

No. 74058-0-I

(King County Superior Court No. 10-2-36431-5)

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON; KRISTINE NORTON;
and NORTHLAND CAPITAL, LLC,
Plaintiffs/Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION,
Defendant/Respondent,

and

JOSE NINO DE GUZMAN and NDG INVESTMENT GROUP, LLC
Non-Appearing Defendants.

RESPONDENT'S BRIEF

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STATE OF WASHINGTON
2016 JUN -8 PM 12: 08

TABLE OF CONTENTS

Table of Authorities **Error! Bookmark not defined.**

I. INTRODUCTION1

II. COUNTERSTATEMENT OF ISSUES ON APPEAL.....3

III. STATEMENT OF THE CASE.....3

 A. Background Of This Action.....3

 B. Bill Prater And The Formation Of Northland.....5

 C. The Nortons And Northland Invest In NDG LLCs5

 D. The Formation Of P.R.E.7

 E. Northland Wired Money Directly To Peru For P.R.E.8

 F. Later, P.R.E. Opened An Account, Which Is Never Used10

 G. The Surprising Discovery Of Nino De Guzman’s Ponzi Scheme.....10

 H. U.S. Bank Was Not Involved In Nino De Guzman’s Fraud11

 I. The Three U.S. Bank Employees Discussed In Appellants’ Brief Were Not Complicit In The Fraud, And Had Nothing To Do With Appellants Or Their Investments.....13

 1. The Two Employees Defrauded By Nino de Guzman.....13

 2. The Branch Manager Who Provided Ordinary Services.....15

 J. Procedural History16

 1. Prior Bank Secrecy Act Appeal (*Norton I*).....17

 2. The Trial Court’s Protective Order18

3.	After Voluntary Dismissals, Appellants’ Remaining Claims Are Dismissed On Summary Judgment	19
IV.	ARGUMENT	20
A.	The Trial Court Correctly Dismissed Appellants’ Aiding and Abetting Fraud Claim.....	20
1.	U.S. Bank Did Not Have Actual Knowledge Of Fraud	21
2.	U.S. Bank Did Not Substantially Assist The Fraud	26
3.	U.S. Bank Did Not Proximately Cause Damages.....	30
B.	The Trial Court Properly Dismissed Appellants’ Negligent Supervision Claim.....	33
1.	Appellants’ Claim Fails Because U.S. Bank Did Not Owe A Legal Duty To Appellants	34
2.	Appellants Were Not Harmed By Any Employee	36
3.	There Is No Evidence That U.S. Bank Was Aware Any Employee Posed A Risk Of Harm To Third Parties	37
4.	There Is No Evidence That U.S. Bank Acted Negligently.....	38
5.	Appellants’ Losses Were Not Proximately Caused By U.S. Bank’s Alleged Negligent Supervision	40
C.	There Is No Basis To Overturn This Court’s Law Of The Case	43
1.	Appellants Are Barred From Re-Litigating <i>Norton I</i> Under Law Of The Case And <i>Stare Decisis</i>	43
2.	No Intervening Controlling Precedent Dictates Reversal	45

3.	This Court's Prior Decision Is Not Clearly Erroneous, Manifestly Unjust, Or Incorrect And Harmful	46
4.	The Hypothetical Documents Appellants Seek Would Not Overcome The Entry Of Summary Judgment	48
5.	The Trial Court Faithfully Applied <i>Norton I</i>	50
V.	CONCLUSION.....	50

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>In re Agape Litig.</i> , 681 F. Supp. 2d 352 (E.D.N.Y. 2010)	28, 32
<i>In re Agape Litig.</i> , 773 F. Supp. 2d 298 (E.D.N.Y. 2011)	<i>passim</i>
<i>Ang v. Martin</i> , 154 Wn. 2d 477, 114 P.3d 637 (2005).....	42
<i>Betty Y. v. Sameeh Al.-Hellou</i> , 98 Wn. App. 146, 988 P.2d 1031 (1999).....	33, 36, 38
<i>Bland v. Mentor</i> , 63 Wn.2d 150, 385 P.2d 727 (1963).....	25
<i>Brady v. Lynes</i> , No. 05 CIV. 6540 (DAB), 2008 WL 2276518 (S.D.N.Y. June 2, 2008).....	35
<i>Briggs v. Nova Servs.</i> , 135 Wn. App. 955, 147 P.3d 616 (2006), <i>aff'd</i> , 166 Wn.2d 794, 213 P.3d 910 (2009).....	33
<i>Cain v. Dougherty</i> , 54 Wn.2d 466, 341 P.2d 879 (1959).....	21
<i>Calvert v. Zions Bankcorporation (In re Consol. Meridian Funds)</i> , 485 B.R. 604 (Bankr. W.D. Wash. 2013).....	<i>passim</i>
<i>City of Fed. Way v. Koenig</i> , 167 Wn.2d 341, 217 P.3d 1172 (2009).....	45
<i>Cotton v. PrivateBank & Trust Co.</i> , 235 F. Supp. 2d 809 (N.D. Ill. 2002).....	46, 47, 48

<i>Crisman v. Pierce Cnty. Fire Prot. Dist. No. 21</i> , 115 Wn. App. 16, 60 P.3d 652 (2002).....	41
<i>Cromer Fin. Ltd. v. Berger</i> , 137 F. Supp. 2d 452 (S.D.N.Y. 2001).....	31
<i>Dobroshi v Bank of Am., N.A.</i> , 65 A.D.3d 882, 886 N.Y.S.2d 106, (N.Y. App. Div. 1st Dep’t 2009).....	38
<i>Eisenberg v. Wachovia Bank N.A.</i> , 301 F.3d 220 (4th Cir. 2002).....	34
<i>El Camino Res., Ltd. v. Huntington Nat’l Bank</i> , 722 F. Supp. 2d 875 (W.D. Mich. 2010) <i>aff’d</i> 712 F.3d 917 (6th Cir. 2013).....	<i>passim</i>
<i>Fabrique v. Choice Hotels Intern., Inc.</i> , 144 Wn. App. 675, 183 P.3d 1118 (2008).....	30
<i>Ferring v. Bank of Am. NA</i> , No. CV-15-01168-PHX-GMS, 2016 WL 407315 (D. Ariz. Feb. 3, 2016).....	40
<i>First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or.</i> , 108 Wn.2d 324, 738 P.2d 263 (1987).....	46
<i>Folsom v. Cty. of Spokane</i> , 111 Wn.2d 256, 759 P.2d 1196 (1988).....	44, 46
<i>Freeman v. JP Morgan Chase Bank, N.A.</i> , 137 F. Supp. 3d 1284 (M.D. Fla. 2015).....	<i>passim</i>
<i>Fremont Reorganizing Corp. v. Duke</i> , 811 F. Supp. 2d 1323 (E.D. Mich. 2011).....	27, 35
<i>Garrison v. Sagepoint Fin., Inc.</i> , 185 Wn. App. 461, 345 P.3d 792 (2015).....	40
<i>Gilbert Tuscany Lender, LLC v. Wells Fargo Bank</i> , 232 Ariz. 598, 307 P.3d 1025 (Ariz. App. 2013).....	40

<i>Guild v. Saint Martin’s College,</i> 64 Wn. App. 491, 827 P.2d 286 (1992).....	41
<i>Hogan v. Sacred Heart Med. Ctr.,</i> 122 Wn. App. 533, 94 P.3d 390 (2004).....	44
<i>Impac Warehouse Lending Grp. v. Credit Suisse First Boston LLC,</i> 270 Fed. App’x 570 (9th Cir. 2008)	31
<i>Inman v. Am. Paramount Fin.,</i> 517 Fed. App’x 744 (11th Cir. 2013)	38
<i>LaHue v. Keystone Inv. Co.,</i> 6 Wn. App. 765, 496 P.2d 343 (1972).....	21, 31
<i>Lawrence v. Bank of America, N.A.,</i> 455 Fed. App’x 904 (11th Cir. 2012)	21
<i>In re: Liberty State Benefits of Delaware, Inc.,</i> 541 B.R. 219 (Bankr. D. Del. 2015).....	43
<i>Lodis v. Corbis Holdings, Inc.,</i> 192 Wn. App. 30, 366 P.3d 1246 (2015).....	43, 44
<i>Lunsford v. Saberhagen Holdings, Inc.,</i> 166 Wn.2d 264, 208 P.3d 1092 (2009).....	44, 46
<i>Marlin v. Moody Natl. Bank, N.A.,</i> No. 04-4443, 2006 WL 2382325 (S.D. Tex. Aug. 16, 2006), <i>aff’d</i> 248 Fed. App’x 534 (5th Cir. 2007).....	34
<i>Martin v. Abbott Labs.,</i> 102 Wn.2d 581, 689 P.2d 368 (1984).....	21
<i>McGraw v. Wachovia Sec., L.L.C.,</i> 756 F. Supp. 2d 1053 (N.D. Iowa 2010).....	39, 40
<i>McKown v. Simon Prop. Grp., Inc.,</i> 182 Wn.2d 752, 344 P.3d 661 (2015).....	35, 36
<i>MLSMK Invs. Co. v. JP Morgan Chase & Co.,</i> 737 F. Supp. 2d 137 (S.D.N.Y. 2010).....	21, 28

<i>Norton v. U.S. Bank Nat. Ass'n</i> , 179 Wn. App. 450, 324 P.3d 693, review denied, 180 Wn. 2d 1023, 328 P.3d 903 (2014).....	<i>passim</i>
<i>Paracor Finance Inc. v. G.E. Cap. Corp.</i> , 96 F.3d 1151 (9th Cir. 1996)	28
<i>Peck v. Siau</i> , 65 Wn. App. 285, 827 P.2d 1108 (1992).....	34, 36
<i>Presidio Grp., LLC v. GMAC Mortgage, LLC</i> , No. 08-5298, 2008 WL 5110845 (W.D. Wash. Dec. 3, 2008)	37, 38
<i>Roberson v. Perez</i> , 156 Wn. 2d 33, 123 P.3d 844 (2005).....	44, 45
<i>Rosner v. Bank of China</i> , 528 F. Supp. 2d 419 (S.D.N.Y. 2007).....	27
<i>Saleemi v. Doctor's Assocs., Inc.</i> , 176 Wn.2d 368, 292 P.3d 108 (2013).....	48, 49
<i>Schlifke v. Seafirst Corp.</i> , 866 F.2d 935 (7th Cir. 1989)	28
<i>Sears v. Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local No. 524</i> , 8 Wn.2d 447, 112 P.2d 850 (1941).....	25
<i>Seattle-First Nat'l Bank v. Carlstedt</i> , 678 F. Supp. 1543 (W.D. Okla. 1987).....	28
<i>Silverhawk, LLC v. KeyBank Nat. Ass'n</i> , 165 Wn. App. 258, 268 P.3d 958 (2011).....	26
<i>Software Design & Application, Ltd. v. Hoefler & Arnett, Inc.</i> , 49 Cal. App. 4th 472, 56 Cal. Rptr. 2d 756 (1996).....	40
<i>State v. Clark</i> , 143 Wn.2d 731, 24 P.3d 1006 (2001).....	48

<i>Swak v. Dep't of Labor & Indus.</i> , 40 Wn.2d 51, 240 P.2d 560 (1952).....	45
<i>Thompson v. The Everett Clinic</i> , 71 Wn. App. 548, 860 P.2d 1054 (1993).....	37
<i>Union Bank of Calif. v. Superior Court</i> , 130 Cal. App. 4th 378, 29 Cal. Rptr. 3d 894 (2005).....	46, 47, 48
<i>United States v. Westerfield</i> , 714 F.3d 480 (7th Cir. 2013)	25, 26
<i>Varga v. U.S. Bank</i> , 952 F. Supp. 2d 850 (D. Minn. 2013) <i>aff'd</i> , 764 F.3d 833 (8th Cir. 2014).....	22, 29
<i>Wellesley Hills Realty Trust v. Mobil Oil Corp.</i> , 747 F. Supp. 93 (D. Mass. 1990).....	35
<i>Whitney Nat'l Bank v. Karam</i> , 306 F. Supp. 2d 678 (S.D. Tex. 2004)	46, 47, 48
<i>Wiand v. Wells Fargo Bank, N.A.</i> , 938 F. Supp. 2d 1238 (M.D. Fla. 2013).....	25, 30
<i>Woods v. Barnett Bank of Ft. Lauderdale</i> , 765 F.2d 1004 (11th Cir. 1985)	29, 30
<i>Woodward v. Metro Bank of Dallas</i> , 522 F.2d 84 (5th Cir. 1975)	25
<i>Zabka v. Bank of Am. Corp.</i> , 131 Wn. App. 167, 127 P.3d 722 (2005).....	<i>passim</i>
<i>Zaleck v. Everett Clinic</i> , 60 Wn. App. 107, 802 P.2d 826 (1991).....	26
Statutes	
31 U.S.C. § 5311 <i>et seq.</i>	17

Rules

RAP 2.5(c)(2).....44
RAP 9.12.....26

Other Authorities

37 Am. Jur 2d Fraud § 29329
Restatement (Second) of Torts § 876(b) (1977)21

I. INTRODUCTION

Appellants John Norton (“Norton”), Kristine Norton (together, the “Nortons”), and Northland Capital LLC (“Northland”) were victims of a fraud perpetrated by their business partner Jose Nino de Guzman (“Nino de Guzman”). Nino de Guzman misused millions of dollars that Appellants wired to him in Peru to buy real estate, as part of their joint business venture P.R.E. Acquisitions, LLC (“P.R.E.”). Appellants were also investors with Nino de Guzman’s investment firm NDG Investment Group L.L.C. (“NDG”), which turned out to be a Ponzi scheme.

In this case, Appellants seek to hold U.S. Bank National Association (“U.S. Bank”) liable for the losses they incurred due to Nino de Guzman’s fraud. But the undisputed evidence, including Appellants’ own sworn testimony, is that U.S. Bank had absolutely *nothing to do* with Appellants’ investments or losses. Appellants were not customers of U.S. Bank, never communicated with anyone at U.S. Bank, and never entered a U.S. Bank branch. Years of discovery have confirmed that U.S. Bank neither knew about nor was in any way complicit in Nino de Guzman’s fraud. U.S. Bank’s *only* connection to this fraud is the innocuous fact that Nino de Guzman and his businesses did some of their banking with U.S. Bank. There is no legal or factual basis for holding U.S. Bank liable for Appellants’ losses, and the trial court (the Honorable Beth Andrus, King County Superior Court) appropriately dismissed their claims on summary judgment.

Appellants’ Opening Brief (“App. Br.” or “Brief”) largely ignores

the undisputed evidence that led to dismissal of their claims. Instead, echoing the bald allegations in their complaint, their Brief is replete with innuendo, hyperbole, speculation, and assertions that are demonstrably false, in an attempt to try to sell to a new court their implausible claim that U.S. Bank was in on the fraud. But the time for simply asserting unsupported allegations is over. On summary judgment, Appellants were required to support their allegations with evidence of real facts supporting valid causes of action creating legal liability. No such evidence exists.

Appellants appeal the dismissal of two causes of action: aiding and abetting fraud, and negligent supervision. As set forth herein, the undisputed evidence demonstrates that there is no support for any of the key elements of these claims. There is no proof that U.S. Bank had actual knowledge of the fraud; that it substantially assisted the fraud; that it had – or breached – any duty of care to Appellants; that any U.S. Bank employee in any way injured Appellants; or that U.S. Bank’s alleged actions proximately caused Appellants’ losses, for example.

Implicitly conceding that they failed to present a triable issue of material fact on their claims to the trial court, Appellants concentrate their efforts here on arguing that this Court should reconsider and reverse its prior decision in this case, *Norton v. U.S. Bank Nat. Ass’n*, 179 Wn. App. 450, 324 P.3d 693, *review denied*, 180 Wn.2d 1023, 328 P.3d 903 (2014) (“*Norton I*”). Appellants blame the decision in *Norton I* for their inability to prove their allegations, and ask this Court to speculate with them that reversal of that decision could theoretically result in the discovery of now-

missing information needed to support their claims. But there is no basis for speculating that any such evidence exists and no legal basis for reversing *Norton I*. To overcome the doctrines of law of the case and *stare decisis*, Appellants have the burden of proving that the *Norton I* decision must be reversed because of intervening, controlling precedent, or that the decision was clearly erroneous and is causing manifest injustice. Appellants have not met this heavy burden. There has been no intervening law dictating reversal, and this Court's prior decision was well reasoned, in accord with applicable precedent, and absolutely correct. There is no justification for this Court to take the extraordinarily unusual step of reversing its law of the case. Appellants' request to do so should be summarily denied, and the dismissal affirmed.

II. COUNTERSTATEMENT OF ISSUES ON APPEAL

1. Should the Court affirm summary judgment of dismissal of Appellants' claim for aiding and abetting fraud? (YES)
2. Should the Court affirm summary judgment of dismissal of Appellants' claim for negligent supervision? (YES)
3. Should the Court reverse its recent decision in *Norton I*, which is law of the case and binding precedent here? (NO)

III. STATEMENT OF THE CASE

A. Background Of This Action

In July 2006, Nino de Guzman voluntarily left his entry-level job at U.S. Bank, after having worked for the bank part-time during and then full time after he quit college. CP 21 (¶ 3.3), 1061. Two months *after*

leaving the bank, he formed NDG. CP 1137. Then, from late 2006 to early 2009, Nino de Guzman ran his company NDG, which was purportedly involved in real estate development projects in Peru. CP 21, 23 (¶¶ 3.6, 3.11). He convinced dozens of investors to give him millions of dollars by way of membership interests in NDG-affiliated LLCs (“NDG LLCs”) that were supposedly involved in specific development projects. CP 20-21 (¶¶ 3.1, 3.6). The purported developer of NDG’s projects was a Peruvian company, Grupo Innova SA (“Grupo Innova”), which was also mostly owned by Nino de Guzman. *Id.* (¶ 3.2). Although substantial real estate was in fact acquired in Peru, much of what Nino de Guzman told his investors turned out to be a lie. In 2013, Nino de Guzman admitted his misconduct, pled guilty to criminal charges, and is now serving a prison sentence. CP 1071-93. No other NDG employees or anyone else was criminally charged and there is no evidence that anyone was aware of Nino de Guzman’s fraud at the time.¹

Appellants were unique among Nino de Guzman’s many victims because they formed a separate business with him, which they funded with substantial funds (most of which they have since recovered). In 2008, Northland wired approximately \$9.8 million directly to Peru for their joint venture P.R.E. to purchase four parcels of real estate. CP 22 (¶ 3.7). A smaller amount, \$1.2 million, was invested by Northland and the Nortons in three NDG LLCs. *Id.* The circumstances of all of these investments –

¹ Appellants state that U.S. Bank has “conceded” the facts of Nino de Guzman’s fraud. To be clear, U.S. Bank has never “conceded” any involvement or culpability in the fraud, and any attempt by Appellants to suggest otherwise is unsupported and false.

none of which involved U.S. Bank – are discussed further below.

B. Bill Prater And The Formation Of Northland

Bill Prater (“Prater”) was an investment consultant and long-time business advisor to Norton, on whom Norton relied for investment advice. CP 366. For a decade, Prater provided various consulting services to Norton and companies with which Norton was involved. CP 107-09.²

Prater was also a paid consultant to Nino de Guzman and his entities, receiving over \$200,000 in fees for same. CP 257-59, 962-1001. Before the fraud was uncovered, Prater agreed to become the “Chairman” of NDG and Grupo Innova. CP 1003-10.

In spring 2008, while Prater was advising both Norton and Nino de Guzman, Prater approached Norton and recommended that he and Norton form an investment company, which became Northland. CP 366. Prater’s role in Northland would be to screen investment opportunities, perform due diligence, and make recommendations. *Id.* Norton’s role would be to fund the investments, as Norton had received around \$50 million from selling the business he had run for years as CEO. CP, 103-06, 366-67. Norton agreed and Northland was formed in May 2008. CP 366, 510-35.

C. The Nortons And Northland Invest In NDG LLCs

Also in the spring of 2008, Prater introduced Norton to NDG, informed Norton of his work with Nino de Guzman, and recommended

² The Nortons also sued Prater for the investments at issue in this case, contending that he “caused Northland and the Nortons” to invest. CP 366, 368-69. The suit was never tried because Prater filed for bankruptcy. But the complaint against Prater was verified and Norton testified in his deposition that the allegations against Prater were true, belying Appellants’ current contention that somehow U.S. Bank caused their losses. CP 115-16.

that Norton and Northland invest in NDG's ventures. CP 110, 255, 368. Prater provided information and contacts to facilitate the investments, and made representations about how the investments worked. CP 282, 368.

From spring to summer of 2008, Norton and Northland considered investments in the membership interests of NDG LLCs recommended by Prater. Norton communicated with NDG and Prater (*not U.S. Bank*) about the NDG LLCs and potential investments. CP 386-438, 615-16, 673-89. Before making any investments, Appellants reviewed various documents, including offering memoranda, LLC agreements, and certificates of formation. CP 386-506, 537-613, 619-62, 673-747. *None* of these documents made any reference to U.S. Bank. *Id.* Appellants also signed subscription agreements and provided NDG with information via prospective investor questionnaires. CP 498-506, 660-69, 735-47. In doing so, they confirmed in writing that they: (1) had conducted their own "independent investigation" and were not relying upon "any other materials or oral representations"; (2) were not "relying upon the advice" of anyone else "in making a final investment decision"; and (3) had "sufficient knowledge and experience in financial and business matters to be capable of evaluating the merits and risks of [the] investment." *Id.*

Norton had the final decision as to which NDG LLCs, if any, he and his wife or Northland would invest in because he was supplying the funds. CP 256. All investments were based on Prater's recommendations, which had nothing to do with U.S. Bank. CP 113-14, 250-54, 287, 368-69, 943. Ultimately, the Nortons and Northland decided to invest in the

NDG LLCs as follows: The Nortons invested \$200,000 in Larco-Bolivar Investments, LLC in May 2008 and \$500,000 in Shell La Paz, LLC in July 2008. CP 22 (¶ 3.7), 125, 155, 440-51, 508, 673-89, 749. In both instances, the Nortons wrote a check from their account at Horizon Bank to NDG for the investment and mailed the check to NDG. *Id.* Also in July 2008, Northland invested \$500,000 in NDG-Brycon, LLC. CP 22 (¶ 3.7), 537-613. For this investment, Northland wrote a check from its business account at Core Bank and provided it to NDG. CP 671. NDG deposited these three checks into basic, free checking accounts Nino de Guzman had opened at U.S. Bank for the NDG LLCs. CP 1015-20. These subsequent deposits are the only connection between these investments and U.S. Bank.

Appellants signed LLC agreements to become investors in these NDG LLCs. CP 453-506, 619-62, 691-747. They did so believing they would receive incredible returns, such as one project supposedly generating *200 percent annually* for seven years. CP 943-45. Yet, Appellants did little to no analysis as to whether the stated returns were achievable. CP 126-27, 140, 150-53.

D. The Formation Of P.R.E.

Separate from the NDG LLCs, Prater developed and proposed to Norton a different business for Northland involving the direct purchase of real estate in Peru. CP 368-69, 928. Prater proposed jointly forming P.R.E. (Peruvian Real Estate) to act as a “land bank” that would “purchase and flip the Peruvian real estate which the NDG LLCs would purportedly

develop.” CP 166-68, 182, 198, 368-69, 928. Prater and Norton invited Nino de Guzman to “join” them in P.R.E., and he eagerly agreed. CP 800-02, 1012-13. Nobody else was involved with P.R.E. and there is no evidence that Northland’s partnership with Nino de Guzman in P.R.E. was ever disclosed to the other NDG investors. CP 188, 751-95.³

In July 2008, Northland and Nino de Guzman formed P.R.E. CP 165, 751-95. Northland was the contributing member of P.R.E., with a 90 percent interest, and Nino de Guzman was the non-contributing member, with a 10 percent interest. *Id.* Northland’s ownership effectively gave it complete control over P.R.E.’s business and affairs. CP 751-95.⁴

E. Northland Wired Money Directly To Peru For P.R.E.

In the summer and fall of 2008, Prater was extensively involved, on behalf of Northland and P.R.E., in evaluating potential “[s]peculative real estate investments” in Peru. CP 281, 797-98, 804-25, 834, 838-39, 1022. All of Northland’s P.R.E. investments were based upon Prater’s recommendations, which had nothing to do with U.S. Bank. CP 113-14, 287. Like Appellants’ investment in the NDG LLCs, Norton had the ultimate decision as to which properties P.R.E. would buy or not buy because he was supplying the funds. CP 112-13, 166. To make those decisions, Norton reviewed the potential investments and communicated

³ The parties acknowledged the conflict in Nino de Guzman joining P.R.E., since it would be flipping properties to the NDG LLCs for huge profits (and thus would have adverse interests). The three agreed to waive the conflict. CP 166, 186-87, 770.

⁴ For example, Northland had the right to appoint and remove the manager, to amend the LLC agreement, or even dissolve the company, among other rights. CP 769, 772, 775. Northland chose Nino de Guzman as manager (CP 766), but remained heavily involved by analyzing and making all investment decisions about particular properties.

with both Prater and Nino de Guzman. CP 169-70, 183-84, 797-825, 834, 838-39. He also traveled to Peru with Prater to visit properties. CP 929. Neither Northland nor Norton ever communicated with anyone from U.S. Bank, which had no involvement in P.R.E. CP 177-79, 251-53.

Ultimately, based on Prater's recommendations, Norton agreed that Northland would contribute funds to P.R.E. for the purchase of four pieces of property in Peru. CP 112-14, 117. To that end, Northland made four wire transfers to Peru, totaling \$9,771,723, between July 31, 2008, and November 7, 2008, each for the intended purpose of P.R.E.'s purchase of specific pieces of real estate. CP 22 (§ 3.7), 174-78, 192-94. Each time, Northland wired the money directly from bank accounts in Washington to a Grupo Innova bank account in Peru. CP 184, 827-32, 841-42. *None* of the accounts or wires involved or went through U.S. Bank. *Id.*

Northland assumed that once the money was wired to Peru, Nino de Guzman would use the funds to purchase properties for P.R.E. CP 168. However, Northland did not require an escrow or any other controls on the funds, and never saw any purchase/sale agreements or documentation of the real estate it was supposedly buying, or how the funds would be used, either before or after its wires to Peru. CP 184-85, 197. Without any such controls, Nino de Guzman was able to take the funds wired to his Peruvian company and use them at will, which he did. CP 227-28, 937-39.

Northland expected "substantial" short-term profits from P.R.E., such as one deal expected to generate \$850,000 in profit in about three

weeks. CP 194-96, 836-39. All profits were to be made by flipping properties to the NDG LLCs – essentially, profiting P.R.E. at the expense of the NDG LLCs and their unsuspecting members. CP 166-67.

F. Later, P.R.E. Opened An Account, Which Is Never Used

Subsequently, on November 12, 2008, Nino de Guzman opened a basic checking account for P.R.E. at U.S. Bank. CP 1024-31. This account was not opened until *after* Northland had made its four wires to Peru for P.R.E., and was the first and only connection between P.R.E. and U.S. Bank. At the time of the P.R.E. investments, Appellants were unaware of what, if any, banking relationships P.R.E. might have had, and were unaware even after the investments that P.R.E. had later opened an account at U.S. Bank. CP 847. In fact, P.R.E.'s checking account at U.S. Bank was never used and was closed a few months after it was opened. CP 1024-31; RP 38.

G. The Surprising Discovery Of Nino De Guzman's Ponzi Scheme

Neither the Nortons nor Northland suspected Nino De Guzman of fraud at the time they invested. CP 243, 271. Like everyone else, they believed NDG to be a legitimate enterprise. CP 243, 263-65.

In December 2008, however, Appellants discovered that Nino de Guzman had not used P.R.E.'s funds as planned. CP 224, 850-51, 1063. At first, Nino de Guzman apologized and claimed that he had used the funds for different properties. CP 933-35. By early 2009, however, Nino de Guzman's misuse of P.R.E. funds became clearer and questions arose regarding his activities overall. CP 227-28, 937-39. Appellants initially

decided not to blow the whistle because they were hoping that new investors would be led into putting money into NDG that Appellants could then recover. CP 229, 231-32, 941, 950-51. Ultimately, however, further discoveries were made about Nino de Guzman's misconduct, which led to the unraveling of NDG in the spring of 2009. CP 947-48.⁵ Appellants engaged in recovery efforts in Peru, and have since received back most of their investments with Nino de Guzman. CP 67, 1928.

H. U.S. Bank Was Not Involved In Nino De Guzman's Fraud

The evidence shows that U.S. Bank was not complicit in Nino de Guzman's fraud. Rather, the undisputed facts confirm that U.S. Bank had no connection to Appellants' investments or to Nino de Guzman's misconduct involving Appellants' investments.

To begin with, Appellants were never customers of U.S. Bank. CP 129, 244. U.S. Bank provided no services to the Nortons or Northland at any point in connection with any investment. Indeed, it is undisputed – and admitted by Norton and Prater – that *neither Northland nor the Nortons ever communicated or interacted with anyone from U.S. Bank about any investment relating to Nino de Guzman.*⁶ CP 118-19, 128-33,

⁵ Northland forced Nino de Guzman to withdraw from P.R.E. CP 220, 853-902, 924. Subsequently, P.R.E. – which was then controlled by Norton – made false representations to the Internal Revenue Service in an effort to obtain favorable tax treatment. Specifically, P.R.E. stated that Northland was the sole owner of P.R.E. since inception, which was untrue, and that Nino de Guzman had withdrawn before P.R.E. had any operations, assets, or liabilities, which was also false. CP 212-14, 853-54, 904-25.

⁶ CP 208 (Norton Dep.) (Q: “[A]t no time did you ever speak to any U.S. Bank employee about any of your NDG-related investments, right?” A: “That’s correct.”); CP 178 (Norton Dep.) (Q: “[Y]ou never had any conversation with any employee of U.S. Bank prior to making those [P.R.E. investments], isn’t that right?” A: “That’s correct.”); CP 251-52 (Prater Dep.) (Prater testifying that he “[n]ever communicated” with U.S. Bank about P.R.E. or about any NDG investment, and that U.S. Bank “played

144-46, 156-57, 160-63, 177-79, 199-201, 203-05, 207-08, 222, 250-54, 269-70, 272-75, 287. Nobody from U.S. Bank induced Appellants to invest or had any involvement in any of their investments. *Id.* Further, Appellants did not review any documentation that mentioned U.S. Bank, contact or speak with anyone from U.S. Bank on any topic, or visit any U.S. Bank branch in connection with any investment. *Id.*

As to the three NDG LLC investments specifically, at no point did Norton, Northland, or Prater interact with U.S. Bank. CP 128-33, 144-46, 156-57, 161-63, 208, 252. For each investment, Appellants provided the funds to NDG through checks written on their banks (Horizon Bank and Core Bank); they never entered any U.S. Bank branch or spoke with anyone at U.S. Bank. *Id.* In fact, Norton admitted that at the time of the investments, he did not actually know where the bank accounts for the LLCs were maintained. CP 132, 147-48, 158-61. Moreover, Norton and Prater have confirmed that they are unaware of any specific facts that U.S. Bank knew or showing it should have known that Nino de Guzman was committing a fraud, *or* that U.S. Bank provided any services outside the ordinary course of business with respect to the LLCs in which Appellants invested. CP 236, 240-41, 265-66. The *only* link between the NDG LLCs and U.S. Bank are the routine banking services U.S. Bank provided for the basic checking accounts the NDG LLCs opened in the ordinary course of business. CP 952-60, 1015-20.

Similarly, as to P.R.E, the evidence is undisputed that U.S. Bank

no role” in Appellants’ investment decisions).

was not involved in and provided no services relating to Northland's wires to Peru. CP 177-79. In fact, Appellants knew their investments in P.R.E. would *not* be routed through U.S. Bank. CP 22 (§ 3.7). Norton admitted that U.S. Bank did not engage in any wrongdoing with respect to the wiring of funds to Peru for P.R.E. and did not even know about it. CP 202, 242. Indeed, U.S. Bank had no involvement in P.R.E. whatsoever. CP 177-79, 199-201, 207-08, 287. Appellants themselves never had any belief that U.S. Bank had any connection with P.R.E., its use of funds, or the purchase of land in Peru. *Id.* The *only* link between P.R.E. and U.S. Bank is the bank account that P.R.E. opened after the fact and never used.

I. The Three U.S. Bank Employees Discussed In Appellants' Brief Were Not Complicit In The Fraud, And Had Nothing To Do With Appellants Or Their Investments

Through suggestion and innuendo, Appellants try to portray a connection between three unrelated U.S. Bank employees and NDG, and wrongly try to suggest it somehow supports their claims.⁷ Yet, as confirmed by the trial court, the undisputed facts reveal no wrongdoing by U.S. Bank and no connection between the employees and Appellants' investments or losses.

1. The Two Employees Defrauded By Nino de Guzman

Appellants repeatedly stress the fact that former low-level U.S.

⁷ Appellants falsely imply that there was another employee that had something to do with Nino de Guzman's fraud, Darin Donaldson. App. Br. 7. The undisputed facts are that Donaldson was an *employee of NDG*, not U.S. Bank, during all relevant times, and that he was unaware of the fraud. CP 120-21, 128, 229, 947.

Bank employees Benjamin Copstead and Charles Marza referred family and friends to NDG, but there is nothing about Copstead's or Marza's actions that supports Appellants' claims. Notably, the employees had nothing to do with Appellants. Neither of them knew Appellants or was involved in their investments, and in fact, Copstead did not even work for U.S. Bank when Appellants invested. CP 325-26. *Appellants admit they never met either of these individuals and that neither employee had any connection to Appellants' investments or losses.* CP 131, 144-45, 157, 178, 237-38, 269-70, 283.

Moreover, there is no basis for any suggestion that either Copstead or Marza was complicit in the fraud. Both were defrauded just like Appellants. Copstead and Marza were among Nino de Guzman's large group of college fraternity brothers and friends, and coincidentally became employed at different times in unrelated entry-level positions at U.S. Bank after college. CP 296-97, 308-09, 325, 327, 335. Both invested in their friend Nino de Guzman's business and they referred family and friends to NDG, for which they received some compensation. CP 298-307, 318, 328-32. For example, Marza's mother and aunts invested, as did Copstead's mother and grandmother. CP 305, 315, 331. Unfortunately, all of these people were defrauded by Nino de Guzman. CP 310-14, 316-19, 334, 337-38. There is no proof that Copstead or Marza were involved in the fraud, nor could anyone reasonably infer otherwise.⁸

Finally, the undisputed evidence is that Copstead's and Marza's

⁸ Norton similarly introduced a friend to NDG, who was then defrauded. CP 209-10.

referrals of friends and family to NDG *was not part of their employment with or even disclosed to U.S. Bank.*⁹ CP 306-07, 318, 330. Copstead's and Marza's connection to NDG was unrelated to Appellants or to U.S. Bank, and cannot be the basis for any potential liability of U.S. Bank.

2. The Branch Manager Who Provided Ordinary Services

Appellants also focus on former U.S. Bank branch manager Jeffrey Behn, who happened to work at the branch where Nino de Guzman did much of his banking. Again, Appellants' focus is misplaced. *Appellants never had any interaction with Behn, who had nothing to do with their investments.* CP 131, 144-45, 157, 178, 238-39, 354-56. Moreover, there is no proof that Behn was involved in wrongdoing. Behn's undisputed testimony is that he had no knowledge of the fraud, never received any compensation from Nino de Guzman, and had no involvement in NDG or in Nino de Guzman's misconduct. CP 346-60. *There is no evidence otherwise.* The record shows only that Behn provided NDG with regular banking services, such as opening accounts and making wires, identical to those provided to other bank customers. CP 348-49.

Appellants assert that Behn "shielded the de Guzman accounts from scrutiny." App. Br. 19. Appellants only "evidence" is the fact that Behn made changes to an internal bank form used in opening one account

⁹ Appellants vaguely suggest that Copstead may have been complicit because he opened an early NDG-related account that did not anticipate international wires. App. Br. 9; *see* CP 1571-73. This account was not used for wires and had nothing to do with Appellants. CP 1312. Appellants also deceptively suggest that Marza opened accounts for Nino de Guzman. App. Br. 7. That suggestion is unsupported and false. CP 1209-13.

– the account opened by Nino de Guzman for P.R.E. Appellants try hard to portray this routine act as nefarious. It was not. Behn’s undisputed testimony is that he made and initialed corrections to the form, in the ordinary course of his job duties as a branch manager, because a subordinate inaccurately completed the form. CP 343-44. Moreover, the changes to the form were accurate, and the account is also irrelevant since *it was never even used*.¹⁰ CP 1024-31. In addition, the correction of the form and account opening occurred *after* Appellants’ investments. CP 22 (¶ 3.7), 1631-44. The form and account had nothing to do with Appellants or the fact that Nino de Guzman had defrauded them.¹¹ Appellants’ attempt to suggest that Behn — an ordinary branch employee providing ordinary banking services — was somehow in on the fraud is baseless.¹²

J. Procedural History

Notwithstanding the lack of any connection between U.S. Bank and Nino de Guzman’s misconduct, Appellants nonetheless filed this

¹⁰ The changes indicated that international wires (para. 9) and currency transactions greater than \$8,000 (para. 10) were not anticipated in the account. In fact, there were no international wires or currency transactions. CP 1024-31.

¹¹ Appellants also attempt to suggest that Behn was complicit because another account was marked as not expecting international wires, but later had wires. Again, this was not an account into which Appellants deposited funds and Behn’s undisputed testimony was that the account was opened in the ordinary course based on information provided by the customer about expectations at the time. CP 1623-24; RP 31. The fact that the account later happened to have a wire is unsurprising and is not indicia of complicity in fraud.

¹² Appellants speculate that Behn was incentivized to assist the fraud by his compensation at U.S. Bank, which included the potential for modest bonuses for branch performance. This speculation is entirely unsupported. CP 351. It is also implausible that Behn would commit fraud to increase his chances of an “incentive payment” of a few hundred dollars a quarter at most. CP 1593-95. Notably, Behn’s compensation plan was the standard plan for all branch managers in the bank. CP 351-52; *see In re Agape Litig.*, 773 F. Supp. 2d 298, 321-22 (E.D.N.Y. 2011) (holding that inference of fraud must be based on “some benefit beyond additional compensation or prestige from a position already held”).

action against U.S. Bank in 2010. They were the only investors to do so.

1. Prior Bank Secrecy Act Appeal (*Norton I*)

In discovery, Appellants sought documents and information that, to the extent they existed, were protected by the Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.* and related laws and regulations (the “BSA”). Specifically, Appellants requested material relating to any suspicious activity monitoring or investigation U.S. Bank may have conducted of Nino de Guzman, as well as U.S. Bank’s methods and policies for monitoring suspicious activity. CP 1934-2015. U.S. Bank informed Appellants that such material, if it existed, would be prohibited from disclosure under the BSA, but Appellants persisted. U.S. Bank moved for a protective order. CP 2054-67. Superior Court Judge Monica Benton denied U.S. Bank’s request for oral argument and, without explanation, ordered U.S. Bank to produce any existing BSA materials. CP 2016-17, 2083-88. This Court granted discretionary review. CP 2089-97.

In 2014, this Court unanimously reversed and remanded for entry of a protective order barring the requested discovery. *Norton I*, 179 Wn. App. 450, 324 P.3d 693. This Court held that U.S. Bank’s “internal investigations and monitoring of suspicious activity” was privileged and that U.S. Bank could “not be ordered to describe or disclose its internal investigations, either generally or those specifically related to this case.” *Id.* at 462-63. This Court further held that disclosure of the material sought by Appellants would “undermine public policy.” *Id.* at 461-62.

Appellants sought further review. A unanimous panel of the

Washington Supreme Court denied Appellants' petition for review. *See Norton v. U.S. Bank Nat. Ass'n*, 180 Wn.2d 1023, 328 P.3d 903 (2014). On August 6, 2014, this Court issued its Mandate to the trial court for further proceedings in accordance with its *Norton I* decision. CP 2018-34.

2. The Trial Court's Protective Order

On November 19, 2014, Superior Court Judge Beth Andrus entered a protective order, which provided U.S. Bank all protections conferred under the *Norton I* decision, and thus specifically barred Appellants from seeking BSA-privileged information. CP 2035-38. The form of order was negotiated by the parties and Appellants waived notice of presentation. *Id.*

Subsequently, Appellants attempted to circumvent this Court's decision in *Norton I* and the protective order by proffering expert opinions of alleged BSA violations relating to suspicious activity monitoring of Nino de Guzman's banking activity. CP 2098-2115. U.S. Bank moved to enforce the protective order and strike opinions relating to the BSA. *Id.*¹³ After a hearing, Judge Andrus granted the motion in part, ruling that evidence relating to the BSA and whether it was violated would not be the subject of admissible expert opinion in this case. CP 2039-43.

¹³ U.S. Bank argued that the opinions were: (1) *speculative*, as there was not and could not be any evidence about what U.S. Bank did or did not do in these areas, under *Norton I* and the protective order; (2) *irrelevant*, as the BSA duties of U.S. Bank did not run in favor of Appellants and had no bearing on their claims; and (3) *improper* because U.S. Bank is precluded by law from responding to them directly. CP 2098-2115.

3. After Voluntary Dismissals, Appellants' Remaining Claims Are Dismissed On Summary Judgment

Appellants filed their third (and final) amended complaint on April 22, 2015. CP 19-36. Appellants alleged the following claims against U.S. Bank: (1) breach of fiduciary duty; (2) violation of the Washington Securities Act; (3) aiding and abetting fraud, breach of fiduciary duty, and conversion; (4) negligent hiring, retention, and/or supervision; (5) unjust enrichment; and (6) violation of the Washington Consumer Protection Act ("CPA"). *Id.* U.S. Bank filed a motion for partial summary judgment seeking dismissal of all claims relating to P.R.E. CP 55. Appellants then voluntarily dismissed their fiduciary duty and securities claims, and all claims brought by P.R.E. CP 51-53, 55.

On July 31, 2015, U.S. Bank filed a motion for summary judgment on all remaining claims. CP 54-90. Appellants voluntarily dismissed their unjust enrichment and CPA claims (CP 2124-25), leaving their claims for (1) aiding and abetting fraud, breach of fiduciary, and conversion (Counts 7-9), and (2) negligent hiring, retention, and/or supervision (Count 10). The trial court permitted the parties to submit over-length briefing and provided the parties with extended oral argument. RP 60. At the conclusion of the hearing, the court granted U.S. Bank's motion and dismissed Appellants' claims. RP 56-58. With respect to the aiding and abetting claim, Judge Andrus found "insufficient evidence to create a genuine issue of material fact that U.S. Bank knew of de Guzman's fraud on the plaintiffs or that any of U.S. Bank's action provided de Guzman with substantial assistance to commit fraud against the plaintiffs." RP 57.

She also found “insufficient evidence that any act taken by U.S. Bank employees, including that of Mr. Behn, proximately caused plaintiffs’ losses.” *Id.* With respect to the negligent hiring, retention, or supervision claim, Judge Andrus held that to prevail, Appellants had to establish “that U.S. Bank owed a duty of care to [them].” *Id.* She concluded that this Court’s holding in *Zabka v. Bank of Am. Corp.*, 131 Wn. App. 167, 127 P.3d 722 (2005), *published with modifications* (Jan. 19, 2006), “is dispositive of the fact that the bank did not owe a duty of care to the plaintiffs because they were not a customer of U.S. Bank and -- or they didn’t have any sort of special relationship to the bank.” RP 57-58.

Appellants now appeal the trial court’s decision, and also request that this Court overturn its decision in *Norton I*. In their Brief, Appellants have only appealed with respect to their claims for (1) aiding and abetting fraud and (2) negligent supervision, and thus those are the only claims that must be addressed. *See, e.g., Zabka*, 131 Wn. App. at 174 (claims not mentioned in opening brief would not be addressed by the Court).

IV. ARGUMENT

A. **The Trial Court Correctly Dismissed Appellants’ Aiding and Abetting Fraud Claim**

To prove aiding and abetting fraud, Appellants must establish that U.S. Bank: (1) had actual knowledge of the commission of the fraud *and* (2) knowingly provided substantial assistance to advance the fraud’s commission, (3) proximately causing Appellants’ losses. *See Calvert v. Zions Bankcorporation (In re Consol. Meridian Funds)*, 485 B.R. 604,

616-25 (Bankr. W.D. Wash. 2013).¹⁴ As confirmed during the summary judgment hearing, this legal standard is undisputed by the parties. RP 34-35, 56-57. Appellants failed to submit evidence establishing a genuine issue of material fact as to *any* of the elements of this claim.

1. U.S. Bank Did Not Have Actual Knowledge Of Fraud

The first element is actual knowledge of fraud.¹⁵ This element requires “actual knowledge,” which is “a high degree of scienter” that is not satisfied by “constructive knowledge” or negligence. *El Camino Res., Ltd. v. Huntington Nat’l Bank*, 722 F. Supp. 2d 875, 910 (W.D. Mich. 2010) *aff’d* 712 F.3d 917 (6th Cir. 2013) (quotations omitted). To be liable, a defendant must “reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act.” *Calvert*, 485 B.R. at 617. This standard is intentionally set as a high threshold, in part to protect service providers like banks from the unjust results that could accompany hindsight accusations (like those here) that the defendant “should have known” of customer wrongdoing. *See*

¹⁴ *See also Martin v. Abbott Labs.*, 102 Wn.2d 581, 596, 689 P.2d 368 (1984); *Cain v. Dougherty*, 54 Wn.2d 466, 471-72, 341 P.2d 879 (1959); *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 783, 496 P.2d 343 (1972); Restatement (Second) of Torts § 876(b) (1977).

¹⁵ *Calvert*, 485 B.R. at 616-17 (requiring actual knowledge); *see also Martin*, 102 Wn.2d at 598 (aiding and abetting liability requires that defendant “knew” of another’s tortious conduct); *LaHue*, 6 Wn. App. at 783 (dismissing claim for “failure to prove the required knowledge of prospective wrongdoing”). There is *extensive* case authority nationwide confirming that actual knowledge is necessary to prove aiding and abetting liability, as Appellants have acknowledged (RP 34-35). *See, e.g., MLSMK Invs. Co. v. JP Morgan Chase & Co.*, 737 F. Supp. 2d 137, 144 (S.D.N.Y. 2010) (“While it may be true that Defendants could have connected the dots to determine that Madoff was committing fraud, Plaintiff offers no facts to support the claim that they actually reached such a conclusion.”); *Lawrence v. Bank of America, N.A.*, 455 Fed. App’x 904, 907 (11th Cir. 2012) (bank providing services to customer running Ponzi scheme could not be liable absent “actual knowledge” of fraud); *see also* CP 71 (citing additional authority).

Varga v. U.S. Bank, 952 F. Supp. 2d 850, 859 (D. Minn. 2013) *aff'd*, 764 F.3d 833 (8th Cir. 2014) (courts must be “mindful of the potentially devastating impact aiding and abetting liability might have on commercial relationships”) (quotations omitted).

Appellants have *no evidence* that U.S. Bank had actual knowledge of Nino de Guzman’s fraud. Norton has *admitted* that he is unaware of any facts indicating that U.S. Bank knew of Nino de Guzman’s fraud. CP 236. Prater has testified similarly. CP 265, 274-75. Put simply, there is not “a single piece of evidence” showing that U.S. Bank had actual knowledge of fraud. *El Camino*, 722 F. Supp. 2d at 925.

Appellants acknowledge the “absence of direct evidence” of knowledge, but argue that there is sufficient “circumstantial evidence” to prove this element. App. Br. 15, 18. There is not. Appellants claim that their “evidence” of knowledge consists of: (1) Nino de Guzman enlisting bank employees to solicit investors; (2) bank employees opening multiple accounts for NDG that were used for large international wire transfers; and (3) steady deposits being made by NDG into Nino de Guzman’s personal accounts. *Id.* at 19. This “evidence” is not remotely sufficient to establish a genuine issue of material fact about knowledge.

As a matter of law, courts routinely conclude that the kind of supposed “circumstantial evidence” of knowledge offered by Appellants is insufficient to survive summary judgment. For example, in *El Camino*, on which Appellants have relied (CP 1923 n.63), the court explained:

Plaintiffs’ circumstantial case rests on a concatenation of

“red flags,” suspicious circumstances, and other irregularities allegedly known by the Bank, combined with “atypical banking practices” committed by [the] Bank, including violation of the Bank’s anti-money-laundering responsibilities and its own internal policies. *Plaintiff’s showing in this regard is legally insufficient....* Mere “suspicions,” even of tortious conduct, are insufficient to satisfy the actual knowledge standard. Similarly, knowledge of “red flags” is insufficient, as these indicate only the possibility of irregularities and therefore establish, at best, only constructive knowledge....

722 F. Supp. 2d at 920, 922 (emphasis added) (citations omitted). The court went on to confirm that even actual knowledge that “something was wrong” is insufficient to show “actual knowledge of the tortious conduct.” *Id.* at 922. Here, the alleged “circumstantial evidence” is far less than the evidence found to be legally insufficient in *El Camino* and other cases. *Id.*; see also, e.g., *In re Agape Litig.*, 773 F. Supp. 2d 298, 309-10 (E.D.N.Y. 2011) (proof that bank actively monitored account showing obvious signs of fraud showed only constructive, not actual, knowledge).

Appellants’ contention that Nino de Guzman “enlisted” Copstead and Marza to refer friends and family to NDG offers no proof that U.S. Bank had knowledge of Nino de Guzman’s fraud. As noted above, the undisputed testimony is that these individuals’ involvement with NDG was not part of their employment with U.S. Bank or even known by U.S. Bank, and that they had no knowledge of the fraud and, in fact, were its victims just like Appellants.¹⁶ Likewise, Appellants’ contention that Nino de Guzman “enlisted” Behn to provide banking services to NDG offers no

¹⁶ *Cf. Freeman v. JP Morgan Chase Bank, N.A.*, 137 F. Supp. 3d 1284, 1297-98 (M.D. Fla. 2015) (holding that bank officer’s suspicious activity, including \$100,000 payment from fraudster, would not be imputed to bank as evidence of knowledge where the bank was not aware of the payment, which violated bank policy).

proof that U.S. Bank had knowledge of fraud. The testimony is undisputed that Behn received nothing from Nino de Guzman, had no involvement with NDG, provided NDG only with banking services like those provided to other customers, and had no knowledge of the fraud.

Appellants suggest that Behn's changes to the P.R.E. account form are evidence he was aware of misconduct, but offer no explanation as to how. The undisputed facts are that the initialed corrections were made in the ordinary course. Nothing about the form indicates knowledge of wrongdoing. Moreover, even if one was to assume that Behn lied under oath and had some awareness of wrongdoing – and there is no basis for such an assumption – that would not assist Appellants. General knowledge of wrongdoing is insufficient to show actual knowledge of fraud.¹⁷ *El Camino*, 722 F. Supp. 2d at 910, 922.

Appellants offer other “evidence” of knowledge is that Nino de Guzman made transfers into his personal account and opened a number of different accounts.¹⁸ However, these facts have no logical bearing on whether U.S. Bank had *actual knowledge* of Nino de Guzman's fraud against Appellants. At most, Appellants could argue that these facts show “‘red flags,’ suspicious circumstances, and other irregularities,” which the case

¹⁷ Appellants imply that because Behn had some familiarity with NDG, it should be inferred he was aware of the fraud. Such an inference is not reasonable given his firm denial of any such knowledge, the lack of evidence to the contrary, and the implausibility of the notion that he would knowingly be involved in fraud. Moreover, even NDG's own employees, investors, and proposed Chairman (Prater) did not know of Nino de Guzman's fraud, despite the fact that these people (including Appellants) had *vastly* more interaction with Nino de Guzman and involvement in NDG than Behn.

¹⁸ Most of the accounts were opened by the various NDG LLCs, generally one account each. Nino de Guzman and his wife also had accounts, as did NDG. CP 1208-13.

law universally holds to be insufficient as a matter of law. *See, e.g., El Camino*, 722 F. Supp. 2d at 922 (citing cases).

Appellants rely on *Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975) as their principal authority as to why actual knowledge can be inferred here.¹⁹ Nothing in *Woodward* supports their claims. There, the court found as a matter of law that circumstantial evidence was *insufficient* to prove a claim for aiding and abetting against a bank. 522 F.2d at 94-99. Moreover, the case involved federal securities law claims and has been disavowed as being inapplicable to state law aiding and abetting claims where actual knowledge is required, as here. *See Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1246 (M.D. Fla. 2013).

Finally, Appellants assert that the Court should allow them to meet their burden by proving “indifference to the truth in the face of suspicious circumstances” (*i.e.* conscious avoidance). App. Br. 18. Yet, this standard has *never* been applied by a Washington court in the context of civil aiding and abetting liability – where the standard is actual knowledge – and Appellants offer no authority supporting its application here.²⁰

¹⁹ Appellants also cite two aged Washington cases for the general proposition that knowledge can be inferred from circumstantial evidence. Neither case involved aiding and abetting or had facts remotely related to the present case. *See Bland v. Mentor*, 63 Wn.2d 150, 151-58, 385 P.2d 727 (1963) (action to have deed nullified and obtain judgment in amount of defendants’ equity in land); *Sears v. Int’l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local No. 524*, 8 Wn.2d 447, 449-57, 112 P.2d 850 (1941) (action based on causing breach of contract by union members in labor dispute). Neither case supports the contention that there is sufficient evidence from which a reasonably jury could find that U.S. Bank had actual knowledge of the fraud.

²⁰ *Cf. Calvert*, 485 B.R. at 616-17 (noting lack of Washington law supporting conscious avoidance standard). Appellants’ only citation is to *United States v. Westerfield*, 714 F.3d 480, 482-86 (7th Cir. 2013), an inapposite case involving an attorney who was criminally convicted of wire fraud for participating in mortgage fraud. There, the court concluded that the “testimony of many people” and documentary

Moreover, this argument was *never made below* and should be disregarded for that reason alone. RAP 9.12; *see* RP 34-35, 56 (Appellants' counsel acknowledging "actual knowledge" standard and court noting that the parties have no difference of opinion on the standard).²¹

Further, even in jurisdictions that apply a "conscious avoidance" standard, plaintiffs must meet the "very high bar" of showing that the "defendant actually knew [of the fraud] because he or she suspected a fact and realized its probability, but refrained from confirming it in order later to be able to deny knowledge." *Agape*, 773 F. Supp. 2d at 319. Here, there is no evidence that U.S. Bank took any actions for the purpose of avoiding knowledge. *Cf. id.* at 319-21 (finding that conscious avoidance was not adequately pled even though bank did not investigate customer complaints of fraudulent conduct and other red flags). Thus, even if this standard was applicable, and it is not, Appellants have not satisfied it. Appellants have not shown a genuine issue of fact as to actual knowledge.

2. U.S. Bank Did Not Substantially Assist The Fraud

Even if U.S. Bank had actual knowledge of the fraud, and it did not, the trial court correctly found that there was no genuine issue of material fact "that any of U.S. Bank's actions provided de Guzman with

evidence allowed the jury to conclude that, if the defendant had been unaware of the scheme it was only because she deliberately stayed ignorant. *Id.* at 484-86. The jury's verdict on overwhelming evidence of the defendant's criminal participation in the fraud bears no similarity to the supposed "evidence" Appellants have pointed to here.

²¹ *See also, e.g., Silverhawk, LLC v. KeyBank Nat. Ass'n*, 165 Wn. App. 258, 265, 268 P.3d 958 (2011) ("An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal."); *Zaleck v. Everett Clinic*, 60 Wn. App. 107, 111 n.1, 802 P.2d 826 (1991) (declining to consider argument not raised to the trial court).

substantial assistance to commit fraud against” Appellants. RP 57. In fact, Appellants failed to provide *any* evidence that U.S. Bank actually assisted Nino de Guzman in defrauding Appellants. CP 274-75 (Prater testifying he has no knowledge of any assistance provided by U.S. Bank).

With respect to Appellants’ investments in P.R.E., U.S. Bank had no involvement whatsoever. The only service it provided relating to P.R.E. concerned a checking account opened in the ordinary course *after* Appellants’ investments, which was never used. With respect to Appellants’ investments in the NDG LLCs, U.S. Bank again had no involvement, and merely provided ordinary banking services for checking accounts into which Appellants’ funds ultimately were deposited by NDG. This is not substantial assistance. As the court explained in *El Camino*:

[S]ubstantial assistance means something more than merely providing routine professional services that aid the tortfeasor in remaining in business, but do not proximately cause the Appellants’ harm. In the banking area, courts generally hold that a bank does not aid and abet its customer’s wrongdoing merely by providing routine banking services to its customers. . . . Generally, mere maintenance of a bank account, receipt or transfer of funds, or repeated execution of wire transfers involving allegedly purloined funds do not constitute substantial assistance. Ordinary business transactions that a bank performs for its customer can satisfy the substantial assistance element . . . only if the bank actually knew that those transactions were assisting the customer in committing a specific tort.

722 F. Supp. 2d at 911 (quotations and citations omitted).²²

²² There is overwhelming case law support for the proposition that banking services are not substantial assistance. *See, e.g., Rosner v. Bank of China*, 528 F. Supp. 2d 419, 427 (S.D.N.Y. 2007) (providing banking services to a customer engaged in fraud is not substantial assistance as a matter of law); *Fremont Reorganizing Corp. v. Duke*, 811 F. Supp. 2d 1323, 1347 (E.D. Mich. 2011) (“A bank does not aid and abet its customer’s wrongdoing merely by providing routine banking services.”) (quotations omitted);

Appellants assert, without any citation to authority, that “[t]he extent of a defendant’s substantial assistance, as well as its knowledge, are questions of fact.” App. Br. 16. Appellants ignore the mountain of authority in which courts have ruled, *as a matter of law*, that plaintiffs had failed to show that a defendant bank had actual knowledge of or substantially assisted a fraud. Claims identical to those made here are routinely decided on motions to dismiss, and are certainly proper for summary judgment resolution. *See, e.g., Calvert*, 485 B.R. at 625; *Agape*, 773 F. Supp. 2d at 318, 322-26; *El Camino*, 722 F. Supp. 2d at 919-30.

Appellants argue that U.S. Bank provided substantial assistance by opening and maintaining accounts without scrutiny, which allowed the fraud to proceed. Yet, “[t]he caselaw is clear that opening accounts and approving transfers, even where there is a suspicion of fraudulent activity, does not amount to substantial assistance.” *In re Agape Litig.*, 681 F. Supp. 2d 352, 365 (E.D.N.Y. 2010). Likewise, “[s]ilence, inaction, or a failure to investigate does not constitute substantial assistance” as a matter of law. *El Camino*, 722 F. Supp. 2d at 914.²³ “Distilled to its essence,

Seattle-First Nat’l Bank v. Carlstedt, 678 F. Supp. 1543, 1549 (W.D. Okla. 1987) (banking services and “other regular banking operations” are “insufficient to create aiding and abetting liability”); CP 73 (citing additional authority). Notably, despite the number of recent cases arising from Ponzi schemes and other frauds, counsel for U.S. Bank is unaware of any case where a bank was held liable on facts remotely like those here. Courts nationwide have soundly rejected attempts to hold banks liable for providing banking services to even very large scale Ponzi scheme perpetrators like Bernie Madoff. *See, e.g., MLSMK*, 737 F. Supp. 2d at 144 (rejecting claims against bank arising from Madoff scheme); *cf. Schlifke v. Seafirst Corp.*, 866 F.2d 935, 950 (7th Cir. 1989) (“Public policy dictates that sophisticated investors such as these [plaintiffs] not be allowed to harass on fanciful bases financial institutions which are merely performing the functions that society and law have created for them.”) (quotations omitted).

²³ *See also, e.g., Paracor Finance Inc. v. G.E. Cap. Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996) (holding that “[m]ere inaction is not enough” as what is required is “positive steps

[Appellants'] allegation boils down to a complaint that U.S. Bank breached a duty to prevent fraud from passing through . . . its accounts. No such duty exists." *Varga*, 952 F. Supp. 2d at 862.²⁴

Appellants next cite Copstead's and Marza's referrals of friends and family to NDG as substantial assistance by U.S. Bank. But the evidence is undisputed that their personal involvement with NDG was not part of their employment with U.S. Bank, much less known to U.S. Bank. Moreover, Copstead and Marza never met Appellants and had nothing to do with their investments. Their actions have no bearing on whether U.S. Bank substantially assisted Nino de Guzman's fraud against Appellants.

Finally, Appellants contend that Behn's change to the P.R.E. account document constituted substantial assistance. It did not. The undisputed evidence is that this internal form correction, for an account that was not used, was done in the ordinary course of banking services.

Appellants cite the federal securities case *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004 (11th Cir. 1985), for the proposition that "[s]ubstantiality is based upon all the circumstances surrounding the transaction in question." App. Br. 16-17. But even taking into account "all the circumstances," there is no evidence that U.S. Bank assisted Nino

to advance" the fraud); *Varga*, 952 F. Supp. 2d at 860 (holding that "failing to alert others cannot constitute substantial assistance as a matter of law," as liability must be based on the defendant's "affirmative acts, not acts it should have taken") (quotations omitted).

²⁴ Appellants quote American Jurisprudence in an effort to suggest that the standard for substantial assistance is more favorable to them than the case law suggests. App. Br. 16. It is not. Appellants' quotation conveniently omitted the part of the passage stating that it concerned aiding and abetting *breach of fiduciary duty*. 37 Am. Jur 2d Fraud § 293. As Appellants have not appealed on that claim, this standard is inapplicable. In any event, the quoted standard does not assist Appellants because there is *no evidence* that U.S. Bank affirmatively assisted or knowingly helped conceal the fraud.

de Guzman's fraud against Appellants, let alone substantially. Furthermore, the *Woods* case has been found inapposite to state law aiding and abetting claims. See *Wiand*, 938 F. Supp. 2d at 1246. The trial court properly found no genuine dispute of fact on substantial assistance.

3. U.S. Bank Did Not Proximately Cause Damages

To prevail, Appellants must also establish that any alleged substantial assistance *proximately caused* their losses. *Calvert*, 485 B.R. at 617, 624. Thus, Appellants must show:

that the secondary party proximately caused the violation, or, in other words, that the encouragement or assistance was a substantial factor in causing the tort. But-for causation is insufficient. Rather, a plaintiff must demonstrate that its injury was a direct and reasonably foreseeable result of the conduct.

El Camino, 722 F. Supp. 2d at 910-11 (quotations and citations omitted).²⁵

The trial court found "insufficient evidence that any act taken by U.S. Bank employees . . . proximately caused plaintiffs' losses." RP 57.

In their Brief, the entirety of Appellants' argument on this issue is the conclusory statement that "there is substantial circumstantial evidence that would allow a jury to find that U.S. Bank contributed to the Norton's losses by lending substantial assistance to de Guzman." App. Br. 15. They fail, however, to point to anywhere that this supposed evidence can be found. That is because it does not exist. The undisputed facts do not establish *any* relationship between Appellants' losses and any action by

²⁵ See also *Fabrique v. Choice Hotels Intern., Inc.*, 144 Wn. App. 675, 683, 183 P.3d 1118 (2008) (granting summary judgment for failure to prove proximate cause, *i.e.*, "a cause which, in a direct sequence, unbroken by any new, independent cause, produces the injury complained and without which the injury would not have occurred").

U.S. Bank, let alone the kind of direct and unbroken relationship that could be considered a proximate cause.

The only connection U.S. Bank had to P.R.E. was the account opened after Appellants' investments, which was never used. And the only connection U.S. Bank had to the NDG LLCs was the provision of ordinary banking services for accounts into which NDG deposited funds. Such connections are indistinguishable from the role of any bank and are unrelated to the injuries Appellants suffered.²⁶ The mere fact that NDG "needed a bank" to effectuate its Ponzi scheme is legally insufficient to establish that the bank's services proximately caused investor losses.²⁷

Appellants make vague claims throughout other sections of their Brief that can be charitably read as arguments about causation. For example, Appellants broadly assert that "[h]ad U.S. Bank properly refused to allow de Guzman's multiple accounts to be used for frequent foreign six figure wire transfers, de Guzman would not have been able to easily divert investor funds for his personal benefit." App. Br. 24. Yet, U.S. Bank had no duty to "refuse" to provide banking services to Nino de Guzman, and

²⁶ See *Impac Warehouse Lending Grp. v. Credit Suisse First Boston LLC*, 270 Fed. App'x 570, 572 (9th Cir. 2008) (holding that assistance was not substantial where it did not "contribute to [plaintiff's] injury"); *Lahue*, 6 Wn. App. at 783-84 (explaining that the lack of proximate cause between the alleged assistance and the underlying embezzlement supported dismissal of aiding and abetting claim).

²⁷ *El Camino*, 722 F. Supp. 2d at 927; see also *id.* at 928 ("Providing general banking services to a client is no more the direct and reasonably foreseeable cause of injury to the client's customers than the providing of offices or fancy cars."); *Agape*, 773 F. Supp. 2d at 325 (holding that while bank's services made it easier to "effectuate the scheme, these conventional banking transactions were not the proximate cause of the Plaintiffs' damages"); *Cromer Fin. Ltd. v. Berger*, 137 F. Supp. 2d 452, 472 (S.D.N.Y. 2001) (holding that although the "Ponzi scheme may only have been possible" because of financial services, the services were not the proximate cause of plaintiff's losses).

the idea that its doing so was the proximate cause of Appellants' losses is entirely speculative and unsupported by any evidence.²⁸

Appellants attempt to infer some causal connection between their losses and Behn's changes to the account form. But Behn's changes to the form and the opening of the P.R.E. account occurred *after* all of Appellants' investments had already been made. If the P.R.E. account had not been opened or the change to the form not been made, nothing would have been different for Appellants. There was no causal link whatsoever between Appellants' losses and the P.R.E. account or form.

Finally, Appellants seem to contend that U.S. Bank somehow caused their losses by allowing money from Peru to be wired back into Nino de Guzman's accounts. This contention is baseless. First, the receipt or transfer of purloined funds *does not constitute substantial assistance*. *El Camino*, 722 F. Supp. 2d at 911, 914. Second, there is no evidence that the funds wired from Peru to Nino de Guzman's accounts at U.S. Bank were *Appellants'* funds. Third, Appellants fail to provide any basis for asserting that U.S. Bank should have been on the lookout for, or prevented the wiring of, funds into Nino de Guzman's accounts. Indeed, it is undisputed that U.S. Bank had no involvement in Appellants' direct wire transfers to Peru and no knowledge that they had occurred.

In summary, there is no proof that any "assistance" by U.S. Bank

²⁸ See *El Camino*, 722 F. Supp. 2d at 928 (holding that a bank's "failure to shut down [a fraudster's] accounts does not constitute substantial assistance, because [the bank] owed plaintiffs no duty to do so"); see also, e.g., *Agape*, 681 F. Supp. 2d at 365; *Freeman*, 137 F. Supp. 3d at 198-99.

proximately caused Appellants' losses. Their losses were caused by Nino de Guzman's misuse of funds. CP 24 (¶ 3.12). With respect to P.R.E., the losses also came about as a result of Appellants imposing no controls on the \$9.8 million wired to Peru or requiring any documentation before the funds were sent, which enabled Nino de Guzman to misuse the funds in Peru; this had nothing to do with U.S. Bank, which never touched the funds. Appellants cannot prove proximate causation and their aiding and abetting fraud claim was properly dismissed.

B. The Trial Court Properly Dismissed Appellants' Negligent Supervision Claim

To prove negligent supervision, in addition to establishing the general elements of negligence, including a legal duty, Appellants must show: (1) the employee presented a risk of harm to others; (2) the employer knew, or should have known in the exercise of reasonable care, that the employee posed a risk to others; and (3) the employer's failure to supervise was the proximate cause of loss. *See, e.g., Briggs v. Nova Servs.*, 135 Wn. App. 955, 966-67, 147 P.3d 616 (2006), *aff'd*, 166 Wn.2d 794, 213 P.3d 910 (2009). Where the employer has such knowledge about the risks posed by an employee, it has a duty to foreseeable victims "to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others." *Betty Y. v. Sameeh Al.-Hellou*, 98 Wn. App. 146, 149, 988 P.2d 1031 (1999). To recover, Appellants must prove that: (1) U.S. Bank had and breached this duty; (2) the employee injured them; and (3) U.S. Bank's negligence was a proximate cause of the injuries

suffered by the Appellants at the hands of the employee. *See Peck v. Siau*, 65 Wn. App. 285, 288-94, 827 P.2d 1108 (1992). Appellants have no evidence on *any* of these elements. CP 272 (Prater testifying he is not aware of any facts showing that U.S. Bank negligently supervised any employees).

1. Appellants' Claim Fails Because U.S. Bank Did Not Owe A Legal Duty To Appellants

From the outset, Appellants' negligent supervision claim fails because U.S. Bank owed them no duty of care. At the summary judgment hearing, Judge Andrus correctly explained that to prove negligent supervision, Appellants "must establish as a matter of law that U.S. Bank owed a duty of care to [them]." RP 57. In *Zabka*, this Court held that banks have no duty to noncustomers to prevent losses resulting from the misconduct of its customers. 131 Wn. App. at 172-73.²⁹ Judge Andrus found *Zabka* dispositive here, holding that U.S. Bank did not, as a matter of law, owe a duty of care to Appellants under the circumstances, because it is undisputed that they were not customers of U.S. Bank and did not have any special relationship with the bank. RP 57-58. Accordingly, the negligent supervision claim was dismissed.

The trial court's decision should be affirmed. It is black letter law that a claim premised on negligence can only proceed where the defendant

²⁹ The Washington rule is identical to the "universal rule in this country" that banks do not owe duties to noncustomers and have no duty to protect them from the misconduct of bank customers. *El Camino*, 722 F. Supp. 2d at 907; *see also, e.g., Marlin v. Moody Natl. Bank, N.A.*, No. 04-4443, 2006 WL 2382325, at *7 (S.D. Tex. Aug. 16, 2006) ("Banks have no duty to non-customers."), *aff'd* 248 Fed. App'x 534 (5th Cir. 2007); *Eisenberg v. Wachovia Bank N.A.*, 301 F.3d 220, 227 (4th Cir. 2002) (citing cases).

owed a duty of care to the plaintiff. *Zabka*, 131 Wn. App. at 170-71. Appellants were not customers of and had no relationship with U.S. Bank, and thus U.S. Bank owed them no duty of care. *Id.* at 172-73. Put simply, Appellants are “not a member of any class to whom the bank owed a duty.” *Id.* at 170-71. Notably, the substance of Appellants’ allegations here are essentially identical to those of the investors in *Zabka*, *i.e.*, that if the bank had refused to open accounts or allow transfers, their loss theoretically could have been avoided. Whether Appellants frame their claim as “negligence” or “negligent supervision” is of no consequence. Either way, as noncustomers, U.S. Bank owed them no duty of care. Appellants’ negligent supervision claim thus fails as a matter of law.³⁰

Appellants argue that *Zabka* does not control and rely instead on *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 344 P.3d 661 (2015), which they claim extended the duty of supervision to all reasonably foreseeable victims of employees. But *McKown* does not support Appellants. There, the plaintiff was a retail store employee who was shot in a mall shooting. 182 Wn.2d at 758. The plaintiff *did not* bring a negligent supervision claim, but instead alleged ordinary negligence against the mall owner. *Id.* The Court’s opinion addressed “the scope of landowners’ or possessors’ responsibility for harm that results when strangers commit criminal acts against invitees on business premises.” *Id.*

³⁰ See, e.g., *Fremont*, 811 F. Supp. 2d at 1344 (dismissing negligent supervision claim because defendants owed no duty to plaintiff); *Brady v. Lynes*, No. 05 CIV. 6540 (DAB), 2008 WL 2276518, at *1 (S.D.N.Y. June 2, 2008) (same); *Wellesley Hills Realty Trust v. Mobil Oil Corp.*, 747 F. Supp. 93, 99-101 (D. Mass. 1990) (same).

at 757. It has no bearing on the facts or law of this case.³¹

Appellants confusingly assert, without record citation, that they were “foreseeable victims of de Guzman’s use of the Bank to facilitate and lend legitimacy to his Ponzi scheme.” App. Br. 21. This argument ignores that there is no evidence U.S. Bank was aware of Appellants’ investments, let alone Nino de Guzman’s fraud. Appellants would have this Court hold that banks have a duty to noncustomers that could be hurt by a customer’s misconduct because such victims are “foreseeable.” Well-established authority in Washington and throughout the nation holds otherwise. *Zabka*, 131 Wn. App. at 172-73; *see also, e.g., Freeman*, 173 F. Supp. 3d at 1293 (rejecting argument that noncustomers are within a bank’s “foreseeable zone of risk” because they deposited money into a customer’s bank account). U.S. Bank had no duty to Appellants, and their negligent supervision claim fails.

2. Appellants Were Not Harmed By Any Employee

Appellants’ negligent supervision claim fails for the further reason that they were not harmed by any U.S. Bank employee. Negligent employment claims are designed to hold employers responsible for the torts of employees under narrow circumstances. Such claims are typically asserted in the context of an employee causing physical injury. *See, e.g., Betty Y.*, 98 Wn. App. at 148-52 (sexual misconduct by employee); *Peck*,

³¹ Citing *McKown*, Appellants suggest that whether a duty exists here must be reconsidered anew under principles of foreseeability. App. Br. 21. But this Court has already undertaken the relevant duty analysis and determined, as a matter of law, that banks have no relevant duty to noncustomers. *Zabka*, 131 Wn. App. at 172-73.

65 Wn. App. at 288-94 (same). Here, it is undisputed that no U.S. Bank employee committed a tort against or otherwise harmed Appellants.

Throughout their Brief, Appellants make assertions about Copstead, Marza, and Behn to insinuate that these people had something to do with their losses. They did not. *Appellants have admitted that none of these individuals harmed them.* CP 237-39 (Norton); CP 272 (Prater); RP 45. Copstead was not involved in their investments and not even employed by the bank at the time they invested;³² Marza had no involvement in their investments or NDG's banking; and Behn had no involvement in their investments and only provided ordinary banking services to NDG. Appellants never met any of them. The person who defrauded Appellants was not a U.S. Bank employee (it was Nino de Guzman), and no U.S. Bank employee was responsible for Appellants' losses. Appellants' claim fails as a matter of law.

3. There Is No Evidence That U.S. Bank Was Aware Any Employee Posed A Risk Of Harm To Third Parties

Even if Appellants could overcome the fact that they were not harmed by any U.S. Bank employee, and they cannot, their claim would still fail because they have no evidence that U.S. Bank was or should have been aware of a *risk of harm* posed by Copstead, Marza, or Behn.³³

³² See *Freeman*, 137 F. Supp. 3d at 1299 (bank officer's alleged improper interactions with fraudster could not support claim where officer was no longer assigned to the fraudster's accounts by the time the plaintiff invested).

³³ See, e.g., *Presidio Grp., LLC v. GMAC Mortgage, LLC*, No. 08-5298, 2008 WL 5110845, at *4 (W.D. Wash. Dec. 3, 2008) ("Plaintiffs are required to submit specific facts, as opposed to general conclusions, showing that the employer knew or should have know[n] that its employee presented a danger to others."); *Thompson v. The Everett Clinic*, 71 Wn. App. 548, 555, 860 P.2d 1054 (1993) (negligent supervision claim fails where there is no evidence of prior knowledge of employee's dangerous tendencies).

Courts regularly dismiss claims like this one even where an employee committed a fraud against the plaintiff.³⁴ Here, the person who defrauded Appellants was *not* a U.S. Bank employee.

Appellants offer no record support or explanation as to how U.S. Bank should have been aware that any employee posed some risk of harm. They do not identify what risk of harm any employee posed or how U.S. Bank should have been aware of any such risk. For this reason as well, Appellants' negligent supervision claim fails.

4. There Is No Evidence That U.S. Bank Acted Negligently

Nor is there any evidence of any *negligence* on U.S. Bank's part relating to any purported, unidentified risk of harm posed by an employee. Even if there was evidence that U.S. Bank should have been aware that some employee posed a risk of harm (and there is not), the scope of any obligation of U.S. Bank would merely be to "prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others." *Betty Y*, 98 Wn. App. at 149. Here, there is no evidence – nor even any allegation – that any U.S. Bank employee harmed Appellants through the use of the "tasks, premises, or instrumentalities" U.S. Bank entrusted to them, let alone that any such harm had something to do with negligence by

³⁴ See *Presidio*, 2008 WL 5110845, at *4 (dismissing negligent supervision claim based on employee's fraud, where there was no evidence that employer knew or should have known of employee's proclivity for fraud); see also *Inman v. Am. Paramount Fin.*, 517 Fed. App'x 744, 748 (11th Cir. 2013) (affirming dismissal of negligent supervision claim based on employee's fraud for lack of sufficient allegations that the bank was or should have been aware of employee's predisposition to commit wrongs); *Dobroski v Bank of Am., N.A.*, 65 A.D.3d 882, 885, 886 N.Y.S.2d 106, 109-110, (N.Y. App. Div. 1st Dep't 2009) (granting summary judgment on negligent supervision claim against bank where plaintiff failed to show it knew or should have known of employee's propensity to engage in misconduct, or that its negligence proximately caused plaintiff's injuries).

U.S. Bank.

Appellants contend that U.S. Bank was negligent in failing to monitor Copstead and Marza in connection with their receipt of funds from NDG. Appellants argue that U.S. Bank could have monitored the personal accounts of its employees to see whether they were receiving funds from outside employment, but failed to do so. This argument is a red herring. U.S. Bank had no duty to monitor the personal activities of its 65,000+ employees. Even if it did, the undisclosed receipt of funds from outside employment is a violation of U.S. Bank's code of ethics. *See Freeman*, 137 F. Supp. 3d at 1290. Moreover, Copstead did not even work for the bank when Appellants invested, and Copstead's and Marza's receipt of referral fees from NDG for introducing friends and family *had nothing to do with their employment at U.S. Bank* and *nothing to do Appellant's investments*. These personal activities are irrelevant to Appellants' claims.

Appellants cite *McGraw v. Wachovia Sec., L.L.C.*, 756 F. Supp. 2d 1053, 1057 (N.D. Iowa 2010), as support for their claim that U.S. Bank owed them a duty to monitor the personal activities of its employees. But *McGraw* involved a brokerage employee who *directly* defrauded the plaintiffs by involving them in fictitious investments. *Id.* There are no analogous facts here. Further, the limited duty the court implied on the brokerage company there to investigate its employee's outside activities was *expressly* based on licensing requirements in Financial Industry Regulatory Authority (FINRA) Rules specific to securities brokerage. *Id.*

at 1073-75. In stark contrast, courts universally hold that *banks do not* owe duties of care to noncustomers and have no obligation to protect noncustomers from the misconduct of bank customers. *See Zabka*, 131 Wn. App. at 170-71. The *McGraw* case has no bearing here.³⁵

Appellants also argue that U.S. Bank was negligent in failing to supervise Behn with respect to the banking services he provided to NDG. Appellants claim that U.S. Bank's internal procedures were inadequate or not adequately enforced as to Behn, particularly with respect to account opening paperwork. Again, this argument is a red herring. U.S. Bank owed no duty to Appellants with respect to its internal procedures.³⁶ Even if it did, there is no evidence that the alleged procedure violations posed a risk of harm *to Appellants* (indeed, they admit they were never harmed by Behn), nor any evidence that U.S. Bank somehow failed to act reasonably as to any such risk of harm. There is simply no proof of negligence.

5. Appellants' Losses Were Not Proximately Caused By U.S. Bank's Alleged Negligent Supervision

Finally, the trial court correctly ruled that there is "insufficient evidence that any act taken by U.S. Bank employees, including that of

³⁵ Appellants' citation of *Garrison v. Sagepoint Fin., Inc.*, 185 Wn. App. 461, 485-502, 345 P.3d 792 (2015), which similarly held that a broker-dealer had a duty of supervision under National Association Of Securities Dealers (NASD) rules, is likewise inapposite.

³⁶ In *Zabka*, for example, there was proof the bank "failed to follow" its "standard procedures" and "internal standards," and that its "failures may have facilitated the theft." 131 Wn. App. at 173. Nonetheless, plaintiffs' claim was dismissed because the bank "did not have a duty to prevent their loss." *Id.*; *see also, e.g., Gilbert Tuscaney Lender, LLC v. Wells Fargo Bank*, 232 Ariz. 598, 603, 307 P.3d 1025, 1030 (Ariz. App. 2013) (banks generally have no duty to third parties to comply with internal policies); *Software Design & Application, Ltd. v. Hoefler & Arnett, Inc.*, 49 Cal. App. 4th 472, 482, 56 Cal. Rptr. 2d 756, 762 (1996) (same); *Ferring v. Bank of Am. NA*, No. CV-15-01168-PHX-GMS, 2016 WL 407315, at *2-5 (D. Ariz. Feb. 3, 2016) (dismissing negligent supervision claims based on alleged failure to comply with internal procedures or industry standards).

Mr. Behn, proximately caused [Appellants'] losses.” RP 57. There is simply no evidence that the proximate cause of Appellants’ injury was U.S. Bank’s alleged negligent supervision of its employees.³⁷

Appellants’ attempts to argue otherwise are fatally flawed. First, their entire “negligent supervision proximate causation” theory suffers from a major disconnect. Their cause of action is based on the contention that U.S. Bank failed to adequately supervise the employment of Copstead, Marza, and Behn. But they do not claim, nor could they, that any of these people caused them harm. Instead, they argue that the proximate cause of their losses was the “imprimatur of legitimacy” or “vener of legitimacy” that purportedly existed because NDG received services from U.S. Bank. App. Br. 23, 24. Put simply, neither the alleged actions of Copstead, Marza, and Behn, nor any alleged failure to supervise them, have any logical connection to the purported “imprimatur” resulting from NDG doing its banking at U.S. Bank, which they claim to be the cause of their losses.

Moreover, Appellants’ “imprimatur” theory is both wrong as a matter of law (as it would make all banks liable for the misconduct of their customers) and unsupported by the record. Appellants did not know – and did not inquire about – what bank the NDG LLCs would use to deposit

³⁷ See, e.g., *Crisman v. Pierce Cnty. Fire Prot. Dist. No. 21*, 115 Wn. App. 16, 21, 60 P.3d 652 (2002) (dismissing claim where plaintiff “fail[ed] to explain how the [employer’s] alleged misconduct proximately caused his harm”); *Guild v. Saint Martin’s College*, 64 Wn. App. 491, 499, 827 P.2d 286 (1992) (dismissing claim where there was no showing that the employer’s “negligence proximately caused damage” to the Appellants).

their investments, or where, if anywhere, P.R.E. had accounts. CP 132, 147-48, 158-61, 847. The fact that Nino de Guzman had bank accounts at U.S. Bank and elsewhere was not the proximate cause of Appellants' investments, and certainly was not the proximate cause of their losses. Furthermore, to the extent NDG's "vener of legitimacy" could somehow be considered relevant to Appellants' negligent supervision claim here, and it is not, the undisputed fact is that while many reputable institutions vouched for Nino de Guzman and his business, U.S. Bank did not do so.³⁸ No "vener" was provided by U.S. Bank.

Appellants attempt to circumvent the requirement of proximate cause by claiming that U.S. Bank's alleged negligence was arguably a "but for" cause of their losses, which is a question of fact for the jury. App. Br. 23. But the authority Appellants cite is to the contrary. As stated in *Ang v. Martin*, on which they rely:

[P]roximate causation, includes cause in fact and legal causation. Cause in fact, or 'but for' causation, refers to the physical connection between an act and an injury. . . . Legal causation, however, presents a question of law: It involves a determination of whether liability *should* attach as a matter of law given the existence of cause in fact.

154 Wn.2d 477, 482, 114 P.3d 637 (2005). Given the complete lack of evidence that U.S. Bank's alleged negligent supervision proximately caused Appellants' losses, Judge Andrus properly ruled as a matter of law

³⁸ InterBank, Scotiabank, CitiBank, CB Richard Ellis, Peruvian government officials including the first lady of Peru, PriceWaterhouseCoopers, and the law firm Graham & Dunn all vouched for Nino de Guzman and NDG. CP 276-78. U.S. Bank did not. CP 278.

that Appellants failed to sustain their burden on proximate cause.³⁹

For all of these reasons, there is no legal or factual basis for Appellants' negligent supervision claim. It was properly dismissed.

C. There Is No Basis To Overturn This Court's Law Of The Case

Recognizing that there is insufficient evidence to withstand summary judgment, Appellants conclude their Brief by blaming this Court for Appellants' inability to meet their burden of proof. Appellants make the extraordinary request that this Court reverse its unanimous decision in *Norton I* and send the case back to the trial court so that they can try to find some evidentiary support for their claims. As established herein, there is no legal basis for this Court to reconsider and reverse its prior decision. Appellants' request for reconsideration should be denied.

1. Appellants Are Barred From Re-Litigating *Norton I* Under Law Of The Case And *Stare Decisis*

Under the law of the case doctrine, "a question of law decided by the [appellate] court on a former appeal becomes the law of the case, in all its subsequent stages, and will not ordinarily be considered or reversed on a second appeal when the facts and the questions of law presented are substantially the same." *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 54, 366 P.3d 1246 (2015). This doctrine gives finality to litigated issues, in order "(1) to protect settled expectations of the parties; (2) to insure

³⁹ Appellants' citation to *In re: Liberty State Benefits of Delaware, Inc.*, 541 B.R. 219 (Bankr. D. Del. 2015) does not support their argument. There, the court concluded, *on a motion to dismiss*, that allegations of actions by bank employees in furtherance of a fraud were sufficient to state a claim. *Id.* at 238-39. Similarly, here the trial court denied U.S. Bank's early motion to dismiss based on Appellants' allegations. But mere allegations no longer suffice at the summary judgment stage.

uniformity of decisions; (3) to maintain consistency during the course of a single case; (4) to effectuate the proper and streamlined administration of justice; and (5) to bring litigation to an end.” *Id.* at 55. Law of the case is closely related to other doctrines that promote predictability, uniformity, consistency, finality, and efficiency in the judicial system, including *stare decisis*, collateral estoppel, and *res judicata*. *Id.* at 54.

RAP 2.5(c)(2) codifies two recognized exceptions to the law of the case doctrine. First, reconsideration may be allowed where there has been an intervening change in controlling precedent. *Roberson v. Perez*, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). Second, reconsideration may be allowed “where the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in manifest injustice,” and there would be no manifest injustice to the other party. *Folsom v. Cty. of Spokane*, 111 Wn.2d 256, 264, 759 P.2d 1196 (1988); *see also Hogan v. Sacred Heart Med. Ctr.*, 122 Wn. App. 533, 543, 94 P.3d 390 (2004).

Similarly, the doctrine of *stare decisis* requires “a clear showing that an established rule is incorrect and harmful before it is abandoned.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 278, 208 P.3d 1092 (2009). As the Washington Supreme Court has explained:

The constraints of *stare decisis* prevent the law from becoming subject to incautious action or the whims of current holders of judicial office. Although *stare decisis* limits judicial discretion, it also protects the interests of litigants by providing clear standards for determining their rights and the merits of their claims. Therefore, overruling prior precedent should not be taken lightly.

Id. (citations and quotations omitted). “This respect for precedent

promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” *City of Fed. Way v. Koenig*, 167 Wn.2d 341, 347, 217 P.3d 1172 (2009).

Appellants cannot establish that reversal of this Court’s decision in *Norton I* is necessary or appropriate under any of these standards.

2. No Intervening Controlling Precedent Dictates Reversal

The first exception to the law of the case doctrine does not apply because there is no intervening, controlling precedent here that dictates reversal. In fact, the Washington Supreme Court, by a unanimous panel, *denied* Appellants’ petition for review of *Norton I*. Thus, the only arguably new, arguably controlling authority supports *Norton I*.

In their Brief, Appellants make no effort to argue that there has been intervening, controlling BSA precedent, nor could they. Instead, they rely on the same arguments and largely the same case citations that they previously presented to this Court on appeal and to the Washington Supreme Court in their petition for review. U.S. Bank respectfully requests judicial notice of these prior filings.⁴⁰ Notably, *all* of the cases on which Appellants rely are trial court orders from other jurisdictions – and all but one is unreported and non-precedential. They are by no means controlling precedent requiring reversal of *Norton I*. *Cf. Roberson*, 156

⁴⁰ See *Norton v. U.S. Bank Nat’l Assoc.*, No. 685317, Respondents’ Brief (filed Sept. 24, 2012) and Petition for Review (filed Mar. 20, 2014); see also, e.g., *Swak v. Dep’t of Labor & Indus.*, 40 Wn.2d 51, 53-54, 240 P.2d 560 (1952) (“A court of this state will take judicial notice of the record in the cause presently before it or in proceedings engrafted, ancillary, or supplementary to it.”).

Wn.2d at 43 (holding that Washington Supreme Court decision issued subsequent to initial appeal was intervening, controlling precedent).

3. This Court’s Prior Decision Is Not Clearly Erroneous, Manifestly Unjust, Or Incorrect And Harmful

The second exception to the law of the case doctrine does not apply here because Appellants have not proven that the holding of *Norton I* was “clearly erroneous” or that its application results in “manifest injustice.” *Folsom*, 111 Wn.2d at 264. Similarly, they have not made a “clear showing” that *stare decisis* should be ignored because this Court’s decision was both “incorrect and harmful.” *Lunsford*, 166 Wn.2d at 278. To the contrary, this Court’s decision was appropriate and correct.⁴¹

Courts applying the BSA privilege have identified two categories of materials. The first category “represents the factual documents which give rise to suspicious conduct.” *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002); *see also Union Bank of Calif. v. Superior Court*, 130 Cal. App. 4th 378, 391, 29 Cal. Rptr. 3d 894 (2005); *Whitney Nat’l Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004). These documents are “business records made in the ordinary course” of banking business – not as part of suspicious activity monitoring efforts – and such documents are not protected by the BSA privilege. *Cotton*, 235

⁴¹ Appellants’ citation to *First Small Bus. Inv. Co. of Cal. v. Intercapital Corp. of Or.*, 108 Wn.2d 324, 331, 738 P.2d 263 (1987) does not help them. There, the Washington Supreme Court held that it could review a clearly erroneous Court of Appeals decision, made earlier in the case, concerning the disqualification of counsel, where the same issue was again presented and justice was best served correcting the erroneous ruling. *Id.* at 330-33. The circumstances there bear no similarity to Appellants’ request here for this Court to simply reverse its own decision based on the same arguments presented before.

F. Supp. 2d at 815. U.S. Bank produced all such ordinary course of business documents requested by Appellants. *Norton I*, 179 Wn. App. at 453, 463.

The second category is documents “representing drafts of SARs [suspicious activity reports] or other work product or privileged communications that relate to the SAR itself,” including materials “prepared for the purpose of investigating or drafting a possible SAR,” which must not be produced under the BSA. *Cotton*, 235 F. Supp. 2d at 815-16. These were the materials Appellants sought in discovery, which this Court properly held were privileged. *Norton I*, 179 Wn. App. at 461-63.

The decision in *Norton I* was well-reasoned and well-supported. This Court principally relied on the Office of the Comptroller of the Currency (“OCC”) interpretation of its own BSA regulation, and the three cases (*Cotton*, *Whitney*, and *Union Bank*) cited by the OCC and other courts as accurately describing the BSA privilege. *Id.* at 454-62. Since its decision, the OCC interpretation has not been altered; *Cotton*, *Whitney*, and *Union Bank* remain good law; and the public policies and law enforcement goals underlying a broad interpretation of the BSA privilege to protect banks’ BSA monitoring and reporting functions remain as strong as ever. *Id.*

Appellants argue that *Norton I* should be reversed because a few trial court orders from other jurisdictions have arguably construed the BSA privilege more narrowly than this Court’s prior decision. But none

of these other – almost entirely non-precedential – decisions show *Norton I* to be *clearly erroneous*. At most, they reveal only that courts across the country have not all been entirely uniform in their application of the privilege. The *Cotton*, *Whitney*, and *Union Bank* cases remain persuasive and oft-cited authority on the scope of the BSA privilege. Appellants do not dispute this, but instead simply echo the arguments made in their *Norton I* briefing that they believe these cases should be interpreted more narrowly than their plain language holdings provide. This Court has already thoroughly considered and rejected these same arguments. *See State v. Clark*, 143 Wn.2d 731, 744-45, 24 P.3d 1006 (2001) (refusing to revisit argument addressed in previous appeal).

This Court’s prior decision comports with the primary published authority addressing the scope of the BSA privilege, including the OCC’s published interpretation. Appellants have not come close to proving that the decision is “incorrect and harmful” or “clearly erroneous,” nor that its application results in “manifest injustice.” Indeed, it would be manifestly unjust to reverse the decision at this point, as the parties have spent substantial time and resources litigating in reliance on this Court’s prior decision, which Appellants now ask to be unraveled for insufficient reasons. The Court should refuse to reconsider its prior, correct decision.

4. The Hypothetical Documents Appellants Seek Would Not Overcome The Entry Of Summary Judgment

It is well settled that “error without prejudice is not grounds for reversal.” *Saleemi v. Doctor’s Assocs., Inc.*, 176 Wn.2d 368, 380, 292

P.3d 108 (2013) (quotation omitted). “Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial.” *Id.* To obtain reversal, Appellants must establish not only that this Court’s prior decision was in error, but also that they were prejudiced by such error. They cannot satisfy this burden.

Appellants transparently acknowledge that they are seeking to reverse *Norton I* because they are hoping that documents theoretically might exist that could help them prove their implausible allegation that U.S. Bank had knowledge of Nino de Guzman’s Ponzi scheme. App. Br. 25. However, even if proof of “knowledge” existed, their claims would still fail because they cannot and would not be able to satisfy other elements of their claims.

As set forth above, with respect to Appellants’ aiding and abetting claim, setting aside the knowledge element, there is no proof of substantial assistance by U.S. Bank in a fraud on Appellants, nor is there any proof that any action by U.S. Bank proximately caused their losses. Likewise, setting aside knowledge, Appellants’ negligent supervision claim still fails because there was no duty, no U.S. Bank employee who injured them, no negligence in addressing an employee’s risk of harm to others, and no proof that any alleged failure to supervise proximately caused Appellants’ losses. Appellants’ speculative hope, after years of discovery, that they might be able to find evidence to support certain elements of their claims, if this Court were to reverse its prior decision, is ultimately irrelevant. Appellants’ claims would still fail, for the many reasons set forth herein.

5. The Trial Court Faithfully Applied *Norton I*

Finally, Appellants summarily assign error to the trial court's entry of a protective order after *Norton I* and the granting, in part, of U.S. Bank's later motion to enforce that order. App. Br. 2. However, they do not address this issue in their argument and thus waive it. In any event, the trial court's protective order complied with this Court's Mandate in *Norton I*. The form of the order was negotiated, with Appellants waiving presentation, and was later enforced by motion. There was no error.

V. CONCLUSION

For the foregoing reasons, U.S. Bank respectfully requests that the Court affirm the trial court's dismissal of Appellants' claims.

Respectfully submitted this 8th day of June, 2016.


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I hereby certify that on this date I caused to be served a copy of the foregoing on the following by the method indicated:

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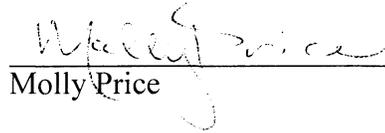
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