Case No. 345408

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

EPIC,

Appellant,

v.

CLIFTONLARSONALLEN LLP,

Respondent.

RESPONDENT'S REPLY BRIEF

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I. INTRODUCTION

On December 17, 2015, appellant EPIC commenced a lawsuit against its former auditors respondent CliftonLarsonAllen LLP ("CLA"), the successor in interest to LeMaster & Daniels PLLC and LarsonAllen LLP. EPIC alleges that in auditing EPIC's financial statements for the years 2006, 2007, 2008, 2009, and 2010, the auditors failed to learn about and tell EPIC of a fact EPIC already knew; namely, that EPIC's own Chief Financial Officer was managing EPIC's finances in a manner that violated Federal regulations. In January 2012, the Federal government formally notified EPIC of the mismanagement. EPIC immediately responded by terminating the employment of its CFO. CLA's audit of EPIC's 2011 financial statements – which was issued in September 2012 – fully disclosed the issue. Nevertheless, and despite an unambiguous two-year contractual limitations clause in the audit engagement contract, EPIC waited until December 2015 to file this lawsuit.

Upon CLA's motion to dismiss, the Superior Court, Judge Susan Hahn presiding, agreed that the two-year contract limitations clause was enforceable and ordered that EPIC's Amended Complaint be dismissed with prejudice. This Court should affirm Judge Hahn's decision.

II. IDENTIFICATION OF DEFENDANTS

The defendant in this case is CliftonLarsonAllen LLP, a Minnesota limited liability partnership.

III. COUNTER-STATEMENT OF THE CASE

The basic facts of record in this matter are undisputed. However, as the statement of facts in EPIC's brief omits key items of information, CLA submits the following Statement of Facts.

A. Statement of Facts.

1. Introduction to the parties.

Appellant EPIC is a non-profit corporation that operates a Head Start program that is funded by grants from the Administration for Children and Families ("ACF"), a division of the U.S. Department of Health and Human Services ("HHS"). (CP 8-9 (Am. Compl., ¶¶ 1 and 6).) The regulations pertaining to such funding are set forth in Title 45 of the Code of Federal Regulations. During the relevant time, those regulations included a provision requiring the timing and amount of cash advances to be "as close as is administratively feasible to the actual disbursements by the recipient organization." (CP 144-45 (Hudson Decl., ¶ 1); *see also* 45 C.F.R. § 74.22(b)(2) (2010).)

Respondent CLA is a Minnesota limited liability partnership, with an office in Yakima County. (CP 8 (Am. Compl., ¶ 2).) CLA is the successor to LarsonAllen LLP which, in turn, was the successor to LeMaster & Daniels PLLC ("L&D"). (CP 9, *Id.*, ¶ 5; CP 29-30 (Koller Decl. ¶¶ 2, 6.) Unless the context indicates otherwise, the term "CLA", as used in this brief, refers to CliftonLarsonAllen and both of its predecessors.

2. The terms of the parties' relationship.

For 2006–2009, EPIC retained CLA's predecessor L&D to audit EPIC's year-end financial statements; for 2010-2011 EPIC retained L&D's successor (and CLA's predecessor) LarsonAllen to perform the same task. EPIC and CLA's predecessors entered into yearly written engagement contracts that set forth the terms and conditions under which CLA would conduct the audits. (CP 9 (Am. Compl., ¶ 5); CP 34-82 (Koller Decl., Exs. A-F).)

Each of the engagement agreements contained contractual limitations clauses which required EPIC to bring any claim within two years. The limitations clause in the four agreements pertaining to the 2006–2009 audits stated:

> It is agreed by Client and L&D or any successors in interest that no claim arising out of services rendered pursuant to this agreement by or on behalf of Client shall be asserted more than two years after the date of the last audit report issued by L&D.

(CP 38 (Koller Decl., Ex. A p. 4); CP 44 (*Id.*, Ex. B p. 5); CP 52 (*Id.*, Ex. C p. 6); CP 57 (*Id.*, Ex. D p. 4).) The limitations clause in the two agreements pertaining to the 2010–2011 audits stated:

> **Time limitation**
>
> The nature of our services makes it difficult, with the passage of time, to gather and present evidence that fully and fairly establishes the facts underlying any Dispute. We both agree that, notwithstanding any statute or law of limitations that might otherwise apply to a Dispute, any action or legal proceeding by you against us must be commenced within twenty-four (24) months ('Limitations Period') after the date when we deliver our final audit report under this agreement, regardless of whether we do other services for you relating to the audit report, or you shall be forever barred from commencing a lawsuit or obtaining any legal or equitable relief or recovery.
>
> The Limitation Period applies and begins to run even if you have not suffered any damage or loss, or have not become aware of the existence or possible existence of a Dispute.

(CP 70 (*Id.*, Ex. E p. 6); CP 79(*Id.*, Ex. F p. 6) (bold in original).)

In addition, the engagement agreements express the parties' understanding that CLA's work papers or audit documentation are the property of CLA. (CP 36 (Koller Decl., Ex. A p. 2); CP 49 (*Id.*, Ex. C p. 3); CP 58 (*Id.*, Ex. D p. 5); CP 69(*Id.*, Ex. E p. 5); CP 78 (*Id.*, Ex. F p. 5).)

3. CLA's issuance of audit reports.

Pursuant to these six engagement agreements, CLA's predecessors issued the following audit reports:

- 2006 audit report: May 22, 2007.
- 2007 audit report: May 17, 2008.
- 2008 audit report: June 29, 2009.
- 2009 audit report: May 18, 2010.
- 2010 audit report: March 28, 2011.
- 2011 audit report: September 19, 2012.

(CP 9 (Am. Compl., ¶¶ 5, 8); CP 84 (Koller Decl., Ex. G); CP 86 (*Id.*, Ex. H); CP 88, *Id.* (Ex. I); CP 91 (*Id.*, Ex. J); CP 94 (*Id.*, Ex. K); CP 97-123 (*Id.*, Ex. L).) [1] In addition, on June 25, 2013, CLA issued its last audit report, for the 2012 financials. (CP 125-26 (Koller Decl., Ex. M).)[2]

4. In January 2012, HHS notified EPIC that EPIC had violated federal regulations concerning matching grants to expenditures.

EPIC's Amended Complaint alleges that, from 2007 until 2011, "an EPIC employee" violated the HHS regulations noted above by using Head Start funds from one funding period to pay expenses that EPIC incurred in the previous funding period. (CP 9 (Am. Compl. ¶¶ 7 and 9).) This person was EPIC's Chief Financial Officer Walter Abegglen. (CP

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[1] An audit of the financial statements for a given year is necessarily done during the following year.

[2] EPIC makes no claim arising out of the June 25, 2013 report. (*See* CP 9 (Am. Compl. ¶¶ 7 and 9).)

169 (Suppl. Hudson Decl., ¶¶ 4-6); Def.'s Suppl. CP ___ (Sub No. 36, Abegglan Decl. ¶¶ 1-3).)

On January 17, 2012, HHS notified EPIC of issues regarding EPIC's management of grants. (CP 169 (Suppl. Hudson Decl., ¶ 4); CP 157-64 (Connor Decl., Ex. N).) In February 2012, soon after receiving this notice, EPIC "put a stop" to the funds mismatching issue by terminating Abegglen's employment. (CP 145 (Hudson Decl., ¶ 8.) Thus, by February 2012, EPIC had actual knowledge that HHS had determined that EPIC had been mismanaging its funds and EPIC had taken steps to deal with the problem.[3] (*Id.*, *see* CP 174 (Suppl. Couch Decl., ¶ 3) (stating that EPIC was aware of mismatching funds issue in January 2012).) EPIC's management "spent most of the rest of 2012" working on this issue. (CP 171 (Suppl. Hudson Decl., Ex. A).)

5. CLA's report regarding the 2011 audit further noted the fund mismatching issue.

On September 19, 2012, CLA issued its audit report for 2011. (CP 97-123 (Koller Decl., Ex. L).) This report fully identified and discussed the funds mismatching issue. The report stated, in part:

[3] As discussed below, the fact that EPIC's CFO was responsible for the mismanagement means that EPIC had imputed knowledge of the problem.

> As discussed in note 12, the opening balance of unrestricted net assets in the accompanying financial statements has been restated.
>
> * * *

(CP 99 (Koller Decl. Ex. L).) This audit report also stated,

> **NOTE 12 PRIOR PERIOD RESTATEMENT**
>
> Net assets at the beginning of 2011 have been adjusted to properly reflect cash receipts on accounts receivable for prior years and to match grant expenditures with reimbursements applicable to prior years. The adjustment resulted in a decrease in net assets and an increase in accrued expenses of $331,095. The effect of the restatement on the previously reported change in net assets for the year December 31, 2010 has not been determined.
>
> **NOTE 13 OPERATIONS**
>
> EPIC has filed an insurance claim related to the misappropriation of Head Start grant funds by a former employee, related to funds drawn down from current federal grants but not used to pay current grant expenditures.

(CP 111 (*Id.*, Ex. L, Notes 12 and 13) (bold in original).) This audit report also stated,

> As described in items 2011-01, 2011-02 and 2011-03 in the accompanying schedule of findings and questioned costs, EPIC did not comply with requirements regarding cash management and period of availability of federal funds ....

(CP 115 (*Id.*, p. 17).) Finding 2011-02 to this September 2012 report further described the fund mismatching issue:

> Condition: EPIC drew down funds from current Head Start grants for expenditures incurred in previous grant years.
>
> Questioned Costs:
>
> $448,885 related to November 1, 2010 through October 31, 2011 grant year
>
> $477,320 related to November 1, 2011 through October 31, 2012 grant year
>
> Context: During the reconciliation process of accounts receivable and grant draw downs, it was noted that the expenses incurred in the last month of the previous grant year were claimed on the current year grant draw down. *This occurred for at least two consecutive prior grant years*. The questioned costs noted above are the amounts drawn down on the respective grants to pay expenses incurred in October 2010 and October 2011.

(CP 119 (*Id.*, p. 21) (underlining in original; italics added).)

Thus, by the time of CLA's audit report in September 2012, EPIC knew: (1) that HHS had identified a problem with how EPIC administered grant funds; (2) that the problem had occurred in at least two years before 2011; (3) that the problem had resulted in a $331,095 adjustment to EPIC's financials; and (4) that EPIC had terminated the employment of the corporate officer responsible for the problem.

6. EPIC accedes to HHS' administrative action and decides to investigate possible legal action.

On February 8, 2013, HHS formally notified EPIC that EPIC would be required to repay more than $1.1 million in funds that were improperly used to pay expenses incurred during an earlier funding period. (CP 9 (Am. Compl., ¶ 9); Def.'s Suppl. CP ___ (Sub. No. 36, Hudson Decl., ¶ 3).) In April 2013, EPIC decided to relinquish federal funds it had received in the amount of $303,287. (CP 9 (Am. Compl., ¶ 11); Def.'s Suppl. CP ___ (Sub. No. 36, Hudson Decl., ¶¶ 5, 6).) EPIC also decided to relinquish its claim to future grants. (CP 9 (Am. Compl., ¶ 10).)

EPIC soon suspected that it had a claim against CLA. (CP 145 (Hudson Decl., ¶ 7).) In October 2013, EPIC retained a forensic accountant, Tiffany Couch, to investigate such a claim. (*Id.*; CP 148 (Couch Decl., ¶ 2).) Couch asked CLA to provide audit documentation. (*Id.*; CP 149 (Couch Decl., ¶ 6).) CLA did not grant Couch's request. (*Id.*) As noted above, the engagement agreements provide that the work papers belong to CLA. Moreover, under applicable statutes and professional standards, CLA had no obligation to give EPIC or EPIC's expert access to those work papers. *See* RCW § 18.04.390; WAC § 4-30-051; AICPA Prof. Stds., AU § 339A.06.[4] Without reviewing the work

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[4] The AICPA Professional Standards recognize that, as a condition of sharing audit work papers with a successor auditor, a predecessor auditor may require

papers, Couch reached a "preliminary opinion" that the audit should have detected the grant mismanagement. (CP 149 (Couch Decl., ¶ 3).) She notified EPIC of this conclusion in June 2015. (*Id.*)

B. Procedural History.

EPIC commenced this lawsuit on December 17, 2015, and filed an Amended Complaint on January 22, 2016. (CP 1-11). EPIC alleges that the year-end financial statement audits that CLA performed "during 2007-11" did not "uncover and/or disclose to EPIC" EPIC's own violation of the federal regulations governing the payment of Head Start expenses. (CP 9 (Am. Compl. ¶ 8).) On April 1, 2016, CLA filed a motion to dismiss under CR 12(b)(6) or, in the alternative, for summary judgment under CR 56. (CP 12-28). In support of its motion, CLA also filed the Declaration of Peter Koller, with Exhibits A-M. (CP 29-126). EPIC responded to this motion on April 19, 2016. (CP 127-143). In support of its opposition, EPIC filed Declarations from Tiffany Couch and Gary Hudson. (CP 144-151). CLA filed a Reply on April 25, 2016 along with a

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the successor auditor to sign a letter that states that the successor auditor "will not comment, orally or in writing, to anyone as a result of that review as to whether [the predecessor auditor's] audit was performed in accordance with generally accepted auditing standards" and "will not provide expert testimony or litigation support services or otherwise accept an engagement to comment on issues relating to the quality of [the predecessor auditor's] audit." AICPA Prof. Stds., AU § 315.11, n.7 and AU § 315.25. Since EPIC retained Couch specifically to investigate a claim against CLA, she could not truthfully make such a statement.

Declaration of Ralph Conner. (Def.'s Second Suppl. CP ___ (Sub. No. 13, Defendant's Reply Brief); CP 152-167). EPIC then filed a Declaration of Walter Abegglen (its former CFO), as well as Supplemental Declarations from Ms. Couch and Mr. Hudson, dated April 27, 2016.[5] (CP 168-174; Def.'s Suppl. CP ___ (Sub. No. 36, Abegglen Decl.)). The Superior Court, Judge Susan L. Hahn presiding, heard oral argument on the motion on April 29, 2016. The Court's Order dismissing the case was filed June 1, 2016. (CP 175-183). This appeal followed.

IV. STANDARD OF REVIEW

CLA's motion to dismiss cited both CR 12(b)(6) and CR 56. The June 1, 2016 Order dismissing the Amended Complaint stated, "Defendant's Motion to Dismiss under CR 12(b)(6) or for Summary Judgment is hereby granted." As such, this appeal concerns the standard under both rules.

A. CR 12(b)(6) Standard.

A CR 12(b)(6) motion challenges the legal sufficiency of the allegations in a complaint. *McAfee v. Select Portfolio Servicing, Inc.*, 193 Wn. App. 220, 226, 370 P.3d 25, 29 (2016) (citing *Contreras v. Crown Zellerbach Corp.*, 88 Wash.2d 735, 742, 565 P.2d 1173 (1977)). A court

[5] Although these three Declarations were not filed in a timely fashion, CLA did not object to their filing and they are part of the record on appeal.

may dismiss a complaint for failing to state a claim if, assuming the truth of the facts alleged in the complaint and viewing those facts in the light most favorable to the nonmoving party, it appears beyond doubt that the plaintiff cannot prove any set of facts which would justify recovery. *Didlake v. Washington State*, 186 Wn. App. 417, 422, 345 P.3d 43, 45 (2014), *review denied* 184 Wn.2d 417 (2015). An order granting a CR 12(b)(6) motion to dismiss is reviewed de novo, as a question of law. *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 954, 962, 331 P.3d 29 (2014); *Kinney v. Cook,* 159 Wn.2d 837, 842, 154 P.3d 206 (2007); *Haberman v. Washington Pub. Power Supply Sys.,* 109 Wn.2d 107, 120, 744 P.2d 1032 (1987). If a plaintiff's claim is legally insufficient even under the proffered facts, dismissal pursuant to CR 12(b)(6) is appropriate. *Jackson v. Quality Loan Serv. Corp.*, 186 Wn.App 838, ¶ 9, 347 P.3d 487, 490–91 (2015) (citing *Gorman v. Garlock, Inc.,* 155 Wn.2d 198, 215, 118 P.3d 311 (2005)).

B. CR 56 Standard of Review.

Under CR 56, summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *McAfee*, 193 Wn. App. 220 at 226. In a motion for summary judgment, all facts and reasonable inferences are construed most favorably to the nonmoving party, and summary judgment is proper if reasonable minds could reach only one conclusion from the evidence presented. *Westberry v. Interstate Distributor Co.*, 164 Wn. App. 196, 204, 263 P.3d 1251, 1255 (2011), *review denied* 174 Wn.2d 1013 (2012). Questions of fact may be determined on summary judgment as a matter of law where reasonable minds could reach but one conclusion. *United Fin. Cas. Co. v. Coleman,* 173 Wn. App. 463, 471, 295 P.3d 763, 767 (2012). A trial court's grant of summary judgment under CR 56 is reviewed de novo. *Pleasant v. Regence Blue Shield*, 181 Wn. App. 252, 261, 325 P.3d 237, 242 (2014) (citing *Smith v. Safeco Ins. Co.,* 150 Wash.2d 478, 483, 78 P.3d 1274 (2003), *review denied* 181 Wn.2d. 1010 (2014). The appellate court is not bound by the reasoning of the trial court, but may affirm summary judgment on any grounds supported by the record. *Blue Diamond Group, Inc. v. KB Seattle 1, Inc.*, 163 Wn. App. 449, 453, 266 P.3d 881, 883 (2011).

C. Conversion of CR 12(b)(6) Motion to Summary Judgment Motion.

A motion to dismiss for failure to state a claim is a motion on the pleadings, and extraneous evidence is not usually considered. *Yurtis v. Phipps*, 143 Wn. App. 680, 692 181 P.3d 849, 856 (2008). Where parties submit documents not included in the original complaint for the court to consider in evaluating a CR 12(b)(6) motion, these submissions sometimes convert a CR 12(b)(6) motion into a motion for summary judgment. *McAfee*, 193 Wn. App. 220 at 226. However, in a motion to dismiss, the trial court may consider documents whose contents are alleged in a complaint but not physically attached to the pleadings. *Id.* (citing *Rodriguez v. Loudeye Corp.,* 144 Wash.App. 709, 725-726, 189 P.3d 168 (2008). There is no need to convert a motion to dismiss on the pleadings into one for summary judgment when the operative facts are undisputed, the core issue is one of law, and whatever else might be presented would not change the disposition of the motion. *Judy v. Hanford Envtl. Health Found.*, 106 Wn. App. 26, 34, 22 P.3d 810, 815 (2001).

V. SUMMARY OF ARGUMENTS

The parties' contracts contained an enforceable limitations clause giving EPIC no more than two years to bring its claims. For the agreements to audit the financials in years 2006-2009, the two-year period began to run on the date of CLA's *last* audit report. For the agreements for the years 2010-2011, the two-year period began to run on the delivery of the audit report *at issue*. CLA delivered an audit report to EPIC for each of these years. The last report in which EPIC's financial mismanagement was not identified was dated March 28, 2011. On September 19, 2012, CLA delivered an audit report regarding EPIC's financial statements for the year 2011. This report identified and fully described the fund mismatching problem and notified EPIC that the issue had existed for at least the last two years. CLA's last audit report of any kind was issued June 25, 2013.

The two-year contractual limitations period commenced either on delivery of CLA's *last* audit report, June 25, 2013 report (under the contractual limitation clauses applicable to the audits for 2006-2009), or on delivery of the March 28, 2011 report (under the contractual limitation clauses applicable to the audits for 2010-2011). If the former, EPIC had until June 25, 2015 to bring its claims; if the latter, it had until March 28, 2013. It is unnecessary to decide which date triggers the running of the period, since EPIC waited until December 17, 2015 – well past both dates – to file its lawsuit against CLA. As a result, EPIC's claims against CLA are time-barred.

In the alternative, CLA presented additional arguments to the Superior Court, any of which would also support affirming the decision to dismiss.

VI. ARGUMENT: THIS COURT SHOULD AFFIRM THE SUPERIOR COURT'S DECISION

This Court should hold that the Superior Court's decision to dismiss EPIC's Amended Complaint was correct and should affirm the judgment.

A. The Contractual Two-Year Limitations Clause Bars EPIC's Claims.

In the engagement agreements, EPIC agreed that it would commence any lawsuit against CLA within a two-year period. This clause is reasonable and enforceable under Washington law, both on its face and as applied to the undisputed facts of this case.

In considering EPIC's contentions, this Court should keep in mind that the burden of proving that the clause is unconscionable rests with EPIC. *Tjart v. Smith-Barney, Inc.*, 107 Wn. App. 885, 898, 28 P.3d 823, 830 (2001); *Luna v. Household Fin. Corp. III*, 236 F. Supp. 2d 166, 1174 (W.D. Wash. 2002). EPIC cannot meet that burden. EPIC does not claim that it did not agree to the time limitation provisions. No Washington statute or other authority prohibits a contractual time limit on bringing claims arising out of an audit engagement. Despite its agreement to the two-year time limit, EPIC waited far more than two years in which to bring its claims. As a result, EPIC's claims are time-barred.

1. The contractual two-year limitations clauses are reasonable and enforceable on their face.

As an initial matter, this Court should conclude that the two-year contractual limitations period is enforceable under Washington law.

a. Under Washington law, contractual limitations clauses are enforceable.

Contractual time limitations clauses are enforceable under Washington law. *See, e.g., Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 512-13, 296 P.3d 821, 826-27 (2013) (recognizing that parties can contractually modify the statute of limitations and can likewise agree to set the time for accrual of causes of action under their contracts); *Syrett v. Reisner McEwin & Assocs.*, 107 Wn. App. 524, 527-28, 24 P.3d 1070, 1072 (2001) ("Under Washington law, parties may agree to a shorter limitation on filing suit than the period of the applicable statute of limitations."); *Wothers v. Farmers Ins. Co. of Wash.*, 101 Wn. App. 75, 79-80, 5 P.3d 719, 721 (2000) ("A statute of limitation cannot enlarge the time for the commencement of an action when the time limitation therefor is fixed by contract."); *Yakima Asphalt Paving Co. v. Dept. of Transp.*, 45 Wn. App. 663, 666, 726 P.2d 1021, 1023 (1986) ("A contract limitation period prevails over the general statute of limitations unless prohibited by statute or public policy, or unless the provision is unreasonable."), *review denied*, 107 Wn.2d 1029 (1987).

b. The *length* of the limitations clauses is reasonable.

Here, the specific limitations period is two years. "Washington cases have found contractual limitations on the time to bring suit ranging between three months and a year to be reasonable and not violative of public policy." *Syrett,* 107 Wn. App. at 530, 24 P.3d at 1073. Indeed, EPIC does not claim that the two-year limitations period, in and of itself, is unreasonable.

c. The *commencement date* in the limitations clauses is reasonable.

EPIC focuses its arguments on the date on which the two-year period begins to run. But contrary to EPIC's position, the parties' agreement that the limitations period would begin to run on delivery of the audit report is enforceable.

Parties to a contract are free to set a trigger date for limitations purposes different from the date that would otherwise apply. *Washington State Major League Baseball Stadium Public Facilities Dist. v. Huber, Hunt & Nichols-Kiewit Const. Co.*, 176 Wn.2d 502, 512-13, 296 P.3d 821, 826-27 (2013); *see also In re Park West Galleries Inc., Mktg. & Sales Litig.*, 732 F. Supp. 2d 1171, 1174-77 (W.D. Wash. 2010) (enforcing nine-month limitations period that commenced on date of invoice). Here, in the engagement agreements, the parties agreed that the limitations period would begin to run on delivery of the audit report. For the agreements to audit the financials in years 2006-2009, the commencement date was the last audit report. (CP 34-63 (Koller Decl., Exs. A-D).) For the agreements for the years 2010 and 2011, the commencement date was the delivery of the audit report at issue. (*Id.*, 64-84 (Exs. E, F).) In the engagement agreements for 2010 and 2011, EPIC and CLA further agreed:

> The Limitation Period applies and begins to run *even if you have not suffered any damage or loss, or have not become aware of the existence or possible existence of a Dispute*.

(*Id.* (Exs. E, F (emphasis added)).) This Court should enforce that agreement. *See, e.g., Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004) ("It is black letter law of contracts that the parties to a contract shall be bound by its terms.").

This Court should enforce the agreements EPIC made and should hold that any claim arising out of the 2006-2009 audits must be brought within two years of the last report issued by CLA, and any claim arising out of the 2010-2011 audits must be brought within two years from the delivery of the audit report for that year. Since EPIC waited until December 2015 to commence its lawsuit, its claims are time-barred. The

Superior Court's decision to dismiss this case should be affirmed under the standard of review applicable to CR 12(b)(6).

2. The contractual limitations clauses are reasonable and enforceable as applied.

Despite its agreement to the unambiguous limitations clauses, EPIC nevertheless contends the clauses are unenforceable. The focus of EPIC's argument is its contention that the clauses, as applied to this case, unfairly required EPIC to bring suit against CLA before EPIC could have discovered its claim. This Court should reject this argument and should affirm the Superior Court's decision under the standard of review applicable to CR 56.

a. The Superior Court properly determined that EPIC had knowledge of the claim within the limitations period.

The undisputed facts of record, including the Declarations submitted by EPIC, establish that the Superior Court properly determined, as a matter of law, that EPIC had knowledge of the relevant facts forming the basis of a claim, well within the applicable contractual limitations periods. As such, the Court's decision should be affirmed.

First, because EPIC does not contend that its former CFO was acting outside the course of employment, EPIC is charged with his knowledge of his actions. As such, EPIC was aware that it was misusing Head Start funds and that CLA had not disclosed that misuse in connection with any of its pre-2011 audits. *See J.M.S. Farms, Inc. v. Dept. of Wildlife,* 68 Wn. App. 150, 158, 842 P.2d 489, 493 (1992) (imputing corporate officer's knowledge and illegal conduct to corporation). Under these circumstances, there is nothing unfair about the trigger date provision.

Aside from the imputation of the knowledge of EPIC's CFO, the Superior Court concluded, on the basis of the documentary evidence before it, that EPIC had knowledge of the claim in 2012. (CP 176 (May 2, 2016 letter ruling, p. 2).)[6] Specifically, the Court stated that, at the time of the September 2012 report,

> Plaintiff was already on notice from the Feds they were in trouble. Accordingly, they knew enough at that time to trigger the limitation period.

(*Id.*) This conclusion is amply supported by the record and should be affirmed. No later than its receipt of the September 2012 audit report, EPIC knew:

1) that it had retained CLA to audit its financial statements;

2) that HHS had identified a problem with how EPIC administered grant funds;

3) that EPIC had terminated the employment of the corporate officer responsible for the problem;

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[6] This letter ruling speaks, in part, of "Defendant's" knowledge of the circumstances. The use of "Defendant" in this context is plainly a typographical error; the context demonstrates that the Superior Court meant to refer to Plaintiff.

4) that the problem had occurred in at least two years before 2011; and

5) its auditors had provided a detailed accounting of the impact of the problem, including a restatement of more than $331,000 on EPIC's balance sheet.

As the Superior Court recognized, the only conclusion a reasonable mind could come to regarding these facts is that EPIC knew it had a potential claim against its auditors, before the limitations period elapsed. (CP 176 (May 2, 2016 letter ruling, p. 2).)

EPIC now assigns as error the Superior Court's determination of this issue as a matter of law. But, as shown by the record, EPIC did not object to the Declarations submitted by CLA. EPIC submitted Declarations of its own to support its position, and EPIC did not object to CLA's argument that the Court could resolve the motion under either CR 12(b)(6) or CR 56. There is no genuine dispute of fact regarding the wording of the audit report or that EPIC had the report in September 2012. On this record, the Superior Court's decision to consider the documentary evidence was correct, and its determination that the undisputed facts established EPIC's knowledge within the contractual limitations period should be affirmed.

b. The clause did not require EPIC to sue CLA before EPIC knew it had a claim.

In arguing that the limitations clauses unfairly required it to sue before it had a full opportunity to investigate, EPIC relies primarily on the decision of the Washington Supreme Court in *Syrett,* 107 Wn. App. 524, 24 P.3d 1070, 1072 (2001). In *Syrett*, the court enforced a six-month contract limitations period, after first noting that a contractual limitations period "is not unreasonable if the time allowed affords a plaintiff sufficient opportunity to ascertain and investigate the claim and prepare for the controversy." *Syrett*, 107 Wn. App. at 529-30, 24 P.3d at 1073.

Here, such an opportunity existed. Washington law regarding the "discovery rule" is instructive in establishing the legal significance of the knowledge EPIC indisputably possessed within the contractual limitations period. Under the discovery rule, the cause of action accrues when the plaintiff learns the salient facts, even if the plaintiff does not understand the legal significance of those facts. *Virginia Ltd. Partn. v. Vertecs Corp.*, 158 Wn.2d 566, 576, 146 P.3d 423, 428 (2006). Determining when a claim accrues can involve fact questions, but it is proper for the trial court to resolve the issue as a matter of law if reasonable minds cannot differ as to the interpretation of the relevant facts. *Martin v. Dematic*, 178 Wn. App. 646, 653, 315 P.3d 1126 (2013). Here, as established above, the

Superior Court properly determined that EPIC knew about the regulatory violations for which it seeks to hold CLA responsible for more than three years before it commenced its lawsuit, and had a full opportunity to investigate and pursue its claims within the limitations period.

EPIC's full and fair opportunity to pursue its claims is demonstrated by two additional undisputed factors. First, contrary to EPIC's contention that it had no opportunity to sue CLA for claims arising out of the 2006 through 2009 audits, EPIC actually had several years in which to bring a claim arising out of those reports. On this point, EPIC misses a key term in the engagement agreements. Unlike the later engagement agreements, the agreements for those earlier audits require a claim to be brought within two years "after the *last* audit report issued by [LeMaster & Daniels PLLC (now CLA)]." (CP 38 (Koller Decl., Ex. A p. 4); CP 44 (*Id.*, Ex. B p. 5); CP 52 (*Id.*, Ex. C p. 6); CP 57 (*Id.*, Ex. D p. 4).) The issuance date of the last audit report was June 25, 2013. (CP 125 (*Id.*, Ex. M).) Thus, EPIC actually had until June 25, 2015 to commence a lawsuit against CLA based upon an alleged failure by CLA to uncover funds mismanagement in the 2006 through 2009 audits.

Second, with regard to EPIC's claim arising out of the March 28, 2011 report for the 2010 audit, EPIC had plenty of time to assert such a claim after the misuse of Head Start funds was disclosed and before the expiration of the two-year period that ran from the date of that report. HHS notified EPIC of the misuse of Head Start funds on January 17, 2012. EPIC took immediate action, including terminating the employment of its CFO. In the September 19, 2012 audit report, CLA disclosed such misuse dating back to at least the end of 2009. (CP 119 (Koller Decl. Ex. L, p. 21).) Thus, during the two-year period after the March 28, 2011 report, EPIC had more than a year – and at least six months from CLA's September 2012 report – in which to assert claims arising out of the March 2011 report.

In short, on this record EPIC had ample opportunity to learn of and investigate any potential claim against CLA, well before the expiration of the contractual limitations period.

c. EPIC's delay in pursuing its claim does not extend the limitations period.

EPIC further contends that the limitations clauses are unreasonable and unenforceable, due to the fact that its forensic accountant did not complete her investigation within the limitations period. EPIC waited until September or October 2013 to retain this person, Tiffany Couch. At some point, Couch requested that CLA provide work papers. (CP 149 (Couch Decl., ¶ 6).) As noted above, the engagement agreements provide that the work papers and audit documentation were the property of CLA, and under professional standards CLA may retain the work papers. Neither Couch nor EPIC argues to the contrary. In June 2015, nearly two years after her retention, Couch provided a "preliminary report" to EPIC.[7] (CP 149 (Couch Decl., ¶ 3).) This report stated her belief that CLA should have detected EPIC's mismanagement and that the auditors breached the standard of care. (*Id.* (¶ 3).) Couch goes on to state that she cannot say "for sure" whether the auditors breached the standard of care. (*Id.* (¶ 8).)

Based on the Couch Declaration, EPIC contends that it was justified in waiting to sue CLA until its expert knew "for sure" whether the standard of care was breached. But EPIC's position is contrary to the facts of the case and Washington law. Under the discovery rule, the running of the statute of limitations is not tolled until a plaintiff consults an expert or is informed by an attorney that a breach of the applicable standard of care has occurred. *Gevaart v. Metco Constr.*, 111 Wn.2d 499, 501-502, 760 P.2d 348 (1988). EPIC does not point to anything in the record which explains either why EPIC had to wait for Couch to finish her work or why Couch could not have issued her preliminary report much sooner than she did. And EPIC does not identify any material fact which it knew when it filed the lawsuit in December 2015 that it did not know

[7] Other than noting her request for the work papers, Couch does not explain the reason for the amount of time it took to issue her report.

within the limitations period. Further, nothing in Washington law supports EPIC's position that, before bringing such a claim, EPIC was required to wait until it could be assured that the claim would prevail. CR 8 simply requires that the Complaint provide a short and plain statement of the claim, and CR 11 simply requires that a claim be "well grounded in fact" and "warranted by existing law." CLA's belief that it has defenses to the claim does not mean that EPIC was legally precluded from commencing the suit. Indeed, when EPIC finally commenced this lawsuit, it did so on the basis of the information it had in September 2012.

In short, the record in this case establishes, beyond any doubt, that well before the expiration of any potentially applicable contractual limitations clause EPIC knew of the facts underlying its potential claim against CLA and had a full and fair opportunity to bring those claims. Therefore, the two-year limitations clause is not unreasonable as applied to the facts of this case, and the limitations period should be enforced.

3. The reasonable two-year limitations clauses bar EPIC's claims.

On these facts, the two-year contractual limitations clauses bar EPIC's claims against CLA. For any claims arising out of the 2006-2009 audits, the contractual limitations clauses gave EPIC until two years after the date of the last audit report, or June 25, 2015, to commence suit. For any claims arising out of the 2010 audit, the contractual limitations clause gave EPIC until two years after the date of that report, or March 28, 2013, to commence suit. In both cases, EPIC had ample opportunity to investigate any possible claims against CLA. This Court should affirm the Superior Court's judgment. But EPIC did not commence its lawsuit until December 17, 2015. Accordingly, the lawsuit is untimely and the Superior Court's decision to dismiss must be affirmed.

B. EPIC's Lawsuit Will Still Be Time-Barred If the Court Rejects the Trigger Date Portion of The Contractual Limitation Provisions.

EPIC admits that two years is a reasonable limitations period, but disputes the reasonableness of using the delivery date of the audit report as the trigger date for the limitations period. As established above, using the delivery date of the audit report as the trigger date for the limitations period is reasonable. However, even if this Court were to find that the trigger date portion of the limitations provision contained in the engagement agreements is unconscionable, the proper remedy is to sever only that portion of the limitations provision and to enforce the balance of the two-year limitations provision. If the Court applies that remedy, EPIC's claims against CLA will still be time-barred because EPIC commenced this lawsuit well over two years after the latest possible date on which EPIC can claim to have discovered it was injured.

The Washington Supreme Court has endorsed the Restatement (Second) of Contracts approach to unconscionable provisions in a contract, which recognizes that a court has the authority to sever the offending clause and enforce the remainder of the contract. *Adler*, 153 Wn.2d at 358-59, 103 P.3d at 788 (quoting Restatement (Second) of Contracts § 208 (1981)); *see also Gandee v. LDL Freedom Enters.*, 176 Wn.2d 598, 603, 293 P.3d 1197, 1199 (2013) (noting that "[s]everance is the usual remedy for substantively unconscionable terms"). Section 208 of the Restatement reads as follows:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, *or may enforce the remainder of the contract without the unconscionable term*, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Restatement, § 208 (emphasis added).

Here, EPIC's only objection is to the portion of the time limitation provisions that uses the delivery date of the audit report as the date on which the two-year limitations period starts. Therefore, the Court could sever that particular clause and, instead, employ a standard accrual date as the start date for the limitations period. The result will be that this lawsuit will still be time-barred, because it was not commenced until more than two years after each of the following events: (a) HHS's notification to

EPIC in January 2012 of issues regarding funds matching; (b) CLA's September 2012 audit report; (c) HHS's February 8, 2013 demand that EPIC return the misused Head Start funds; (d) EPIC's relinquishment of federal funding in April 2013; (e) HHS's final agreement in August 2013 to require EPIC to only repay $300,000 of misused funds; and (f) EPIC's engagement (in September/October 2013) of a forensic accountant to investigate CLA's work. (*See* CP 9 (Am. Comp., ¶ 9); Def.'s Suppl. CP ___ (Sub No. 36, Hudson Decl., ¶¶ 5-7); CP 148 (Couch Decl., ¶ 2).) In short, if the Court severs the portion of the time limitations provision that sets the date of delivery of the audit report as the commencement date of the two-year limitations period, EPIC's purported claims against CLA will continue to be barred by the two-year limitations period because it is undisputed that those purported claims accrued prior to December 17, 2013 (*i.e.*, more than two years before this lawsuit was filed).

C. The Statute of Limitations Bars EPIC's Claims.

Even if the contractual limitations clause were not enforceable, the applicable Washington statute of limitations would still apply to bar EPIC's claims against CLA. This Court could affirm the Superior Court's decision that EPIC's claims are time-barred on this alternative ground.

1. EPIC's claims are barred by the three-year statute of limitations applicable to tort claims.

The statute of limitations bars EPIC's claims against CLA. Under Washington law, a three-year statute of limitations applies to tort claims, including professional malpractice actions. RCW § 4.16.080. As established above, by early 2012 – and no later than September 2012 – EPIC had knowledge of facts under the "discovery rule" sufficient to put it on notice of its potential claims against CLA. However, EPIC waited until December 2015 – nearly four years after learning of the issue, and three years and three months after CLA's 2012 audit report – to commence this lawsuit. As a result, its claims are barred by the statute of limitations.

2. EPIC's assertion of a breach of contract claim does not alter the limitations period.

EPIC contends that its breach of contract claim against CLA in the Amended Complaint allows it to proceed on the basis of the six-year statute of limitations applicable to contract claims. But EPIC's purported contract claim fails to state any cause of action and does not permit EPIC to invoke the six-year statute of limitations.

To assert a viable breach of contract claim, EPIC would have had to allege that CLA "violated a specific contractual undertaking", as opposed to a breach of a duty to use reasonable care in the performance of the audit engagements. *See Boguch v. Landover Corp.*, 153 Wn. App.

595, 618-19, 224 P.3d 795, 807-08 (2009) (citing *G.W. Constr. Corp. v. Prof'l Serv. Indus., Inc.*, 70 Wn. App. 360, 366, 853 P.2d 484 (1993)). The court in *Boguch* held that "[a] claim that a realtor breached his or her duty to a seller is not an action on a contract, unless the seller claims that the realtor's omission 'violated a specific contractual undertaking.'" 153 Wn. App. at 618-19, 224 P.3d at 807-08. Similarly, the court in *G.W. Construction*, 70 Wn. App. 360, 853, P.2d 484 (1993), held that an action against inspecting engineers who erroneously certified that the placement of rebar in a building met the plans and specifications sounded in tort, not contract, because the faulty certification "was not a breach of a specific term of [the engineers'] contract." 70 Wn. App. at 366; 853 P.2d at 487. Similarly, in *Owens v. Harrison*, 120 Wn. App. 909, 86 P.3d 1266, (2004), the Court stated,

> If the tortious breach of a duty, rather than a breach of a contract, gives rise to the cause of action, the claim is not properly characterized as breach of contract.

120 Wn. App at 915, 86 P.3d at 12 69 (citing *G.W. Constr.*, 70 Wn. App. at 364). As the Court further explained in *Owens*:

> [A]n attorney who agrees to draft a will for a client breaches the client contract by failing to draft the will. But if the attorney drafts the will negligently, the client has a tort claim even though the attorney drafted the will and did not breach the contract.

Id. at 915-16, 86 P.3d at 1269 (citing *G.W. Constr.*, 70 Wn. App. at 364, 853 P.2d 484).

Here, EPIC has not alleged that CLA either entirely failed to perform the services that were the subject of the engagement agreements between EPIC and CLA or that CLA breached a particular provision of any of those agreements. Rather, EPIC contends that CLA breached the standard of care applicable to an auditor in failing to identify EPIC's financial mismanagement. (CP 9 (Am. Compl. ¶ 8); CP 149 (Couch Decl., ¶ 3); CP 174 (Suppl. Couch Decl., ¶ 3).) That is a tort claim, not a contract claim.

Absent an allegation that CLA "violated a specific contractual undertaking," EPIC's purported breach of contract claim fails to state a claim on which relief can be granted and should be dismissed accordingly. Therefore, EPIC's argument that it is asserting a breach of contract claim does not allow it to claim the benefit of the six-year statute of limitations. Instead, the three-year limitations period applies and bars EPIC's claims.

D. The Doctrine of *In pari delicto* Bars this Lawsuit.

In addition to being time-barred, this lawsuit is also barred by the *in pari delicto* doctrine.

The *in pari delicto* doctrine is an equitable defense that "is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct." *Pinter v. Dahl*, 486 U.S. 622, 632 (1988). In a landmark 2010 opinion regarding claims against auditors who had allegedly failed to uncover misconduct committed by corporate agents, the New York Court of Appeals described the doctrine and its underlying purpose as follows:

> The doctrine of in pari delicto mandates that the courts will not intercede to resolve a dispute between two wrongdoers. This principle has been wrought in the inmost texture of our common law for at least two centuries. The doctrine survives because it serves important public policy purposes. First, denying judicial relief to an admitted wrongdoer deters illegality. Second, in pari delicto avoids entangling courts in disputes between wrongdoers.

Kirschner v. KPMG LLP, 912 N.Y.S.2d 508, 938 N.E.2d 941, 950 (N.Y. 2010) (footnote and citations omitted).

Numerous courts have endorsed the use of *in pari delicto* principles to bar <u>any</u> recovery from third-party auditors by corporate entities whose personnel actively engaged in corporate wrongdoing that the auditors allegedly failed to uncover. *See, e.g.*, *Kirschner,* 938 N.E.2d at 950; *Cenco v. Seidman & Seidman*, 686 F.2d 449, 454-55 (7th Cir. 1982) (Illinois law); *Baena v. KPMG LLP*, 389 F. Supp. 2d 112, 117 (D. Mass. 2005), *aff'd,* 453 F.3d 1, 6-10 (1st Cir. 2006); *A.I.G., Inc. v. Greenberg,* 965 A.2d 763, 822-28 (Del. Ch. 2009), *aff'd sub nom. Teachers' Ret. Sys. of La. v. PricewaterhouseCoopers LLP*, 2011 WL

13545 (Del. Jan. 3, 2011); *Peterson v. McGladrey LLP*, 792 F.3d 785, 788 (7th Cir. 2015); *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 814 (Minn. Ct. App. 2007), *rev. denied* (Minn. Sept. 18, 2007).[8]

Although there does not appear to be any reported decision in which a Washington court enforced the *in pari delicto* doctrine in the context of a claim against an auditor by a corporate client, courts in Washington have recognized that common law doctrine in other contexts. *See, e.g., Evans v. Luster,* 84 Wn. App. 447, 451-53, 928 P.2d 455, 458-59 (1996) (applying *in pari delicto* doctrine to preclude claim between equally culpable parties to an illegal contract); *In re Consolidated Meridian Funds (Calvert v. Zions Bancorporation)*, 485 B.R. 604, 618 (Bankr. W.D. Wash. 2013) (acknowledging that *in pari delicto* doctrine "prohibits one party from bringing a claim against another when the claiming party bears the stigma of culpability," but holding that the doctrine did not apply under the particular facts of that case); *Walsh v. Brousseau,* 62 Wn. App. 739, 745-46, 815 P.2d 828, 832-33 (1991)

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[8] The in pari delicto doctrine is different from comparative fault principles. The in pari delicto doctrine operates as a complete bar to claims by a plaintiff who jointly engages in wrongdoing, even in a jurisdiction that has adopted "pure comparative negligence." See, e.g., *Kirschner*, 938 N.E.2d at 950 (decided under the law of New York, a state that has adopted "pure comparative negligence" by statute – N.Y. C.P.L.R. § 1411); *Ameriwood Indus. Int'l Corp. v. Arthur Anderson & Co.*, 961 F. Supp. 1078, 1085 (W.D. Mich. 1997) ("Michigan case law firmly recognizes the continuing viability of the doctrine [of in pari delicto] following the advent of pure comparative negligence.").

(stating "general rule of *in pari delicto* is that when the parties are of equal guilt, the defendant will prevail," but holding that case fell within public policy exception to general rule) (citing *Goldberg v. Sanglier,* 96 Wn.2d 864, 639 P.2d 1347 (1982)); *Guard v. Town of Friday Harbor*, 22 Wn. App. 758, 761, 592 P.2d 652 (1979) (discussing *in pari delicto* principles in context of a claim for common law indemnity).

EPIC acknowledges that its employee – its CFO – violated federal law by using Head Start funds from one funding period to pay expenses that EPIC incurred in the previous funding period. (CP 9, Am. Compl., ¶¶ 7 and 9.) That conduct, undertaken by an agent of EPIC on EPIC's behalf, was a clear violation of Federal regulations. 45 C.F.R. § 74.22(b)(2) (2010). Because EPIC cannot avoid responsibility for its agent's misconduct, EPIC's complaint against CLA fails to state a claim on which relief can be granted and should be dismissed with prejudice under the *in pari delicto* doctrine.

As the court in *Kirschner* explained, longstanding agency principles are a key part of applying the *in pari delicto* doctrine, to a corporation:

> Traditional agency principles play an important role in an in pari delicto analysis. Of particular importance is a fundamental principle that has informed the law of agency and corporations for centuries; namely, the acts of agents, and the knowledge they acquire while acting within the

> scope of their authority are presumptively imputed to their principals. … Corporations are not natural persons. "[O]f necessity, [they] must act solely through the instrumentality of their officers or other duly authorized agents." … A corporation must, therefore, be responsible for the acts of its authorized agents even if particular acts were unauthorized.

938 N.E.2d at 950 (citations omitted). Washington courts have recognized those same agency principles and have imputed the conduct and knowledge of corporate agents to the entities on whose behalf they were acting. *See, e.g., Broyles v. Thurston County*, 147 Wn. App. 409, 428, 195 P.3d 985, 995 (2008) ("[A] corporation is 'an artificial being, invisible, intangible, and existing only in contemplation of law,' which by necessity 'must act through its officers, directors, or other agents.'") (quoting 18 Am. Jur. 2d *Corporations* §§ 1, 2 (2004)); *J.M.S. Farms, Inc. v. Dept. of Wildlife,* 68 Wn. App. 150, 158, 842 P.2d 489, 493 (1992) (imputing corporate officer's knowledge and conduct to entity).

Consistent with these imputation principles, when an employee of a corporation engages in wrongful conduct while acting in his or her role as a corporate agent, the corporation cannot avoid legal responsibility for the employee's conduct. That is true even when the corporation replaces the employee, because the relevant time for determining whether or not to apply *in pari delicto* to a corporation is as of the time of the wrongful act. *See Nisselson v. Lernout*, 469 F.3d 143, 155-156 (1st Cir. 2006) (recognizing that "a [corporate] party's culpability *vel non* must be based on its status at the time the alleged illegality occurred"); *see also Adelphia Recovery Trust v. Bank of America*, No. 05 Civ. 9050, 2010 WL 3452374, at *8 (S.D.N.Y. Sept. 1, 2010) (recognizing that "wrongful acts are imputed to a corporation (if at all) when the acts occurred," meaning that the subsequent removal of the wrongdoers does not prevent application of the *in pari delicto* doctrine). The logic and fairness of that approach is obvious. Just as an audit firm cannot safeguard itself against a claim arising out of a failed audit by firing everyone who worked on the audit, a corporate claimant in a failed audit case cannot escape responsibility for the wrongful conduct of its corporate agents by removing them after the fact.

Finally, the so-called "adverse interest" exception could not prevent application of the *in pari delicto* doctrine in the present case. That narrow exception applies to prevent imputation only where the corporate agent who is engaged in the misconduct has "totally abandoned" the interests of the corporation, has acted "entirely for his own or another's purposes," and has provided "*no* benefit to the corporation." *Kirschner*, 938 N.E.2d at 952-53. In the present case, the EPIC employee did not "totally abandon" the interests of EPIC and act for his own benefit when he misused Head Start funds <u>to pay expenses of EPIC</u>. Moreover, because

EPIC benefitted in the short term from the payment of its expenses, EPIC cannot plausibly assert that it sustained "no benefit" from its employee's violations of law.

For all of these reasons, the Court should affirm the Superior Court's decision to grant CLA's motion to dismiss on the alternative basis of the *in pari delicto* doctrine.

VII. COSTS.

Without presuming the outcome of the subject appeal, CLA respectfully requests an award of costs and recoverable fees in accordance with and pursuant to the court rules, which provide, in relevant part, that "the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review." RAP 14.2; *see also Kirby v. City of Tacoma*, 124 Wn. App. at 475. CLA further reserves the opportunity to file a cost bill to set forth its costs and fees that are recoverable under Washington law and the relevant rules of appellate procedure.

VIII. CONCLUSION.

The Superior Court properly determined that the two-year contractual limitations clauses in the engagement agreements between EPIC and CLA bar EPIC's present lawsuit. This Court should affirm the Superior Court's judgment.

DATED this 2nd day of December, 2016.

MEYER, FLUEGGE & TENNEY, P.S.

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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On the 2nd day of December, 2016, I deposited in the mails of the United States Postal Service a properly stamped and addressed envelope containing a copy of this document to the following:

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DATED this 2nd day of December, 2016, at Yakima, Washington.

Kathleen M. Marugg

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