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No. 72818-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON and KRISTINE NORTON, individually, and derivatively on behalf of LARCO-BOLIVAR INVESTMENTS, LLC, and SHELL LA PAZ, LLC; NORTHLAND CAPITAL, LLC, individually, and derivatively on behalf of NDG-BRYCON, LLC; and P.R.E. Acquisitions, LLC,

Appellants,

v.

GRAHAM & DUNN, P.C.,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BETH ANDRUS

AMENDED BRIEF OF APPELLANTS

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I. INTRODUCTION

Appellants John and Kristine Norton and their investment companies lost over $10 million as a result of a Ponzi scheme that could not have been perpetrated or concealed without the active participation of respondent Graham & Dunn, PC which served as legal counsel for the scheme's architect, Jose Nino de Guzman. After the scheme finally came to light in early 2009, Graham & Dunn denied all wrongdoing and withheld from the attorney who briefly represented the Nortons and other defrauded investors in formulating an initial recovery strategy and allocation formula critical emails from a Graham & Dunn partner. In one undisclosed email Graham & Dunn advised paying a disgruntled employee to remain silent regarding the "**violation of various state and federal securities laws**" because it would be a "**HUGE**" issue and would let the "**cat[] out of the bag.**" The Nortons filed this action against Graham & Dunn only nine months after that email came to light.

The trial court erred in dismissing the Nortons' claims on summary judgment based on the three-year statute of limitations. A jury should resolve whether the Nortons timely brought their claims under the "discovery rule," which tolls the limitations period

until after a plaintiff discovers the facts that give rise to a cause of action.

The trial court further erred in refusing to equitably toll the limitations period on the Nortons' claims because Graham & Dunn thwarted plaintiffs' discovery of their claims by concealing its wrongdoing until after the limitations period had ostensibly expired. The trial court unjustly allowed Graham & Dunn to profit from its deceit. This Court should reverse the trial court's summary judgment order and remand for a trial of the Nortons' claims.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in entering its November 14, 2014, Order Granting Defendant's Motion for Summary Judgment. (CP 717-28; Appendix A)

2. The trial court erred in entering its December 1, 2014, Order Denying Plaintiffs' Motion for Reconsideration of Order Granting Defendant's Motion For Summary Judgment. (CP 741-42; Appendix B)

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Should a jury resolve whether a defendant who denied wrongdoing and withheld inculpatory evidence prevented the plaintiffs from discovering within three years the defendant's active

involvement in, and concealment of, the Ponzi scheme that cost the plaintiffs over $10 million?

2. Is the three year limitations period for tort claims equitably tolled during the time in which former counsel prevents the plaintiffs from discovering their causes of action by falsely denying wrongdoing and concealing critical evidence?

IV. STATEMENT OF FACTS

Because the trial court dismissed the Nortons' claims on summary judgment, this Court reviews the facts, and all reasonable inferences from them, in the light most favorable to the Nortons:

A. Beginning in 2008, the Nortons invested millions in NDG Investment Group, which purported to offer investment opportunities in Peruvian real estate.

In early 2008, John Norton was approached by his business associate William Prater about investing in a group of companies acquiring and developing real estate in Peru. (CP 68, 490-91) These companies, NDG Investment Group, LLC, and Grupo Innova, SA, were formed by Jose Nino de Guzman. (CP 490)

Prater described NDG's general business model to Norton: NDG would create a U.S.-based limited liability company for each development project in Peru. (CP 491) NDG would then raise funds for the LLC to purchase the property and to fund the initial

stage of development. (CP 491) Grupo Innova would then be responsible for all remaining aspects of development. (CP 491, 532) On May 3, 2008, Norton and his wife, Kristine, wired $200,000 to the bank account of one of these LLCs, Larco-Bolivar, LLC. (CP 491)

Prater then approached Norton about further investment in the NDG companies, suggesting that they form a private investment company, eventually called Northland Capital, LLC, with Norton owning 50% and Prater the other 50%. (CP 491) Prater would identify and screen investment opportunities and perform due diligence, and Norton would fund any investments. (CP 65, 491) Northland's first investment, as recommended by Prater, was an NDG-promotion called NDG-Brycon, LLC. (CP 491) On July 15, 2008, Northland sent $500,000 to NDG-Brycon's account. (CP 491) On July 22, 2008, the Nortons sent $500,000 to another NDG-related LLC, Shell La Paz, LLC. (CP 491)

In July 2008, Prater told Norton that as word of Grupo Innova's interest in developing particular properties spread, land prices skyrocketed before NDG could raise the funds in the U.S. to purchase the property. (CP 71, 77, 492) Prater told Norton that they needed a "land bank," an entity that would buy and hold

properties prior to their development by NDG/Grupo Innova. (CP 71, 77, 492) On July 28, 2008, Northland formed P.R.E. Acquisitions, LLC, to act as a land bank for NDG and Grupo Innova projects. (CP 73, 492) Northland owned 90% of the membership interests in P.R.E. and de Guzman held the remaining 10%. (CP 73, 492)

De Guzman was P.R.E.'s initial manager and was tasked with identifying parcels of land for P.R.E. to purchase and hold while Grupo Innova planned the projects and NDG raised the funds in the U.S. (CP 492) P.R.E. would then sell the land to NDG, or a company owned by NDG, when the development funds were available. (CP 492) P.R.E. would be guaranteed a certain selling price, which in turn would be disclosed to the U.S. investors in the investment materials for each NDG-managed development project. (CP 492) This would allow P.R.E. to receive a guaranteed return, while also allowing the NDG developments to acquire land without being exposed to the rapidly rising prices in Peru. (CP 492)

In the summer and fall of 2008, the Nortons and Northland wired over $9.8 million to Peru, following de Guzman's assurance those funds would be used to purchase future NDG development sites. (CP 13, 493) However, de Guzman did not use the money for

the intended land purchases. (CP 493) When confronted by Norton, de Guzman stated that he had instead used the funds to purchase other properties. (CP 493) Norton expressed his disappointment with de Guzman, but de Guzman assured him there were no other problems with Norton's investments. (CP 85, 493)

B. With the aid of NDG and de Guzman's counsel, Graham & Dunn, Norton negotiated a Memorandum of Understanding with de Guzman designed to prevent future mismanagement.

Dissatisfied with de Guzman's assurances, in January 2009, Norton, along with his attorney, negotiated the terms of a Memorandum of Understanding with Darin Donaldson, an NDG executive, de Guzman, and Prater to address de Guzman's mismanagement of P.R.E. and to prevent future mismanagement. (CP 112-29, 494) The negotiating parties then met with Nicolas Drader, a partner at Graham & Dunn, on January 23, 2009, who prepared a formal Memorandum of Understanding. (CP 113, 115, 119-20, 494, 511-12) Drader had represented NDG and de Guzman since May 2007; drafted the organizational documents for the investment LLCs and provided advice on compliance with securities laws. (CP 283, 341, 417, 508-09) Graham & Dunn drafted P.R.E's

Amended and Restated Limited Liability Company Agreement, executed in February 2009. (CP 494)

De Guzman agreed in the MOU to resign as manager of P.R.E. and to relinquish his 10% membership interest. (CP 125, 494) The MOU also sharply limited de Guzman's signing authority on behalf of NDG. (CP 125) The MOU required NDG to engage PricewaterhouseCoopers, or another accounting firm, to perform a tracing of funds spent by NDG. (CP 124)

Norton had no reason to suspect any wrongdoing on the part of Graham & Dunn. (CP 494) Graham & Dunn appeared to work quickly to address and "fix" de Guzman's mismanagement after it came to light. (CP 494) Had Norton suspected Graham & Dunn of any misconduct, he would not have allowed the firm to draft the documents memorializing the new agreements with de Guzman. (CP 494)

C. After learning they had lost over $10 million to de Guzman's fraud, the Nortons sued de Guzman, Prater, and U.S. Bank, and briefly joined a group of other NDG investors trying to coordinate a recovery and allocation strategy.

By June of 2009, de Guzman's house of cards had collapsed. (CP 153, 495) Norton, and other investors, as well as a group of whistleblowing NDG employees, discovered that de Guzman had

been stealing investment funds to pay for an extravagant lifestyle, including a yacht, an expensive art collection, and hundreds of thousands spent at nightclubs in Las Vegas, Miami, and Hollywood. (CP 4, 139-44, 439, 519) On June 16, 2009, Graham & Dunn ceased its representation of de Guzman and NDG. Graham & Dunn cited only the failure to pay the firm's significant bills, and did not disclose any misconduct by de Guzman or NDG. (CP 548)

In June 2009, Norton began discussions with a "Steering Committee" of other investors defrauded by de Guzman with the goal of coordinating a strategy for recovering the millions illicitly taken by de Guzman. (CP 99, 495) The first issue Norton addressed with the Steering Committee was the allocation of any recovery among the investors. (CP 495) Norton's sporadic discussions of allocation issues with the Steering Committee lasted less than six weeks. (CP 495) As Norton had lost, by far, the most money at the hands of de Guzman, from the outset, Norton's relationship with the other Steering Committee investors was fraught with tension. In a July 2009 email, other investors recognized Norton's unique position because of his relationship with P.R.E. and that he could "argue that some of the LLC investors['] money is his." (CP 999) The email also stated that

"[p]er our legal counsel: As to Norton, no one is giving up rights [against him]." (CP 999)

The Steering Committee's litigation strategy in the U.S. focused on U.S. Bank, whose employees received commissions for the sale of NDG securities and who allowed, and profited from, de Guzman's laundering of investor funds. (CP 14, 495-97) Recognizing that information implicating other parties had not yet come to light, in a June 11, 2009, email to other Steering Committee members Norton identified anyone that had any business relationship with de Guzman as a possible source of recovery, including Graham & Dunn. (CP 148-50, 496)

In early July 2009 Norton participated in an interview that resulted in the Steering Committee hiring attorney Steve Sirianni to investigate the Ponzi scheme and to pursue litigation against U.S. Bank. (CP 496) Norton contributed a proportionate share of funds to retain Mr. Sirianni. (CP 496, 1001-03) As part of his investigation, Mr. Sirianni attempted to obtain documents relating to NDG and the investment LLCs from Graham & Dunn. (CP 166, 496) Also in July 2009, Graham & Dunn produced documents to the lawyers representing the whistleblowing NDG employees, which were then forwarded to Mr. Sirianni. (CP 156, 169, 171, 188-89,

496, 715) These documents showed Graham & Dunn's efforts to have NDG and de Guzman comply with applicable securities law. (CP 678-715) When producing these emails, Graham & Dunn denied any wrongdoing, claiming that it served only as a scrivener. (CP 156) However, Graham & Dunn omitted from this production a critical, November 2008 internal Graham & Dunn email that implicated the firm in a cover-up of de Guzman's fraud (discussed *infra*, § D).

Later in July 2009, Norton was asked to leave the Steering Committee after its other members and Norton failed to agree on an allocation of recovered funds. (CP 99-100) Norton later received a full refund of his deposit with Mr. Sirianni's firm. (CP 100, 497, 500-02) Norton never saw any of the documents sent to the attorneys for the whistleblowing employees or to Mr. Sirianni in July 2009, and did not speak with Mr. Sirianni after the Steering Committee's initial interview. (CP 496) Nor was Norton ever told by anyone that the Steering Committee's subsequent counsel had uncovered information implicating Graham & Dunn. (CP 496-97)

After July 2009, Norton and the Steering Committee had distinct adverse interests. Norton insisted that any allocation of recovered funds fairly recognize Norton's much more significant

loss. (CP 497) Other members of the Steering Committee suspected that Norton actively participated in de Guzman's fraud. In July 2010, an attorney for the Steering Committee accused Norton of criminal conduct as a "business partner" and "coconspirator" of de Guzman. (CP 1325) In a September 9, 2009 letter confirming Norton's departure from the Steering Committee and refunding Norton's contribution, the other investors cited "irreconcilable conflicts of interests . . . and our inability to resolve them." (CP 500)

The Steering Committee brought, and forced Norton to successfully defend, a criminal complaint against Norton in Peru. (CP 1325-26) When the Steering Committee finally sued Graham & Dunn in July 2012, it continued to allege that Norton had participated in and benefited from de Guzman's fraud. (CP 520-21, 540-42, 553 (accusing Norton of conspiring with de Guzman by accepting a "pay off" to conceal de Guzman's fraud from other investors); CP 542-43 (implying that P.R.E. – not just de Guzman – intentionally misrepresented ownership of potential development properties)) The Steering Committee not only failed to disclose information about Graham & Dunn to Norton, but actively withheld any information that would have allowed Norton to obtain facts

necessary to bring claims against Graham & Dunn that would have survived Rule 11. (CP 497) In particular, the Steering Committee entered into a tolling agreement with respect to its claims against Graham & Dunn, and agreed to maintain its confidentially in order to prevent the agreement's disclosure to Norton. (discussed *infra,* § D)

After being asked to leave the Steering Committee, Norton continued to pursue recovery on his own. The Nortons' legal teams in the U.S. and Peru entered into negotiations with Grupo Innova. (CP 497) In 2010, the Nortons sued U.S. Bank. (CP 14, 206-24) In August 2011, the Nortons sued William Prater. (CP 226-45) The Nortons also filed liens in Peru on properties that NDG and Grupo Innova had agreed to purchase and develop. (CP 14)

D. The Nortons did not discover until July 2012 that Graham & Dunn had actively aided and abetted de Guzman's Ponzi scheme.

In July 2012, fourteen lawsuits were filed against Graham & Dunn by NDG investors, including a lawsuit by former Steering Committee investors called the "*Aggen* suit." (CP 517-54) The *Aggen* suit relied heavily on internal Graham & Dunn documents, including a previously undisclosed "smoking gun" November 2008 email in which Graham & Dunn counseled NDG that it would be a

"**HUGE**" issue if its "**violation of various state and federal securities laws**" were known and thus, in order to avoid letting the "**cat[] out of the bag**," NDG should conceal its violations by paying for the silence of an employee with intimate knowledge of de Guzman and NDG's fraud. (CP 518-19 (emphasis in original); *see also* CP 11) As noted in the *Aggen* complaint, the November 2008 email "in which Graham & Dunn recommend concealing securities law violations from investors and authorities was omitted" from Graham & Dunn's July 2009 production to the whistleblower employees' counsel. (CP 549; *see also* CP 548 ("Plaintiffs could not have discovered [Graham & Dunn's role in the fraud] at an earlier time because . . . Graham & Dunn had been actively concealing NDG's misrepresentations from investors and the authorities."))

The *Aggen* complaint revealed that Graham & Dunn was not just another innocent party duped by de Guzman's fraud; it actively supported that fraud, providing critical support and cover for de Guzman's Ponzi scheme. In addition to advising de Guzman on how to conceal his and NDG's fraud, Graham & Dunn prepared and reviewed LLC agreements and private placement memoranda containing misrepresentations, advised on investor communications and sales practices, communicated with investors,

and assisted NDG in selling securities to investors. (CP 517-54; *see also* CP 8, 11)

Unbeknownst to other investors, including the Nortons, Graham & Dunn had secretly negotiated an agreement with the *Aggen* plaintiffs to toll the three-year statute of limitations. (CP 565) This secret agreement prevented Graham & Dunn from arguing that the *Aggen* complaint was untimely filed and barred by the statute of limitations. (CP 565) When the *Aggen* plaintiffs finally filed their lawsuit, Graham & Dunn denied all wrongdoing, claiming that it was unaware of any fraud on de Guzman's part. (CP 515, 590-635) Graham & Dunn also asserted immunity from liability under a "qualified privilege" that prevents a lawyer from being liable "for assisting a person's breach of duty to a third party" unless "acting outside the scope of the attorney-client relationship." (CP 625)

The *Aggen* suit disclosed for the first time Graham & Dunn's active role in NDG and de Guzman's fraud. (CP 497) Less than a year later, on April 11, 2013, the Nortons and Northland, individually and derivatively on behalf of the NDG LLCs (collectively "the Nortons"), filed suit against Graham & Dunn. (CP 1-29) The Nortons asserted claims for aiding and abetting a breach

of fiduciary duty, aiding and abetting fraud and/or misrepresentation, negligent misrepresentation, violations of the Securities Act of Washington, conspiracy to commit fraud, and derivative claims of breach of fiduciary duty and professional negligence. (CP 19-26)

E. The trial court dismissed the Nortons' complaint on summary judgment as time-barred.

Graham & Dunn moved for summary judgment, arguing that the applicable three year statute of limitations barred the Nortons' claims. (CP 42-52)[1] The Nortons confirmed that they did not discover the basis for their suit, including the November 2008 email establishing Graham & Dunn's active advice to conceal NDG's securities violations, until the *Aggen* lawsuit. (CP 471-88)

On November 14, 2014, King County Superior Court Judge Beth Andrus ("the trial court") granted Graham & Dunn's summary judgment motion. (CP 717-28) The trial court ruled that as a matter of law the Nortons knew of Graham & Dunn's role in aiding de Guzman's fraud "no later than September 2009," after Norton

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[1] The statute of limitations for each of the Nortons' claims was three years. RCW 21.20.430(4)(b) (securities fraud); RCW 4.16.080(4) (negligent misrepresentation, aiding and abetting fraud, and conspiracy to commit fraud); RCW 4.16.080(2) (breach of fiduciary duty and professional malpractice).

left the investor Steering Committee, because Norton listed Graham & Dunn (as well as all other business associates of de Guzman) as a possible source of recovery in June 2009 and because the documents received by the attorney for the Steering Committee, Mr. Sirianni, not Norton, in July 2009 purportedly demonstrated a basis for the Nortons' claims against Graham & Dunn. (CP 724-27) The trial court denied the Nortons' motion for reconsideration. (CP 741-42)

The Nortons appealed. (CP 743-44)

V. ARGUMENT

A. The standard of review of the trial court's summary judgment is de novo.

A defendant seeking summary judgment on statute of limitations grounds has the burden of showing the absence of any issue of fact. *Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 517, 983 P.2d 1193 (1999), *rev. denied*, 141 Wn.2d 1016 (2000). This Court reviews the trial court's summary judgment order de novo, engaging in the same inquiry as the trial court. *August v. U.S. Bancorp*, 146 Wn. App. 328, 339, ¶ 27, 190 P.3d 86 (2008), *as amended* (Sept. 4, 2008), *rev. denied*, 165 Wn.2d 1034 (2009). On summary judgment "[a]ll facts and inferences are considered in the

light most favorable to the nonmoving party." *August*, 146 Wn. App. at 339, ¶ 27. "A summary judgment should be granted only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *August*, 146 Wn. App. at 339, ¶ 27 (citing CR 56).

Here, the facts must be viewed in the light most favorable to the Nortons, the non-moving parties. This Court should reverse the trial court's summary judgment order because Graham & Dunn failed to meet its burden of establishing as a matter of law that the Nortons failed to bring suit within three years of discovering the basis for their claims and that they are not entitled to invoke the doctrine of equitable tolling.

B. The Nortons timely brought suit against Graham & Dunn because they filed suit within three years of discovering Graham & Dunn's active involvement in de Guzman's fraud – a necessary element of their claims.

The Nortons did not know until July 2012 – when the November 2008 email finally came to light – that Graham & Dunn had played an integral role in perpetrating and concealing the fraud that cost them over $10 million. That email established what Graham & Dunn's previous disclosures (which were not seen by Norton) did not even suggest – that counsel did not just try (and

fail) to coax its client's compliance with securities law and fiduciary duties, but actively participated in the client's misfeasance and its cover up. The Nortons could not have discovered that fact any sooner because Graham & Dunn consistently represented that it had *not* engaged in wrongdoing and concealed the evidence that refuted its fiction. By holding the Nortons' claims time-barred as a matter of law, the trial court ignored well-established law that a plaintiff's knowledge of its claims and its diligence in investigating them are issues of fact for a jury. This Court should reverse and remand for a trial at which a jury will determine the timeliness of the Nortons' claims.

1. The timeliness of plaintiff's claims under the "discovery rule" is an issue of fact for a jury.

The discovery rule tolls the statute of limitations on a plaintiff's cause of action until after the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, facts that give rise to his cause of action. *See* RCW 21.20.430(4)(b); *Hipple v. McFadden*, 161 Wn. App. 550, 560, ¶ 17, 255 P.3d 730, *rev. denied*, 172 Wn.2d 1009 (2011); *see also* RCW 4.16.080(4) ("An action for relief upon the ground of fraud, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved

party of the facts constituting the fraud."). For the limitation period to start running, a plaintiff must discover facts that establish each element of his cause of action. *1000 Virginia Ltd. P'ship v. Vertecs Corp.*, 158 Wn.2d 566, 575-76, ¶ 10, 146 P.3d 423 (2006), *as corrected* (Nov. 15, 2006).

Washington courts have time and again held that whether a plaintiff did or should have discovered facts that start the limitations period is a question of fact. *See, e.g.*, *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 34-35, 864 P.2d 921 (1993); *Aug.*, 146 Wn. App. at 348-49, ¶ 65; *Hipple*, 161 Wn. App. at 561, ¶ 20.

The discovery rule allows a plaintiff to discover fraud and similar misconduct that, by its very nature, is hidden from public scrutiny. The "[m]ere suspicion of wrong is not discovery of the fraud; the discovery contemplated is of evidentiary facts leading to a belief in the fraud and by which the existence of the fraud may be established." *Young v. Savidge*, 155 Wn. App. 806, 823-25, ¶¶ 30-33, 230 P.3d 222 (2010) (issue of fact whether plaintiff could have discovered earlier that dentist misrepresented content of filling even though significant symptoms pointed towards misrepresentation); *Busenius v. Horan*, 53 Wn. App. 662, 667-68,

769 P.2d 869 (1989) (issue of fact whether plaintiff should have discovered sooner that defendant fraudulently represented that real property complied with building and zoning codes despite letters from county zoning department stating that property violated codes); *Ives v. Ramsden*, 142 Wn. App. 369, 385, ¶ 29, 174 P.3d 1231 (2008) ("Under the discovery rule, the statute of limitation . . . begins only when the aggrieved party discovers, or should have discovered by due diligence, the fact of fraud or securities fraud and sustains some actual damage as a result.") (emphasis removed).

Likewise, courts liberally apply the discovery rule to preserve the plaintiff's claim where a defendant thwarts or undermines a plaintiff's discovery of the facts establishing a cause of action. In *Adcox*, 123 Wn.2d at 35, for instance, the Supreme Court held that the plaintiffs' malpractice action was not time barred because the

doctors misled plaintiffs about the cause of their son's cardiac arrest.[2]

The Court's analysis in *Price v. State*, 96 Wn. App. 604, 980 P.2d 302 (1999), *rev. denied*, 139 Wn.2d 1018 (2000), demonstrates why the intensely factual nature of the discovery rule is ill-suited for summary judgment. In *Price*, two parents sued the Department of Social and Health Services in December 1994 for failing to disclose relevant information about their adopted son. DSHS moved for summary judgment arguing that the parents knew of their cause of action prior to December 1991 because in 1989 DSHS revealed previously undisclosed documents, the parents sent

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[2] *See also 1000 Virginia*, 158 Wn.2d at 588-89, ¶ 43 ("Vertecs itself contended in 1994 that leaks were due to improper caulking and unconnected ductwork that was not within the scope of its work. Therefore, we do not agree that evidence of the leaks in 1994 is sufficient to support Vertecs' claim that as a matter of law 1000 Virginia discovered or should have discovered its cause of action against Vertecs in 1994."); *Aug.*, 146 Wn. App. at 348 , ¶ 64 (the "allegations concerning the Bank's failure to disclose and the Bank's missing or misleading statements, are sufficient to raise a material issue of fact as to whether there was fraudulent concealment"); *Allyn v. Boe*, 87 Wn. App. 722, 737, 943 P.2d 364 (1997) ("Thus, although Mr. Allyn learned of the trespass within the three-year period of the statute, he was frustrated in identifying the trespasser by Boe's denials and concealment. Under these circumstances, fairness compels the application of the discovery rule."), *rev. denied*, 134 Wn.2d 1020 (1998); *Samuelson v. Cmty. Coll. Dist. No. 2 (Grays Harbor Coll.)*, 75 Wn. App. 340, 346, 877 P.2d 734 (1994) (discovery rule particularly appropriate "where the plaintiff must rely on the defendant's self-reporting, because the probability increases that the plaintiff will be unaware of any cause of action"), *rev. denied*, 125 Wn.2d 1023 (1995).

a letter in September 1991 to DSHS expressing their belief that DSHS did not reveal all information about their son's health problems, and the parents suspected prior to December 1991 that their son's health problems were the result of fetal alcohol syndrome. The parents argued that they did not discover their cause of action until July 1994 when DSHS turned over their son's entire case file.

Division Two reversed the trial court's summary judgment of dismissal, holding that the information first disclosed by DSHS in 1989 "was not critical to [the parent's] decision to adopt." 96 Wn. App. at 617. The parents did not know facts establishing the causation element until 1994 because "it was not until [then], when DSHS provided the complete file, that the [parents] knew (1) that DSHS was continuing to breach its statutory duty to disclose *and* (2) that DSHS had concealed information that would have affected their adoption decision, thereby proximately causing their injury." 96 Wn. App. at 617 ("the information first disclosed in 1994 was critical to their adoption decision.") (emphasis in original). *See also Winbun v. Moore*, 143 Wn.2d 206, 217, 18 P.3d 576 (2001) (issue of fact whether claim was time-barred because hospital failed to produce documents "significant to a determination of [defendant's]

negligence" and those "missing documents obscured [the patient's] ability to determine the nature and extent of [defendant's] care").

2. The trial court erred in holding as a matter of law that the Nortons should have reasonably discovered Graham & Dunn's misconduct by September 2009.

The trial court erroneously held as a matter of law that the Nortons discovered or should have discovered by September 2009 the basis for their claims against Graham & Dunn. The Nortons discovered that they had been damaged by de Guzman's fraud in the spring of 2009 but they did not learn of Graham & Dunn's active concealment of that fraud until July 2012. *Winbun*, 143 Wn.2d at 217 (despite patient knowing of basis for malpractice claim against one physician, it was question of fact whether patient should have discovered basis for malpractice claim against another physician).

Here, as in *Price*, the information revealed in the July 2009 productions was not critical to the Nortons' claims against Graham & Dunn, and thus could not trigger the statute of limitations, even assuming they saw it (which they did not). Those emails supported Graham & Dunn's self-serving representations that it was just another innocent party duped by de Guzman and that it had done

its best to convince de Guzman to comply with relevant securities laws and his fiduciary duties. (CP 678-715) At the time it produced these emails, Graham & Dunn denied all wrongdoing, claiming that it was simply a scrivener. (CP 156; *see also* CP 515)

It was not until 2012, when the Nortons discovered the November 2008 email in which Graham & Dunn advised de Guzman to pay an employee for his silence regarding his illicit activity, that the Nortons discovered that Graham & Dunn actively participated in de Guzman's misconduct, a necessary element of each of their claims against the firm. *See Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 131, 744 P.2d 1032 (1987) (to be liable under the Securities Act of Washington, a defendant must be "a *substantial* contributive factor in the sales transaction") (emphasis added), *amended,* 109 Wn.2d 107, 750 P.2d 254 (1988); Restatement (Second) of Torts § 876 (1979) (to establish defendant's liability for aiding another's tortious conduct a plaintiff must show that defendant "knows that the other's conduct constitutes a breach of duty and *gives substantial assistance or encouragement* to the other so to conduct himself") (emphasis added); *Alexander v. Sanford,* 181 Wn. App. 135, 180, ¶ 90, 325 P.3d 341, *rev. granted,* 339 P.3d 634 (2014) (to establish

conspiracy plaintiff must show that "two or more people combined to accomplish an unlawful purpose").

The November 2008 email was not, as the trial court reasoned, "just one piece of evidence." (CP 726) It was the piece of evidence that demonstrated Graham & Dunn's active participation in the Ponzi scheme and its cover up. Indeed, as Graham & Dunn itself asserted in defending the *Aggen* suit, without evidence that it actively participated and acted in bad faith, it could not be liable to the investors. (CP 625) The same trial court that granted summary judgment here, confirmed in the *Aggen* suit that plaintiffs face a significant hurdle when determining whether and when to sue a law firm like Graham & Dunn, which enjoys a qualified privilege from tort liability under Section 876 of the Restatement (Second) of Torts. The firm is not liable unless (1) the client sought the law firm's services to enable it to commit a crime or fraud; and either (2) the law firm agrees to help the client commit a crime or fraud (conspiracy); or (3) the law firm knows the client's conduct rises to the level of a crime or fraud and it substantially assists the client in the commission of the crime or fraud (aiding and abetting). (CP 726)

The trial court in this case failed to grasp the distinction between a lawyer's good faith hand wringing in trying to get a client to comply with the law, as reflected in Graham & Dunn's incomplete July 2009 production, and actively aiding and abetting its client's fraud, as revealed by the July 2012 *Aggen* complaint. Only *after* the November 2008 email came to light in the *Aggen* lawsuit did the Nortons have reason to suspect that Graham & Dunn had not simply provided advice that was ignored, but instead that it encouraged and participated in de Guzman's and NDG's fraud. The trial court usurped the jury's constitutional duty to resolve disputed issues of fact in holding that the limitations period starting running when Graham & Dunn produced only those documents that supported its denial of wrongdoing while omitting the critical email that proved its active involvement in perpetrating and concealing de Guzman's Ponzi scheme.

Even assuming that Graham & Dunn's incomplete 2009 productions were sufficient "disclosures" to alert an investor of potential claims, there is no evidence that Norton actually saw those productions, or was even given access to them. Norton in fact never saw Graham & Dunn's self-serving, incomplete production and had nothing but a few preliminary scoping and recovery allocation

discussions with the Steering Committee before he was asked to leave and received a full refund of his investment in the Steering Committee's initial efforts. (CP 495-97) Norton had no communication with the Steering Committee's attorney after his initial interview. (CP 496) Norton and the Steering Committee quickly parted ways due to "irreconcilable conflicts of interests." (CP 500) At the very least, whether Norton saw the documents, which the trial court believed put him on notice of Graham & Dunn's active participation in de Guzman's fraud and cover up, presented a disputed issue of fact.

Norton's June 2009 email "identif[ying] Graham & Dunn as a *possible* source of recovery" was not, as the trial court held, conclusive evidence that he knew facts establishing all essential elements of the Nortons' claims by September 2009. (CP 148, 724) (emphasis added) If the parents' letter in *Price*, which affirmatively accused the defendant of specific wrongdoing, did not establish a basis for summary judgment, then Norton's scoping letter expressing interest in pursuing recovery against *all* known business associates of de Guzman (including Graham & Dunn), but which did not mention any specific wrongdoing, cannot establish *as a matter of law* that Norton knew facts sufficient to establish claims.

At most, the letter establishes "[m]ere suspicion of wrong," and a jury must resolve whether that "suspicion" rose to actual knowledge of the Nortons' claims. *Young*, 155 Wn. App. at 823-24, ¶ 31; *Busenius*, 53 Wn. App. at 667.

The trial court further erred by relying on the "publically available" nature of "Form D" security filings to assert that the Nortons should have discovered their claims earlier. (CP 726)[3] The Form Ds, which Graham & Dunn filed late on behalf of NDG, at most provided notice that Graham & Dunn had been unable to convince its recalcitrant client to timely file required paperwork, not that it actively covered up massive securities fraud. Although the Form Ds were public (once Graham & Dunn actually filed them), the Form Ds themselves only establish that Graham & Dunn had not been able to obtain the dates of first sale from NDG and de Guzman – NOT that Graham & Dunn purposefully left the date off the Form Ds in an effort to deceive regulators, as was first alleged in the *Aggen* suit.

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[3] Form Ds confirm that a security is exempt from registration with the SEC under the Securities Act of 1933 and must be filed within 15 days after the sale of the first security disclosing the amount of the offering and the date of first sale. 17 CFR 230.503.

Consistent with its July 2009 explanations to Mr. Sirianni, Graham & Dunn has consistently maintained in the *Aggen* suit that the late Form Ds revealed only "NDG was slow to provide the information necessary to complete the forms." (CP 607; *see also* CP 171 ("NDG was aware that they were required to file a Form D for each private placement within 15 days of the first sale of securities, but they did not meet the deadline.")) Only after the *Aggen* suit established that Graham & Dunn purposely delayed and manipulated the Form D filing process has Graham & Dunn taken the completely contrary position that all investors should have known of Graham & Dunn's fault in 2008 when the Form Ds were not filed. Had Graham & Dunn convinced the trial court in *Aggen* that it was the victim of a non-responsive client it would be judicially estopped from arguing that de Guzman's fraud could have been discovered merely by looking for absent Form Ds. For purposes of summary judgment, this court should hold that a jury, when faced with Graham & Dunn's contradictory positions, could reject its current argument as lacking any semblance of credibility.

The trial court likewise erred in concluding that the Nortons had not acted diligently in pursuing and investigating their claims. The Nortons briefly cooperated with a group of similarly defrauded

investors that conducted an initial investigation. After being told to leave the Steering Committee because of irreconcilable conflicts of interest, the Nortons diligently pursued litigation against those parties the evidence actually implicated – de Guzman, U.S. Bank, Prater and Grupo Innova in Peru. (CP 497) The Nortons should not be punished for that diligence. *Price*, 96 Wn. App. at 617 (rejecting defendant's attempt "to turn this diligence against the [plaintiffs]"). Unlike these other parties, Graham & Dunn actively misrepresented its role, including by hiding NDG's "**HUGE**" securities law violations in 2008 and purportedly "fixing" de Guzman's mismanagement of P.R.E., and repeatedly asserted a qualified privilege that protects an attorney from liability "for assisting a person's breach of duty to a third party" unless he "act[s] outside the scope of the attorney-client relationship." (CP 625)

The Nortons could not, as the trial court intimated, have obtained the November 2008 email from the *Aggen* plaintiffs (former Steering Committee investors), based on the Steering Committee investors' empty "offer[] to share information." (CP 721) Quite the contrary, those investors aggressively arrayed against the Nortons, seeking to impose criminal liability on Norton as de Guzman's "partner" and "coconspirator." (CP 1325)

"Irreconcilable conflicts of interest," not a lack of diligence, explain why the Nortons never received this email from the *Aggen* plaintiffs. (CP 500)

Moreover, on summary judgment, Graham & Dunn, *not* the Nortons, bore the burden of establishing that there was no issue of fact regarding "when this email first came to light," contrary to the trial court's holding. (*Compare* CP 726 *with Niven v. E.J. Bartells Co.*, 97 Wn. App. 507, 517, 983 P.2d 1193 (1999)) Graham & Dunn produced no evidence when it first revealed the November 2008 email or that Mr. Sirianni, the attorney for the Steering Committee, saw this email before Norton and the Steering Committee parted ways in July 2009. Graham & Dunn has only itself to blame for its untimely disclosure. It should not benefit from its own concealment of critical evidence.

Beard v. King Cnty., 76 Wn. App. 863, 889 P.2d 501 (1995) (cited at CP 723) does not support the trial court's decision. In that case, police officers filed a claim for damages in February 1989 alleging that another officer had improperly divulged confidential information obtained in an internal investigation. More than three years later, after confirming their suspicion that the officer had in fact disclosed confidential information, the plaintiffs filed a new

action again based on the improper disclosure. The trial court dismissed the second action as time-barred and this Court affirmed because the plaintiffs had both "suspected *and specifically alleged*" the basis of their claims in the earlier action. 76 Wn. App. at 866 (emphasis added); *see also* 76 Wn. App. at 867 ("This appeal presents the narrow issue of whether the discovery rule continues to toll the commencement of the limitation period after the injured party has specifically alleged the essential facts but does not yet possess proof of those facts.").

Here, unlike *Beard*, the Nortons did not allege, let alone suspect, a *specific* basis for recovering against Graham & Dunn. 76 Wn. App. at 868 ("An injured claimant who reasonably suspects that *a specific wrongful* act has occurred is on notice that legal action must be taken") (emphasis added); *see also Kittinger v. Boeing Co.*, 21 Wn. App. 484, 488, 585 P.2d 812 (1978) (reversing summary judgment because fact that plaintiff "heard rumors about a memorandum charging him with misconduct" did not establish as a matter of law that he knew of basis for libel claim). In his June 2009 email, Norton listed Graham & Dunn only as one of many business associates of de Guzman who might eventually be implicated in his wrongdoing. (CP 148-50) Norton's passing

reference to Graham & Dunn does not as a matter of law establish that he knew of its specific wrongdoing. The issue was for the jury.

A jury could find that the Nortons reasonably discovered Graham & Dunn's integral role in perpetrating and concealing the fraud that cost them over $10 million only in July 2012. This Court should reverse and remand for a trial at which a jury will determine the timeliness of the Nortons' claims.

C. The doctrine of equitable tolling prevents Graham & Dunn from profiting from its concealment of wrongdoing.

The doctrine of equitable tolling provides a separate and independent basis for reversing the trial court's summary judgment. Both before and after the collapse of de Guzman's house of cards, Graham & Dunn denied, concealed, and obscured any wrongdoing on its part. And Graham & Dunn's ploy worked – until 2012 the Nortons believed that the firm was just another innocent party taken in by de Guzman's scheme. The doctrine of equitable tolling precludes Graham & Dunn from benefiting from its deceit, regardless of when the Nortons actually discovered their claims.

"Washington 'allows equitable tolling when justice requires.'" *Thompson v. Wilson*, 142 Wn. App. 803, 814, ¶ 21, 175 P.3d 1149 (2008) (quoting *Millay v. Cam,* 135 Wn.2d 193, 206, 955 P.2d 791

(1998)). "The doctrine of equitable tolling permits a court to allow an action to proceed when justice requires it, even though a statutory time period has nominally elapsed." *In re Hoisington*, 99 Wn. App. 423, 430, 993 P.2d 296 (2000) (quotation omitted). Equitable tolling is permitted where there is evidence of bad faith, deception, or false assurances by the defendant and the exercise of diligence by the plaintiff. *Thompson*, 142 Wn. App. at 814, ¶ 21. "In Washington equitable tolling is appropriate when consistent with both the purpose of the statute providing the cause of action and the purpose of the statute of limitations." *Millay*, 135 Wn.2d at 206. When equitable tolling is raised as a defense to a summary judgment motion, the trial court must decide whether to equitably toll the statute of limitations viewing the facts and reasonable inferences most favorably to the nonmoving party. *Thompson*, 142 Wn. App. at 814-15, ¶ 24.

Graham & Dunn's extensive efforts to conceal its wrongdoing mandate equitable tolling. Its efforts began at the latest with its intentional decision to counsel NDG to not disclose to anyone outside of NDG the "**HUGE**" securities violations it outlined in its much later discovered November 18, 2008 email. (CP 519) Graham & Dunn's concealment continued in January 2009 with its

apparently innocent negotiation and drafting of the Memorandum of Understanding and Amended and Restated Limited Liability Company Agreement for P.R.E. to "fix" de Guzman's misappropriation of P.R.E. funds. (CP 494) Throughout this process, including at least one meeting at Graham & Dunn's offices to correct what were characterized as only de Guzman's mistakes, Graham & Dunn led Norton to believe that Graham & Dunn, too, was an innocent bystander who was unaware of any fraud by NDG and de Guzman.

After learning of the Ponzi scheme, Norton began discussions with a Steering Committee of similarly defrauded investors that engaged an attorney to begin investigating the scheme. Graham & Dunn intentionally threw that attorney "off the trail" by denying all wrongdoing and producing only the documents that omitted any mention of the firm's own participation. Even assuming Norton saw Graham & Dunn's 2009 production, where, as here, a defendant provides false assurances and employs deceptive tactics aimed at preventing the discovery of a cause of action, the court should use equitable tolling to ensure the defendant is not rewarded for its misdeeds. *Millay*, 135 Wn.2d at

207 (equitable tolling appropriate where defendant's actions "caused confusion and uncertainty for" the plaintiff).

The Nortons discovered Graham & Dunn's misconduct later than other investors precisely because Graham & Dunn hid its involvement from the Nortons – who had lost more than any other investors. Graham & Dunn secretly negotiated a tolling agreement with the *Aggen* investors (who had accused Norton of conspiring with de Guzman here and in Peru) in order to give Graham & Dunn a statute of limitations argument it would not have otherwise been able to assert had the Nortons earlier been privy to the information disclosed in *Aggen*. (CP 565) This Court should refuse to allow Graham & Dunn to escape liability because it successfully hid its misconduct. The Nortons worked harder and pursued more responsible parties in the U.S. and in Peru than any other NDG investor; to bar their rights when Graham & Dunn intentionally threw them off the trail would be a grave injustice. That injustice is underscored by Graham & Dunn's brazenly contradictory positions in the *Aggen* lawsuit (that it committed no wrongdoing) and this lawsuit (that its wrongdoing was open and obvious by July 2009). (*Compare* CP 42-52 *with* CP 590-635)

Moreover, equitable tolling furthers the public policy of the Washington Securities Act, which forms the basis of de Guzman's liability, and provides liability for other participants in security fraud. The Securities Act is intended to protect innocent buyers or sellers of securities from those who intentionally misrepresent information to ensure a purchase or sale occurs. *Cf. Millay*, 135 Wn.2d at 206 ("Tolling of the redemption period for reasons of misrepresentation serves the [redemption] statutes' purposes"). Equitable tolling is also consistent with the purpose of the statute of limitations because both Graham & Dunn's and the Nortons' conduct is well-preserved; there is no danger of prejudice to any party from any lost evidence or faded memories.

Graham & Dunn successfully convinced the Nortons that it had committed no wrongdoing and that any further investigation was useless. The Nortons believed Graham & Dunn's assurances that highly regarded lawyers, protected by a qualified privilege against being sued for their client's fraud, and seemingly acting in the Nortons' best interests, were not in fact complicit in the fraud. Graham & Dunn's complicity was not revealed until the Nortons became privy to the November 2008 email that Graham & Dunn purposefully concealed. This Court should refuse to allow Graham

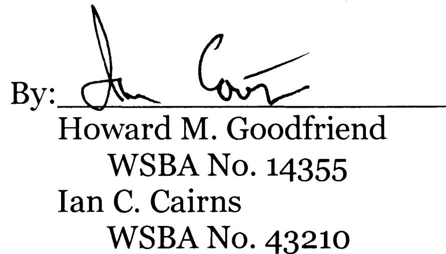
& Dunn to benefit from its concealment of its misfeasance and should remand for a trial at which a jury will determine whether the Nortons timely brought suit to recover the millions lost as a result of the fraud Graham & Dunn actively aided and concealed.

VI. CONCLUSION

This Court should reverse and remand for a trial of the Nortons' claims.

Dated this 18th day of May, 2015.

SMITH GOODFRIEND, P.S.



By: ______________________
Howard M. Goodfriend
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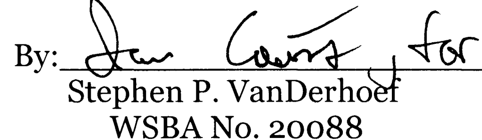
Ian C. Cairns
WSBA No. 43210

CAIRNCROSS & HEMPELMANN, P.S.



By: ______________________ , for
Stephen P. VanDerhoef
WSBA No. 20088

Attorneys for Appellants

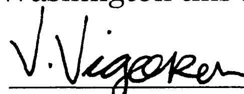
DECLARATION OF SERVICE

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

That on May 18, 2015, I arranged for service of the foregoing Amended Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger _X_ U.S. Mail ___ E-File
Stephen P. VanDerhoef Cairncross & Hempelmann PS 524 Second Avenue, Suite 500 Seattle, WA 98104-2323	___ Facsimile ___ Messenger ___ U.S. Mail _X_ E-Mail
Frank Hill Hill Gilstrap, P.C. 1400 W. Abram Street Arlington, TX 76013	___ Facsimile ___ Messenger ___ U.S. Mail _X_ E-Mail
Louis D. Peterson Michael R. Scott Alexander M. Wu Hillis Clark Martin & Peterson PS 1221 2nd Avenue, Suite 500 Seattle, WA 98101-2925	___ Facsimile ___ Messenger _X_ U.S. Mail _X_ E-Mail

DATED at Seattle, Washington this 18th day of May, 2015.



Victoria K. Vigoren

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KING COUNTY
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CASE NUMBER: 13-2-16205-9 SEA

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

JOHN NORTON and KRISTINE NORTON, individually, and derivatively on behalf of Larco-Bolivar Investments LLC, and Shell La Paz LLC; NORTHLAND CAPITAL LLC, individually and derivatively on behalf of NDG-BRYCON, LLC, and P.R.E. ACQUISITIONS, LLC,

Plaintiffs,

v.

GRAHAM & DUNN, P.C.,

Defendant.

NO. 13-2-16205-9 SEA

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant Graham & Dunn, P.C. filed a motion for summary judgment seeking the dismissal of all personal and shareholder derivative claims asserted by Plaintiffs John and Kristine Norton, Northland Capital LLC, and PRE Acquisitions, LLC (the Norton Plaintiffs). Graham & Dunn argues that the claims are barred by the statute of limitations. Plaintiffs contend their claims are not time-barred because they did not have actual knowledge of evidence of Graham & Dunn's alleged complicity in securities fraud until July 2012.

The Court GRANTS the motion for summary judgment for the following reasons:

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II. EVIDENCE CONSIDERED

The Court considered the following pleadings: (1) Defendant's motion for summary judgment (Dkt. #18); (2) the Declaration of Louis D. Peterson in support of Defendant's motion for summary judgment dated October 9, 2014 (Dkt. #19 & 23); (3) Plaintiffs' opposition to Graham & Dunn's motion for summary judgment (Dkt. #25); (4) the Declaration of John Norton in opposition to Defendant's motion for summary judgment, dated October 27, 2014 (Dkt. #26); (5) the Declaration of Stephen P. Vanderhoef in opposition to Defendant's motion for summary judgment (Dkt. #27); (6) Defendant's reply in support of motion for summary judgment (Dkt. #28); (7) the Supplemental Declaration of Louis Peterson in support of defendant's motion for summary judgment (Dkt. #29); (8) the Declaration of Nicholas Drader in support of Defendant's motion for summary judgment (Dkt. #30); (9) the Declaration of Kathleen J. Hedrick in support of Defendant's motion for summary judgment (Dkt. #31).

The Court also reviewed and considered the complaint (Dkt. #1) and Graham & Dunn's answer and affirmative defenses (Dkt. #7) in this lawsuit; the complaint (Dkt. #1) and amended complaint (Dkt. #8) in *Aggen v. Graham & Dunn*, No. 12-2-25058-8; the original complaint (Dkt. #1) in *Norton et al. v. U.S. Bank et al.*, No. 10-2-36431-5, the original complaint (Dkt. #1) in *Norton et al. v. Prater*, No. 11-2-28118-3, the Court's July 3, 2014 Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment in *Aggen v. Graham & Dunn*; and the Court's June 25, 2014 Order Granting Defendant's Motion for Partial Summary Judgment Dismissing All Claims of Plaintiffs Clarus Investment 9 LLC and Clarus Investment 10 LLC, in *Aggen v. Graham & Dunn*.

III. ISSUE ON SUMMARY JUDGMENT

The sole issue presented in this motion is whether Plaintiffs' claims are time-barred.

IV. FACTUAL BACKGROUND

Plaintiffs John and Kristine Norton are two of approximately 90 investors victimized by Ponzi scheme artist, Jose Nino de Guzman. They and the other Norton Plaintiffs lost

approximately $10 million to de Guzman's Lima, Peru real estate development scam. Graham & Dunn acted as legal counsel to de Guzman's company, NDG Investment Group, through which he perpetrated his fraud against investors. *See* Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment, dated July 3, 2014, in *Aggen et al. v. Graham & Dunn*, No. 12-2-25058-8.

In approximately 2006, de Guzman formed NDG to raise money for Peruvian real estate development projects. In 2008, John Norton invested personal funds and funds from Northland Capital LLC, a company in which he and his wife owned a majority interest, in de Guzman's "investment opportunities." In addition to investing in individual LLCs ostensibly formed for the purpose of building Lima residential condominiums, Norton also formed an entity called PRE Acquisitions with de Guzman to act as a "land bank" to acquire the Peruvian real estate that de Guzman wanted to resell to his various LLCs. In the second half of 2008, Northland funded what Norton believed to be four PRE land purchases in Peru.

In January 2009, Norton discovered that de Guzman had misappropriated the money that Northland had provided to PRE for land purchases. Norton had expected de Guzman to use this money to purchase specific parcels of land, to immediately resell them at a profit to an LLC de Guzman had formed for the purpose of developing the land into condominiums (with money de Guzman raised from other investors), and then to reimburse Northland from these sale proceeds. When Norton traveled to Lima and confronted de Guzman about the whereabouts of the anticipated sale proceeds, de Guzman told him that he had used the money to purchase additional land without Norton's prior knowledge or consent. Norton and his legal counsel insisted that de Guzman reimburse Northland and relinquish control over PRE. They worked with Graham & Dunn to document this revised business relationship and removed de Guzman from control over further financial PRE transactions.

In February 2009, NDG employees and other investors discovered de Guzman had not only scammed Norton, but had in fact misappropriated the money he had received from every

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one of his investors. In March and April 2009, NDG employees informed all of NDG's investors of de Guzman's fraud, including Norton. Norton acknowledge that during this period of 2009, he and his "legal team at Ryan Swanson & Cleveland, continued to review information obtained through cooperation with officers of NDG and continued to discover, over an extended period of time, the inappropriate nature of Mr. de Guzman's business dealings in both the U.S. and Peru."

Sometime in mid-2009, Norton, along with other investors, formed a group called the NDG Investors Steering Committee, whose purpose was to formulate a strategy for recovering their losses. Norton has testified that "the only topic [the steering committee] discussed regarding litigation in the U.S. involved litigation against U.S. Bank, N.A." This testimony, however, is inconsistent with Norton's description of the steering committee's activities in 2009 and 2010. In August 2010, Norton explained the steering committee's purpose this way:

> I had originally invested in a U.S. recovery investor fund that was put together by the Steering Committee to finance an investigation and recovery effort, **primarily focused on the responsibility of U.S. Bank and NDG's attorneys Graham & Dunn, a law firm in Seattle** (emphasis added).

In June 2009, Norton wrote emails to other steering committee members proposing an approach to allocating the costs and fruits of any recovery efforts against de Guzman, NDG, "G&D," and U.S. Bank:

> The allocation ... is based, as closely as possible, on what cash ended up where. This is a way to align the recovery "investment" and "returns" with the pro-rata claim defendants. It doesn't make sense to try to recover monies from Innova [de Guzman's Lima, Peru partner] ... if they have already returned some to the US. The monies already returned to the US have to be claimed against the US defendants and Innova should be held accountable for the money they retained and used. In turn the "Innova" monies returned from Peru to the US should be added to the US claim against Jose/NDG/G&D and US Bank, as those funds were mishandled/misused "after" they returned to the US.

Norton's reference to "the US claim" against G&D is an admitted reference to a possible legal claim against Graham & Dunn. The accompanying spreadsheet Norton prepared identified a "Claim Against G&D" as one of many "Recovery Opportunities." Norton testified that he listed

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Graham & Dunn as a "potential defendant" because "there was a possibility that we might discover the lawyers, and anyone else who conducted business with Nino de Guzman, had participated in and assisted with" de Guzman's actions. Norton Decl. at ¶ 19.

The steering committee hired lawyer Steven Sirianni to develop a legal recovery strategy. Norton sent $24,000 to Sirianni in July 2009 to defray his share of the investigation costs. At the same time, Graham & Dunn produced to Sirianni several CDs of file materials relating to de Guzman and his companies. These documents included emails from attorneys and paralegals at Graham & Dunn alerting de Guzman and NDG employees that the company was not in compliance with securities regulations.

On September 9, 2009, the steering committee determined that it had "irreconcilable conflicts of interest" with Norton, his attorney, Jay Hadley, Northland, and PRE. It notified Norton that the committee would obtain new counsel for the remaining investors and that Norton's attorneys "may wish to file a suit that parallels ours." It offered to share information it discovered with Norton and his counsel.

Norton has not explained what he did to investigate claims against Graham & Dunn after leaving the steering committee. He did, however, pursue litigation against others. On October 14, 2010, the Nortons filed a complaint against U.S. Bank, de Guzman and NDG. *Norton et al. v. U.S. Bank et al.*, No. 10-2-36431-5. In this complaint, the Nortons alleged, among other claims, that U.S. Bank had materially aided de Guzman in violating the Washington State Securities Act (WSSA). On August 15, 2011, the Nortons sued their former partner in Northland, investment consultant William Prater, alleging fraud, negligent misrepresentation, aiding and abetting fraud, and violations of the Washington State Securities Act. *Norton et al. v. William N. Prater, Jr.*, No. 11-2-28118-3. The *U.S. Bank* case is pending before this Court and discovery has occurred in that case. The *Prater* lawsuit is stayed pending Prater's bankruptcy.

On July 23, 2012, over 85 investors, many of whom were a part of the original steering committee, filed a lawsuit against Graham & Dunn, claiming that the law firm violated the

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Washington State Securities Act and committed various torts, including aiding and abetting in de Guzman's fraud. *Aggen v. Graham & Dunn*, No. 12-2-25058-8. Simultaneously, thirteen *Aggen* Plaintiffs filed shareholder derivative actions against Graham & Dunn, alleging professional malpractice and breach of fiduciary duty. *Katara v. Graham & Dunn*, No. 12-2-25137, (consolidated with 12 other derivative actions). The *Aggen* Plaintiffs had entered into a statute of limitations tolling agreement in February 2012, thereby extending any statute of limitations by approximately six months. With the exception of two *Aggen* Plaintiffs, Clarus Investment 9 LLC and Clarus Investment 10 LLC, Graham & Dunn agreed that these claims were not time-barred because of the tolling agreement.[1]

The Norton Plaintiffs initiated this lawsuit against Graham & Dunn on April 11, 2013. They allege claims on behalf of the Nortons individually and derivatively on behalf of Larco-Bolivar Investment LLC and Shell La Paz LLC; claims on behalf of Northland Capital LLC, individually and derivatively on behalf of NDG-Brycon, LLC; and claims on behalf of PRE Acquisitions, LLC. The claims mirror in many respects the claims asserted in *Aggen* and *Katara*. Unlike the *Aggen* Plaintiffs, however, the Norton Plaintiffs did not sign a tolling agreement with Graham & Dunn to extend any applicable statutes of limitations.

V. ANALYSIS

The Norton Plaintiffs allege aiding and abetting a breach of fiduciary duty, aiding and abetting fraud, negligent misrepresentation, violations of the Washington State Securities Act, and conspiracy to commit fraud. The Norton Plaintiffs also allege derivative claims of breach of fiduciary duty, and professional negligence. All of the Norton Plaintiffs' claims are subject to a three-year statute of limitations. RCW 21.20.430(4)(b) (securities fraud); RCW 4.16.080(4) (negligent misrepresentation and aiding and abetting fraud and conspiracy to commit fraud); RCW 4.16.080(2) (breach of fiduciary duty and professional malpractice).

[1] This Court dismissed the claims of Clarus Investment 9 and Clarus Investment 10 as time-barred on June 25, 2014.

De Guzman's fraud was discovered in February 2009. The Norton Plaintiffs filed this lawsuit in April 2013, more than four years later. They argue that they did not discover evidence that Graham & Dunn "was an active and willing participant in NDG's and Nino de Guzman's theft" until the *Aggen* Plaintiffs filed their lawsuit on July 23, 2012 and disclosed the content of an email between Graham & Dunn attorney Nick Drader and de Guzman—an email they allege demonstrates Graham & Dunn's complicity in de Guzman's Ponzi scheme. They contend that the statutes of limitations tolled until they found out about this email. The Court disagrees.

The discovery rule provides that a cause of action does not accrue until an injured party knows, or in the reasonable exercise of due diligence should have discovered, the factual basis for the cause of action. *Estate of Hibbard*, 118 Wn.2d 737, 744-45, 826 P.2d 690 (1992).
The plaintiff bears the burden of proving that a defendant's alleged actions were not discoverable through the exercise of due diligence until within three years of filing the lawsuit. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000). In *Beard v. King County*, 76 Wn. App. 863, 867-868, 889 P.2d 501 (1995), the Court of Appeals for Division I addressed the issue of whether the discovery rule tolls the limitations period in a case where an injured party has a reasonable suspicion that a claim exists but does not yet possess specific proof of facts supporting the claim. The court held that the statute of limitations does **not** toll:

> [T]he limitations period begins to run when the factual elements of a cause of action exist and the injured party knows or should know they exist, whether or not the party can then conclusively prove the tortious conduct has occurred. A smoking gun is not necessary to commence the limitation period. **An injured claimant who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken.** At that point, the potential harm with which the discovery rule is concerned – that remedies may expire before the claimant is aware of the cause of action – has evaporated. The claimant has only to file suit within the limitation period and use the civil discovery rules within that action to determine whether the evidence necessary to prove the cause of action is obtainable. If the discovery rule were construed so as to require knowledge of conclusive proof of a claim before the limitations period begins to run, many claims would never be time-barred.

76 Wn. App. at 868 (emphasis added).

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"A party must exercise reasonable diligence in pursuing a legal claim." *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 772, 733 P.2d 530 (1987). If diligence is not exercised in a timely manner, the cause of action is barred by the statute of limitations. *Id.* The question of when a plaintiff should have known the information necessary to trigger a statute of limitations is usually a question of fact, but a court may decide the issue on summary judgment if reasonable minds can reach only one conclusion. *Allen v. State*, 118 Wn.2d 753, 760, 826 P.2d 200 (1992). The Court believes this case to be appropriate for summary judgment.

In this case, the Norton Plaintiffs knew of de Guzman's Ponzi scheme by March 2009, at the latest. They knew that Graham & Dunn had represented de Guzman, the LLCs in which they had invested, and PRE by that date as well. The Norton Plaintiffs immediately began investigating avenues for recovering losses, and by June 2009 they had identified Graham & Dunn as a possible source of recovery. They joined the investor steering committee and contributed money to retain counsel to assist in recovery efforts against Graham & Dunn. By mid-July 2009, the steering committee's attorney had received a copy of Graham & Dunn files, including most of the emails between Nick Drader and de Guzman that formed the basis for securities and fraud claims alleged in the *Aggen* complaint. Based on the record before this Court, the Norton Plaintiffs had a significant amount of information about Graham & Dunn's activities and ample time to analyze this information by at least September 2009, which was when the steering committee and the Norton Plaintiffs chose to go their separate ways. Thus, based on the record before the Court, the Norton Plaintiffs' statutes of limitations triggered no later than September 2009.

The Norton Plaintiffs contend that even if they had evidence on which to base a claim of professional negligence or negligent misrepresentation by September 2009, they did not have evidence on which to base their claim for securities fraud under the WSSA or aiding and abetting fraud. They argue that the November 14, 2008 email from Nick Drader to de Guzman in which Drader advised de Guzman not to disclose NDG's securities law violations to investors is the

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piece of evidence they needed to assert these fraud claims. The Norton Plaintiffs contend that Graham & Dunn did not produce this email in July 2009, and they first learned of its content when they read the *Aggen* complaint in July 2012.

The Court concludes that while this email may have provided additional support for a securities fraud or aiding and abetting fraud claim, the Norton Plaintiffs had ample evidence on which to base a claim under the WSSA before July 2012. Under Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 744 P.2d 1032 (1987) and Hines v. Data Lines Systems, Inc., 114 Wn.2d 127, 787 P.2d 8 (1990), a law firm can be liable as a seller of a client's securities if the law firm's actions are a "substantial contributive factor" in the sales transactions. *Id.* at 148. As this Court noted in its order denying Graham & Dunn's motion for summary judgment of the securities fraud claim in *Aggen*:

> A reasonable jury could find that the law firm provided business advice on what rates of return to offer to investors to maximize NDG's profits; drafted offering memoranda with the representation that the offering was exempt from registration while knowing of NDG activities that could jeopardize that exemption; drafted the LLC agreements and subscription agreements reaffirming the existence of the exemption; reviewed NDG's web site and advised NDG on its content; advised NDG marketing staff on how to respond to inquiries it received from its web site from potential investors and prepared a questionnaire for potential investors to complete after reviewing the web site; reviewed and edited investor presentation power points; helped de Guzman negotiate a personal work-out with Northland; advised NDG to pay Northland money raised from investors in the Los Alamos project after de Guzman admitted to misusing monies received from Northland; and advised NDG employees to continue to solicit investors for the Los Alamos project to replenish the funds paid out to Northland.
>
> A reasonable jury could also find that Graham & Dunn's role was as significant as the role played by de Guzman or other NDG employees because the law firm drove the pace of the new LLCs offerings with full knowledge that NDG was in violation of securities laws on earlier offerings and by advising NDG employees to hide these violations from investors, the SEC and the DFI. This evidence, when viewed in the light most favorable to Plaintiffs, creates a genuine issue of material fact as to whether Graham & Dunn's actions were a substantial contributive factor in NDG's securities sales.

Most of this evidence was available to the Norton Plaintiffs by September 2009. Indeed, the

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facts the Norton Plaintiffs alleged in Paragraphs 30-40, 42-43, and 47-48, of their complaint were based on information Graham & Dunn had produced or information that was publicly available by July 2009. As in *Beard*, the Norton Plaintiffs had more than a reasonable suspicion that Graham & Dunn had liability under the WSSA. The evidence that Graham & Dunn may have advised NDG employees to hide securities law violations from investors in November 2008 is just one piece of evidence supporting the Norton Plaintiffs' WSSA claim. The Norton Plaintiffs could have initiated this lawsuit and begun discovery to determine what, if any, additional evidence existed to support those claims within the limitations period.

With regard to the claim of aiding and abetting fraud, this Court set out the following test and analysis of the evidence in its summary judgment ruling in *Aggen*:

> [T]his Court holds that a law firm enjoys a qualified privilege from tort liability to a non-client under Section 876 of the Restatement (Second) of Torts unless (1) the client sought the law firm's services to enable it to commit a crime or fraud; and either (2) the law firm agrees to help the client commit a crime or fraud (conspiracy); or (3) the law firm knows the client's conduct rises to the level of a crime or fraud and it substantially assists the client in the commission of the crime or fraud (aiding and abetting). ...
>
> ... In early 2009, [Drader] told de Guzman that if investors learned of his failure to file the proper forms with the SEC and the [Department of Financial Institutions], the authorities could require NDG to rescind the investments and repay the proceeds raised to the investors. He expressly advised his client to hide the date of the first sale of securities to avoid this potential exposure despite the law requiring this disclosure. This evidence is sufficient to create a genuine issue of material fact as to whether Drader acted outside the limits of the legal advice privilege and engaged in affirmative actions with the intent to deceive investors.

The Norton Plaintiffs had access to this evidence by September 2009 and could have relied on it to assert an aiding and abetting fraud claim within the statute of limitations period, even without knowledge of the November 2008 email.

Moreover, the Norton Plaintiffs provided the Court with no explanation for why, through reasonable investigation, they were unable to access the November 2008 email on which they rely. They have produced no evidence as to when this email first came to light or why they

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would have been unable to obtain a copy of it when the *Aggen* Plaintiffs received it. The *Aggen* Plaintiffs initiated both their WSSA claims and aiding and abetting fraud claims in a timely manner—strong evidence that the Norton Plaintiffs could have, with reasonable diligence, done the same. Under *Beard*, the statute of limitations did not toll until the Norton Plaintiffs learned of the November 2008 email.

Based on the foregoing, the Court concludes that the Norton Plaintiffs' claims against Graham & Dunn are time-barred.

VI. ORDER

Summary judgment is GRANTED. The Norton Plaintiffs' claims, including any derivative claims brought on behalf of Larco-Bolivar Investments, LLC and Shell La Paz, LLC, are dismissed in their entirety and with prejudice.

Dated this 14th day of November, 2014.

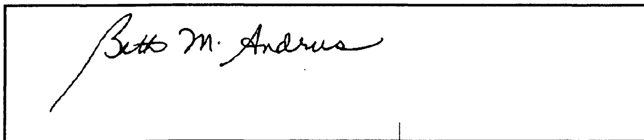
\s\ (E-FILED)
Judge Beth M. Andrus
King County Superior Court

King County Superior Court
Judicial Electronic Signature Page

Case Number: 13-2-16205-9
Case Title: NORTON ET AL VS GRAHAM AND DUNN

Document Title: ORDER GRANTING SUMMARY JUDGMENT

Signed by: Beth Andrus
Date: 11/14/2014 10:13:28 AM



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HONORABLE BETH ANDRUS

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

JOHN NORTON and KRISTINE NORTON, individually, and derivatively on behalf of LARCO-BOLIVAR INVESTMENTS, LLC and SHELL LA PAZ, LLC; NORTHLAND CAPITAL, LLC, individually, and derivatively on behalf of NDG-BRYCON, LLC, and P.R.E. ACQUISITIONS, LLC,

Plaintiffs,

v.

GRAHAM AND DUNN, P.C., a Washington professional corporation,

Defendant.

NO. 13-2-16205-9 SEA

ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

THIS MATTER came before the Court on Plaintiffs' Motion for Reconsideration of Order Granting Defendant's Motion for Summary Judgment (the "Motion"). The Court has reviewed the motion and supporting pleadings, *Douchette v. Bethel School Dist. No.* 403, 117 Wn.2d 805, 818 P.2d 1362 (1991), and the files and records herein. Based on the foregoing, Plaintiff's Motion is DENIED.

DATED this 1st day of December, 2014.

\s\ (E FILED)

Honorable Beth M. Andrus

King County Superior Court
Judicial Electronic Signature Page

Case Number: 13-2-16205-9
Case Title: NORTON ET AL VS GRAHAM AND DUNN

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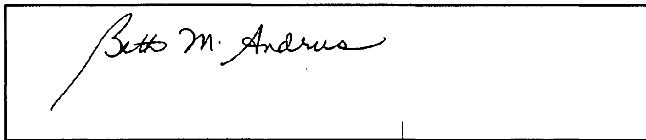

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