

No. 68154-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MWW, PLLC dba Moran Windes and Wong, PLLC and MORAN &
KELLER, PLLC its successor;
Appellants,

v.

RYAN and JANE DOE SMITH, and the marital community composed
thereof; JOHN and JANE DOE GUARINO, and the marital community
composed thereof; all individually and as successors in interest to
INTERACTIVE OBJECTS, INC.; YARMUTH WILSDON CALFO
PLLC; RICHARD and JANE DOE YARMUTH, and the marital
community composed thereof; and the proceeds of the legal malpractice
settlement paid by or on behalf of CAIRNCROSS & HEMPELMANN,
P.S., a Washington professional service corporation, in res,
Respondents.

**BRIEF OF RESPONDENTS YARMUTH WILSDON CALFO PLLC
AND RICHARD AND JANE DOE YARMUTH**

818 Stewart Street, Suite 1400
Seattle, WA 98101

YARMUTH WILSDON CALFO PLLC

John H. Jamnback, WSBA # 29872
Cristin Kent Aragon, WSBA #39224

Attorneys for Yarmuth Wilsdon Calfo
PLLC, Richard and Jane Doe Yarmuth

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I. INTRODUCTION

Years ago, attorney Dennis Moran, through his law firm Moran Windes and Wong, signed a contingent fee agreement with client Brent Nelson. The Moran firm was to represent Nelson in a malpractice action against Cairncross and Hempelmann. The contingent fee agreement provided that if Nelson's interest in the malpractice action was transferred to anyone else, the Moran firm would automatically – and immediately – have an attorney lien in a fixed amount of \$750,000—regardless of the amount of work the Moran firm did prior to the transfer, and regardless of the quality of the Moran firm's work. Shortly after the Moran firm filed the complaint on Nelson's behalf, Nelson's interest in the malpractice case was acquired by respondents Ryan Smith and John Guarino (“Smith and Guarino”) in 2006. At the time, Respondents Yarmuth Wilsdon Calfo PLLC and Richard Yarmuth represented Smith and Guarino.

After over a year of discovery and motions practice, Yarmuth Wilsdon Calfo settled the case on Smith's and Guarino's behalf. Thereafter, the Moran firm asserted its alleged \$750,000 fixed-fee attorney lien on the settlement proceeds. In response, Smith and Guarino sought and obtained a ruling from the Trial Court invalidating the Moran firm's lien.

The Moran firm appealed but did not seek a stay of the Trial Court's ruling invalidating the lien, nor did it file a supersedeas bond. The

Court of Appeals determined that the Moran firm had the right to seek to enforce a statutory attorney's fee lien, and the case was remanded to the Trial Court to determine what amount, if any, the Moran firm was entitled to.

On remand, the Moran firm again asserted its \$750,000 lien claim against Smith and Guarino. It did not assert this lien claim against Respondents Yarmuth Wilsdon Calfo and Richard Yarmuth, Smith's and Guarino's attorneys. After the Trial Court denied the Moran firm's motion for summary judgment which sought to fix the lien amount at \$750,000,¹ Moran filed an unsuccessful interlocutory appeal, and then appeared to lose interest in the case. After fourteen months of no activity, the Moran firm's lien claim against Smith and Guarino was properly dismissed for want of prosecution pursuant to CR 41(b)(1). The Moran firm again appealed, but it failed to make the necessary showing that discretionary review before this Court or the Supreme Court was appropriate. Both this Court and the Supreme Court rejected Moran's motions/petitions for discretionary review.

The appellant in the present case, "MWW, PLLC dba Moran Windes and Wong, PLLC and Moran & Keller, PLLC its successor" ("Moran") then filed a new lawsuit, attempting to collect on the same

¹ The Trial Court correctly noted that since Moran was basing his claim on a contingent fee agreement and he withdrew from the case well before substantial completion, the basis of his lien was limited to reasonably hourly rates. CP 54-56. Moran had already acknowledged in his deposition that the Moran firm had generated no written time records regarding its work on this case for Mr. Nelson. CP 296.

alleged \$750,000 attorney lien. Moran filed the lawsuit July 18, 2011—well over three years after the lien claim arose. As it had in the previous lawsuit, Moran named Smith and Guarino as defendants. However, for the first time, it added Yarmuth Wilsdon Calfo PLLC and Richard and Jane Doe Yarmuth (collectively “Yarmuth”) as defendants as well. Prior to that date, Moran (or any other allegedly Moran-related firm) had never asserted a claim against Yarmuth. Moran asserted claims against Yarmuth for conversion and “foreclosure on attorney fee lien.” Because the claims Moran asserted failed as a matter of law, *and* because the claims were barred by the statute of limitations, the Trial Court properly dismissed the claims against Yarmuth.

Moran’s arguments in this appeal are legally incorrect and are unsupported by the record. Moran’s outlandish claim that the Trial Court’s order of dismissal that is the subject of this appeal “was an ill-considered rush to shield the defendant attorneys from wrongdoing” (Moran’s Opening Brief, at 1) is a wholly unsubstantiated and highly improper attack on a respected judge, and is a prime example of the histrionics that substitute for legal analysis throughout Moran’s Brief. The record demonstrates that the claims against Yarmuth fail as a matter of law – both because they are untimely and because Moran cannot collect on its alleged \$750,000 attorney lien through the claims Moran asserted against Yarmuth. Because the Trial Court properly dismissed the claims against Yarmuth, Yarmuth respectfully requests that the Court affirm the Trial Court’s dismissal.

II. ISSUES REGARDING ASSIGNMENT OF ERRORS

1. Did the Trial Court properly dismiss the claims against Yarmuth because, as a matter of law, Moran does not have a contract-based attorney lien claim against Yarmuth?
2. Did the Trial Court properly dismiss the conversion claim against Yarmuth when the Complaint does not allege that Yarmuth improperly received specific money, nor does it allege that Yarmuth had an obligation to return specific money?
3. Did the Trial Court properly dismiss the conversion claim against Yarmuth because the claim is time-barred when the claim is subject to a three-year limitations period, the lien claim arose at latest in 2007, and Moran filed the Complaint in 2011?
4. Did the Trial Court properly dismiss the claim to foreclose on the attorney lien against Yarmuth when Moran does not assert any underlying theory of recovery against Yarmuth?
5. Did the Trial Court properly dismiss the claim to foreclose on the attorney lien against Yarmuth because the claim is time-barred when the claim is subject to a three-year limitations period, the lien claim arose at latest in 2007, and Moran filed the Complaint in 2011?

6. Did the Trial Court properly decline to apply judicial estoppel when Moran had never asserted a claim against Yarmuth before the instant case, and any positions Yarmuth took on behalf of their former clients Smith and Guarino in the prior action are not inconsistent with the positions taken in this case?
7. Should the Court award Yarmuth attorney fees in this appeal under RAP 18.9 when Moran's arguments are frivolous?

III. STATEMENT OF THE CASE

On March 28, 2006, the Moran firm allegedly entered into a retainer agreement with Brent Nelson ("Nelson") that included an agreement by the Moran firm to represent Nelson in a legal malpractice claim on a contingent-fee basis against the law firm Cairncross & Hempelmann.² CP 4-5. Moran filed that action on Nelson's behalf on March 29, 2006. CP 71-74. In a sheriff's sale on August 7, 2006, Smith and Guarino—Nelson's creditors—acquired Nelson's rights, title, and interest in the claims. CP 5. Smith and Guarino were substituted as

² Moran's "Statement of the Case" cites to the record only a handful of times, even though Moran includes more than 12 pages of "facts" in its brief. Yarmuth respectfully requests that the Court disregard Moran's Statement of the Case to the extent the record does not support it. See RAPs 10.3, 10.7; *Hirata v. Evergreen State Ltd P'ship No. 5*, 124 Wn. App. 631, 637 n.4, 103 P.3d 812 (2004) (striking portions of brief not supported by record); *Housing Auth. of Grant County v. Newbigging*, 105 Wn. App. 178, 184-85, 19 P.3d 1081 (2001) (disregarding portions of brief not supported by record); *Northlake Marine Works, Inc. v. City of Seattle*, 70 Wn. App. 492, 513, 857 P.2d 283 (1993) ("Allegations of fact without support in the record will not be considered by an appellate court.").

plaintiffs in Nelson's malpractice claim as the real parties in interest. *Id.* Moran withdrew as plaintiff's counsel, before any significant activity occurred. CP 75; CP 170-72. Yarmuth Wilsdon Calfo PLLC subsequently appeared as Smith's and Guarino's attorneys. CP 176.

The legal malpractice case settled. On August 24, 2007, a law firm identifying itself as Moran Windes & Wong, PLLC served a letter on various entities, including counsel for Plaintiffs Smith and Guarino, asserting an attorney's lien of \$750,000 in the name of Moran Windes & Wong PLLC against the settlement proceeds in the underlying case.³ CP 177. On September 6, 2007, Smith and Guarino moved to invalidate the claimed lien. CP 6. Moran then asserted a lien claim against the settlement proceeds based on its prior representation of Nelson. CP 5. Judge McCarthy dismissed Moran's attorney's lien claim on September 24, 2007, and the underlying legal malpractice claim in Civil Action No. 06-2-10589-3 SEA settled and was dismissed September 27, 2007. CP 48-52.

Moran appealed the order invalidating the lien. However, Moran did not seek to stay the order or bond the appeal pursuant to the supersedeas procedures of RAP 8.1. CP 5, 79. On June 30, 2008, this Court reversed the order dismissing the lien and remanded the case to determine what amount, if any, Moran was entitled to assert. *Smith v. Moran, Windes & Wong PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008).

³ These background facts are set forth in this Court's prior opinion, *Smith v. Moran, Windes & Wong, PLLC*, 145 Wn. App. 459, 187 P.3d 275 (2008).

The Washington Supreme Court thereafter denied Smith's and Guarino's petition for review (165 Wn.2d 1032, 203 P.3d 381 (2009)), and the case was mandated back to the trial court. Moran Windes & Wong PLLC then filed a motion for summary judgment on May 15, 2009, as a plaintiff-intervenor, seeking a judgment for its claimed \$750,000 lien based on its purported fee agreement with Nelson and its contract lien. CP 54. Moran Windes & Wong was the only entity to assert this alleged attorney's lien. Judge Canova denied the motion for summary judgment on October 22, 2009. CP 54-56. Rather than proceeding to trial after the denial of its summary judgment motion, Moran Windes & Wong PLLC instead filed a motion for discretionary review of that order on November 15, 2009. This Court denied the motion for discretionary review on January 13, 2010, and sent the case back to the trial court on February 26, 2010. CP 58-64. After that date, no action of record occurred for 14 months. CP 78.

On April 26, 2011, a new entity identifying itself as "Moran, Wong & Keller, a Washington PLLC" filed what was styled as its "Motion for Case Schedule and Trial Date." Because Moran Wong & Keller was not the name of record for the entity that had (a) asserted the lien, (b) intervened in the lawsuit to enforce the lien, and (c) appeared as a party of record in the case, Smith and Guarino opposed this non-party motion. Thereafter, Smith and Guarino moved to dismiss the case for want of prosecution pursuant to CR 41(b)(1) because the lien claimant and plaintiff-intervenor party of record, Moran Windes and Wong, PLLC, had failed to note the action for trial or hearing within one year after the

issues of law or fact had been joined. The Trial Court denied Moran, Wong & Keller's non-party Motion for Case Schedule and Trial Date on the grounds that it was not a party of record and lacked standing to bring the Motion. It then dismissed the case, without prejudice, pursuant to Smith and Guarino's CR 41(b)(1) Motion by order dated May 18, 2011. CP 45-46.

On or around May 19, 2011, an entity identifying itself as "MWW PLLC, dba Moran Wong & Keller, formerly dba Moran, Windes & Wong, a Washington PLLC" filed a notice of appeal seeking review of the order of dismissal without prejudice, the order denying the motion of the non-party to set the case for trial, and three earlier orders issued in the case.⁴ Appendix A1-A13. By letter dated June 7, 2011, this Court advised the parties that it had placed the matter on the docket to determine (1) whether the notice of appeal presented issues that were reviewable as of right, or alternatively, (2) whether the issues presented should be accepted for discretionary review, and setting a hearing for July 1, 2011. Appendix A14. The Appellant in that proceeding elected not to submit a brief or legal memorandum addressing either issue, or even to respond to the brief submitted by Smith and Guarino. Commissioner James Verellen ultimately terminated the appeal by notation ruling dated July 1, 2011. CP

⁴ The three additional orders included in the Notice of Appeal were: (1) a November 30, 2009, order denying Moran, Windes & Wong's Motion to Compel Arbitration, (2) an October 22, 2009 order denying Moran, Windes & Wong's Motion for Summary Judgment, and (3) an August 9, 2009 order granting Plaintiffs Smith and Guarino's CR 56 (f) continuance to conduct discovery. Notably, the Court of Appeals had already denied Moran Windes & Wong's request for discretionary review of the October 22, 2009 order denying its Motion for Summary Judgment.

214-15. The Supreme Court likewise denied discretionary review on January 9, 2012. CP 428-33.

On July 18, 2011, Moran (the appellant in this case)⁵ filed a new lawsuit concerning the attorney lien in King County Superior Court against Smith and Guarino and added their marital communities. CP 1-9. In addition, plaintiff named as new defendants Yarmuth Wilsdon Calfo, PLLC, and partner Richard Yarmuth and his marital community individually. Prior to the July 18, 2011 complaint, Moran had never asserted claims against Yarmuth. Because Yarmuth were now named as defendants, they could no longer serve as counsel for Smith and Guarino. Smith and Guarino obtained new counsel in the trial court, as they have for this appeal.

Yarmuth moved to dismiss the claims against them. CP 26-39. Yarmuth moved to dismiss under CR 12(b)(6) for two reasons: (1) the claims against them failed as a matter of law, and (2) the claims were barred by the statute of limitations. *Id.* First, Yarmuth argued that Moran had a statutory lien claim in an amount to be proven (which Moran declined to pursue); Moran did not have a contract lien claim of a fixed amount (which it alleged in this and the prior action before Judge Canova). *Id.* Both causes of action against Yarmuth—for conversion and “foreclosure on attorneys’ fee lien”—are premised on Moran having an enforceable attorney’s contract

⁵ In its last briefing to the Court of Appeals and Supreme Court, Appellant alternately referred to itself as “Moran, Wong & Keller,” and “Moran & Keller.” The record does not demonstrate whether these are the same entities.

lien of a liquidated amount, and these claims cannot be prosecuted as a matter of law against Yarmuth. *Id.* Second, claims under either cause of action had to be brought within three years, and the Complaint failed to allege any actionable conduct by Yarmuth within that period. *Id.* Moran opposed the motion. CP 218-377.

The Trial Court granted the motion to dismiss on December 12, 2011, finding both that the claims against Yarmuth failed as a matter of law and were barred by the statute of limitations. CP 386-87. This appeal followed.⁶ CP 388-89.

IV. SUMMARY OF ARGUMENT

The Trial Court properly dismissed the claims against Yarmuth under CR 12(b)(6), and this Court should affirm. Moran asserted two claims against Yarmuth: for conversion and to foreclose on the attorney lien. Both fail as a matter of law. First, the conversion claim against Yarmuth fails because Moran did not allege the elements necessary to hold Yarmuth liable for conversion. Specifically, Moran did not allege that Yarmuth wrongfully received certain money, or that Yarmuth had an obligation to return specific money. In the absence of such allegations, the claim fails as a matter of law.

⁶ The Trial Court also dismissed Smith and Guarino as defendants on this date, finding the claims against them could be pursued in the pending appeal. CP 386-87. However, once the Supreme Court denied review in the then-pending appeal, Moran filed a CR 60 motion as to the Trial Court's dismissal of Smith and Guarino. The Trial Court denied the motion and affirmed its dismissal of Smith and Guarino on the merits. Moran has also appealed that decision. This brief addresses only the arguments aimed at the Yarmuth defendants, since presumably, Smith's and Guarino's new attorneys will file a separate brief addressing the issues aimed at them in this appeal.

Second, the claim to foreclose the attorney lien fails as a matter of law because Moran did not assert an underlying theory of recovery (such as quantum meruit) against Yarmuth. Moran does not, as a matter of law, have a contract-based attorney lien claim against Yarmuth. Moran's alleged fee agreement with Nelson was a contingent agreement. Washington law is clear that when an attorney has a contingent fee agreement but withdraws from the case prior to its conclusion, the contingent agreement is replaced by the reasonable value of the services the attorney actually provided. Here, Moran withdrew shortly after filing the complaint on Nelson's behalf, leaving it with a claim only for the reasonable value of its services—a claim Moran has chosen not to pursue. Because Moran has no theory of recovery against Yarmuth, the claim to foreclose on the attorney lien fails.

Finally, both claims are barred by the three-year limitations period. The limitations period on both claims began to run, at latest, in 2007 when the Trial Court dismissed Moran's lien claim and the underlying case upon settlement. Moran did not file this case until 2011, more than three years after the claim arose. Accordingly, the claims are untimely, providing the Court an additional reason to dismiss them.

V. ARGUMENT

A. Standard of Review

The Court reviews dismissals under CR 12(b)(6) de novo. *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). The Court should affirm a dismissal under CR 12(b)(6) when the Court “concludes, beyond

a reasonable doubt, the plaintiff cannot prove any set of facts which would justify recovery.” *Id.* (citations and internal quotations omitted). While the Court must presume the allegations in the complaint are true, the Court should affirm the dismissal when the complaint’s allegations demonstrate “there is some insuperable bar to relief.” *Id.* (citations omitted). The court “is not required to accept the complaint’s legal conclusions as true.”

Rodriguez v. Loudeye Corp., 144 Wn. App. 709, 717-18, 189 P.3d 168, 172 (2008).

B. Moran’s Contract Attorney Lien Claim Against Yarmuth Fails As A Matter Of Law Because Moran Does Not Have A Contract-Based Attorney Lien.

The Trial Court properly dismissed the contract-based attorney lien claim against Yarmuth, and this Court should affirm the dismissal. The complaint in this case asserts that Moran⁷ is entitled to claim a remedy against Yarmuth based on a contract Moran had with a non-party, for legal services that Moran did not complete. CP 1-9. The contract at issue is the purported contingent fee agreement between Moran and Nelson. *Id.* Moran asserts that former client Nelson agreed that the law firm would be

⁷ Moran states that “Defendants have not challenged standing in this action.” Moran’s Opening Brief, at 17 n.7. As set forth above in Yarmuth’s Statement of the Case, Yarmuth has previously successfully challenged that “Moran, Wong & Keller” (and/or Moran & Keller) is not the real party in interest in this case. However, because Yarmuth moved to dismiss this case solely on the basis that the complaint failed to state a claim, regardless of the true plaintiff’s identity, Yarmuth did not need to raise the standing issue. Should this Court reverse the dismissal, Yarmuth reserves the right to challenge the current Plaintiff’s standing to prosecute the attorney lien.

paid a fixed fee of \$750,000⁸—without regard to the time the law firm expended on the case or the result obtained—if Nelson’s interest in the lawsuit was transferred to a third party. CP 4-5. The Complaint does not allege that either Smith and Guarino (who purchased Nelson’s cause of action) or Yarmuth (their former attorneys) have any contractual relationship with Plaintiff that would support recovery from them for this fixed-fee based in contract. *See* CP 1-9. In addition, the Complaint acknowledges, as it must, that the Moran firm was no longer representing Smith or Guarino in the underlying litigation when the case settled. CP 5-6. Instead, the Complaint alleges that Smith and Guarino “purchased Nelson’s interest” in the malpractice case, and “then substituted in as parties to the Nelson lawsuit against Cairncross and negotiated a settlement of all claims.” CP 5. Indeed, Moran successfully moved to withdraw from the case, shortly after it was filed, when Smith and Guarino purchased Nelson’s interest.⁹ CP 113.

Moran had a contingent fee agreement with Nelson. CP 4-5. Washington law is clear that when an attorney is replaced during a lawsuit, the amount of that attorney’s claim for legal fees is not fixed by contract. Rather, the claim can only be based on the reasonable hourly rates for services provided:

⁸ The language of the purported fee agreement between Moran and Nelson quoted in the Complaint at ¶ 3.1 appears to be an agreement by Nelson that an unidentified non-party to the contract will be liable to pay the law firm a fixed fee of \$750,000. CP 4-5.

⁹ *See* CP 66-67. Notably, Moran also filed a motion to dismiss the complaint it had filed on behalf of Nelson, which was denied by Order dated September 5, 2006. CP 69-70.

It has long been the rule in this state that where the compensation of an attorney is to be paid contingently, and the attorney is discharged prior to the occurrence of the contingency, the measure of the fee is not the contingent fee agreed upon but reasonable compensation for the services actually rendered.

Barr v. Day, 124 Wn.2d 318, 329, 879 P.2d 912 (1994) (citing *Ross v. Scannell*, 97 Wn.2d 598, 608-09, 647 P.2d 1004 (1982)); *see also Krein v. Nordstrom*, 80 Wn. App. 306, 311, 908 P.2d 889 (1995); *Ramey v. Graves*, 112 Wash. 88, 91, 191 P. 801 (1920).

Judge Canova applied this principle when he denied Moran's Motion for Summary Judgment. CP 54-56. In responding to Moran's argument that the lien amount was \$750,000 based on Moran's alleged contract with Nelson, Judge Canova stated:

The Court further finds that the contingent nature of the fee agreement (conceded by plaintiff-intervener (sic) at page 4 of MW&W's Response to Plaintiffs' Supplement Opposition to MW&W's Motion for Summary Judgment) creates a genuine issue of fact as to the amount to be allowed under RCW 60.40.010(1)(d). When the attorney-client relationship is terminated before full performance by the attorney, as in this case, any contingent fee agreement is replaced by a reasonable hourly fee. *Forbes v. American Building Maintenance Co. West*, 148 Wn. App. 273, 288 (2009), *citing Taylor v. Shigaki*, 84 Wn. App. 723, 728 (1997).

CP 56 (emphasis added).

The Complaint does not allege "full performance" or even substantial performance (CP 1-9), and the record in the underlying case demonstrates that the Moran firm withdrew from the case on its own motion well before the case settled. CP 75. The Complaint's causes of action for conversion and to "foreclose on attorney lien" both claim

damages based on Moran's contract lien claim, which Judge Canova rejected, and accordingly, fail to state a claim on which relief may be granted against Yarmuth. The Trial Court here concluded that the complaint failed to state a contract-based attorney lien claim against Yarmuth and properly dismissed the claim under CR 12(b)(6). CP 386-87. This Court should affirm.

C. The Complaint Fails to State a Claim for Conversion Against Yarmuth.

The Trial Court properly concluded that the facts alleged in the Complaint are insufficient to state a cause of action for conversion against Yarmuth. Conversion is "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Consulting Overseas Mgmt., Ltd. v. Shtikel*, 105 Wn. App. 80, 83, 18 P.3d 1144 (2001) (quoting *Wash. State Bank v. Medalia Healthcare, LLC*, 96 Wn. App. 547, 554, 984 P.2d 1041 (1999)); *Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 722, 197 P.3d 686 (2008).

Money is not considered chattel and cannot become the subject of conversion unless (1) it has been wrongfully received, or (2) there was an obligation to return the "specific money" to the party claiming it. *Consulting Overseas*, 105 Wn. App. at 83; *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 817-18, 239 P.3d 602 (2010). "[T]here can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to

return the specific money to the party claiming it.” *Pub. Util. Dist. No. 1 of Lewis County v. Wash. Pub. Power Supply Sys.*, 104 Wn.2d 353, 378, 705 P.2d 1195, 1211 (1985) *modified*, 713 P.2d 1109 (1986) (citing *Davin v. Dowling*, 146 Wash. 137, 262 P. 123 (1927) and *Seekamp v. Small*, 39 Wn.2d 578, 237 P.2d 489 (1951)).

Further, “[k]nowledge of a lien against money does not make the recipient liable for conversion.” *Reliance Ins. Co. v. U.S. Bank of Washington, N.A.*, 143 F.3d 502, 506 (9th Cir. 1998) (applying Washington law) (citing *Davin*, 146 Wash. 137). The *Reliance Ins. Co.* decision noted that “[t]hough money or a check could in some circumstances be the subject of conversion, for example if someone wrongfully took a check from another’s desk, the tort traditionally involves the wrongful taking and carrying away of something tangible.” *Reliance Ins. Co.*, 143 F.3d at 506 (internal citation omitted).

Neither of the conditions for a conversion claim applies here. As to the first, the Complaint alleges that Yarmuth received the settlement proceeds at issue in the normal course of business—when Smith’s and Guarino’s claim against Cairncross settled and “the liened proceeds of the Settlement were transferred to [Yarmuth] and placed in its IOLTA trust account.” CP 5. There is no allegation in the Complaint (nor can there be) that Yarmuth “wrongfully received” these funds during the settlement process. *See* CP 1-9. Thus, Moran does not allege that the money at issue was “wrongfully received.”

As to the second condition, the Complaint does not allege that Yarmuth failed to return an identified sum of money to Moran at a time when Yarmuth were obligated “to return the specific money to the party claiming it.” See CP 1-9; *Pub. Util. Dist. No. 1 of Lewis County*, 104 Wn.2d at 378. Moran argues that RPC 1.15A(g) required Yarmuth to “either hold in trust, or interplead the settlement funds,” until Moran’s lien claim was “resolved,” and claims that the alleged violation of this ethical rule forms the basis for a claim. Moran’s Opening Brief, at 22. This argument is frivolous. The Washington Supreme Court has held that alleged violations of ethical rules do not give rise to an independent cause of action against an attorney, and may not even be considered as evidence in a civil case for damages. *Hizey v. Carpenter*, 119 Wn.2d 251, 259–60, 830 P.2d 646 (1992); see also, *Barrett v. Freise*, 119 Wn. App. 823, 842, 82 P.3d 1179, 1189 (2003). At any rate, the record does not support Moran’s unsupported factual assertions that Yarmuth’s conduct violated RPC 1.15(A)(g). Accordingly, Moran fails to allege sufficient facts to support his claim for conversion against Yarmuth.

Indeed, Moran has not sufficiently alleged facts that support a past or present, or even future, entitlement to any “specific” sum—much less \$750,000—that provides a basis for a conversion claim against Yarmuth. The United States District Court for the Western District of Washington, Pechman, J., reached the following conclusion regarding conduct analogous to the Complaint’s allegations against the Yarmuth:

Here, Defendants do not allege that Plaintiff wrongfully received any money. Defendants also do not allege that Plaintiff took money from them and then failed to return such funds. Instead, Defendants allege that Plaintiff has retained money that Defendants are owed under the Agreement. This allegation amounts to a breach of contract claim, not an action for conversion.

First Global Commc'ns, Inc. v. Bond, C05-749P, 2006 WL 231634, at *5 (W.D. Wash. Jan. 27, 2006) (applying Washington law).

Here, the conduct alleged in the Complaint is even further removed from a conversion claim: the purported agreement that Moran relies on to support Yarmuth's liability is not even with Yarmuth, but *with a non-party*—Moran's former client Nelson. CP 1-9. While Moran alleges that it has an attorney's contract lien on some portion of Smith's and Guarino's settlement proceeds (based on their being successors-in-interest to Moran's contract with Nelson), Moran cannot make such an allegation against Yarmuth. Indeed, there has been no enforceable determination¹⁰ of any specific lien amount that Yarmuth may be alleged to have converted. It is uncontested, and acknowledged in the Complaint, that Moran withdrew from the case prior to the settlement, and that Smith and Guarino, represented by another law firm, had substituted in as plaintiffs prior to the settlement. *Id.* Based on these uncontested facts, undisputed Washington law, and a prior ruling by Judge Canova, the amount (if any)

¹⁰ Moran argues that Judge Canova's order denying its motion for summary judgment to establish the lien in the amount of \$750,000 has no precedential value. Moran's Opening Brief, at 23. Moran misses the point. Judge Canova's order simply shows there has been no enforceable determination of the amount of Moran's lien. Without a concrete determination as to the amount of the lien, Yarmuth cannot, as a matter of law, have "converted" the settlement funds that were allegedly subject to the lien. *See Pub. Util. Dist. No. 1 of Lewis County*, 104 Wn.2d at 378.

of Moran's lien claim remains undetermined. Accordingly, Yarmuth could not have "converted" the claimed lien amount. Judge Canova's ruling precludes Plaintiff's argument that Yarmuth "converted" the amount of \$750,000 because absent an established legal right to this specific amount, there can be no conversion as a matter of law. Indeed, at best, all Moran can claim is a statutory attorney's lien against settlement proceeds in an amount yet to be determined. However, such a statutory lien claim does not provide the basis for a claim of conversion against Yarmuth. The Trial Court properly dismissed the conversion claim, and this Court should affirm.

D. Plaintiff's Conversion Claim Against Yarmuth Is Time Barred.

Even if the Complaint alleged the elements of a claim for conversion against Yarmuth (it does not), the Trial Court properly found that the claim is time barred. The limitations period for a conversion claim is three years. *See* RCW 4.16.080(2); *Hudson v. Condon*, 101 Wn. App. 866, 872-74, 6 P.3d 615 (2000); *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038-39 (9th Cir. 2010). The three years begin to run when the plaintiff knew or should have known all of the essential elements of its applicable cause of action. *Louisiana-Pac. Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1580 (9th Cir. 1994) (citing *Rose v. A.C. & S., Inc.*, 796 F.2d 294, 296 (9th Cir. 1986)) (applying Washington law). Moran filed the complaint against Yarmuth nearly four years after the underlying malpractice case settled (and Moran's lien claim was initially dismissed and the settlement funds dispersed). CP 1-9, 48-52. The filing also

occurred more than three years after the Court of Appeals reinstated the lien. *See Smith*, 145 Wn. App. 459.

As alleged in the Complaint, and as established by the Trial Court, Moran's initial lien claim against the settlement proceeds was dismissed on Smith's and Guarino's motion on September 24, 2007. CP 6, 48-49. As a matter of law, Moran was aware of the essential elements of his cause of action, *at the latest*, as of the date of that Order. That Order denied Moran's lien and gave Smith and Guarino unencumbered¹¹ rights to the settlement proceeds. *See id.* In addition, the Complaint asserts a claim for interest on the claimed lien amount "beginning the date the defendants first received the Settlement proceeds in 2007. . . ," providing further basis that the three-year limitations period commenced, by Moran's own admission, in 2007. CP 9.

Moran incorrectly asserts that the conversion claim did not arise until the Supreme Court's mandate on March 25, 2009. The record simply does not support that the claim did not exist until the mandate; indeed, Moran alleges that the lien arose by operation of the fee agreement "immediately preceding [the] involuntary transfer" of the legal

¹¹ Although it (incorrectly) claims that Yarmuth were required to maintain the settlement proceeds in a trust account even after the Moran lien was dismissed by Judge McCarthy, notably absent from the Complaint are any allegations that Moran obtained a stay of the order dismissing the lien claim or bonded the appeal pursuant to the supersedeas procedures of RAP 8.1 (which it did not). Moran asserts a number of reasons why Nelson allegedly did not post the required bond to stay the order pending appeal (Moran's Opening Brief, at 9-10), but the record does not support Moran's assertions. In fact, the record belies them. CP 341 (77: 5-14). This Court should disregard Moran's unsupported factual assertions. *See* RAPs 10.3, 10.7; *Hirata*, 124 Wn. App. at 637 n.4; *Housing Auth. of Grant County*, 105 Wn. App. at 184-85; *Northlake Marine Works, Inc.*, 70 Wn. App. at 513.

malpractice claim from Nelson to Smith and Guarino. CP 5; *see also* CP 131 (“The court held that as of March 2006 when the malpractice action was commenced, by operation of law under RCW 60.40.101[sic](1)(d), Moran had an attorney’s lien for compensation upon the malpractice action and its proceeds. Smith and Moran, 145 Wn. App. at 466-67”).

Further, Moran’s appeal of the order invalidating the lien did not affect the limitations period because Moran chose not to stay the order pending appeal under RAP 8.1. “A proceeding on appeal to reverse a judgment, where no supersedeas bond is given, is no obstacle to the enforcement of the rights established by the judgment appealed from, and therefore such an appeal will not prevent the running of the statute.” *Baisch v. Gibson*, 138 Wash. 127, 130, 244 P. 259, 260 (1926). Thus, the limitations period on Moran’s attorney-lien claim continued to run during the pendency of the appeal.

But even if Moran’s appeal somehow tolled the limitations period as to Smith and Guarino (it did not), the appeal could not possibly have affected the limitations period as to Yarmuth because Yarmuth were not parties to that case. There are no facts in the record to support Moran’s argument that the claims against Yarmuth could not be brought until the parties (Moran, Smith, and Guarino) exhausted their appeals in the prior case. In fact, Moran admits that this Court, on June 30, 2008, reversed the order invalidating the lien. Moran’s Opening Brief, at 13. According to Moran’s own (incorrect) theory, Moran had a lien claim against Yarmuth as of that June 30, 2008 ruling. However, Moran did not bring the lawsuit

against Yarmuth until July 18, 2011—more than three years after Moran alleges he could assert the lien claim against Yarmuth. Moran’s conversion claim against Yarmuth is untimely.

Moran cites RCW 4.16.030 to support his assertion that the limitations period for his claim is six years, but that statute is inapplicable. RCW 4.16.030 states,

An action to collect any special assessment for local improvements of any kind against any person, corporation or property whatsoever, or to enforce any lien for any special assessment for local improvements of any kind, whether said action be brought by a municipal corporation or by the holder of any delinquency certificate, or by any other person having the right to bring such an action, shall be commenced within ten years after such assessment shall have become delinquent, or due, or within ten years after the last installment of any such special assessment shall have become delinquent or due when said special assessment is payable in installments.

Moran’s claims in this case are not to collect a “special assessment for local improvements,” making the statute inapplicable. Presumably, Moran intended to cite RCW 4.16.040(1), which provides a six-year limitations period for written contracts. That statute is likewise inapplicable because the conversion claim is not based on a contract with Yarmuth. At any rate, Moran’s claim is for the tort of conversion, not breach of contract. Accordingly, the six-year limitation period cannot apply to the claim.

Any claim for conversion regarding the settlement proceeds against Yarmuth expired *at the latest* on September 24, 2010—three years after the Trial Court invalidated Moran’s lien—and the current claim filed on

July 18, 2011, is barred by the three year statute of limitations. The Court should affirm the dismissal.

E. Plaintiff's Complaint Fails to State a Claim to Foreclose Attorney's Lien Against Yarmuth.

Moran's second cause of action against Yarmuth is what it describes as a claim to "foreclose on its attorney's fee lien."¹² Indeed, like its conversion claim, the Complaint fails to allege a viable cause of action against Yarmuth or to establish the amount of the lien it is purportedly due—and it seeks to foreclose on—for providing legal services. It is axiomatic that an attorney seeking payment of fees owed from a client for whom he or she obtained a judgment or settlement must include some underlying theory of recovery showing the basis for the obligation and the amount owed. Typically, a complaint seeking to enforce an attorney's lien would include a cause of action for (1) breach of contract, or (2) quantum meruit to establish a legal basis for the amount of the lien, along with the attorney's statutory lien right.

In this case, other than the legally-insufficient and time-barred conversion claim, Moran fails to allege any underlying cause of action to establish its right to obtain relief against Yarmuth based on a claimed entitlement to foreclose on an attorney's lien. Unless the Court accepts Moran's theory that, contrary to Washington law and Judge Canova's

¹² It is unclear whether Moran is appealing the dismissal of this claim on the merits because Moran does not address it in the substance of its brief. In an abundance of caution, Yarmuth addresses the issue here, even though Moran appears to have waived the issue by not addressing it in its opening brief.

Order, Moran is entitled to a contingent flat fee of \$750,000 based on its uncompleted representation of a former party, there is no theory of recovery alleged to establish an amount of attorney's fees to foreclose upon. As a result, the claim fails as a matter of law.

There is no factual basis alleged in the Complaint for Moran to assert a contract lien claim against Yarmuth. Under these circumstances, the Complaint's unsupported legal conclusion that the lien value is "fixed" at \$750,000 is of no probative or other value. Moran must allege and prove its "reasonable hourly fee" and amount of work performed to provide a legally recognizable basis to support its attorney's lien claim. *See Forbes v. Am. Bldg. Maint. Co. W.*, 148 Wn. App. 273, 288, 198 P.3d 1042 (2009), *aff'd in part and rev'd in part on other grounds*, 170 Wn.2d 157, 240 P.3d 790 (2010). Insofar as the Complaint fails to allege any basis for the attorney lien claim other than its unenforceable contractual flat fee amount, it fails to state a claim to foreclose on attorney's lien against Yarmuth. The Court should affirm.

F. Plaintiff's Claim to Foreclose Attorney's Lien Against Yarmuth is Time Barred.

Moran's claim to foreclose on an attorney's lien against Yarmuth is also barred by the applicable three year statute of limitations, which applies to "an action upon a contract or liability, express or implied, which

is not in writing, and does not arise out of any written instrument.” RCW § 4.16.080(3).¹³

As set forth in the Complaint, Moran provided legal services to Nelson beginning in March 2006, and then ended its participation in the case when its motion to disqualify itself and withdraw from the underlying case was granted by Order dated September 21, 2006. CP 1-9. Moran alleges in the Complaint that its lien claim was “fixed” “immediately preceding an involuntary transfer,” which is alleged to be August 7, 2006. CP 4-5. Moran first asserted its lien claim when the case settled, and the lien was dismissed by Order dated September 24, 2007. PC 5-6, 48-49.

As set forth above, the Complaint does not allege that Yarmuth is a party to any written contract with Moran. *See* CP 1-9. Rather, Moran’s “contract” claim is based on a contract it claims it had with its former client, Nelson (who Yarmuth never represented). *Id.* Accordingly, Moran’s claim to foreclose on an attorney’s lien against Yarmuth must be based ultimately on a theory of quantum meruit and governed by a three year statute of limitations per RCW 4.16.080(3). *See Bogle & Gates, P.L.L.C. v. Zapel*, 121 Wn. App. 444, 451, 90 P.3d 703, 707 (2004) (three-year limitations period in RCW 4.16.080(3) applied to bar the law firm’s claim for fees where writing was insufficient to establish contract between the parties); *Purvis v. Pub. Util. Dist. No. 1 of Kitsap County*, 50 Wn.2d

¹³ Moran incorrectly argues that the six-year limitation period applies. As set forth above, Moran does not allege that he had a contract with Yarmuth. Accordingly, the six-year limitation period applicable to written contracts does not apply.

204, 208, 310 P.2d 233 (1957); *Hahn v. Strasser*, C10-0959-RSM, 2011 WL 98523, at *2 (W.D. Wash., Jan. 12, 2011) (applying RCW 4.16.080(3)).

Under any interpretation of the allegations of the Complaint, the three-year limitations period has expired. The Complaint alleges the lien claim was established when Smith and Guarino acquired the malpractice claim at a sheriff's sale on August 7, 2006. CP 5; *see also Smith*, 145 Wn. App. at 472 (finding that Moran's lien arose by operation of law in 2006). This means the three year statute of limitations expired on August 7, 2009. However, even assuming that the statute did not begin to run until the lien claim was asserted after the settlement and dismissal by Order dated September 24, 2007, the claim against Yarmuth is still untimely, having expired on September 24, 2010. Accordingly, this claim is time barred as well, and the Trial Court properly dismissed it.

Moran's argument that the lien claim did not arise until the Supreme Court's mandate denying review on March 25, 2009 is without merit. As set forth above, the Complaint alleges that the lien claim was established "immediately preceding an involuntary transfer," which is alleged to be August 7, 2006. CP 4-5. Indeed, even accepting Moran's unsupported factual assertions, Moran claims that it specifically drafted the fee agreement to give the firm an attorney fee lien effective immediately upon transfer of Nelson's interest. Moran's Opening Brief, at 10-12 ("It provided that if Mr. Nelson transferred any interest in the claims or proceeds to a third party, voluntarily or otherwise, that interest

shall be subordinate to the Attorney's lien which shall automatically be fixed at \$750,000 *immediately preceding an involuntary transfer.*"). Thus, both the Complaint and Moran's own brief establish that the attorney lien was established at the time Smith and Guarino purchased Nelson's interest in the malpractice claim. That occurred in 2006, making Moran's complaint filed in this case in 2011 untimely. The Trial Court properly dismissed the claim, and this Court should affirm.

G. Judicial Estoppel

Moran's arguments regarding judicial estoppel are misplaced, and the Trial Court properly found that the doctrine is inapplicable. "Judicial estoppel is an equitable doctrine that precludes *a party* from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (citations omitted and emphasis added). A court focuses on three core factors when deciding whether to apply the doctrine of judicial estoppel:

(1) whether a *party's* later position is clearly inconsistent with its earlier position; (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

Mavis v. King County Pub. Hosp. No. 2, 159 Wn. App. 639, 650, 248 P.3d 558, 563 (2011) (quoting *Miller v. Campbell*, 164 Wn.2d 529, 539, 192 P.3d 352 (2008)) (emphasis added). While judicial estoppel does not

require privity of parties between the first and later actions, the party against whom it is applied must have been a party in the first and later actions. *See Johnson v. Si-Cor Inc.*, 107 Wn. App. 902, 907-08, 28 P.3d 832 (2001) (reviewing cases discussing judicial estoppel, all of which applied it only against a party in the later action that was also a named party in the prior lawsuit). Judicial estoppel applies only to prevent “inconsistent positions as to facts. It does not require counsel to be consistent on points of law.” *Anfinson v. FedEx Ground Package System, Inc.*, 159 Wn. App. 35, 63, 244 P.3d 32 (2010), *review granted*, 172 Wn.2d 1001, 258 P.3d 685 (2011) (citing *King v. Clodfelter*, 10 Wn. App. 514, 521, 518 P.2d 206 (1974)).

Judicial estoppel is inapplicable here for a number of reasons. First, Yarmuth were not parties to any of the prior actions in which Moran attempted to collect its alleged \$750,000 lien; Smith and Guarino were parties, but Yarmuth were not named defendants. CP 156-59. Moran misleadingly refers to the “defendants” as having taken positions in the prior case when arguing for judicial estoppel (Moran’s Opening Brief, at 19), but Yarmuth were not previously defendants. Thus, Yarmuth, as parties, could not possibly have taken *any* position as to the claims at issue now. As explained above, Yarmuth previously served as counsel to Smith and Guarino, but Yarmuth were not named defendants until the complaint in this action was filed in July 2011. Therefore, Yarmuth did not take an “earlier position” to compare to its position in this litigation.

Second, judicial estoppel applies only to facts, not legal conclusions. *Anfinson*, 159 Wn. App. at 63. Even if Yarmuth is somehow bound by the factual positions Smith and Guarino took in the prior case – and they are not – judicial estoppel would not apply to bind Yarmuth to Smith’s and Guarino’s *legal* positions – including arguments regarding the legal effect of the limitations period on the claims in this case.

Moreover, Smith’s and Guarino’s positions in the prior case are not inconsistent with Yarmuth’s position here. As the record demonstrates, this Court (and the Supreme Court) rejected the Moran firm’s prior appeals because the Moran firm failed to make the required showing necessary for the Court to accept discretionary review. CP 214-15, 367-77; CP 428-33. Indeed, Moran elected not to even file a brief in this Court addressing why the Court should accept review in the prior case, given that the Trial Court’s dismissal was without prejudice. This Court and the Supreme Court denied review because Moran failed to address the relevant standard for discretionary review. CP 214-15, 367-77; CP 428-33. The record simply does not support Moran’s assertion that Smith, Guarino, or Yarmuth argued “that MWW could not bring the appeal because MWW could merely refile and have its claim accepted.” Moran’s Opening Brief, at 20. Rather, the record demonstrates that Smith and Guarino made no such argument; rather, they pointed out that Moran, as the appellant, failed to meet his burden of showing this Court why it should accept review. *See, e.g.*, CP 367 (“Appellant’s new submission fails to make any showing or plausible argument demonstrating why, in

this instance, the dismissal without prejudice constitutes a final judgment or decision determining action subject to appeal as a matter of right pursuant to RAP 2.2(a)(1) and (3).”). As Commissioner Verellen stated in denying review,

Here, the appellant does not assert that a statute of limitations would bar refiling the action. He argues that the motion to dismiss is tactical and he cannot anticipate what new or different defenses might be raised if the appellant refiles the action. The dilemma is that appellant has the burden of establishing that this [sic] the action has been discontinued The appellant does not establish that the dismissal without prejudice is appealable under RAP 2.2(a)(3) or the Munden doctrine.

CP 215, 377 (emphasis added). Notably absent from Commissioner Verellen’s ruling is an indication that Smith and Guarino (or Yarmuth) ever agreed that the statute of limitations would *not* bar re-filing. Instead, the Commissioner simply held that Moran failed to meet his burden to justify discretionary review. Moran’s representations to the contrary are unfounded and disingenuous.

Further, as set forth above, the Trial Court did not dismiss the claims against Yarmuth only because they were time-barred; it also dismissed the claims because they failed as a matter of law, for the reasons set forth above. Accordingly, even if judicial estoppel applied—and it does not—the Court should still affirm the dismissal because the claims fail on their merits.

H. Moran’s Appeal Is Frivolous, and Yarmuth is Entitled To An Attorney Fee Award.

Yarmuth respectfully requests that the Court award it the attorney fees it incurred in this appeal under RAP 18.9. In determining whether to impose sanctions for a frivolous appeal, the Court examines, based on the record as a whole, whether “there are no debatable issues upon which reasonable minds could differ” and whether “the appeal is so totally devoid of merit that there was no reasonable possibility of reversal.” *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987); *see also Streater v. White*, 26 Wn. App. 430, 435, 613 P.2d 187, 191 (1980). Here, an award of reasonable attorney’s fees and costs to Yarmuth is appropriate under RAP 18.9, as all of Moran’s arguments in this appeal against Yarmuth are frivolous.

As set forth above, Moran’s conversion claim both fails as a matter of law (because Moran did not and cannot plead the required elements) and because it is time-barred. *See supra* Parts V.C-D. Moran’s Complaint failed to allege any rational argument based on law or fact to support a claim for conversion against Yarmuth. *See* CP 1-9. Put simply, Moran’s conversion claim against the Yarmuth Defendants was frivolous and unsupported by any rational argument on the law or facts.¹⁴

¹⁴ Although the Yarmuth Defendants need not show that Moran’s claims were asserted for an improper purpose, that standard is easily met here, where Moran’s Complaint included spiteful and mean-spirited (and baseless) allegations regarding defendant Richard Yarmuth. *See* CP 7 (Complaint ¶ 3.8 (“Mr. Yarmuth schemed to deliberately deceive the Superior Court...”). Yarmuth will not credit those allegations by addressing them at length here; suffice it to say, Moran’s spiteful allegations, like its claims, are without any rational basis in law or fact. *See Reid v. Dalton*, 124 Wn. App. 113 (2004) (affirming grant of fees and costs under RCW 4.84.185 and declining to “address the

Moran’s claim to “foreclose on its attorney’s lien” was similarly frivolous, for the reasons set forth above. *See supra* Parts V.B, V.E-F. Moran wholly failed to allege any underlying cause of action that might establish its right to obtain relief against Yarmuth. Additionally, Moran’s claim against Yarmuth is plainly time-barred, as explained above. Even under a generous application of the three-year limitations period, the claim is still clearly time-barred. *See, e.g., Reid v. Dalton*, 124 Wn. App. 113, 121-22 (2004) (affirming grant of fees and costs under RCW 4.84.185 where plaintiff’s claims were, *inter alia*, time-barred under the applicable statute of limitations). Even if Moran *had* alleged valid causes of action (it did not), it is beyond dispute that both of its claims were plainly time-barred.

VI. CONCLUSION

The Trial Court properly dismissed the claims against Yarmuth under CR 12(b)(6), and this Court should affirm. Moran’s claims for conversion and to foreclose on the attorney lien both fail as a matter of law. Moran has not pled the required elements to state a claim for conversion against Yarmuth. Similarly, Moran does not have a contract-based attorney lien claim against Yarmuth, and Moran fails to plead any other underlying theory of recovery to foreclose on the attorney lien against Yarmuth. Additionally, both claims are barred by the three-year limitations period, which began to run at latest in 2007—making the

regrettable accusations by [plaintiff] that opposing counsel lied, attempted theft, and committed fraud against the tribunal”).

complaint filed here in 2011 untimely. This Court should affirm the dismissal of the claims against Yarmuth.

Finally, because the arguments Moran asserts in this appeal are frivolous, Yarmuth respectfully requests that it be awarded the attorney fees it incurred in this appeal under RAP 18.9. Moran's claims against Yarmuth are not well grounded in fact or law, and the arguments it makes in this appeal are baseless. Accordingly, Yarmuth respectfully requests an award of attorney fees.

Dated: 30th day of April, 2012.

Respectfully submitted,

YARMUTH WILSDON CALFO PLLC

By 

John H. Jamnback, WSBA #29872
Cristin Kent Aragon, WSBA #39224

Attorneys for Respondents
Yarmuth Wilsdon Calfo PLLC, Richard
Yarmuth, and Jane Doe Yarmuth

VII. APPENDIX

A1-A13: Notice of Appeal dated May 19, 2011

A14: Letter dated June 7, 2011, from Court of Appeals

CERTIFICATE OF SERVICE

I certify that on the 30th day of April, 2012, I caused true and correct copies of the foregoing document to be served as follows:

Dennis M. Moran
William Keller
Moran, Windes & Wong, PLLC
5608 17th Avenue NW
Seattle, WA 98107-5232
Email: d Moran@morankellerlaw.com
bill@morankellerlaw.com

- Via Email
- Via Facsimile
- Via Hand Delivery
- Via U.S. Mail

Jerry N. Stehlik
Bucknell Stehlik Sato & Stubner, LLP
2003 Western Avenue, Suite 400
Seattle, WA 98121

- Via Email
- Via Facsimile
- Via Hand Delivery
- Via U.S. Mail

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

Dated this 30th day of April, 2012 at Seattle, Washington.


Colette Saunders
Legal Assistant

THE HONORABLE GREGORY CANOVA

RECEIVED
MAY 19 2011
YARMUTH WILSDON CALFO PLLC

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

MWW PLLC, dba MORAN WONG & KELLER,
formerly dba MORAN, WINDES & WONG, a
Washington PLLC,

Appellant,

v.

RYAN SMITH; JOHN GUARINO; STEVEN
WOLLACH; THAD WARDALL; and FULLPLAY
MEDIA SYSTEMS, INC., as successor-in-interest
to INTERACTIVE OBJECTS, INC.,

Plaintiffs,

v.

CAIRNCROSS & HEMPELMANN, P.S., a
Washington professional service corporation, its
individual principals and their respective marital
communities,

Defendant.

No.: 06-2-10589-3 SEA
On remand.

**NOTICE OF APPEAL TO COURT
OF APPEALS DIVISION ONE**

NOTICE OF APPEAL
Page 1 of 3

MORAN WONG & KELLER
5608 17th Avenue Northwest
SEATTLE, WASHINGTON 98107
Phone: 206.788.3000 Facsimile: 206.788.3001

1 Intervener Appellant MWW PLLC dba Moran Wong & Keller formerly dba Moran
2 Windes & Wong, seeks review by the Court of Appeals, Divisoin 1, of the following Final
3 Orders by the trial court, which are attached hereto:

4 1. May 18, 2011 Order Granting Plaintiffs' Motion to Dismiss Claims of Plaintiff
5 Intervenor Moran Windes and Wong, PLLC for Failure to Prosecute;

6 2. May 12, 2011 Order denying non-party Moran, Wong & Keller Motion for Case
7 Schedule and Trial Date;

8 3. November 30, 2009 Order denying Plaintiff/Intervenor's Motion to Compel
9 Arbitration;

10 4. October 22, 2009 Order denying Plaintiff-Intervenor's Motion for Summary
11 Judgment;

12 5. August 9, 2009 Order granting Plaintiff's Motion for Continuance pursuant to CR
13 56(f).

14 In accordance with RAP 5.3(c) the following are counsel of record for active parties
15 in this case. Carincross and Hempelmann, P.S have been dismissed and are no longer active
16 parties:

17 18 19 20 21	MWW, PLLC dba Moran Wong & Keller, formerly dba Moran Windes & Wong. Appellant, Intervener	Dennis Moran Bill Keller Moran, Wong & Keller 5608 17th Ave. NW Seattle, WA 98107 206-788-3000 phone. 206-788-3001 fax. dmoran@mwwlaw.net bkeller@mwwlaw.net
22 23	Ryan Smith; John Guarino; Steven Wollach; Thad Wardall and Fullplay Media Systems, Inc. as successor in interest to Interactive	John Jamnback Yarmuth Wilsdon Calfo, dba Yarmuth Wisdon Calfo PLLC, adba Yarmuth Wilsdon

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Objects, Inc.,
plaintiffs

PLCC,
818 Stewart Street, Suite 1400
Seattle, WA 98101
206-516-3800 phone
206-516-3888 fax

Dated this 19th day of May, 2011.

MORAN WONG & KELLER,

 /s/ Dennis Moran
WILLIAM A. KELLER, WSBA # 29361
DENNIS M. MORAN, WSBA # 19999
Attorneys for Plaintiff

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

MORAN, WINDES AND WONG, PLLC, a
Washington Professional Corporation,

Plaintiff-Intervenor,

v.

RYAN SMITH; JOHN GUARINO; STEVEN
WOLLACH; THAD WARDALL; and
FULLPLAY MEDIA SYSTEMS, INC., as
successor-in-interest to INTERACTIVE
OBJECTS, INC.,

Plaintiff,

v.

CAIRNCROSS & HEMPELMANN, P.S., a
Washington professional service corporation,
its individual principals and their respective
marital communities,

Defendant.

No. 06-2-10589-3SEA

Proposed ORDER GRANTING
PLAINTIFFS' MOTION TO DISMISS
CLAIMS OF PLAINTIFF INTERVENOR
MORAN WINDES AND WONG, PLLC
FOR FAILURE TO PROSECUTE

This matter comes before the Court on Plaintiffs' Motion to Dismiss Claims of
Plaintiff Intervenor Moran Windes & Wong, PLLC for Failure to Prosecute pursuant to CR
41(b)(1). Having considered the Motion, Plaintiffs' Opposition, and the reply thereto, and
the records and files herein, and being fully informed, now therefore:

*and finding that the motion by non-party Moran, Wong and Koller to note this matter for
trial was denied by order dated May 12, 2011 and further finding that CR 41 (b)(1) has
been factually complied with;*

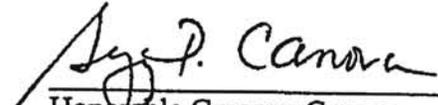
Proposed ORDER GRANTING PLAINTIFFS' MOTION TO
DISMISS CLAIMS OF PLAINTIFF INTERVENOR MORAN
WINDES & WONG, PLLC FOR FAILURE TO PROSECUTE -

Page 1

YARMUTH WILSDON CALFO
618 STEWART STREET, SUITE 1400
SEATTLE WASHINGTON 98101
T 206.516.3800 F 206.516.3888

1 It is hereby Ordered that Plaintiffs' Motion to Dismiss Claims of Plaintiff-Intervenor
2 Moran Windes & Wong, PLLC for Failure to Prosecute is GRANTED, and Plaintiff-
3 Intervenor Moran Windes And Wong, PLLC's lien claim in this matter is DISMISSED
4 without prejudice, *pursuant to CR 4(b)(1) JHC*

5 Dated: May 18, 2011

6 
7 Honorable Gregory Canova

8
9 Presented by:

10 Yarmuth Wilsdon Calfo PLLC

11 By: /s/ John H. Jamnback
12 John H. Jamnback
WSBA No. 29872

13 Attorneys for Plaintiffs Ryan Smith and
14 John Guarino

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Hon. Gregory P. Canova
Hearing: May 5, 2011
Without Oral Argument

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

MORAN, WINDES AND WONG, PLLC, a
Washington Professional Corporation,

Plaintiff-Intervenor,

v.

RYAN SMITH; JOHN GUARINO; STEVEN
WOLLACH; THAD WARDALL; and
FULLPLAY MEDIA SYSTEMS, INC., as
successor-in-interest to INTERACTIVE
OBJECTS, INC.,

Plaintiff,

v.

CAIRCROSS & HEMPELMANN, P.S., a
Washington professional service corporation,
its individual principals and their respective
marital communities,

Defendant.

No. 06-2-10589-3SEA

[Signature]
~~Proposed~~ ORDER DENYING NON-
PARTY MORAN, WONG & KELLER, A
WASHINGTON PLLC'S MOTION FOR
CASE SCHEDULE AND TRIAL DATE

This matter comes before the Court on Non-Party movant Moran, Wong & Keller, a
Washington PLLC's Motion for Case Schedule and Trial Date. Having considered the

[Proposed] Order Denying Non-Party Moran, Wong & Keller,
a Washington PLLC's Motion for Case Schedule and
Trial Date - Page 1

|||
YARMUTH WILSDON CALFO
616 STEWART STREET, SUITE 1400
SEATTLE WASHINGTON 98101
T 206.616.3800 F 206.616.3888

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Motion, Plaintiffs' Opposition, and the reply thereto, and the records and files herein, and
being fully informed, ~~now therefore~~: *The court finds sufficient evidence that the*
~~Moran, Wong & Keller~~ *non-party has standing to bring this motion at this time; now, therefore*

It is hereby Ordered that Non-Party movant Moran, Wong & Keller, a Washington
PLLC's Motion for Case Schedule and Trial Date is DENIED.

Dated: May 12, 2011

Gregory P. Canova
Honorable Gregory Canova

Presented by:
Yarmuth Wilsdon Calfo PLLC
By: /s/ John H. Jarnback
John H. Jarnback
WSBA No. 29872
Attorneys for Plaintiffs Ryan Smith and
John Guarino

[Proposed] Order Denying Non-Party Moran, Wong & Keller,
a Washington PLLC's Motion for Case Schedule and
Trial Date - Page 2

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III
YARMUTH WILSDON CALFO
618 STEWART STREET, SUITE 1400
SEATTLE WASHINGTON 98101
T 206.516.3800 F 206.516.3888

RECEIVED

DEC 02 2009

MORAN WINDES & WONG

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

MORAN, WINDES AND WONG, a
Washington professional corporation,

Plaintiff/Intervenor,

v.

RYAN SMITH; et al,

Plaintiffs,

v.

CAIRNCROSS & HEMPELMANN, P.S., a
Washington professional service
corporation, its individual principals and
their respective marital communities,

Defendant.

NO. 06-2-10589-3 SEA

ORDER DENYING PLAINTIFF/
INTERVENOR'S MOTION TO
COMPEL ARBITRATION

THIS MATTER came before the Court on plaintiff/intervenor's Motion to Compel Arbitration, and the Court considered the pleadings filed in support of and in opposition to said motion, and reviewed the records and files herein, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the Motion to Compel Arbitration is DENIED.

DATED this 30th day of November, 2009.

G. P. Canova

GREGORY P. CANOVA

Judge of the Superior Court

ORDER DENYING PLAINTIFF/
INTERVENOR'S MOTION TO
COMPEL ARBITRATION

JUDGE GREGORY P. CANOVA
KING COUNTY SUPERIOR COURT
516 THIRD AVE
SEATTLE WA 98104
(206) 296-9290

FILED
KING COUNTY, WASHINGTON

OCT 2 2 2009

**SUPERIOR COURT CLERK
BY JANIE SMOTER
DEPUTY**

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

MORAN, WINDES AND WONG, a
Washington professional corporation,

Plaintiff/Intervenor,

v.

RYAN SMITH; et al,

Plaintiffs,

v.

CAIRNCROSS & HEMPELMANN, P.S., a
Washington professional service
corporation, its individual principals and
their respective marital communities,

Defendant.

NO. 06-2-10589-3 SEA

**ORDER DENYING PLAINTIFF-
INTERVENOR'S MOTION FOR
SUMMARY JUDGMENT**

THIS MATTER came before the Court on plaintiff/intervenor's Motion for Summary Judgment on Lien Amount and the Court considered the following documents:

1. Plaintiff's (sic) Motion for Summary Judgment on Lien Amount dated 5/15/09;
2. Declaration of Dennis Moran in Support of Motion for Entry of Judgment dated 5/7/09, with exhibits thereto;
3. Plaintiff's Response to Moran, Windes & Wong's Motion for Summary Judgment dated 6/1/09;

ORDER DENYING PLAINTIFF-
INTERVENOR'S MOTION FOR
SUMMARY JUDGMENT

1

JUDGE GREGORY P. CANOVA
KING COUNTY SUPERIOR COURT
516 THIRD AVE
SEATTLE WA 98104
(206) 296-9290

ORIGINAL

- 1 4. Declaration of Richard Yarmuth in Support of Plaintiffs' Response dated
- 2 6/1/09, with exhibits thereto;
- 3 5. Moran, Windes & Wong's Reply Memo;
- 4 6. Plaintiff's Supplemental Opposition to Moran, Windes & Wong's (MW&W)
- 5 Motion for Summary Judgment dated 10/8/09;
- 6 7. Declaration of John H. Jamnback in support of Plaintiff's Supplemental
- 7 Opposition dated 10/8/09, with exhibits thereto;
- 8 8. Declaration of Gregory J. Hollon dated 10/6/09, with exhibits thereto;
- 9 9. Declaration of David Boerner dated 10/7/09;
- 10 10. MW&W's Supplemental Filing for Hearing on MW&W's Motion for Summary
- 11 Judgment and Motion to Strike Certain Evidence from Consideration;
- 12 11. Moran Declaration in Support of MW&W's Supplemental Filings;
- 13 12. MW&W's Response to Plaintiff's Supplemental Opposition to MW&W's
- 14 Motion for Summary Judgment;
- 15 13. Plaintiff's Reply to MW&W's Supplemental Brief in Support of Its Motion for
- 16 Summary Judgment;
- 17 14. Declaration of John H. Jamnback in Support of Plaintiff's Reply;
- 18 15. Supplemental Moran Declaration in Support of MW&W's Motion for Summary
- 19 Judgment; and
- 20 16. Plaintiff's Response to Supplemental Moran Declaration in Support of
- 21 MW&W's Motion for Summary Judgment.
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ORDER DENYING PLAINTIFF-
 INTERVENOR'S MOTION FOR
 SUMMARY JUDGMENT

JUDGE GREGORY P. CANOVA
 KING COUNTY SUPERIOR COURT
 516 THIRD AVE
 SEATTLE WA 98104
 (206) 296-9290

1 The Court heard argument of counsel and finds that genuine issues of material fact exist
2 in attempting to apply the factors set forth in RPC 1.5(a) to determine the reasonableness of the
3 attorney fees sought pursuant to RCW 60.40.010(1)(d).

4 The Court further finds that the contingent nature of the fee agreement (conceded by
5 plaintiff-intervener at page 4 of MW&W's Response to Plaintiff's Supplemental Opposition to
6 MW&W's Motion for Summary Judgment) creates a genuine issue of material fact as to the
7 amount to be allowed under RCW 60.40.010(1)(d). When the attorney-client relationship is
8 terminated before full performance by the attorney, as in this case, any contingent fee
9 agreement is replaced by a reasonable hourly fee. *Forbes v. American Building Maintenance*
10 *Co West*, 148 Wn. App. 273, 288 (2009), citing *Taylor v. Shigaki*, 84 Wn. App. 723, 728
11 (1997). As noted in *Taylor*, at 728-29, there is an exception to this rule where the attorney has
12 substantially performed the duties owed to the client before the attorney is discharged. *Taylor*,
13 at 728. "The determination of substantial performance is a question of fact" *Taylor*, at
14 728, citing *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716 (1982). Now, therefore, it is
15 hereby
16

17
18 ORDERED, ADJUDGED and DECREED that plaintiff-intervenor's Motion for
19 Summary Judgment on Lien Amount is DENIED.

20 DATED this 22nd day of October, 2009.

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23 
24 GREGORY P. CANOVA
25 Judge of the Superior Court

ORDER DENYING PLAINTIFF-
INTERVENOR'S MOTION FOR
SUMMARY JUDGMENT

3

JUDGE GREGORY P. CANOVA
KING COUNTY SUPERIOR COURT
516 THIRD AVE
SEATTLE WA 98104
(206) 296-9290

FILED

KING COUNTY WASHINGTON

AUG 07 2009

SUPERIOR COURT CLERK
BY DAWN TUBBS
DEPUTY

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY**

MORAN, WINDES AND WONG, a
Washington professional corporation,

Plaintiff/Intervenor,

v.

RYAN SMITH; et al,

Plaintiffs,

v.

CAIRNCROSS & HEMPELMANN, P.S., a
Washington professional service
corporation, its individual principals and
their respective marital communities,

Defendant.

NO. 06-2-10589-3 SEA

ORDER GRANTING PLAINTIFF'S
MOTION FOR CONTINUANCE
PURSUANT TO CR 56(f)

THIS MATTER came before the Court on plaintiff/intervenor's Motion for Summary Judgment on Lien Amount. Plaintiff has requested a continuance of the hearing on the motion, pursuant to CR 56(f), to allow additional relevant discovery to be conducted. The Court has reviewed the records and file herein, considered the argument of counsel, and finds a sufficient basis has been shown to justify the CR 56(f) continuance. Now, therefore, it is hereby

ORDER GRANTING PLAINTIFF'S
MOTION FOR CONTINUANCE
PURSUANT TO CR 56(f)

1

JUDGE GREGORY P. CANOVA
KING COUNTY SUPERIOR COURT
516 THIRD AVE
SEATTLE WA 98104
(206) 296-9290

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ORDERED, ADJUDGED and DECREED that plaintiff's Motion for Continuance is GRANTED pursuant to CR 56(f). It is further

ORDERED, ADJUDGED and DECREED that Plaintiff/Intervenor's Motion for Summary Judgment is reset for October 16, 2009 at 9:45am. It is further

ORDERED, ADJUDGED and DECREED that any supplemental briefing shall be filed by plaintiffs six court days before said hearing date, with response and reply briefs filed in accordance with LCR 7(b)(4).

DATED this 7th day of August, 2009.


GREGORY P. CANOVA
Judge of the Superior Court

ORDER GRANTING PLAINTIFF'S
MOTION FOR CONTINUANCE
PURSUANT TO CR 56(f)

JUDGE GREGORY P. CANOVA
KING COUNTY SUPERIOR COURT
516 THIRD AVE
SEATTLE WA 98104
(206) 296-9290

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

June 7, 2011

Dennis Michael Moran
Moran Wong and Keller
5608 17th Ave NW
Seattle, WA, 98107-5232
dmoran@mwwlaw.net

John Hugo Jamnback
Yarmuth Wilsdon Calfo PLLC
818 Stewart St Ste 1400
Seattle, WA, 98101-3311
jjamnback@yarmuth.com

William Arthur Keller
Moran Wong and Keller
5608 17th Ave NW
Seattle, WA, 98107-5232
dmoran@mwwlaw.net

CASE #: 67179-1-I
MWW PLLC, dba Moran Wong & Keller formerly dba Moran Windes & Wong, App. v. Ryan
Smith, et al., Res.

Counsel:

On May 19, 2011, a notice of appeal was filed in the above case. It appears that the order appealed from is not reviewable as of right pursuant to RAP 2.2(a).

This is to advise that pursuant to RAP 6.2(b), the court has set a hearing to determine (1) whether the decision is reviewable as a matter of right pursuant to RAP 2.2(a) or, (2) if by discretionary review pursuant to RAP 2.3(b), whether review should be accepted. This hearing is set for Friday, July 1, 2011, at 10:30 am.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

TWG

2006 WL 231634

Only the Westlaw citation is currently available.
United States District Court,
W.D. Washington.

FIRST GLOBAL COMMUNICATIONS, INC.,
Plaintiff,

v.

Jackson BOND, et al., Defendants.

No. C05-749P. | Jan. 27, 2006.

Attorneys and Law Firms

Derek Alan Newman, Venkat Balasubramani, Newman & Newman, Seattle, WA, for Plaintiff.

John W. Dozier, Jr., Dozier Internet Law, Glen Allen, VA, Douglas E. McKinley, Law Office of Douglas E. McKinley Jr., Richland, WA, for Defendants.

Opinion

ORDER ON PLAINTIFF'S MOTION TO DISMISS DEFENDANTS' COUNTERCLAIMS

PECHMAN, J.

*1 This matter comes before the Court on Plaintiff's motion to dismiss Defendants' counterclaims for failure to state a claim upon which relief may be granted pursuant to Fed.R.Civ.P. 12(b)(6). (Dkt. No. 37). Having considered the materials submitted in support of and in opposition to this motion, the Court hereby GRANTS in part and DENIES in part Plaintiff's motion.

The Court GRANTS Plaintiff's motion to dismiss the following counterclaims alleged in Defendants' First Amended Answer and Counterclaims (Dkt. No. 39): (1) conversion; (2) fraud in the inducement; (3) fraud; (4) breach of indemnification agreement; (5) violations of RCW 19.86.030; (6) conspiracy to injure in trade, business or reputation; and (7) interference with prospective economic advantage. The Court DENIES Plaintiff's motion to dismiss the following counterclaims: (1) breach of contract; (2) breach of duty of good faith and fair dealing; and (3) trademark damages. The reasons for the Court's decision are set forth below.

Background

A. The Parties

Plaintiff First Global Communications is a New Jersey corporation. Plaintiff has registered the trademark for "World Sex Guide" and operates a website (worldsexguide.org) under that name. Plaintiff alleges that it is the successor-in-interest to a company called Aeroweb, Inc. Defendants allege that Aeroweb's primary owner was an individual named Ian Eisenberg, who was also a defendant in an unrelated action brought by the Federal Trade Commission (FTC) in this Court in *FTC v. Cyberspace.com, LLC*, C00-1806L (W.D.Wash.).

Defendants are Jackson Bond, an individual who lives in Argentina, and Powertools Software, Inc. ("Powertools"). Mr. Bond was president of Powertools. Defendants operate a number of websites that may be regarded as competitors of Plaintiff's site.

B. The Agreement

Much of this dispute arises from a "Web Site Development Agreement" (the "Agreement") that was signed in March 2001. The Agreement was between Aeroweb and Powertools. Ian Eisenberg signed the Agreement for Aeroweb, while Defendant Jackson Bond signed for Powertools.

In the "recitals" section, the Agreement states that the parties "would like POWERTOOLS to design, develop, maintain and operate an Internet web site ... that features adult entertainment in connection with information about the worldwide sexual services industry." (Agreement at 1). Aeroweb was to provide the means to host this site. *Id.* Powertools was to receive 25 percent of the adjusted gross revenues from the site (which included revenue from membership fees, usage fees, advertising revenues, and revenues from the sale of merchandise), while Aeroweb was to retain the remaining 75 percent. *Id.* §§ 1.1, 4.1.

Under the Agreement, Powertools was to provide "content" to the site and to update the content at least once every thirty days. *Id.* § 2.2. The Agreement also provided that Powertools could include a link on the site that would redirect users to "one ... different site operated by POWERTOOLS." *Id.* § 3.1.

*2 The Agreement could only be terminated for cause

after giving the other party notice and an opportunity to cure. *Id.* § 9. Plaintiff alleges that it terminated the Agreement on June 7, 2004. Defendants contend that Plaintiff failed to terminate the Agreement in the manner required by the contract.

The Agreement included a choice of law and forum selection clause that provided that the Agreement would be governed by Washington state law and that any suits related to the Agreement would be brought in state or federal court in King County, Washington. *Id.* § 11.3.

C. This Action

1. Plaintiff's Claims

Plaintiff filed this lawsuit in April 2005. Plaintiff's First Amended Complaint raises claims for breach of contract, trademark infringement, false designation of origin, Washington Consumer Protection Act (CPA) violations, and violations of the federal Computer Fraud and Abuse Act.

2. Defendants' Counterclaims

Defendants filed an answer and counterclaims to Plaintiff's First Amended Complaint on September 20, 2005. Defendants initially raised nine counterclaims: (1) breach of contract; (2) conversion; (3) fraud in the essence; (4) fraud; (5) breach of indemnification agreement; (6) Washington CPA violations under RCW 19.86.020; (7) conspiracy to injure in trade, business, or reputation; (8) interference with prospective economic advantage; and (9) breach of duty of good faith and fair dealing.

On October 13, 2005, Plaintiff filed this motion, seeking dismissal of all nine counterclaims raised by Defendants.

On October 27, 2005, Defendants filed an amended answer and counterclaims. The amended pleading included ten counterclaims: (1) breach of contract; (2) conversion; (3) fraud in the inducement; (4) fraud; (5) breach of indemnification agreement; (6) conspiracy to injure in trade, business, or reputation; (7) violations of RCW 19.86.030; (8) interference with prospective economic advantage; (9) breach of duty of good faith and fair dealing; and (10) trademark damages.

Several days later, Defendants filed their response to Plaintiff's motion to dismiss. Defendants argued that the amendments to their counterclaims remedied any pleading deficiencies identified in Plaintiff's motion to dismiss. In its reply brief, Plaintiff argued that notwithstanding the

amendments, Defendants' counterclaims are still subject to dismissal.

Analysis

Plaintiff has moved for dismissal of Defendants' counterclaims under Fed.R.Civ.P. 12(b)(6). Dismissal under Rule 12(b)(6) is warranted if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Van Buskirk v. Cable News Network, Inc.*, 284 F.3d 977, 980 (9th Cir.2002). All allegations of material fact are construed in a light most favorable to the non moving party. *Allwaste, Inc. v. Hecht*, 65 F.3d 1523, 1527 (9th Cir.1995). However, "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion for to dismiss for failure to state a claim." *Arpin v. Santa Clara Valley Transp. Agency*, 261 F.3d 912, 923 (9th Cir.2001). Dismissal is also proper "when there is a 'lack of a cognizable theory' to support a claim." *City of Arcadia v. EPA*, 411 F.3d 1103, 1106 n. 3 (9th Cir.2005). In ruling on a motion to dismiss, the Court may consider materials that are attached to a complaint, *see Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n. 19 (9th Cir.1990), as well as documents outside the complaint if the complaint specifically refers to the documents and the authenticity of the documents is not questioned. *See Inlandboatmens Union of the Pacific v. Dutra Group*, 279 F.3d 1075, 1083 (9th Cir.2002).

*3 Analysis of the pending motion is complicated by the fact that Defendants amended their counterclaims after Plaintiff filed the motion to dismiss. As a result, Plaintiff's opening brief is directed at the counterclaims initially alleged by Defendants, rather than the amended counterclaims that were submitted after the motion to dismiss was filed. However, Defendants' amendments to their counterclaims largely do not state "new" counterclaims, but simply attempt to address the pleading deficiencies identified in Plaintiff's opening brief.

Plaintiff contends that Defendants were required to obtain leave of court to raise any new counterclaims that were not included in Defendants' initial answer and counterclaims. Plaintiff points to Fed.R.Civ.P. 13(f), which provides that "[w]hen a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may be leave of court set up the counter-claim by amendment." However, Fed.R.Civ.P. 15(a) provides that "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading

is served.” Plaintiff did not file a responsive pleading to Defendants’ original counterclaims. Instead, Plaintiff filed this motion to dismiss, which is not regarded as a responsive pleading under Rule 15(a). *See Crum v. Circus Circus Enters.*, 231 F.3d 1129, 1130 n. 3 (9th Cir.2000). As a result, the Court finds that the requirements of Rule 15(a), rather than the requirements of Rule 13(f), governed Defendants’ ability to amend their counterclaims. *See, e.g., A.J. Indus., Inc. v. U.S. Dist. Court for the Cent. Dist. of Cal.*, 503 F.2d 384, 388 (9th Cir.1974) (“Where a responsive pleading had not yet been filed we see no reason why Rule 15(a) should not apply, with Rule 13(f) coming into force after the filing of the responsive pleading”). Under Rule 15(a), Defendants were entitled to amend their counterclaims and to add new counterclaims once as a matter of course because no responsive pleading had been filed to the original counterclaims.¹ *See Delta Envtl. Prods., Inc. v. McGrew*, 56 F.Supp.2d 716, 717 n. 1 (S.D.Miss.1999); *Van Dette v. Aluminum Air Seal Mfg. Co.*, 11 F.R.D. 558, 559-60 (N.D.Ohio 1951).

1 Even if leave of Court were required under Rule 13(f), “courts have been quite liberal about granting leave to amend under Rule 13(f).” 6 Charles A. Wright et al., *Federal Practice & Procedure* § 1430 at 213 (2d ed.1990).

1. Breach of Contract Counterclaim

Defendants’ first counterclaim alleges that Plaintiff breached the Web Site Development Agreement. (Dkt. No. 39 at 9-11). Among other things, Defendants allege that Plaintiff failed to provide the required notice of termination in accordance with the contract terms. They also allege that Plaintiff failed to provide any accounting of revenue as required by the contract. In addition, Defendants claim that Plaintiff failed to make reasonable attempts to generate and collect membership and/or usage fees from the site.

Plaintiff argues that this counterclaim must be dismissed because Defendants did not notify Plaintiff of any of the alleged breaches. Plaintiff claims that such notice was required by the Agreement. However, sections 9.2 and 9.3 of the Agreement only require that notice and an opportunity to cure be provided if one party seeks to terminate the contract. These sections of the Agreement provide as follows:

*4 9.2 *Grounds for Termination.* A party may terminate this Agreement upon written notice if the other:

(a) commits a material breach of one or more of the terms of this Agreement; or

(b) upon the reasonable determination of the non-breaching Party that the breaching Party has not or cannot fulfill its obligation under this Agreement; or

(c) becomes insolvent, makes an assignment for the benefit of creditors, files a voluntary or involuntary petition under the bankruptcy or insolvency laws of any jurisdiction, appoints a trustee or receiver for its property or business, or it adjudicated bankrupt or insolvent.

9.3 *Cure Period.* Upon written notice of termination under Section 9.2, the breaching party shall have fifteen (15) days to provide such evidence or take such corrective action as may be reasonably appropriate to the non-breaching Party for the breaching party to cure any inadequacies in performance described in the non-breaching Party’s written notice of anticipatory breach. Failure of the breaching Party’s ability to provide such evidence or take such corrective actions shall provide the non-breaching Party with the absolute right to immediately terminate this Agreement. Failure of the non-breaching party to provide the breaching Party with the cure opportunities described in this Section 9.3 shall constitute a material breach of this Agreement by the heretofore non-breaching Party.

There is no allegation that Defendants ever attempted to terminate the Agreement-instead, it was Plaintiff who allegedly terminated the Agreement in June 2004. As a result, Defendants were not obliged under the Agreement to provide Plaintiff with notice of the breaches alleged in their counterclaim. Therefore, Plaintiff’s motion to dismiss the breach of contract counterclaim will be denied.

2. Conversion Counterclaim

Defendants next raise a counterclaim for conversion. This claim is based on allegations that Plaintiff failed to pay Defendants their share of the adjusted gross revenues from the website as required by the Agreement. (Dkt. No. 39 at 11).

Plaintiff argues that under Washington law, a conversion claim cannot be brought for money allegedly owed under a contract. As Plaintiff notes, Washington courts have held:

The tort of conversion is “the act of willfully

interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." Money may become the subject of conversion, but only if the party charged with conversion wrongfully received the money, or if that party had an obligation to return the money to the party claiming it.

Consulting Overseas Mgmt., Ltd. v. Shtikel, 105 Wash.App. 80, 83, 18 P.3d 1144 (2001) (internal citation omitted). Similarly, the Ninth Circuit has noted that "[t]hrough money or a check could in some circumstances be the subject of conversion, for example if someone wrongfully took a check from another's desk, the tort traditionally involves the wrongful taking and carrying away of something tangible." *Reliance Ins. Co. v. U.S. Bank of Washington, N.A.*, 143 F.3d 502, 506 (9th Cir.1998) (applying Washington law) (internal citation omitted).

*5 Here, Defendants do not allege that Plaintiff wrongfully received any money. Defendants also do not allege that Plaintiff took money from them and then failed to return such funds. Instead, Defendants allege that Plaintiff has retained money that Defendants are owed under the Agreement. This allegation amounts to a breach of contract claim, not an action for conversion. As other courts have noted, "[i]n general, a conversion action cannot be maintained where damages are merely being sought for breach of a contract." *Geler v. Nat'l Westminster Bank USA*, 770 F.Supp. 210, 214 (S.D.N.Y.1991) (applying New York law); see also *Seekamp v. Small*, 39 Wash.2d 578, 582-84, 237 P.2d 489 (1951). As a result, the conversion counterclaim will be dismissed.

3. Fraud in the Inducement Counterclaim

Defendants also bring a counterclaim for "fraud in the inducement." Defendants allege that they would not have entered into the Agreement if they had known certain facts about Aeroweb and Mr. Eisenberg. Defendants allege that Aeroweb: (1) failed to disclose that Mr. Eisenberg had entered into a stipulated permanent injunction with the FTC in October 2000 that required him to refrain from certain practices, which allegedly prevented Aeroweb from carrying out the terms and conditions of the Agreement as warranted in § 6.1 of the contract; and (2) falsely represented that Aeroweb owned the rights to the "World Sex Guide" trademark. (Dkt. No. 39 at 12-14).

Washington courts have stated that "[f]raud in the inducement ... is fraud which induces the transaction by

misrepresentation of motivating factors such as value, usefulness, age or other characteristic of the property or item in question." *Pedersen v. Bibioff*, 64 Wash.App. 710, 722, 828 P.2d 1113 (1992). A party claiming fraud generally must allege and prove: (1) a representation of an existing fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person to whom it is made; (6) ignorance of its falsity on the part of the person to whom it is made; (7) the latter's reliance on the truth of the representation; (8) his right to rely upon it; and (9) his consequent damages. *Id.* at 723 n. 10, 828 P.2d 1113. Alternatively, a party may allege that the defendant breached a duty to disclose a material fact. *Alejandre v. Bull*, 123 Wash.App. 611, 619, 98 P.3d 844 (2004).

Plaintiff argues that the fraud in inducement counterclaim fails as a matter of law because Defendants fail to allege that any material facts were either misrepresented or undisclosed. The Court agrees.

Defendants note that Ian Eisenberg entered into a stipulated permanent injunction with the FTC in October 2000 that provided that he and his corporations were "permanently restrained and enjoined from sending a bill, or causing a bill to be sent, to any consumer for any product or service sold by defendant without first obtaining express, verifiable authorization that the consumer being charged has agreed to be charged for the product or service." (Dkt. No. 40 at 7). Defendants suggest that this provision of the FTC injunction prevented Mr. Eisenberg from performing the requirements of the Agreement between Aeroweb and Powertools. *Id.* at 7-8. However, there is no discernible reason why this provision of the FTC injunction-which prohibits Mr. Eisenberg from billing a consumer for services without the consumer's express authorization-prevented Mr. Eisenberg from fulfilling the obligations of the Agreement. The parties to the Web Site Development Agreement presumably did not contemplate that users of the site would be billed for products or services unless they had expressly authorized to be charged for the products or services. As a result, the restrictions in the FTC injunction do not support Defendants' allegations that Plaintiff failed to disclose a material fact that prevented Mr. Eisenberg or Aeroweb from fulfilling the terms and conditions of the Agreement.

*6 Defendants also allege that Aeroweb falsely represented that it owned the "World Sex Guide" trademark. Plaintiff maintains that this allegation is insufficient to support a fraud in the inducement claim, arguing:

Aeroweb's representations under the Agreement (§ 6.1) did not contain any representations regarding the Mark. Moreover, First Global is the successor in interest to Aeroweb and is the rightful owner [of] the mark. The only party who could bring an action for infringement for use of the Mark was First Global. First Global does not allege any infringement for Defendants' use of the Mark consistent with the Agreement, nor could it, being the successor-in-interest to Aeroweb. Consequently, Defendant have suffered no damages as a result of Aeroweb's purported misrepresentations. Defendants' fraud in the inducement counterclaim based upon Aeroweb's alleged misrepresentations regarding ownership of the Mark fails as a matter of law and should be dismissed.

(Opening Brief at 10). Defendants offer no response to these arguments, and the Court finds Plaintiff's arguments persuasive.

Therefore, Defendants' counterclaim for fraud in the inducement will be dismissed.

4. Fraud Counterclaim

In addition to their "fraud in the inducement" counterclaim, Defendants also raise a separate counterclaim for fraud. (Dkt. No. 39 at 14-15). Along with very general allegations, Defendants allege:

Between March 7, 2001 and March of 2002, the Defendants had at least three telephone conversations with representatives of the Plaintiff, including Ian Eisenberg. During each of these conversations, the Plaintiff's representatives expressed their intention to begin a policy of charging users for access to the Plaintiff's website.

Id.

Plaintiff argues that this counterclaim should be dismissed because Defendants have failed to plead fraud with the particularity required by Fed.R.Civ.P. 9(b). As Plaintiff notes, "Rule 9(b) requires plaintiffs to state the 'time, place and specific content of the false representations as well as the identities of the parties to the

misrepresentation." *Segal Co. (Eastern States), Inc. v. Amazon.com*, 280 F.Supp.2d 1229, 1231 (W.D.Wash.2003) (quoting *Teamsters Local # 427 v. Philo-Ford Corp.*, 661 F.2d 776, 782 (9th Cir.1981)). Here, Defendants do not provide the time or place of the alleged false representations, but simply allege that three conversations took place within the course of a year. Such a vague allegation does not satisfy the time and place particularly requirements of Rule 9(b). See *Segal*, 280 F.Supp.2d at 1231.

Although not raised by Plaintiff, it should also be noted that Defendants cannot base a fraud claim under Washington law on a party's promise of future performance. As the court noted in *Segal*:

In order to state a claim of fraud, plaintiffs must assert that an "existing fact" was misrepresented by defendant. However, "[a] promise of future performance is not a representation of an existing fact and will not support a fraud claim." In this case, plaintiffs' fraud claim rests on the fact that defendant misrepresented its intent to fulfill a future promise. As a matter of law, this allegation cannot provide a basis for a fraud claim. "[W]ere the rule otherwise, any breach of contract would amount to fraud...."

*7 *Id.* at 1232 (internal citations omitted). Here, Defendants' allegation of fraud is simply a claim that Plaintiff failed to fulfill a promise to charge users for access to Plaintiff's website. As in *Segal*, such allegations cannot support a claim for fraud.

Therefore, Defendants' counterclaim for fraud will be dismissed.

5. Breach of Indemnification Agreement Counterclaim

Defendants next bring a counterclaim for "breach of indemnification agreement." (Dkt. No. 39 at 15). Defendants base this claim on the indemnification clause of the Agreement, which provides in part that:

AEROWEB agrees to defend, indemnify and hold harmless POWERTOOLS ... from and against any and all loss, liability, claims, damage, cost or expense, causes of action, suits, proceedings, judgments, awards, executions and liens ... proximately caused by an actual breach of any warranties or representations made by AEROWEB under the terms of this Agreement.

(Agreement at § 7.2). Defendants allege that Plaintiff breached the indemnification clause by filing this lawsuit.

Plaintiff argues that this counterclaim defies common sense, noting that the indemnification clause simply requires Plaintiff to indemnify Defendants from lawsuits that are “proximately caused by an actual breach of any warranties or representations” by Plaintiff. The Court agrees. Plaintiff’s lawsuit is based on allegations of wrongdoing by Defendants, not by Plaintiff. As a result, Plaintiff’s lawsuit does not constitute a breach of the indemnification agreement. Therefore, this counterclaim will be dismissed. *See, e.g., Mead v. Park Place Properties*, 37 Wash.App. 403, 408-09, 681 P.2d 256 (1984) (dismissing breach of indemnification counterclaim that was based on plaintiff’s lawsuit against defendant).

6. Conspiracy to Injure in Trade, Business, or Reputation Counterclaim

Defendants next raise a counterclaim for “conspiracy to injure in trade, business, or reputation.” Defendants allege that Plaintiff has conspired with two of its predecessors-in-interest (Aeroweb and a company called “Marvad Corporation”) to injure Defendants “by requesting the entry of an Injunction prohibiting competition for two years, and to obtain the database of registrants and customer names and addresses from the Defendants in order to misappropriate the entire internet website owned by Defendants for Plaintiff’s sole and exclusive use.” (Dkt. No. 39 at 16). In essence, this counterclaim is based on the fact that Plaintiff has sought an injunction and other forms of relief in this litigation.

Defendants cite no authority from Washington or any other jurisdiction in which a court has held that a claim for conspiracy to injure in trade, business, or reputation may be based on the fact that the opposing party sought an injunction or other forms of relief in a lawsuit. As a result, the conspiracy counterclaim will be dismissed.

7. Counterclaim for Violations of RCW 19.86.030

*8 In its initial counterclaims, Defendants raised a claim under RCW 19.86.020, a provision of the Washington Consumer Protection Act (CPA) that prohibits unfair or deceptive acts or practices in trade or commerce. In its amended counterclaims, Defendant no longer assert a claim under RCW 19.86.020. Instead, they raise a counterclaim under RCW 19.86.030, a provision of the CPA that prohibits restraints of trade.

Like the conspiracy claim discussed above, Defendants

essentially base this claim on the fact that Plaintiff has sought an injunction and other forms of relief in this litigation. (Dkt. No. 39 at 16-17). Again, however, Defendants cite no case law suggesting that a claim under RCW 19.86.030 may be based on the opposing party’s request for an injunction and other forms of relief in a lawsuit. Furthermore, Defendants make no allegation that Plaintiff’s lawsuit constitutes “sham litigation.” Therefore, this counterclaim will be dismissed.

8. Interference with Prospective Economic Advantage Counterclaim

Defendants also bring a counterclaim for “interference with prospective economic advantage,” which both parties characterize as a tortious interference claim. (Dkt. No. 39 at 17). Once again, this claim is essentially based on the fact that Plaintiff has sought an injunction and other forms of relief in this case. Defendants allege that by seeking such relief, Plaintiff has attempted to interfere with the contractual relationships between Defendants and its customers.

As before, Defendants fail to point to any case law holding that a tortious interference claim may be based on a request for an injunction or other forms of relief in a lawsuit. In addition, it should be noted that Defendants only allege that Plaintiff “attempted” to interfere with Defendants’ contractual relationships with the users of Defendants’ websites; there is no allegation that Plaintiff actually caused any breach or termination of Defendants’ contractual relations with a third-party, a necessary element of a tortious interference claim. *See, e.g., Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wash.App. 500, 506, 31 P.3d 698 (2001) (elements of tortious interference claim include “an intentional interference inducing or causing a breach or termination” of a valid contractual relationship or business expectancy). Therefore, this counterclaim will be dismissed.

9. Breach of Duty of Good Faith and Fair Dealing Counterclaim

Defendants next allege that Plaintiff breached its duty of good faith and fair dealing under the Agreement. Among other things, Defendants allege that Plaintiff failed to permit Powertools to perform its obligations under the Agreement and failed to maintain a link to Powertools’ website as required by the contract.

Plaintiff argues that this counterclaim should be dismissed because it is duplicative of the breach of contract claim. However, the only authority that Plaintiff cites for this

argument is a bankruptcy court decision from Delaware. See *In re Buckhead America Corp. v. Reliance Capital Group, Inc.*, 178 B.R. 956 (D.Del.1994). The Court does not find this authority persuasive. Washington courts have held that “[i]n every contract there is an implied covenant of good faith and fair dealing which obligates the parties to cooperate with one another so that each may obtain the full benefit of performance.” *Cavell v. Hughes*, 29 Wash.App. 536, 539, 629 P.2d 927 (1981). Defendants’ allegations are sufficient to state a claim for breach of this implied duty.

10. Trademark Damages Claim

*9 Finally, Defendants assert a counterclaim for trademark damages under 15 U.S.C. § 1120. Because this counterclaim was not raised until Defendants filed their amended answer and counterclaims, Plaintiff’s opening brief did not address this claim.

Plaintiff argues in its reply brief that this newly-added counterclaim should be dismissed. However, Defendants have not had an opportunity to respond to those arguments, which were presented for the first time in the reply brief. Therefore, this counterclaim will not be dismissed at this time.

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Conclusion

The Court finds that seven of Defendants’ ten counterclaims should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief may be granted. Therefore, Plaintiff’s motion is GRANTED in part. The Court hereby dismisses Defendants’ counterclaims for: (1) conversion; (2) fraud in the inducement; (3) fraud; (4) breach of indemnification agreement; (5) violations of RCW 19.86.030; (6) conspiracy to injure in trade, business, or reputation; and (7) interference with prospective economic advantage.

The Court finds that Defendants have adequately alleged counterclaims for breach of contract and breach of duty of good faith and fair dealing. Therefore, Plaintiff’s motion to dismiss will be DENIED with respect to those two counterclaims. The Court further DENIES Plaintiff’s request to dismiss Defendants’ counterclaim for trademark damages because this counterclaim was first addressed by Plaintiff in its reply brief.

The clerk is directed to send copies of this order to all counsel of record.

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United States District Court, W.D. Washington,
at Seattle.

Gerald M. HAHN and Michelle M. Hahn, husband
and wife, Plaintiffs,

v.

Steven Z. STRASSER and Jane Doe Strasser,
husband and wife, and marital community
comprised thereof; Steven Z. Strasser, individually
and as his sole and separate estate, Defendants.

No. C10-0959-RSM. | Jan. 12, 2011.

Attorneys and Law Firms

Charles E. Watts, Oseran Hahn Spring Straight & Watts,
Bellevue, WA, for Plaintiffs.

David Ryan Ebel, Matthew Turetsky, Schwabe
Williamson & Wyatt, Seattle, WA, for Defendants.

Opinion

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

RICARDO S. MARTINEZ, District Judge.

I. INTRODUCTION

*1 This matter comes before the Court on Motion for Summary Judgment (Dkt. # 8) brought by Plaintiff Hahn ("Plaintiff") and on Motion for Summary Judgment (Dkt.# 24) brought by Defendant Strasser ("Defendant"). Plaintiff claims that he is entitled to damages as a result of a breach of contract by Defendant. Defendant argues that if any contract existed, it was an oral contract that is now time-barred. Defendant also claims that an attorney-client relationship existed between Plaintiff and Defendant. As such, Defendant contends any contract would have been a violation of Rule of Professional Conduct 1.8, which prohibits attorneys from engaging in transactions with

clients.

II. BACKGROUND

Plaintiff contends that in 1989, Defendant promised to pay Plaintiff half of the proceeds received by Defendant as a "finder's fee" for helping to find a buyer for real property owned by a third party. Plaintiff apparently assisted Defendant in this endeavor. Indeed, Defendant gave half of the \$50,000 "finder's fee" that he received in 1989 to Plaintiff without issue. Plaintiff states that due to insufficient funds at the time of the initial sale in 1989, Defendant negotiated a contingent arrangement whereby an additional fee would be paid to Defendant upon resale or refinancing of the property. Plaintiff alleges that he and Defendant were in agreement to share this fee when it would ultimately be paid upon the sale or refinancing of the property. The letter of March 20, 1989 ("Letter") is presented by Plaintiff as a memorialization of this agreement, and Plaintiff claims this Letter confirms his interest in the "finder's fee."

On April 16, 2004, the real property was sold to a third party. Out of the closing of the sale, Defendant received an additional \$164,000-the remaining portion of the "finder's fee." Plaintiff learned of the sale in 2009, and claims that he is entitled to \$82,050 out of the proceeds received by Defendant in 2004.

III. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. FRCP 56; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court must draw all reasonable inferences in favor of the non-moving party. See *F.D.I. C. v. O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir.1992), *rev'd on other grounds*, 512 U.S. 79, 114 S.Ct. 2048, 129 L.Ed.2d 67 (1994). In ruling on summary judgment, a court does not weigh evidence to determine the truth of the matter, but "only determine[s] whether there is a genuine issue for trial." *Crane v. Conoco, Inc.*, 41 F.3d 547, 549 (9th Cir.1994) (*citing O'Melveny & Meyers*, 969 F.2d at 747). Material facts are those which might affect the outcome of the suit under governing law. *Anderson*,

477 U.S. at 248.

IV. DISCUSSION

A. Applicable Statute of Limitations

*2 The primary issue in this action for breach of contract is whether Plaintiff's claim is time-barred by the Washington statute of limitations governing causes of actions sounding in contract. Washington law sets forth two distinct statutes of limitations—a three-year statute of limitations governing oral contracts, RCW 4.16.080, and a six-year statute of limitations governing written contracts, RCW 4.16.040. If Plaintiff can establish that a written contract existed, Plaintiff's action is not barred, as the six-year statute of limitations would apply. However, if as Defendant contends, any contract that allegedly existed was oral, then the three-year statute of limitations applies, and Plaintiff's claim is time-barred.

In order to decide whether a written contract existed, the Court must determine whether the Letter is sufficient to constitute a written agreement. For a writing to constitute a contract, it must contain all the essential elements of a contract, including "the subject matter, the parties, the terms and conditions, and the price or consideration." *Smith v. Skone & Connors Produce*, 107 Wash.App. 199, 26 P.3d 981, 985 (Wash.Ct.App.2001). Moreover, for purposes of the six-year statute of limitations, a written agreement must contain all the essential elements of the contract without resort to parol evidence. *Bogle & Gates v. Zapel*, 121 Wash.App. 444, 90 P.3d 703, 705 (Wash.Ct.App.2004). If resort to parol evidence is necessary, then the contract is partly oral and the three year statute of limitations applies. *Id.*

The Letter in question cannot constitute a written contract. Rather, the Letter is a later writing that was ostensibly created after an oral agreement occurred. The Letter sought to confirm the share of the commission due to Plaintiff at the time. Nowhere does the letter contain a description of consideration required of Plaintiff; nor is there any description of what acceptance or performance was required of Plaintiff. Absent these essential elements, the Letter alone cannot be construed as a written contract. As such, parol evidence is necessary to establish material elements of the contract in question. None of the cases cited by Plaintiff stand for the proposition that a writing may be considered a contract despite the omission of vital elements of a contract such as consideration. The contract, therefore, is oral and the three-year statute of limitations applies.

B. Acknowledgment of a Past Debt

The Court now turns to Plaintiff's argument that the Letter constitutes an acknowledgment of a debt under RCW 4.16.280, and that consequently Plaintiff's claim is not barred by the statute of limitations. The general rule is that an acknowledgment in the form of a written promise to pay restarts the statute of limitations in cases where the original claim is not yet time-barred, while an acknowledgment made after the claim is time-barred creates a new cause of action for which the old debt serves as consideration. *Jewell v. Long*, 74 Wash.App. 854, 876 P.2d 473, 474 (Wash.Ct.App.1994). However, the Letter presented by Plaintiff in this case can have no such effect on the statute of limitations.

*3 Plaintiff's cause of action accrued on April 16, 2004, which is when the money Plaintiff claims he is owed became due as a result of the latest sale of the Aurora Avenue property. The Letter that Plaintiff argues is an acknowledgment dates to March, 20 1989. Therefore, the Letter cannot be considered an acknowledgment of a past debt within the meaning of RCW 4.16.280 since the debt itself did not yet exist when the Letter was written.

C. Discovery Rule

Plaintiff relies on *Architectronics Constr. Mgmt. v. Khorram* in arguing that the discovery rule applies to breach of contract actions. 111 Wash.App. 725, 45 P.3d 1142 (Wash.App.Ct.2002). Plaintiff contends that the statute of limitations should be tolled until he discovered the alleged breach in 2010. Under such a theory, Plaintiff's claim would not be time-barred.

However, *Architectronics* has been abrogated by *1000 Virginia Ltd. Partnership v. Vertecs*, 158 Wash.2d 566, 146 P.3d 423 (Wash.2006), and is no longer controlling law. In *1000 Virginia*, the Washington Supreme Court ruled that a claim arising out of a contract accrues on breach and not on discovery of the breach. *Id.* Therefore, Washington law holds that the discovery rule does not apply to actions for breach of contract.

D. Motion to Strike

The Court grants Plaintiffs' Motion to Strike and has not considered the materials in question for purposes of this motion.

E. RPC 1.8

Given the outcome this motion, the Court need not reach the issue of whether RPC 1.8 was violated.

V. CONCLUSION

The Letter in question does not constitute a written contract, and therefore this Court will apply the three year statute of limitations set forth under RCW 4.16.080. Because the Letter is not an acknowledgment within the meaning of RCW 4.16.280, and because the discovery rule is inapplicable, Plaintiff's claim is time-barred.

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Having reviewed the relevant pleadings, the declarations and exhibits attached thereto, and the remainder of the record, the Court hereby finds and ORDERS:

- (1) Defendants' Motion for Summary Judgment (Dkt.# 24) is GRANTED.
- (2) Plaintiffs' Motion for Summary Judgment (Dkt.# 8) is DENIED.
- (3) Plaintiffs' Motion to Strike (Dkt.# 25) is GRANTED.
- (4) This action is DISMISSED. The Clerk is directed to close this case.

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