal of Ta Chi and Lotus' claims for disgorgement of Wang's management fees and remand for entry of judgments in favor of Ta Chi for \$207,000 and in favor of Lotus for \$21,831.65, plus interest;

3. Reverse the dismissal of Ta Chi's breach of fiduciary duty claim for Summer Fruit's packing and handling charges and remand for entry of a judgment in Ta Chi's favor for \$331,049, plus interest;

4. Reverse the dismissal of Ta Chi and Lotus' claim to recover the costs they incurred following Wang's advice to enter the packing business and remand with instructions for the trial court to enter a judgment in their favor for the amounts spent and to transfer the assets purchased to Wang subject to a lien in favor of Ta Chi and Lotus for the amounts of their judgments;

5. As an alternative to (4), reverse the dismissal of Ta Chi's breach of contract claim against Jong Seng and remand for entry of a judgment against Jong Seng for between \$810,000 and \$1,080,000, plus prejudgment interest, with an instruction for the trial court to make

additional findings and conclusions regarding the liability of Wang and Fugachee for Jong Seng's breach;

6. Reverse the trial court's denial of Lotus' claim for diverted revenue and remand for entry of a judgment in favor of Lotus and against Wang and Summer Fruit for \$405,837, plus interest;

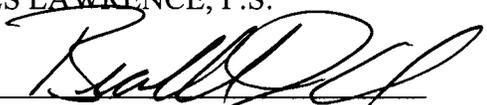
7. Reverse the evidentiary ruling excluding the deposition designations attached to Ta Chi's post trial brief;

8. Reverse the denial of attorneys fees and costs to Ta Chi and Lotus and remand for entry of a judgment against Wang and her entities for the payment of their fees and costs below; and

9. Award Ta Chi and Lotus the costs and attorneys fees that they incurred on appeal.

DATED this 18th day of October, 2010.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 18th day of October, 2010, I caused a true and correct copy of the foregoing document, "Appellants' Brief," to be mailed via Federal Express, overnight delivery, to the following counsel of record:

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