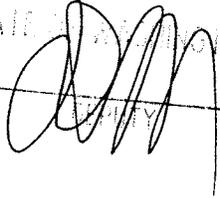


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DIVISION II

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STATE OF WASHINGTON

BY 

No. 40029-4-II

DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

Washington Construction, Inc., Plaintiff-Appellant

v.

David Alan Ltd., et al., Defendants,

and

Sterling Savings Bank, Defendant-Respondent

ON APPEAL FROM PIERCE COUNTY SUPERIOR COURT
(Hon. Vicki L. Hogan)

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

	<u>Page</u>
A. INTRODUCTION AND GENERAL RESPONSE TO COUNTERSTATEMENT.....	1
1. David Alan Ltd. Was the Agent for David Alan Development, LLC	2
2. The Record Amply Supports Sterling’s Knowledge of the Milne Fraud	3
B. STERLING IS LIABLE TO WCI UNDER THE CONTRACTS AS A MATTER OF LAW	5
1. Sterling Ignores Express Language of the Contract.....	6
2. WCI Is Also a Third-Party Beneficiary of the Agreement .	8
3. WCI Pled Liability Under Contract, and Even If the Complaint Were Insufficient Amendment Would Not Cause Prejudice.	9
C. WCI’s ESTOPPEL CLAIMS ARE SUPPORTED BY THE SUMMARY JUDGMENT RECORD	11
1. Promissory Estoppel Is Supported By the Record	11
2. Estoppel By Silence Is Supported By the Record.....	15
a. Estoppel By Silence Does Not Require Proof That the Estopped Party Committed Fraud	15
b. WCI Was Induced Not To Investigate the Good Standing of the Construction Financing	16
c. Sterling Had a Duty In Equity and Good Conscience To Notify WCI	17

3. Other Estoppel Principles Are Likewise Supported By the Record	20
4. WCI's Estoppel Claims Were Adequately Pled	21
D. TORTIOUS INTERFERENCE IS SUPPORTED BY THE RECORD	22
E. AIDING AND ABETTING A FRAUD IS SUPPORTED BY THE RECORD	23
F. UNJUST ENRICHMENT IS SUPPORTED BY THE RECORD	24
G. CONCLUSION	25

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Table of Cases</u>	
<i>Broeckel v. State of Alaska, Department of Corrections,</i> 941 P.2d 893 (1997)	13
<i>Central Heat, Inc. v. The Daily Olympian, Inc.,</i> 74 Wn.2d 126 (1968)	15
<i>Chemical Bank v. WPPSS,</i> 102 Wn.2d 874 (1984)	11, 12, 16
<i>Donald B. Murphy Contractors, Inc. v. King Co.,</i> 112, Wn. App. 192 (2002)	12, 13
<i>Foman v. Davis,</i> 371 U.S. 178 (1962)	11
<i>Hilton v. Alexander & Baldwin, Inc.,</i> 66 Wn.2d 30 (1965)	11
<i>Irwin Concrete v. Sun Coast Properties,</i> 33 Wn. App. 190 (1982)	24, 25
<i>Lacy v. Wozencraft,</i> 188 Okla. 19 (1940)	16
<i>Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins.</i> <i>Group, Inc.,</i> 114 Wn. App. 151 (2002)	23
<i>Miller v. U.S. Bank,</i> 72 Wn. App. 416 (1994)	22
<i>Pleas v. City of Seattle,</i> 112 Wn2d 794 (1989)	23
<i>Spokane Valley State Bank v. Murphy,</i> 150 Wash. 640 (1929)	15
<i>State v. Vanoli,</i> 86 Wn. App. 643 (1997)	5
<i>Tagliani v. Colwell,</i> 10 Wn. App. 227 (1973)	11

<i>Tokarz v. Frontier Federal Savings and Loan Ass'n</i> , 33 Wn. App. 456 (1983)	19
<i>U.S. v. Heredia</i> , 483 F.3d 913, 917-20 (9 th Cir. 2007)	37
<i>Walla v. Johnson</i> , 50 Wn. App. 879 (1988)	11

Statutes

15 U.S.C. § 6802	18
------------------------	----

Other Authorities

Restatement (Second) of Torts § 867(b).....	24
Restatement (Second) of Contracts § 90	11, 12, 13

A. INTRODUCTION AND GENERAL RESPONSE TO COUNTERSTATEMENT

Sterling's Response simply ignores operative language of the Construction Loan Agreement which renders it liable to WCI as a matter of law. Arguing that the transfer of WCI's Construction Contract to Sterling was merely a security interest, Sterling fails to address the extraordinary nature and consequence of the security it extracted. Upon its Borrower's default, Sterling had exclusive rights to the WCI Contract.

The balance of WCI's claims involve material fact issues. To the extent necessary,¹ we will address Sterling's factual contentions while discussing the specific claims. However, certain of Sterling's assertions pervade its Response, so we will address them here. We also note that Sterling often attempts to draw inferences from the facts in its favor, reversing the summary judgment standard. Finally, to the extent certain of WCI's claims require proof by clear, cogent and convincing evidence, the weight given the evidence is in the province of the jury. See *Powers v. Hastings*, 93 Wn.2d 709, 715 (1980). We now turn to certain of Sterling's general assertions.

¹ To the extent Sterling's contentions are not material to discussion of the claims, we will not occupy the Court with response. Part of Sterling's Response and its supplemental designations of Clerk's Papers relate to events not part of the summary judgment record below. For the most part, they are not material to resolution of the issues on this appeal.

1. David Alan Ltd. Was the Agent For David Alan Development LLC.

Sterling persists in asserting that David Alan Ltd. was not the agent for David Alan Development (DAD) and was therefore a complete stranger to Sterling. We noted below and in our Opening Brief at p.2, n.2, that DAD (the Principal), David Alan Ltd. (the Agent) and David Alan Milne (the owner of both agent and principal) all admitted the agency. Sterling's Response at 24 nonetheless asserts that WCI "misreads" the Milne Defendants' Answer and the "supposed 'judicial admission'". We therefore quote here the legal admission:

The Second Amended Complaint alleged at ¶ 2: "**David Alan, Ltd. ... acted as agent for David Alan Development, LLC.**" CP 22 (emphasis added)

The Milne Defendants' Answer, at ¶ 1: "Answering paragraphs 1, 2, 3, 5, 6, 7, 8, of the Second Amended Complaint, **these defendants admit the allegations contained therein.**" CP 41-42 (emphasis added)

This admission is dispositive. But even without the admission, the uncontradicted facts are that 1) David Milne told Kurt Smith (WCI) at the time of executing the Construction Contract that David Alan Ltd. was DAD's agent; 2) when Sterling asked David Milne for a copy of the Construction Contract for Rita Estates, Milne immediately provided the WCI contract with David Alan Ltd.; and 3) David Milne repeatedly demanded that Sterling pay WCI under the Construction Contract. Thus,

the evidence also requires, at a minimum, that agency be assumed for purposes of summary judgment. Yet, Sterling asks this Court to conclude as a matter of law there was no agency. Sterling cites no authority contrary to the long-standing legal principle that a contract executed by an agent is a contract with the principal. *See WCI's Opening Brief* at 5, n.2.

2. The Record Amply Supports Sterling's Knowledge of the Milne Fraud.

Sterling also asserts that it was “in the dark” and had no knowledge of the Milne fraud – after all, “multi-millionaire” David Milne was worth over \$18 million and for all Sterling knew he had arranged to pay WCI. Sterling is certainly free to see how far it gets with that argument before a jury, but it is not entitled to that factual conclusion on summary judgment. We first note that Sterling's actual knowledge of fraud is not *required* for WCI's claims (even with respect to the aiding and abetting claim scienter is satisfied if Sterling knew or should have known of the fraud), but it certainly makes WCI's claims more compelling and distinguishes this case from most others. Evidence that would support a jury conclusion that Sterling knew of the fraud includes, among other facts (see generally our Opening Brief at 9-18) the following. 1) Before issuing its notice of cessation of advances, Sterling reviewed the WCI contract which explicitly made evidence of adequate financing a condition precedent to

WCI starting and continuing work. 2) Sterling knew that WCI had started work before the notice of cessation of advances, and that WCI did not stop working after the notice to Milne. 3) When processing and approving the loans, Sterling did not accept Milne's assertion that he was worth over \$18 million. After reviewing volumes of financial statements, banking records and other documents, Sterling estimated the Milnes' net worth to be less than \$1.6 million (with negative cash flow and outstanding liabilities over \$21 million) and DAD's to be \$952,000, and it assigned a risk factor of 5 to the loans (indicating a loan bearing risk). *See, e.g., CP 686-87 & 692*

4) Sterling's default notice to Milne demanded immediate payment of over \$8.4 million (not including the Rita Estates debt), and the reason stated for the cessation of advances on Rita Estates was the deterioration of DAD's and the Milnes' financial conditions. 5) Milne was unable to satisfy Sterling's demands. 6) David Milne specifically told Sterling that "I can't in good faith, have contractors working without a source of payment. Therefore I will stop work tomorrow on two conditions....." *CP 513*

Sterling did not agree to the conditions and knew that WCI's work continued. 7) WCI's pay application was certified by the project engineer and presented to Sterling for payment. 8) Sterling knew that, while WCI was continuing to improve the property, residential real estate values were plummeting and cessation of work could create serious erosion concerns,

penalties and substantial deterioration of the value of Sterling's security for prior loan advances. Evidence of knowledge is typically circumstantial, and this record amply supports such a finding. Furthermore, even in the criminal context with a higher burden of proof a jury can find knowledge when any reasonable person would know the fact, *State v. Vanoli*, 86 Wn. App. 643, 646-48 (1997), or in the case of a person's "deliberate ignorance." *U.S. v. Heredia*, 483 F.3d 913, 917-20 (9th Cir. 2007). The issue here is for the jury.

B. STERLING IS LIABLE TO WCI UNDER THE CONTRACTS AS A MATTER OF LAW.

Sterling argues that it is not liable to WCI under the loan and construction contracts because 1) the transfer of the Construction Contract to Sterling was merely a security interest; 2) WCI's argument must be premised upon third-party beneficiary analysis, and no beneficiary status was intended; and 3) WCI contracted with David Alan, Ltd., not the Borrower, DAD. Sterling also argues that WCI did not plead liability under the contract and the trial court properly denied leave to amend to assert it. We have already established that WCI's contract with DAD's agent was a contract with DAD. We will address below Sterling's remaining arguments.

1. Sterling Ignores Express Language of Its Contract.

Sterling argues that the Assignment of Plans, Contracts and Entitlements under the Construction Loan Agreement only intended to create a security interest and contains language excusing Sterling from liability. It therefore has no obligation to WCI. To make this argument, Sterling treats security interests as fungible commodities and ignores essential terms of this agreement. What Sterling characterizes as mere “security” is in fact no ordinary security interest. Sterling has taken its form of agreement so far as to usurp the Borrower’s very right and ability to perform the Construction Contract upon a default under the loan agreement. As noted in our Opening Brief at 20-23, this “security interest” is not a mere right to take some future action, nor even a typical assignment. It is, by its express terms, a present transfer to Sterling of the Construction Contract and other documents necessary to perform it, with a limited license back to the Borrower to use it only so long as the Borrower is not in default of any obligation to Sterling. Sterling admits that a default occurred. The limited Borrower license therefore terminated, leaving Sterling with exclusive rights to the WCI Contract.

Sterling’s response to these express contract provisions is to ignore them. Sterling relies solely on ¶ 4 of the Assignment of Plans, Contracts

and Entitlements, without any attempt to reconcile that paragraph with the rest of the document or the facts. Paragraph 4 states in pertinent part:

Neither this Assignment nor any action or inaction on the part of Lender shall constitute an assumption on the part of Lender of any duty or obligation with respect to the Assigned Collateral, nor shall Lender have any duty or obligation to make any payment to be made by Borrower under the Assigned Collateral

This language could not possibly shield Sterling from liability to third parties as broadly as Sterling suggests. To illustrate, consider a hypothetical in which the Borrower defaults, Sterling directs the Contractor to complete work under the Construction Contract (Assigned Collateral), and then refuses to pay. It seems obvious that Sterling would be liable to the Contractor. But ¶ 4, if read out of context of the facts and rest of agreement as urged by Sterling, says not – no action or inaction by Sterling would constitute an assumption of any liability under the Assigned Collateral. Such an absurd result could neither be enforced nor reasonably intended by the Construction Loan Agreement. Paragraph 4 makes sense, however, and is consistent with the other contract language, the security purposes of the agreement, and fairness to the Contractor when one recognizes that the disclaimer language in ¶ 4 applies so long as no Borrower default has occurred. Prior to any default, the Borrower operates under the license, Sterling's right to the Construction Contract is not exclusive, and the Contractor is not affected by the Assignment of the

right as security because the Borrower has the right to perform and is able to draw loan funds to pay the Contractor as contemplated. This interpretation is also consistent with the ¶ 4 language that Sterling has no obligation to “make any payment to be made by Borrower,” who has the licensed right to perform the Construction Contract absent default. Upon Borrower default, however, the circumstances and legal obligations immediately change under this Agreement. Sterling’s “right” to terminate the Borrower’s license and to obtain exclusive use of the security is automatically exercised, just as if Sterling had affirmatively acted to terminate the license. If Sterling allows work to continue after this exercise of termination, Sterling is obligated to pay for it (and the payment is deemed a loan advance to the Borrower.) If Sterling does not want to complete any or all of the work under the Construction Contract, it can simply notify the Contractor to stop any further work. But it cannot do what it did here – sit by while the Contractor invests huge sums to improve the property under the Assigned Collateral and then refuse to pay.

2. WCI Is Also a Third-Party Beneficiary of the Agreement.

As noted above, WCI’s contract claim does not depend upon third-party beneficiary status as asserted by Sterling. Third-party beneficiary analysis, however, affords an additional basis for liability. It is noteworthy that Sterling feels compelled to re-name the Construction

Loan Agreement as the “Business Loan Agreement” in hope that this might somehow influence this Court. The agreement terms control. Also, while Sterling asserts that the Construction Loan Agreement was not intended to afford any benefit whatsoever to the Contractor, it cannot identify any contract language that says that. A recital that the agreement inures to Sterling’s benefit or that it does not constitute an indemnity to DAD or others against a deficiency or breach does not exclude WCI as a third-party beneficiary any more than it would exclude DAD as a direct beneficiary. Moreover, whether Sterling knew of WCI’s existence when executing the Construction Loan Agreement is irrelevant. The Construction Loan Agreement contemplates and repeatedly refers to the Construction Contract, and WCI’s contract is that Construction Contract. For the reasons stated in our Opening Brief, WCI should be deemed a third-party beneficiary, at least for purposes of notice regarding payment.

3. WCI Pled Liability Under Contract, and Even If the Complaint Were Insufficient Amendment Would Not Cause Prejudice.

WCI pled that Sterling was liable to WCI under the contract. In addition to detailed pleading of the operative facts, WCI alleged at ¶ 10 that WCI proceeded diligently with the work in reliance on the Construction Loan Agreement with Sterling Savings Bank. *CP 808* Paragraph 21 alleged that

WCI was entitled to rely on the Construction Loan Agreement for providing construction funds for its work on the project. **WCI reasonably relied on the loan agreement, and Sterling Savings Bank and/or Action Mortgage Company should be obligated to pay for WCI's work.**

CP 812 (emphasis added.) Paragraph 24 further alleged that

WCI was a third party beneficiary of the construction loan **and** is entitled to be paid for its work performed, as contemplated by the loan agreement.

CP 813 (emphasis added.) Third-party beneficiary status is therefore an additive basis for contract liability, not the only basis. Furthermore, contrary to Sterling's assertion, WCI did not raise the issue for the first time in a post-summary judgment motion to amend. In support of its allegations in the Complaint, WCI thoroughly briefed the issue in opposition to Sterling's motion for summary judgment *CP 769-71*. Sterling had full opportunity to, and did, respond to the merits of this legal argument.

Thus, no amendment of the Complaint was necessary. Solely because of Sterling's argument that WCI had not pled the issue and the lack of clarity about the bases for the trial court's ruling, WCI moved to clarify the court's order and, out of an abundance of caution, for leave to amend the complaint *if* that were deemed necessary. *CP 924-28 & 965-70*. The trial court indicated in its amended order that its basis for dismissing the claim was that WCI had not pled it, and then denied leave to clarify the

complaint without any explanation. *CP 974*, ¶ *B* The trial court’s failure to give any reason and the lack of any obvious prejudice would itself be basis for finding abuse of discretion. *Walla v. Johnson*, 50 Wn. App. 879, 883 (1988); *Foman v. Davis*, 371 U.S. 178 (1962). At any rate, the issue was fully briefed, and Sterling identifies no prejudice if a clarifying amendment were required on this legal issue. Denial of leave to amend, if amendment were necessary, was an abuse of discretion. See *Tagliani v. Colwell*, 10 Wn. App. 227, 233 (1973).

C. WCI’s ESTOPPEL CLAIMS ARE SUPPORTED BY THE SUMMARY JUDGMENT RECORD

1. Promissory Estoppel Is Supported By the Record.

Sterling’s promissory estoppel analysis begins with an erroneous legal assertion that promissory estoppel cannot apply unless Sterling, as promisor, directly communicated a promise to WCI, as promisee. See Sterling’s Response at 30, citing *Hilton v. Alexander & Baldwin, Inc.*, 66 Wn.2d 30, 31 (1965). *Hilton* is not only inapposite on the facts, it predated *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 901 (1984) in which the Supreme Court adopted the 1981 Restatement (Second) revision to § 90 which provided for a third party promissory estoppel claim. *Chemical Bank* holds that promissory estoppel applies when there is a “promise which the promisor should reasonably expect to induce action or

forbearance on the part of the promisee **or a third person**” *Id.*, quoting the Restatement (Second) of Contracts 90(1) (1981) (bold face added to show language added in the Restatement revision). Promissory estoppel therefore applies even when the one induced to action or forbearance is not the promisee, and it can apply even when the promisor does not actually know that the third person relied on it. The test is whether Sterling should reasonably have expected a contractor such as WCI to detrimentally rely on the Construction Loan Agreement. The record clearly satisfies that test. Sterling’s loan representative not only admitted that contractors rely on the loan agreements for payment (*CP 395, Irwin Dep at p91 lines 13-18*), she actually knew that WCI’s Construction Contract required adequate financing as a condition precedent to start of work and continued performance.

Sterling cites *Donald B. Murphy Contractors, Inc. v. King Co.*, 112, Wn. App. 192, 198 (2002), for the proposition that one cannot establish reliance without third-party beneficiary status. Even assuming *arguendo* that WCI were not a third-party beneficiary, *Donald B. Murphy* should not compel dismissal of WCI’s promissory estoppel claim. In that case, with very brief discussion the Division 1 panel rejected a promissory estoppel claim by a subcontractor against the project owner, King County, stating that the subcontractor could not establish justifiable reliance where

it lacked third-party beneficiary status. The subcontractor could not establish justifiable reliance there because contract language stated explicitly that subcontractors were neither incidental nor third-party beneficiaries of the promise, that the subcontractor must assert any claim through the general contractor, and that any payment on the claim was to be made to the general contractor, not the subcontractor. The subcontractor did not show reliance and, in the face of that language, any reliance would not have been justifiable. *Donald B. Murphy* should not be read to compel denial of promissory estoppel when one who is not a third-party beneficiary does show justifiable reliance. Indeed, § 90 allows for such a claim, and comment c thereto states that while reliance by one who is a third-party beneficiary is more foreseeable, a third party who does show foreseeability and reliance has a claim. *See, e.g., Broeckel v. State of Alaska, Department of Corrections*, 941 P.2d 893, 899 (1997) (quoting § 90 and comment c language not referenced in *Donald B. Murphy*, and holding that promissory estoppel was available to a third-party who was not a third-party beneficiary) Here, Sterling admitted it knew that contractors rely on its loan agreements for payment, and it knew WCI was relying on its loan agreement. The foreseeability requirement is satisfied.

Sterling also argues there was no “promise” because WCI had only an unsigned copy of the Construction Loan Agreement. See Sterling’s

Response at 30. First of all, the record does not indicate whether the copy of the Construction Loan Agreement shown to Kurt Smith prior to WCI's start of work was signed or not. But the question is irrelevant given that the financing notebook shown to him also included Sterling's approved construction budget and an email from Sterling's loan representative encouraging David Milne to start work on Rita Estates, both corroborating the existence of the loan. *See Opening Brief* at 6-7. More importantly, Sterling misses the point. The loan agreement relied upon actually existed, it was not some hypothetical or draft that had been falsely represented as executed.

Sterling further argues that the "record is void of any fact that WCI 'relied' on Sterling's loan agreement and changed its position." *Sterling Response* at 28. The assertion is remarkable in the face of the evidence that WCI insisted on seeing evidence of adequate financing before starting work, that WCI made multiple written requests for confirmations and assurances throughout the work, and that the Construction Contract made adequate financing a condition precedent.

Finally, Sterling argues WCI has an adequate legal remedy against the Milne Defendants. Sterling has made no showing that any of them is capable of responding to a judgment. DAD and David and Virginia Milne filed for bankruptcy (the DAD bankruptcy was dismissed because David

Milne filed it pro se and could not come up with a lawyer), and there is no evidence that David Alan Ltd. was anything other than a shell.

Thus, the record supports all elements of a promissory estoppel claim. The Construction Loan Agreement was 1) a promise, that 2) Sterling reasonably should have expected to induce a contractor such as WCI to perform work on the project covered by the agreement, 3) that did in fact induce action in the form of starting work and forbearance in the form of not stopping work, and 4) injustice can be avoided under the circumstances only by enforcing the promise to pay for the work to develop the project.

2. Estoppel By Silence Is Supported By the Record.

Estoppel by silence is not based upon a “promise,” but upon failure to disclose when disclosure is required by equity and good conscience. All elements are satisfied here. *See WCI’s Opening Brief at 27-35*

(a) *Estoppel by Silence Does Not Require Proof That the Estopped Party Committed Fraud.* Sterling’s challenge to estoppel by silence again starts with a faulty legal standard. Citing a 1929 case, *Spokane Valley State Bank v. Murphy*, 150 Wash. 640, Sterling asserts that estoppel by silence requires proof that Sterling committed fraud. As noted in our Opening Brief, however, the Supreme Court subsequently held in *Central Heat, Inc. v. The Daily Olympian, Inc.*, 74 Wn.2d 126 (1968), that

“it is not necessary that the one estopped receive some benefit or consideration from the particular transaction; neither is it necessary that he be guilty of some actual overt act of fraud.” 74 Wn.2d at 133 (*quoting Lacy v. Wozencraft*, 188 Okla. 19, 20 (1940)) Here, the record supports the inference that there was a concealment of the cessation of advances from WCI in hopes that WCI would continue to protect and improve the property.

(b) *WCI Was Induced Not To Investigate the Good Standing of the Construction Financing.* Citing *Chemical Bank*, Sterling next asserts that equity affords a remedy only if the victim was destitute of reasonable and convenient means to ascertain the truth. Its argument fails here for a number of reasons. First, as stated in *Chemical Bank*, 102 Wn.2d at 905, the rule is that estoppel will not apply when both parties have the same means to obtain the information. That is not the case here. Second, WCI had no reason to question the existence of adequate financing after seeing the loan agreement, the approved construction budget, and the email encouraging Milne to start work, all of which were genuine documents. Third, the fraud here was based on undisclosed cessation of advances after execution of the loan agreement. WCI was induced by both David Milne and Sterling to believe that financing remained in good order. Milne’s repeated assurances, the confirmation that the engineer certified WCI’s

pay application to Sterling, Sterling's approval of and direct payment for the Cook Addition work, and Sterling's failure to notify WCI otherwise all created a reasonable perception that the loan was in order. Whether one has a means to ascertain that Sterling would not release funds under the loan agreement means nothing when one has no reason suspect there was a change. Fourth, the information was not conveniently available. Sterling's loan manager said they would not tell a contractor anything even if asked. *CP 899* (Altheide Dep at 72) Only after WCI did not get paid on time, and not until WCI's attorney was able to identify and talk to Sterling's legal counsel did WCI receive any information. And finally, Sterling created the undisclosed notices of default, cessation of advances, demand for immediate payment and consequent instantaneous deterioration of Milne's financial condition. WCI had no reason to suspect that these documents had been issued or of Milne's sudden financial demise.

(c) *Sterling Had a Duty In Equity and Good Conscience to Notify WCI.* Sterling's contention that any disclosure of information was prohibited is impeached by its own legal counsel's release of information² and by the fact that Sterling had a procedure for dealing with suspicious

² Sterling cannot at the same time argue that its counsel's release of information shows that it was readily available, while claiming that Sterling was prohibited from providing it. The truth is that it was neither prohibited nor readily available – it took identifying and contacting Sterling's legal counsel to get any information after WCI was not paid.

transactions which its loan representative did not use. The statutes cited at pages 32 and 44 of Sterling's Response do not prohibit the type of disclosure that could have been made here. (E.g., a simple statement that Sterling did not intend or was unable to release funds for WCI's draws, without any more, would have prevented the fraud, or Sterling could have stopped the work, or Sterling could have requested a meeting with Milne and WCI to work out a way to protect the site until issues were resolved, etc.) The state statutes cited by Sterling protect against identify theft. The federal statute is intended to prevent misuse of private consumer financial information provided to the bank, and even if it were applicable, it specifically exempts (as does Sterling's own policy) disclosure when the consumer consents or "to protect against or prevent actual or potential fraud" *15 U.S.C. § 6802 (2) & (3)(B)* WCI's Opening Brief discussed numerous contract provisions in which DAD consented to any of a variety of means of disclosure, not just one as stated in Sterling's response. Indeed, DAD conferred on Sterling exclusive rights to the WCI Construction Contract upon its default. Sterling's contention that WCI has not proven any fraud simply belies the record, its own admissions of the fraud, the requirement that all inferences be drawn in WCI's favor, and the fact that the exception applies to "potential" fraud. As already addressed in our Opening Brief at 31-33, Sterling's reliance on

Tokarz v. Frontier Federal Savings and Loan Ass'n, 33 Wn. App. 456 (1983) is misplaced – the case does not prohibit disclosure here. Sterling had multiple means to protect both itself and WCI.

Sterling's discussion of tort concepts of duty to disclose appears to misunderstand WCI's arguments. As noted in our Opening Brief at 28, the standard for estoppel by silence should be whether disclosure was required in equity and good conscience. The circumstances here cry for that conclusion. But even if tort-based concepts were applied to estoppel by silence, whether by analogy or otherwise, they would call for disclosure. *See Opening Brief* at 30-35 First, the contracts created a duty to disclose. Second, when intentional torts are involved, the concept of pre-existing duty is replaced by scienter – i.e., knowledge of the fraud suffices to require disclosure. The same should be true under estoppel by silence when silence enables a known or suspected fraud. Third, even if negligence-based concepts were applied to require a pre-existing duty, superior knowledge, special circumstances, or partial disclosure would create a duty to disclose. Notwithstanding Sterling's assertions that Milne caused the default, Sterling clearly had superior knowledge of its notice of default and cessation of advances, Sterling's demands on Milne for immediate payment of extraordinary sums, and Milne's financial

condition.³ Sterling simply says there were no special circumstances, without addressing the discussion and case law in WCI's Opening Brief that knowledge of fraud can be a special circumstance, especially when, as here, the silent party knows the victim is relying on some document or performance by that party, that party's silence is essential to the fraud, and the silent party is reaping substantial benefit from the fraud. Knowledge that WCI relied on the construction loan should itself be a special circumstance. And finally, Sterling's approval and direct payment for WCI's work on Cook Addition constituted partial disclosure fostering WCI's misperception that financing was in good order. Sterling's argument that this is "course of dealing" evidence completely misses the point. The evidence is offered to show that Sterling's actions contributed to WCI's misperception that the loans were in good standing, not for contract interpretation.

3. Other Estoppel Principles Are Likewise Supported By the Record. WCI relies upon its Opening Brief at 35-38 for application of equitable estoppel and estoppel in pais to preclude Sterling's defenses to releasing funds under the Construction Loan Agreement for WCI's

³ Sterling knew the effect of its demand for immediate payment of \$8.4 million, not including the Rita obligation. As noted *infra*, Sterling had mounds of information on Milne's financial condition, as Sterling was relying on that financial condition as a security for repayment of the loan. WCI, on the other hand, was relying on the Construction Loan Agreement for payment.

work. We need note here only that Sterling's attempt to limit estoppel in pais to the statute of limitations context is not supported by the case law. With respect to use of equitable principles to subordinate Sterling's deed of trust to WCI's lien, those claims are not mooted by Sterling's improvident decision to proceed with a non-judicial foreclosure sale of the property. Sterling's sale and acquisition of the property merely converts the remedy to one of recovering from Sterling the funds that should have been paid to WCI if its lien were prior.

4. WCI's Estoppel Claims Were Adequately Pled.

Sterling asserts that the trial court properly denied WCI's motion to amend regarding its estoppel claims. In fact, however, the trial court concluded that amendment was not necessary – it reached the merits of these claims. *See WCI's Opening Brief* at 26 and *Amended Order* at ¶ B (CP 974). Sterling did not cross-appeal that aspect of the trial court's decision. Nor would the record support a conclusion that WCI had merely pled equitable estoppel, as asserted by Sterling. The Complaint pleads specific facts and alleges that those actions and inactions give rise to estoppel. Sterling's argument that the Complaint is limited to equitable estoppel is based solely on that fact that WCI's counsel, while arguing a motion to amend to add aiding and abetting and tortious interference, mentioned only equitable estoppel as an example of existing claims

involving identical facts. In no way was this an amendment or limitation of the Complaint. Finally, even if amendment were required, Sterling would not have been prejudiced. The parties addressed the merits, and the court ruled on the merits.

D. TORTIOUS INTERFERENCE IS SUPPORTED BY THE RECORD

WCI's Opening Brief at 47-48 demonstrates that the record satisfies all elements of tortious interference. With respect to the first two elements, the existence of contract relations and knowledge thereof, Sterling's Response at 42 contends that WCI's Third Amended Complaint did not allege tortious interference with contract, but only tortious interference with a business expectancy. It then claims that WCI had no business expectancy. The argument is perplexing. The Third Amended Complaint alleges at ¶22 that "Sterling Savings and Action Mortgage Company's omissions and conduct constituted a tortious interference with WCI's contract relations." We presume Sterling re-characterized WCI's claim to attempt to resort to *Miller v. U.S. Bank*, 72 Wn. App. 416, 428 (1994), which is inapposite. In *Miller*, the plaintiff complained about an IRS assessment, which was "not the result of any contract between Miller and the IRS; it was a civil penalty. Thus, because no such business expectancy or relationship existed there was no interference." *Id.* at 429.

Here, WCI had a contract, and Sterling knew it.

Sterling's discussion of the third element, intentional interference inducing or causing a breach or termination of the relationship, confuses the requirement of "intent" with wrongful motive or means (discussed below). As noted in our Opening Brief, intent is satisfied if the interferor knew its action was substantially likely to cause the harm. *Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158 (2002). Sterling knew that its action would cause Milne's inability to perform the WCI contract and, indeed, upon default Sterling terminated Milne's very right to perform the Construction Contract.

Sterling's discussion of the fourth element, improper purpose or improper means, completely ignores the improper means alternative. Improper means overrides even a privilege defense to improper purpose. *See our Opening Brief at 47-48.* Moreover, even with respect to improper purpose fact issues exist with respect to Sterling's motives. It is Sterling's burden to establish privilege defenses to improper purpose *Pleas v. City of Seattle*, 112 Wn.2d 794, 804 (1989).

E. AIDING AND ABETTING A FRAUD IS SUPPORTED BY THE RECORD

Sterling's Response confirms that the only "prejudice" it claims from amendment to assert aiding and abetting liability is that it would

have to defend an unrecognized claim. *Response* at 49-50. Aiding and abetting, however, is a viable claim and WCI's amendment was not futile. *See WCI's Opening Brief* at 41- 46. Contrary to Sterling's assertion, no Washington case rejects § 876 of the Restatement (Second) of Torts – the cases cite it with approval. *Id.* WCI alleged that Sterling knowingly and substantially assisted the fraud by remaining silent in order to wrongfully obtain the benefits of WCI's performance without paying for it. Sterling's silence fostered the perception that the loan was in good standing, and its silence was essential to perpetration of the fraud. The allegations satisfy the standard set forth in § 876, and the record supports the allegations.

F. UNJUST ENRICHMENT IS SUPPORTED BY THE RECORD

The bases for WCI's unjust enrichment claim are set forth in its Opening Brief at 39-41. The fact that after summary judgment and note of this appeal Sterling caused a non-judicial foreclosure sale and acquired Rita Estates for less than the amount owed by the Milne defendants does not moot WCI's unjust enrichment claim. Sterling was benefitted by the increased value of the property due to WCI's work, and WCI's protection of the site from serious erosion and penalties. The work set forth in Sterling's approved construction budget was essentially completed – only sidewalks and some dry utilities remained. *Irwin Concrete, Inc. v. Sun*

Coast Properties, Inc., 33 Wn. App. 190 (1982) clearly demonstrates that Washington courts acknowledge that a contractor can claim unjust enrichment against a lender even after its lien is extinguished by a trustee's sale, and it clearly refutes Sterling's contention that unjust enrichment somehow requires a contract between the parties. Sterling attempts to distinguish *Irwin Concrete* by contending that there the lender directly urged the plaintiff to perform the work. In that case, however, there were five claimants, and the record indicates any communication with only two of them. With respect to the other three, the lender only had knowledge that they were continuing work. Yet the Court held all five had unjust enrichment claims. 33 Wn. App. at 196. In any event, the availability of unjust enrichment is very fact specific and the balance of equities and public policy weigh heavily in WCI's favor under the totality of the circumstances here.

G. CONCLUSION

WCI's claims are amply supported by a well-substantiated record. WCI respectfully requests reversal and remand for trial.

RESPECTFULLY SUBMITTED this 5th day of May, 2010.

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By 

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CERTIFICATE OF SERVICE

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STATE OF WASHINGTON

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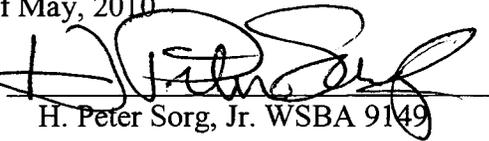
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