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II. THE COURT SHOULD DISREGARD UNSUPPORTED ASSERTIONS

RAP 10.3(a)(5) requires that “[r]eference to the record must be included for each factual statement.” Assertions without the requisite reference to the record are usually disregarded and not considered. *See, e.g., Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (appellate court will not consider assertions or argument not supported by authority or citations to the record). Likewise, claims that are inadequately argued or unsupported by authority are also disregarded and not considered. *Id.*; and *In re Marriage of Lindemann*, 92 Wn.App. 64, 78, 960 P.2d 966 (1998) (“This court will not consider argument unsupported by citations to authority.”); and *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989) (court need not consider issues that are not supported by adequate argument and authority).

Nonetheless, Shinstine offers statements that are unsupported by any citation of the record, refers to trial exhibits that Shinstine did not designate, and makes unsupported representations as to what is stated in, or inferences that can be drawn from, the undesignated trial exhibits. Mr. Hicks has identified the unsupported assertions in its corresponding Motion to Strike, which it is filing to ensure compliance with the RAP. For efficiency and avoiding duplication, Mr. Hicks respectfully refers the

Court to that Motion. However, in deciding the issues on appeal, Mr. Hicks further respectfully requests this Court completely disregard and not consider any of the unsupported assertions.

III. SHINSTINE'S ASSERTION OF AN UNPLEADED AND UNARGUED CLAIM SHOULD ALSO BE DISREGARDED

In its Brief, Shinstine asserts that the Uniform Fraudulent Transfer Act, RCW 19.40, *et seq.*, provides an additional basis to support the Trial Court's findings and conclusions. *See* Brief of Resp., Section III.B, pg. 17-27. Shinstine never pleaded any cause of action based upon the UFTA, CP 11-18 (Amended Complaint). Nor did Shinstine rely upon that claim at trial. RP 107:23-25 and 112:8-21 (asserting RCW 25.15.235 as the basis of personal liability for Mr. Hicks); and *see* CP 119-120 (Trial Court's conclusions that base liability upon RCW 25.15.235).

A well settled principal is that an appellate court will not consider an issue, claim, or theory that was not raised before the Trial Court. *See, e.g., Hansen v. Friend*, 118 Wn.2d 476, 485, 824 P.2d 43 (1992) (declining to consider defenses not raised before Trial Court); and *Blueberry Place Homeowners Ass'n v. Northward Homes, Inc.*, 126 Wn.App. 352, 362-63, 110 P.3d 1145 (2005) (declining to address alternate theory for attorney's fees even though raised before trial court

because “we cannot on this record consider this argument for the first time on appeal.”).

Accordingly, Appellant Hicks is filing a corresponding Motion to Strike to ensure that it complies with the applicable Rules of Appellate Procedure, and within this Reply Brief respectfully requests that the Court completely disregard and not consider any assertions, authority, or argument based upon or related to the UFTA, to wit: the entire Section III.B, pg. 17-27, of Shinstine’s Brief.

IV. LEGAL AUTHORITY AND ARGUMENT

A. THE LLC, NOT HICKS, RECEIVED INVESTMENT MONEY

Shinstine asserts in its Brief that Mr. Hicks “personally guaranteed the obligation” to the investors. Brief of Resp., 8. Shinstine presented no evidence to support any such guarantee, but whether there was or was not a guarantee is of no consequence because the undisputed evidence was that South-N-Erectors, LLC (the “LLC”) was the recipient of the investment funds.

The public records submitted to the Trial Court demonstrated that the LLC was the buyer of the real property at issue. *See* Trial Exhibits 28 (Statutory Warranty Deed), 29 (Real Estate Excise Tax Affidavit), and 30 (Deed of Trust); designated at CP 126-127. Thus, the Trial Court so found

that the LLC and not Mr. Hicks purchased the property. CP 117-118 (FF VI-VII).

As the buyer of the property, the LLC and not Mr. Hicks received the “investment” money that was used to help purchase the property. RP 45:7-23. Some of the investors received in return “a mortgage or some security on the property.” RP 46:2-16. So, Mr. Hicks may or may not have “personally guaranteed” the investment, but regardless the recipient of the investment funds was the LLC.

However, the investors did not “buy equity” or ownership into the LLC. Shinstine claims without any authority or support that investors buy equity. Brief of Resp., pg. 24. While an investor *may* receive equity for her investment, it does not follow that all investors buy equity. An investment is “the outlay of money usually for income or profit.” *Webster’s New Collegiate Dictionary*, 603 (1980); and *see Lumberman’s Indemnity Exchange v. State*, 113 Wash. 82, 88-89, 193 P. 217 (1920) (discussing definition, including “to ‘invest’ means to lay out money or capital in business with a view of obtaining an income or profit.”).

So, for example, an investment might be in the “purchase of property or shares, or in loans secured by mortgages, etc. . . in lands or houses or in bank stock, government bonds, etc.” *Lumberman’s, supra*, 113 Wash. at 89. Thus, one might invest by purchasing government

bonds; no equity is received in return but rather the return is the repayment of principal plus interest. Likewise, one may invest in a company through the purchase of stock, or may invest in a company and receive no equity.

Here, the evidence demonstrated that investments here were not for equity in the LLC--“nobody invested in South-N-Erectors but me” (testimony of Mr. Hicks at RP 47:12-13) and Mr. Hicks was the only owner of the LLC (RP 32:1-3). Rather, the investors outlayed cash with the idea that they would receive some profit. RP 45:13-23.

As the recipient of the investment funds, the LLC was the obligor to repay the investment, at least the primary if not the only obligor.

**B. THE LLC RIGHTFULLY AND PROPERLY
PAID THE INVESTORS BACK**

As the obligor on the investments, the LLC then rightfully and properly paid the investors back when the property sold in October 2006. CP 118 (FF VIII); RP 48:24-24; and Trial Exs. 31 (Stry. Wrrnty. Deed) and 32 (Real Est. Excise Tax Aff.) designated at RP 126-127.

Of course, an investment does not necessarily mean that the investor will in fact receive his or her expected profit or income, however the sale proceeds here were sufficient enough to provide at least some return to the investors. The Trial Court did not determine the purchase price, as no evidence was submitted as to the purchase price, however the

purchase price consisted of a \$130,900 loan secured with a deed of trust *plus* the amount invested. CP 117-118 (FF VII) and Trial Ex. 29); RP 38:3-39:5 and RP 45:7-12.

The property then sold for \$311,000 (Trial Ex. 32—RP 126-127), and the undisputed evidence was that sale proceeds were used to satisfy the loan secured by the deed and pay back the investors. RP 47:1-4 (the sale proceeds “went back to the mortgage lender and the investors who invested in the building.”); and RP 47:23-48:2 (“The money had to go to the original mortgage holder which—whoever was holding on the mortgage and then to the investors.”).

The LLC rightfully paid the investors from the sale proceeds for at least four reasons. First, the investment was related to the property (RP 45:10-23), so obviously any repayment or return would occur with the sale of the property. Second, some of the investors were provided “a mortgage or some security on the property when they invested” (RP 46:6-16), so obviously those “mortgages” or “other security” had to be satisfied for the sale to be consummated, e.g. convey clear title since a Statutory Warranty Deed was used (Trial Ex. 31, CP 126-127). *See* RCW 64.04.030 (form and effect of warranty deed, including warranty that property is “free from all encumbrances”). Third, the investments occurred approximately August 2005 when the property was purchased [CP 117 (FF VI), and Trial

Exs. 28-30 designated at CP 126-127], well before Shinstine wrongfully terminated the LLC in January 2006 then commenced this action on May 1, 2006. Fourth, the investment amounts were undisputed and fixed; the claim by Shinstine was disputed and contingent, and not determined until trial occurred in March 2009.

Shinstine terminated the LLC on January 25, 2006 (RP 35:18-21; CP 3 (¶4); and CP 106 (¶4-6), and did not commence its suit until May 1, 2006 (CP 1). The LLC disputed Shinstine's claims and defended the claims for nearly three years. RP 99:17-25 (Shinstine termination of the LLC wrongful, the LLC asserted claims for monies Shinstine owed); CP 97 (asserting that had counterclaim in answer); and CP 106-108, ¶7-77 (Decl. of Mr. Hicks). Indeed, it was Mr. Hicks and the LLC that pushed to have Shinstine's and the LLC's claims adjudicated, while Shinstine did nothing for nearly three years. CP 2-7 (first Order for Stay to arbitrate with which Shinstine failed to comply); CP 9-10 (Order granting Shinstine leave to amend, and extending stay to arbitrate 90 days; Shinstine failed to arbitrate); and CP 19-91 (Motion for Invol. Dismissal of Shinstine's claims by the LLC and Mr. Hicks).

So, the LLC continued to defend and deny the claims for nearly three years. Shinstine's claim did not become an actual, fixed and liquidated debt of the LLC until trial in March 2009, and of course a

judgment was entered thereafter (CP 114-115). Therefore, there was no reason for the LLC to pay Shinstine in October 2006 from any sale proceeds, nor to *not* pay the investors just because Shinstine asserted a claim that the LLC disputed.

C. EVEN ASSUMING MR. HICKS RECEIVED SALE PROCEEDS, THE “EXCEPTIONAL CIRCUMSTANCES” FOR CORPORATE DISREGARD ARE NOT PRESENT

Mr. Hicks disputes that there was any distribution to him from the LLC out of sale proceeds, or that he ever personally received any of the funds from the sale. However, even assuming that Mr. Hicks personally received some of the sale proceeds, that assumed fact is wholly insufficient to establish corporate disregard.

It is beyond cavil now that a corporate entity is separate and distinct from its owners, “even where they are only one in number.” *Truckweld Equip. Co. v. Olson*, 26 Wn.App. 638, 644, 618 P.2d 1017 (1980). Disregarding the presumed separateness is granted in “**exceptional circumstances...where its recognition would aid in perpetrating a fraud or result in a manifest injustice.**” *Id.* (bold added).

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1. Mr. Hicks Neither Owed a Duty Nor Misused the Corporate Form to Avoid that Duty

The first element for corporate disregard is that “the corporate form must be intentionally used to violate or evade a duty.” *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn.App 916, 924, 982 P.2d 131 (1999). It is “misuse of the corporate form to *avoid a duty* owed to another.” *Id.* at 926 (italics in original). Thus, “the law requires a showing of both disregard of the corporate form *and* that the disregard was done to avoid a duty owed to another.” *Id.* at 926. (holding that duty arises from contract, statute, or ground in equity, and identifying various duties).

Here, Shinstine did not offer, and the Trial Court did not identify, any cognizable legal duty that Mr. Hicks had to Shinstine. First, there was no contractual basis for any duty; Shinstine subcontracted with the LLC not Mr. Hicks. CP 117 (FF III) and RP 32:7-9.

Second, there was no equitable basis for any duty either. As this Court stated in *Rogerson Hiller, supra*:

If duty were to arise from abuse of the corporate form alone, the second part of the first element, ‘to avoid a duty owed,’ would be redundant. Duty would always be created by an abuse of the corporate form such as commingling of the corporate interests.

Rogerson Hiller, supra, 96 Wn.App. at 926.

Third, there was no statutory basis. Shinstine and the Trial Court relied upon RCW 25.15.235, however, as set forth in Mr. Hicks' opening Brief, at Section IV.A pgs 14-17, that statute does not place a duty on Mr. Hicks to Shinstine, but rather Mr. Hicks to the LLC and provides the LLC with recourse against a member. *See* also RCW 25.15.125 (member of a LLC not liable for any debt or obligation of the company).

Typically, the abuse or misuse is typically established through "fraud, misrepresentation, or some form of manipulation of the corporation to the stockholder's benefit and creditor's detriment." *Meisel v. M&N Modern Hydraulic Press*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982) ("the court must find an abuse of the corporate form"); and *Truckweld, supra*, 26 Wn.App. at 644-645. Here, no "fraud, misrepresentation, or manipulation" was alleged by Shinstine or found by the Trial Court. CP 116-120 (FF & CL).

Rather, the Trial Court attempted to work backwards, which is reversible error. In *Meisel, supra*, the Supreme Court refused to work back from an insolvent debtor corporation to create a duty or basis to disregard the corporate form. 97 Wn.2d at 410-411. A creditor is not entitled to a solvent defendant, and to impose "[p]ersonal liability on that basis alone would undermine the very foundation of the entity concept. *Truckweld, supra*, 26 Wn.App. at 645.

2. Nor Did Any Alleged Abuse Cause any Harm

The second element of corporate disregard “requires that the abuse caused harm to the party seeking relief so that disregarding the corporate form is necessary.” *Rogerson Hiller, supra*, 96 Wn.App. at 924, citing *Meisel, supra*, 97 Wash.2d at 410. The alleged abuse or misuse of the corporate form must actually *cause* harm to the creditor such that not disregarding the corporate form will aid in the fraud or misrepresentation. *Meisel, supra*, 97 Wn.2d at 410 (“wrongful corporate activities must actually harm the party seeking relief”); and *Norhawk Investments v. Subway Sandwich Shops*, 61 Wn.App. 395, 401, 811 P.2d 221 (1991) (“the facts do not establish that the corporations were intended to function as one or that to regard them as separate would aid the consummation of a fraud or wrong upon others.”).

Here, the Trial Court imposed liability upon Mr. Hicks because the LLC failed to hold sale proceeds received in October 2006 for a contingent claim that did not become an actual debt until March 2009. CP 120 (CL V, stating that by failing to “preserv[e] funds to pay contingent claims... the LLC violated its duty to pay its obligations.”).

First, there is no such duty to preserve funds to pay contingent and disputed claims. The Trial Court did not identify any authority, and Shinstine has offered no authority to either the Trial Court or to this Court

on appeal. Rather, the authorities affirmatively indicate that an owner of a corporate entity has no such duty.

RCW 25.15, *et seq.*, addressing limited liability companies, makes the member the agent of the corporation, where the corporation is liable for the agent's acts and not the other way around. The statutory scheme parrots the well settled axiom that a corporation and its owners are separate and distinct. RCW 25.15.125 specifically states that an LLC member will not be responsible for any debt, obligation, or liability of the LLC. Likewise, RCW 25.15.155 provides that a member will not personally liable to the LLC or its members, absent "gross negligence, intentional misconduct, or a knowing violation of law." As to a third party like Shinstine, a member is only liable "to the extent that shareholders of a Washington business corporation would be liable in analogous circumstances." RCW 25.15.060. The statutory scheme therefore demonstrates that a member has no duty to provide funds to the company so as to ensure payment to a creditor.

Consistently, this Court previously held that an owner of a corporate entity has no duty to fund the company:

We know of no rule of law requiring a corporate stockholder to commit additional private funds to an already faltering corporation. [citation omitted].

Truckweld, supra, 26 Wn.App. at 645.

Further, the duty to preserve funds and “make provision” for the payment of all claims, contingent included, does not arise until the LLC begins the process of dissolution. *Chadwick Farms v. FHC, LLC*, 166 Wn.2d 178, 197, 207 P.3d 1251 (May 14, 2009) (“A dissolved limited liability company must, under the Act, properly complete the winding up process, which includes paying or making arrangements to pay known obligations and claims, even if unmatured or contingent.”).

Here, the undisputed evidence was up until December 2008, over two and one-half years after Shinstine filed this suit, South-N-Erectors was a going concern, paying its obligations, disputing and defending Shinstine’s claims, and maintaining its own counterclaims against Shinstine. CP 1(commencement of suit); RP 99:17-25 (Shinstine termination of the LLC wrongful, the LLC asserted claims for monies Shinstine owed); CP 97 (asserting that had counterclaim in answer); and CP 106-108, ¶7-77 (Decl. of Mr. Hicks); and CP 19-91 (Motion for Invol. Dismissal of Shinstine’s claims by the LLC and Mr. Hicks). Further, Shinstine did not assert at trial and the Trial Court did not find that Mr. Hicks dissolved or closed South-N-Erectors improperly or hastened the closure to hinder the adjudication of Shinstine’s claim.

Second, even assuming some duty to “preserve funds,” it did not cause harm to Shinstine. Where the allegedly wrongful transfer of funds

was exchanged for “sufficient consideration,” corporate disregard will not lie even if the first element is met. *Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wn.App. 695, 708, 934 P.2d 715 (1997). In *Eagle Pacific, supra*, the trial court found that the defendant formed a new company and transferred assets to the new company “for the sole purpose of hindering” the old company’s creditors. *Id.* However, the transfer of assets was “supported by sufficient consideration” and so the Court of Appeals reversed the trial court and held that disregard was improper. *Id.*

Just as in *Eagle Pacific*, the payment of the investors out of the sale proceeds was supported by sufficient consideration--the investments themselves. The investment money was used to pay the down payment, thus making possible the LLC’s acquisition of the property. Upon sale, the LLC returned the investment. This transaction hardly seems unique and demonstrates that the act complained of (paying the investors) neither is the cause any harm to Shinstine, nor establishes the requisite “extraordinary circumstances” to justify the equitable remedy of disregarding the separateness of the LLC and its owner, Mr. Hicks.

Rather, Shinstine caused whatever harm it allegedly suffered through its failure to prosecute its claims. Shinstine filed the action on May 1, 2006 (CP 1), then essentially did nothing to prosecute its claims.

Had Shinstine pursued its claims diligently as the law requires, it almost certainly would have had an ongoing, solvent South-N-Erectors.

It should not be forgotten that the subcontract contained an arbitration provision. CP 3 (¶3), one purpose of which was presumably to hasten an efficient adjudication. Yet, Shinstine filed this action instead, violating the own terms of its contract. Yet, it then sought to arbitrate months later, submitting to the Trial Court a joint Stipulation in which the Court granted a stay of proceedings so that the parties could arbitrate. CP 2-7. The Court ordered the parties to “complete their arbitration on or before January 31, 2007,” four months later. CP 6. Shinstine failed to arbitrate as it represented to the Court that it would do.

Rather than participating in arbitration, Shinstine instead moved the Trial Court for leave to amend its Complaint to assert a claim against the contractor registration bond South-N-Erectors acquired pursuant to the Contractor Registration Act, RCW 18.27, *et seq.* CP 9-10 and CP 11-18 (¶7.1-7.9). The Trial Court granted Shinstine leave to add its claim against the bond, and extended the stay to allow arbitration “an additional 90 days or April 30, 2007.” CP 9-10.

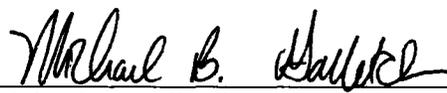
Despite two stays, Shinstine still did not participate in arbitration, and the Court’s deadline of April 30, 2007 expired. CP 19-30. Approximately three months later, with Shinstine still failing to participate

in the action, and failing to respond to discovery requests, all of the Defendants (South-N-Erectors, Mr. Hicks, and the surety) moved for an involuntary dismissal of Shinstine's action. CP 19-91. The Trial Court denied the motion for involuntary dismissal, but instead *for the third time* ordered Shinstine to participate in mediation and arbitration. CP 92.

In December 2008, 16 months after the Trial Court's third order compelling Shinstine to participate in arbitration, South-N-Erectors ceased conducting business and closed its doors. RP 29:12-20 and RP 30:18-20. Since South-N-Erectors closed, it lacked the financial ability to participate in arbitration, so the parties agreed to waive the contractual arbitration provision and agreed to have the Trial Court decide the claims against South-N-Erectors and Mr. Hicks. CP 109.

DATED this 15th day of January 2010.

GALLETCH & FULLINGTON, PLLC



Michael B. Galletch, WSBA #29612
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COURT OF APPEALS
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON DIV. II

SHINSTINE/ASSOC. LLC, a Washington
Limited Liability Company,

Plaintiff,

v.

SOUTH-N-ERECTORS, LLC, a
Washington Limited Liability Company,
ROGER HICKS, individually, and OHIO
CASUALTY INSURANCE CO., Bond
No. 3740456, a foreign corporation,

Defendants,

NO. 39277-1-II

CERTIFICATE OF SERVICE

I, Michael B. Galletch, certify that on January 15, 2010 I deposited in the US
Mail, postage prepaid thereon, true and correct copies of the following documents:

Reply Brief of Appellant
Motion to Strike and/or Disregard
Certificate of Service

upon the following parties to the above entitled action:

WA State Court of Appeals
Division II
950 Broadway #300
Tacoma, WA 98402
(Original + one copy)

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

Signed at Seattle, Washington this 15th day of January 2010.



Michael B. Galletch