

No. 40029-4-II

COURT OF APPEALS, DIVISION II OF THE
STATE OF WASHINGTON

WASHINGTON CONSTRUCTION, INC., Plaintiff-Appellant

v.

DAVID ALAN DEVELOPMENT, ET AL., Defendants,

and

STERLING SAVINGS BANK, Defendant-Respondent

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

RESPONDENT'S RESPONSE BRIEF

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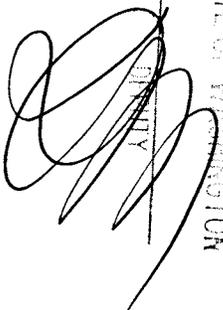
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I. INTRODUCTION

Appellant Washington Construction, Inc. ("WCI") appeals summary judgment dismissal of its claims against Sterling Savings Bank ("Sterling") entered on October 23, 2009. (CP 921-923) WCI also seeks review of an interim ruling denying amendment of its complaint to allege an aiding and abetting a fraud claim, and finally seeks review of the Court's Order of November 5, 2009, denying it, after dismissal of all claims against Sterling had occurred, leave to amend its complaint for a fourth time to allow a claim of assignment of a construction contract. (CP 976-977)

The trial court properly dismissed all issues before it. The decisions of the Court were fully supported by the lack of genuine issues of material fact and WCI's failure to present evidence of any issues of material facts or to establish necessary elements of its claims.

Sterling, on November 5, 2007, agreed to lend David Alan Development, LLC over three million dollars so David Alan Development, LLC could acquire and develop a residential development on a piece of real property located in Pierce County called "Rita Estates." (App. Br. Appx. A) David Alan Development, LLC is owned by David Milne ("Milne") – a multimillionaire developer. (CP 330-332) Sterling

advanced \$1,502,153 of the loan amount so David Alan Development, LLC could acquire the Rita property in November, 2007. (CP 371-372) No further advances for construction were made. (CP 269)

In August, 2008, WCI acting through Kurt Smith, its president, presented a bid for the project to Milne. (CP 587) At a meeting between Smith and Milne, Milne provided certain documents to Smith and was informed by Milne that Sterling would be funding the project. (CP 587, 589, 592) Smith kept no copies of the documents. (CP 589)

On August 19, 2008, WCI and David Alan, Ltd. – an entity entirely different than David Alan Development, LLC ("DAD") – entered into a written construction contract for the Rita project and immediately started work. (CP 348-354) In mid September, WCI requested financial information from David Alan, Ltd. (CP 555, 556, 559) In mid-September, 2008, WCI received, from Milne, an unsigned Construction Loan Agreement between David Alan Development, LLC and Sterling. (CP 559) WCI never received a copy of any signed Construction Loan Agreement between David Alan, Ltd. and Sterling (or of David Alan Development, LLC and Sterling) and never saw, let alone possessed, a copy of the Assignment of Plans, Contracts and Entitlements. (App. Br. Appxs. A & B).

David Alan, Ltd., by David Milne, apparently told WCI that Sterling would fund the construction contract. (CP 592) Sterling and DAD were not parties to the David Alan, Ltd. – WCI construction contract. (CP 349) Sterling never agreed to fund the construction and, when orally informed of the WCI construction contract the next day, on August 20, 2008, told David Milne to immediately stop and have WCI cease work on Rita Estates because Sterling would not pay for the work. (CP 267, 1045) Sterling then issued a written Notice of Cessation of Advances on the loan. (CP 359) Unbeknownst to Sterling, David Milne apparently did not tell WCI to cease work. (CP 267-269) Instead, unbeknownst to Sterling, David Milne told WCI that funding was forthcoming. (CP 592) WCI never asked Milne for permission to talk to Sterling until late October, 2008. (CP 589) When WCI first contacted Sterling in late October, 2008, WCI was immediately informed that Sterling was not funding the construction activity on Rita. (CP 268 ¶48) WCI immediately ceased work and filed a lien on the project on October 27, 2008. (CP 268 ¶ 49)

WCI contends that this is all Sterling's fault. WCI contends that Sterling, a non-party to the David Alan, Ltd. – WCI contract, not knowing of WCI, not having any relationship with WCI, nevertheless had a legal obligation to inform WCI that Sterling was not funding its loan with David

Alan Development, LLC. WCI made several legal and equitable claims against Sterling, all of which were properly dismissed.

WCI made no attempt to contact Sterling to determine whether its work would be paid for by Sterling. WCI had the means to inquire as to the status of the project but did nothing other than take Milne's word that payment would be forthcoming. WCI's brief is laced with statements that Sterling "knew" of David Alan, Ltd.'s "fraud." These statements were not and are not supported by the record. The trial court correctly denied WCI's motion to amend its complaint – a fourth time – to include an "aiding and abetting a fraud" cause of action.

The underlying dispute among other parties is still ongoing. WCI makes this appeal under CR 54(b). The real property in question was sold by non-judicial foreclosure sale on January 8, 2010 and Sterling acquired the property for less than the debt owed for the acquisition cost of the property. (CP 1169) WCI has moved for further continuance of the trial date. *Id.*

II. COUNTER STATEMENT OF THE CASE

- A. **Business entities associated with David Milne entered into business loan agreements with defendant Sterling Savings Bank. WCI was not a party to any of these business loan agreements, although it is these business loan agreements that form the basis of WCI's complaint.**

On May 9, 2007, James Alan, LLC and Sterling Savings Bank entered into the Cook Business Loan Agreement.¹ (CP 275-283) James Alan, LLC is 81% owned by David Milne. (CP 286) The \$7,535,000 Cook Business Loan Agreement pertained to the acquisition and development of a residential development on real property located in Kitsap County, Washington called the "Cook Addition." (CP 275-283)

Several months later, on November 5, 2007, a separate entity controlled by David Milne, David Alan Development, LLC as a borrower and Sterling, as the lender, entered into the Rita Business Loan Agreement. (App. Br. Appx. A) The Rita Business Loan Agreement pertained to the acquisition and development of a residential subdivision on real property located in Pierce County, Washington called "Rita Estates." *Id.* DAD is 100% owned by David Milne. (CP 287)

The Rita Business Loan Agreement was secured by a Construction Deed of Trust, dated November 5, 2007, and recorded on November 13, 2007. (CP 307-316) The Rita Business Loan Agreement stated that no disbursement or approval, by Sterling, of funds related to the Rita project would constitute a representation by Sterling as to the nature of the Rita

¹ WCI makes much of Sterling's contact with WCI on the Cook project in October, 2008. Sterling submits that this is irrelevant as Washington courts consistently hold that "course of dealing" evidence *does not* prevail over express contract terms. *Seattle-First Nat'l Bank v. Westwood Lumber, Inc.*, 65 Wn. App. 811, 823 (1992). Stated differently, Sterling's relationship with WCI on the Cook project has no bearing on Sterling's relationship (or lack thereof) with WCI on the Rita project starting in August, 2008.

project, its construction, or its intended use, nor would such a disbursement constitute Sterling agreeing to indemnify David Alan Development, LLC – or any third party – as to "any breach of any contract." (App. Br. Appx. A & CP 794)

The Rita Business Loan Agreement further incorporated a promissory note that provided, in part, "the terms of this note shall be binding upon the borrower. . . and shall inure to the benefit of the lender." (CP 319)

B. David and Virginia Milne guaranteed the Cook and Rita Business Loan Agreements and had a net worth over \$18 million.

The Milnes submitted financial statements to Sterling in support of these guaranties claiming a net worth of \$18,693,100. (CP 330-332) David Alan Development, LLC also guaranteed the Cook Business Loan Agreement. (CP 287) Sterling's privacy policy and the privacy notice for the Rita Business Loan Agreement forbade Sterling from disclosing its borrower's financial information to third parties. (CP 322-323, 337-338) In fact, the Rita Business Loan Agreement also contained a privacy notice which, in part, defined "customer information" as non-public information about the customer's relationship with Sterling, and limited the disclosure of customer information to companies affiliated with Sterling, credit

agencies, or in accord with Sterling's compliance with legal process. (CP 322)

C. James Alan, LLC defaulted on the Cook Business Loan Agreement when James Alan, LLC's general contractor, Mountain West Construction, placed a lien on the Cook real property, because James Alan, LLC used up its entire \$7 million loan and still had work to do. This, in turn, led Sterling to cease funding the Rita Business Loan Agreement because the financial status of the guarantors of both agreements substantially changed because of the Cook default.

The Cook Business Loan Agreement provided that an event of default occurred when a lien was placed on the real property. (CP 277-278) On April 23, 2008, Mountain West Construction – the general contractor for the Cook project – placed a lien on the Cook property totaling \$833,344.48 and claimed to be prior to Sterling's Deed of Trust on the same piece of real property. (CP 340-343) This April 23, 2008 lien arose because James Alan, LLC, did not pay Mountain West. The borrower had used the entire \$7 million Cook addition loan without completing the project or paying the contractor. (RP 82) As such, Sterling immediately requested that James Alan, LLC resolve the Mountain West lien issue. (CP 266)

Sterling, after giving James Alan, LLC nearly four months to resolve the Mountain West lien matter, sent a default notice to James Alan, LLC on August 21, 2008. (CP 266, 356-357) Sterling also sent the

default notice to the Cook Business Loan Agreement's guarantors: David Alan Development, LLC and David Milne and Virginia Milne. *Id.* The Cook Business Loan Agreement default required, *inter alia*, that James Alan, LLC, and the guarantors of the Cook Business Loan Agreement immediately pay the \$7,122,390.09 principal advanced by Sterling to James Alan, LLC for the Cook project and an additional \$1,300,000 necessary to physically complete the Cook project. (CP 357). Sterling, at the same time, issued and sent a notice of cessation of advances on the Rita loan, because of the Cook default. (CP 267)

D. Sterling never advanced construction funds under the Rita Business Loan Agreement because of the material adverse change in the financial condition and default of David Alan Development, LLC, David Milne and Virginia Milne that was caused by the Cook Business Loan Agreement default.

The Rita Business Loan Agreement allowed Sterling to cease advancing funds to David Alan Development, LLC if a default occurred in any other agreement a borrower or guarantor had with Sterling or a "material adverse change" occurred regarding any guarantor. (App. Br. Appx. A & CP 794) Since David Alan Development, LLC guaranteed the Cook Business Loan Agreement, now in default, Sterling properly exercised its express contractual right to cease advances on the Rita loan because DAD's financial status was materially and adversely changed by virtue of the Cook default. (CP 287, 301)

At various times, David Milne, while acting for David Alan Development, LLC, represented to Sterling that different entities would serve as a general contractor for the Rita project. (CP 266) On April 22, 2008, David Milne represented that Mountain West Construction, LLC would likely be the contractor for the Rita project. *Id.* In July 2008 David Milne sought to retain Clever Construction, Inc. as the general contractor for the Rita project. *Id.*

David Milne on August 19, 2008, without notice to Sterling and in violation of the Rita Business Loan Agreement, signed a construction contract with WCI regarding the development of the Rita project. (App. Br. Appx. A & CP 266, 792)

E. Counsel for WCI drafted the David Alan, Ltd.-WCI construction contract. David Milne then breached the contract.

In early August 2008, Kurt Smith, owner of WCI, contacted David Milne and asked Mr. Milne if he could bid on the Rita project. (CP 587) At a meeting between Smith and Milne, Milne provided certain documents to Smith and was informed by Milne that Sterling would be funding the project. (CP 587, 589, 592) Smith kept no copies of the documents Milne showed Smith in August 2008. (CP 589) The only document Smith maintained was a copy of an unsigned Construction Loan Agreement

between David Alan Development, LLC and Sterling that Smith received from Milne in September 2008. (CP 559)

On August 19, 2008, David Alan, Ltd., not David Alan Development, LLC, and WCI entered into a "construction contract" regarding the Rita property. (CP 348 - 354) WCI's attorney wrote the construction contract, because WCI thought David Alan, Ltd. was the owner. (CP 589, 591) The construction contract allowed WCI to seek assurances as to the funding of the construction contract and obligated David Alan, Ltd. to inform WCI "of any material change in [the contract's] financing." (CP 351)

It is undisputed that WCI never contacted Sterling until late October 2008 to inquire of Sterling as to whether the Rita Estate project would be funded. (CP 268, 589; RP 67) WCI never, as allowed by the WCI-David Alan, Ltd. contract, made a written request to David Alan, Ltd. to obtain "adequate evidence of [the construction project's] financing." (CP 351)

Apparently David Milne never informed WCI of either Sterling's refusal to fund or about the issuance of the notice of cessation of advances. (CP 562-564, 589, 591)

F. On August 20, 2008 – one day after executing the David Alan, Ltd.-WCI contract – David Milne informed Sterling employees, Lisa Irwin and Deborah Sciascia, that he had

entered into a construction contract with WCI. Lisa Irwin immediately told Mr. Milne to cease work because Sterling would not fund Rita because of the Cook default.

On the morning of August 20, 2008, David Milne met with Sterling employees Lisa Irwin and Debra Sciascia, at Ms. Irwin's office in Bellevue, Washington. (CP 267, 1045). Ms. Irwin was the loan officer who administered the Rita and Cook loans on behalf of Sterling. (CP 263) The purpose of the meeting was to discuss the reason why the Mountain West lien on the Cook property had not been resolved after four months, and the status of the Rita project. (CP 267, 1045) While discussing the Rita project, David Milne informed Ms. Irwin that he had entered into a construction contract with WCI for Rita. *Id.* This was the first time that Ms. Irwin, or anyone at Sterling, was made aware that Milne had entered into a construction contract with WCI regarding the Rita project. *Id.* Ms. Irwin told Mr. Milne to immediately cease work on the Rita project. *Id.*²

Mr. Milne replied that he would not stop. (CP 267, 1045). Ms. Irwin reiterated – throughout the meeting – that Milne needed to stop work

² It is Lisa Irwin's deposition testimony upon which WCI makes the blanket assertion that Sterling "knew" of David Alan, Ltd.'s "fraud." The record supports no such evidence of this. A *prima facie* fraud claim requires clear and convincing evidence of: (1) a representation of material fact; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity; (5) the speaker's intent that it be acted upon by the person to whom it was made; (6) ignorance of its falsity by the person to whom the misrepresentation was addressed; (7) the latter's reliance on the truth of the representation; (8) the latter's right to rely upon it; and, (9) consequent damage. *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462 (1969).

on the Rita project because Sterling would not fund the construction activity for the Rita development. *Id.*

Milne continued to disregard Sterling's directives and apparently refused to inform WCI that a notice of cessation advances had been issued on the Rita project. (CP 562-564) Since WCI was a stranger and was not a party to the Rita Business Loan Agreement, Sterling did not, and could not, advise WCI that it had issued a cessation of advances; doing so would violate the terms of the Rita Business Loan Agreement and Sterling's privacy policy. (CP 322-323, 337-338) Moreover, as far as Sterling knew, multimillionaire Milne could have financed the David Alan, Ltd – WCI contract by some other means, particularly since WCI did not initiate any contact with Sterling as to any aspect of the Rita project.

On September 8, 2008, Lisa Irwin reiterated to Milne that he needed to stop work on the Rita project and Sterling would not advance funds to pay for any construction activity. (CP 268, 362) Milne arrogantly replied "the work is already started, the site has been cleared. Once that happens, you need to move forward." (CP 361)

On September 18, 2008, Milne attempted to remedy its breach of the Rita Business Loan Agreement, if Sterling would agree to pay WCI and assist paying for a permit regarding the Rita site. (CP 364) Sterling did not agree and did not advance any construction funds because of the

default on Cook: a default that occurred prior to the David Alan, Ltd. – WCI contract. (RP 82; CP 269, 277-278, 340)

G. WCI made no attempt to contact Sterling regarding the Rita Business Loan Agreement until late October 2008.

Although WCI's contract allowed it to receive financial assurances prior to working, WCI took no steps to contact Sterling until the project was almost completed. (CP 351, 589) The first time that WCI inquired of Sterling as to Rita in late October 2008. *Id.* WCI was immediately informed that Sterling was not paying for the construction work. (CP 268) WCI ceased work and filed a lien on the Rita property. (CP 191-192)

At the time of the WCI-David Alan Ltd contract, the Milnes and David Alan Development, LLC owed Sterling \$1,502,153.16 on the Rita Business Loan Agreement (for acquiring the Rita property) and \$7,122,390.09 on the Cook Business Loan Agreement. (CP 371) The only funds advanced on the Rita Business Loan Agreement were for the acquisition of the Rita property; no funds were advanced for construction improvements on Rita. (CP 269) The Rita construction project has not been completed. (RP 66)

On January 8, 2010, Sterling purchased the Rita Estate property at the trustee sale "for an amount less than the debt owed on the [Rita

Business Loan Agreement]." (CP 1169) Thus, there were no funds generated to pay any lien claimant. *Id.*

H. WCI sued David Alan, Ltd., David Alan Development, LLC, David Milne, Virginia Milne, (the "Milne entities") and Sterling Savings Bank. The Milne entities filed cross-claims against Sterling that were dismissed on summary judgment.

WCI initiated its complaint against David Alan Ltd, David Alan Development, LLC, Mr./Mrs. Milne, Sterling and others on November 19, 2008. WCI amended its complaint on December 1, 2008, April 3, 2009, and was granted leave to amend its complaint for a third time on September 4, 2009. (CP 21, 127-128, 997)

David Alan Development, LLC, David Alan, Ltd., David and Virginia Milne filed a cross claim against Sterling alleging violations of the Consumer Protection Act, breach of contract, equitable indemnity attorney fees and violation of the Washington Consumer Protect Act. (CP 44-46) Sterling obtained summary judgment dismissal of all of the Milne entities' claims. (CP 1149-1151, 1158-1161, 1152-1155)

III. ARGUMENT

WCI appeals from the trial court's October 23, 2009 order of dismissal of its claims against Sterling. (CP 921-923) WCI also seeks review of (1) the trial court's decisions of August 14, 2009 and September 4, 2009, denying WCI's requested amendment of its complaint to add an

aiding and abetting a fraud claim and (2) also seeks, after dismissal of all of its claims, review of the trial court's November 5, 2009 order, denying WCI's requested fourth amended complaint to include an "assignment" claim. (CP 973-975)

A. Summary judgment standard of review and standard regarding estoppel claims.

WCI correctly states that this Court reviews the record de novo regarding appeal of any claims dismissed by summary judgment. (App. Br. 19) WCI is correct that Sterling had the burden at summary judgment to prove the absence of any genuine issue of material fact. *Id.* Sterling met its burden. (CP 921-923) What WCI failed to do at the trial court level, and cannot do now, is to set forth, with support, specific facts showing that there is a genuine issue for trial and establish factual support for each element of its claims for relief. CR 56(e); *Matter of Estate of Hansen*, 81 Wn. App. 270, 285 (1996) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A lawsuit must be dismissed, as here, if the claimant is unable to establish the critical elements of its claims. *Id.*

The standards applicable to WCI's kitchen sink listing of equitable relief claims will be addressed in the appropriate argument section. However, overriding all equitable claims is the legal test that a party claiming to have been influenced by the conduct of another must

demonstrate that he was not only destitute of knowledge of the state of facts, but also destitute of any convenient and available means of acquiring such knowledge and that where the facts are known to both parties or both have the same means of ascertaining the truth, there can be no estoppel. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 905 (1984).

Here, WCI did nothing to verify anything Milne told it. In fact, months later WCI asked permission of Milne to speak with the bank. When WCI contacted the bank, it was immediately told that Sterling was not funding the Rita project.

B. Standard of review for Motion to Amend a Complaint.

The legal standard for review of the denial of any appealed motions to amend will be discussed as it pertains to the arguments advanced by WCI.

C. Assignment of Error No. 2 – Issue No. 1; Assignment of Error No. 3. Sterling is Not Liable to WCI Under the Rita Business Loan Agreement or the Rita Business Loan Agreement's "Assignment of Plans, Contracts and Entitlements" and the Court did not abuse its discretion in denying WCI's leave to amend to include an "assignment" claim.³ (App. Br. 20-23)

WCI first assigns error and argues that the Rita Business Loan Agreement and the additional security device entitled "Assignment of

³ The "Argument" section of WCI's brief addresses WCI's Assignments of Error in an order that is not in sequence with the Assignments of Error sequence set out on pages 3-4 of WCI's brief. Sterling will address WCI's Assignments of Error in the order that they are argued in the body of WCI's appeal brief.

Plans, Contracts, and Entitlements" ("Assignment") between Sterling and David Alan Development, LLC – an agreement to which David Alan, Ltd. and WCI were not parties – somehow, without citation of authority, gives rise to a requirement that Sterling had a legal duty to inform WCI – a stranger – that Sterling would not fund its business loan agreement with David Alan Development, LLC. (App. Br. 20-23 and Appxs. A & B)

1. WCI's assignment argument.

WCI raised its claim of assignment by seeking to amend its complaint, a fourth time, after summary judgment issued dismissing all pled claims.

WCI argues that the Rita Business Loan Agreement ("Construction Agreement") between Sterling and DAD, included an "Assignment of Plans, Contracts and Entitlements." (App. Br. Appx. B) It is undisputed that WCI never obtained an executed copy of the Construction Agreement. (CP 589, 592-593) Likewise, it is undisputed that WCI never obtained nor saw the Assignment. (CP 559, 589)

Nevertheless, WCI argues that under the Assignment that the Borrower (conveniently forgetting that such is expressly defined as DAD - not David Alan, Ltd) transferred all its rights in the plans and "the Construction Contract" to Sterling who, in turn, unless there was a default, licensed DAD to use them. However, once there was a default, WCI

argues DAD (now somehow ubiquitous with David Alan Ltd) had no rights in the construction contract and thus Sterling was the only one who had rights. Therefore, WCI argues, with no citation, that Sterling had a duty to tell WCI no funding was available. Such an argument is futile and is contrary to the express terms of the Assignment.

The trial court correctly ruled that WCI's argument failed for at least three reasons.

2. *WCI's assignment argument fails because: (a) it constituted an improper and futile post-summary judgment motion to amend; (b) the purpose and express provisions of the "Assignment" evidence it is a security instrument; to which, (c) WCI was not a third party beneficiary; and (d) David Alan, Ltd. and David Alan Development, LLC are separate corporate entities. (App. Br. 20-23)*

(a) Improper and futile post-summary judgment motion. (App. Br. 4 & 45)⁴

The Court dismissed all of WCI's claims against Sterling on October 23, 2009. (CP 921-923) WCI, without filing a CR 59 Motion for Reconsideration or CR 60 Motion for Relief from Judgment, sought relief

⁴ WCI's Assignment of Error No. 3 states "The Court abused its discretion by denying leave to amend the complaint, if any amendment is required, in its amended summary judgment order." (App. Br. 4) Page 45 of WCI's appeal brief addresses the trial court's denial of WCI's motion to amend its complaint to include an aiding and abetting a fraud claim. WCI does not address Assignment of Error No. 3 as it pertains to the trial court's denial of WCI's motion to amend its complaint to include WCI's "assignment" claim. Accordingly, Sterling will address it here.

to amend its complaint, a fourth time, to include the "Assignment" claim.
(CP 973-975)

Washington and Ninth Circuit courts consistently deny motions to amend that are brought post-summary judgment. *Haselwood v. Bremerton Ice Arena*, 137 Wn. App. 872, 890 (2007); *Lindaur v. Rogers*, 91 F.3d 1355, 1357 (9th Cir. 1996).

The trial court properly denied WCI's motion to amend to include the Assignment claim because WCI's motion was untimely and because WCI did not seek CR 59 or CR 60 relief. (CP 965-975)

Further, Washington courts consistently hold that a court properly denies a motion to amend a complaint if the amendment is futile. *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142 (1997).

WCI's motion to amend its assignment claim was futile because the assignment claim was predicated on WCI being a third party beneficiary to the Rita Business Loan Agreement. Since the trial court correctly ruled that WCI was not a beneficiary to the Rita Business Loan Agreement, WCI's motion to amend based on the same legal theory was futile.

Nonetheless, even if amendment was allowed WCI's claim would still fail.

(b) The Assignment is a security instrument.

A contextual examination of the Assignment reveals that it is "additional security for the loan: a security agreement." (App. Br. Appx. B). A security agreement is an agreement that creates an interest in specified property to guarantee the performance of an obligation. Black's Law Dictionary, at 1092 (7th ed. 2000) WCI cites no authority for the proposition that the existence of a security agreement somehow creates a duty on the beneficiary of the agreement to a third party. No such authority exists; and, even if it did, the express terms of the Assignment would control as to ensure that all of the contract's provisions are effectuated. *Colorado Structures, Inc. v. Ins. Co. of the West*, 161 Wn.2d 577, 588 (2007).

The Assignment expressly states that "[n]either this assignment nor any action or inaction on the part of [Sterling] shall constitute an assumption on the part of [Sterling] of any duty or obligation with respect to the Assigned Collateral [ostensibly the David Alan, Ltd. – WCI construction contract], nor shall [Sterling] have any duty or obligation with respect to the Assigned Collateral." (App. Br. Appx. B & CP 802¶4)

Accordingly, WCI was entitled to no benefit of the Rita Business Loan Agreement or Assignment, including notice that Sterling was not going to fund the construction draws.

- (c) WCI is not a third party beneficiary to the Assignment. (App. Br. 23-25)

WCI contends that it is a beneficiary of the Rita Business Loan Agreement and the Assignment and, therefore, Sterling was required to give WCI notice that Sterling was not funding the Rita Business Loan Agreement. The Court correctly ruled that WCI was not a party to, nor third party beneficiary of, the Business Loan Agreement. (CP 982-983) Therefore, since WCI is not a party to the Rita Business Loan Agreement, it follows that WCI is not a party to the Rita Business Loan Agreement's Assignment.

A third party may not enforce, or derive benefit from, a contract unless the party proves that the contracting parties (a) intended that the third party personally benefit from a contract, (b) at the time the contract was made; furthermore, (c) a contract that creates a general obligation to pay the costs of performing a specific undertaking does not establish an intention to benefit the party that eventually does the work as incidental beneficiaries do not have a right to recover damages from the non-performance of the contract. *Del Guzzi Constr., Inc. v. Global Northwest Ltd., Inc.*, 105 Wn.2d 878, 886 (1986); *Layrite Concrete Products, Inc. v. H. Halvorson, Inc.*, 68 Wn.2d 70, 73-74 (1966); *McDonald Const. Co. v. Murray*, 5 Wn. App. 68, 70-71 (1971). See e.g., *Lobak Partitions, Inc. v.*

Atlas Constr. Co., Inc., 50 Wn. App. 493, 497-98 (1988); *Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp.*, 305 F.2d 659, 661-663 (9th Cir. 1962).

The Rita Business Loan Agreement was executed on November 5, 2007. (CP 305). It is undisputed that David Alan Development, LLC and Sterling are the only parties to the Rita Business Loan Agreement and the Assignment. *Id.* The Rita Business Loan Agreement states that it "shall inure to the benefit of [Sterling]" and that a disbursement of funds by Sterling does not constitute an indemnity by Sterling to David Alan Development, LLC "or any other person against any deficiency. . . or against any breach of contract." (App. Br. Appx. A & CP 319)

Neither Sterling nor David Alan Development, LLC knew of WCI on November 5, 2007. In fact, it was not until over nine months later (August 19, 2008), and after Milne tried to hire Mountain West and Clever Construction, that WCI was chosen as the general contractor for the Rita project. (CP 266) WCI cites *Lonsdale v. Chesterfield*, 99 Wn.2d 353, 360-362 (1983), for contrary authority but ignores its holding which stated "the creation of a third party beneficiary contract requires that the parties intended that the promisor assume a direct obligation to the intended beneficiary at the time they entered into the contract." *Id.* at 360-362. There is no evidence that the Rita Business Loan Agreement and the

Assignment were entered into for the benefit of WCI, as the existence of WCI was not known on November 5, 2007 – the day the Rita contracts were executed.

Plaintiff's third party beneficiary claim failed as a matter of law and as such renders its claim based on the Assignment unsupported.

(d) David Alan Development, LLC and David Alan, Ltd. are separate legal entities. (App. Br. 5 n.2 & 21)

WCI asks that the Court disregard the fact that David Alan Development, LLC and David Alan, Ltd. are separate legal entities. WCI's contention is contrary to Washington law and is based on flawed evidentiary support.

Washington consistently recognizes the principal that corporations, limited liability companies, and natural persons exist as distinct legal entities and must be treated as such. *See Exchange Nat. Bank of Spokane v. Meikle*, 61 F.2d 176, 179-180 (9th Cir. 1932); *Dickens v. Alliance Analytical Laboratories, LLC*, 127 Wn. App. 433, 440 (2005); RCW 25.15.030(2). Thus, the actions of David Alan Development, LLC, James Alan, LLC, David Alan, Ltd., and David and Virginia Milne must be viewed as independent acts by legally distinct entities.

This lawsuit involves business loan agreements between Sterling and James Alan, LLC (the Cook Loan); Sterling and David Alan

Development, LLC (the Rita Loan); and David and Virginia Milne (guarantors for both the Cook and Rita Agreements). (CP 325-328) The lawsuit also involves a construction contract between WCI and David Alan, Ltd. – a Washington corporation and an entity unknown to Sterling. (CP 354)

WCI contends that David Alan Development, LLC and David Alan, Ltd. are one and the same. WCI's basis for this contention is its misreading of the Milne entities' Answer in which WCI contends that the Milne entities judicially admitted the agency relationship. (*Compare* CP 26 *with* CP 43) Milne, et al. did not judicially admit that David Alan, Ltd. was an agent of David Alan Development, LLC. Milne, et al.'s supposed "judicial admission" of its "agency" was a responsive averment to paragraph 12 of plaintiff's Second Amended Complaint - an averment that does not allege an agency relationship between David Alan, Ltd. and David Alan Development, LLC.

Accordingly, even if the Assignment was transferred to Sterling, WCI's argument would fail because WCI had no contract with Sterling or David Alan Development, LLC.

D. Assignment of Error No. 2 – Issues Nos. 2 & 5; WCI's shotgun equitable remedy argument fails because: (a) the summary judgment record does not support estoppel or any other pled equitable principles as to Sterling; (b) the Court did not abuse its discretion in denying WCI's motion to amend its complaint

to include non-pled promissory estoppel and estoppel by silence and other equitable claims; and, (c) the Court's ability to fashion the equitable relief WCI seeks is governed by the estoppel doctrine that does not apply here. (App. Br. 4, 25-35, 45)

As to points (a) and (b), WCI, pursuant to the Third Amended Complaint that was operative at the time of the summary judgment hearing, alleged that "Sterling should be estopped by its actions and inactions from refusing to release funds to pay for WCI's construction work and improvements to the real property under the loan Agreement." (CP 813) WCI labeled this one claim "equitable estoppel". (CP 77, RP 8). It was not until WCI responded to Sterling's summary judgment motion that WCI claimed and argued that the same facts gave rise to a multitude of equitable remedies and labels. (CP 775-778, 853). WCI failed to recognize that a "party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting a theory into trial briefs and contending it was in the case all along." *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 26 (1999).

Summary judgment was granted, dismissing all of WCI's claims because WCI did not genuinely dispute any material fact and failed to present evidence of each critical element of its claims. (RP 105-106)

WCI moved to amend and clarify the trial court's order and Sterling responded to the merits of WCI's other estoppel claims. (CP 924

– 945; 946-972) The Court properly denied WCI's motion to amend because it was untimely and futile.

The court entered an amended order clarifying that it intended to dismiss all of WCI's estoppel or related equitable claims and denying WCI's motion to amend. (CP 973-75; RP 105-106).

As to point (c), WCI cites the estate administration case of *Rummens v. Guaranty Trust Co.*, 199 Wn. 337, 347 (1939), for the rule that "equity will not suffer a wrong...to be without a remedy." *Id.* at 347. (App. Br. 25)

WCI ignores the rest of *Rummens*. The truism WCI cited only applies in "exceptional cases in which it appears that legal remedies are unavailing." *Id.* at 348. Legal remedies, as evidenced by WCI's lawsuit, are available against David Alan, Ltd., David Milne, and Virginia Milne.

Additionally, WCI further failed (and still fails) to recognize that in order for WCI to create an estoppel claim against Sterling – for Sterling's not telling WCI it was not funding Rita – WCI has to be destitute of any convenient and available means of acquiring the knowledge as to the funding status of Rita. *Chemical Bank v. WPPSS*, 102 Wn.2d 874, 905 (1984). WCI's estoppel claims are barred by *Chemical Bank* because WCI had the ability to ascertain the true facts as to the status

of Rita but did nothing but accept Milne's representation of payment. *Id.* at 905.

WCI had plenty of opportunity to establish the necessary elements to any of its pled claims against Sterling. WCI, in August 2008, looked at some documents Milne gave it before commencing work and concluded it would be paid. (CP 589) Milne took back whatever documents that WCI reviewed. *Id.* WCI, in September 2008, attempted to get copies of documents from Milne but never received any signed agreement between DAD and Sterling – nor any between David Alan, Ltd. and Sterling. (CP 592-593) WCI never saw the Assignment of Collateral. (App. Br. Appx. B) WCI, in October 2008, finally contacted Sterling and was immediately informed that loan funds were not being advanced; WCI immediately ceased work. (CP 268)

Lastly WCI further failed (and still fails) to establish the "reliance" element of its estoppel claims. Washington courts hold that a third party cannot establish reliance if it lacks third party beneficiary status. *Donald Murphy Contractors, Inc. v. King Co.*, 112 Wn. App. 192, 198 (2002); *Gass v. CW Capital, LLC*, 150 Fed. Appx. 605, 607 (9th Cir. 2005) (customer could not use an unsigned financial analysis document from the customer's bank to establish promissory estoppel reliance against the lender).

The record is void of any fact that WCI "relied" on Sterling's loan agreement and changed its position. (App. Br. 27) The record is clear that WCI was unknown to Sterling as to the Rita project. The record is clear that David Alan Ltd. was a stranger to Sterling. Sterling had no special, or any, relationship with either WCI or David Alan Ltd.

WCI then, and now, refuses to recognize that, as here, where no special relationship exists, lender-Sterling owed no duty to the stranger-WCI to disclose information concerning its Borrower (DAD). *Tokarz v. Frontier Federal Savings & Loan Ass'n*, 33 Wn. App. 456, 459 (1982).

All estoppel and equitable claims/remedies were properly dismissed.

- 1. The doctrines of estoppel by silence and promissory estoppel might apply under the record as to David Milne – but not as to Sterling. (App. Br. 26-35).***

WCI argues that the estoppel by silence and promissory estoppel doctrines apply. (App. Br. 26) The doctrines might apply to the acts and omissions of David Alan, Ltd. through David Milne. The doctrines, however, do not apply to Sterling because there was no promise from Sterling to WCI (or David Alan Ltd.) upon which WCI could reasonably rely.

Washington courts consistently hold that the cornerstone of the doctrine of estoppel is that a party should not be allowed to deny what it

once "solemnly acknowledged." *Arnold v. Melani*, 75 Wn.2d 143, 147 (1968); *Spokane Valley State Bank v. Murphy*, 150 Wn. 640, 645 (1929)("Mere silence, to constitute estoppel, must have operated as a fraud, and must have actually misled to the injury of the party [WCI] invoking estoppel."). A party pleading the estoppel doctrine must establish: (1) acts, statements, or admissions inconsistent with a claim subsequently asserted; (2) a change of position by the other party in reliance on the acts, statements or admissions; and, (3) a resulting injustice to the innocent party if the promising party is allowed to contradict or repudiate its former acts, statements or admissions. *Martin Marietta Aluminum, Inc. v. General Elec. Co.*, 586 F.2d 143, 147 (9th Cir. 1978). The estoppel doctrine is not favored; a party pleading estoppel must establish a claim by clear, cogent and convincing evidence. *Berschauer/Phillips Constr. Co. v. Seattle School Dist. No. 1*, 124 Wn.2d 816, 831 (1994).

Here, there are no "acts, statements, or admissions" by Sterling that are inconsistent with any claims that Sterling has asserted. Sterling entered into a contract with James Alan, LLC. and David Alan Development, LLC. A default occurred. Sterling properly exercised its rights under the DAD contract to cease advancing funds. Sterling made no representation to WCI upon which Sterling now seeks to change its

position. Further, the unsigned Rita Business Loan Agreement of November, 2007, that Milne showed to WCI in August, 2008, is not a promise upon which WCI could reasonably rely for payment. *Donald Murphy Contractors*, 112 Wn. App. at 198.

WCI's promissory estoppel argument fails as well. A party pleading promissory estoppel must establish: (1) a promise that (2) the promisor intended to use in order to cause the promisee to change its position that (3) caused the promisee to change its position in (4) justifiable reliance on the promise, and that (5) injustice can be avoided only by enforcing the promise. *Hilton v. Alexander & Baldwin, Inc.*, 66 Wn.2d 30, 31 (1965). In order for a promissory estoppel cause of action to arise "it follows that a promise must be communicated by the promisor to the promisee before the promisee can justifiably rely on it." *Id.* (emphasis added).

The record contains no facts that evidence a promise communicated by Sterling to WCI that caused WCI to change its position.

2. ***Sterling (a) had no equity duty to notify WCI; (b) Sterling's privacy notice prohibited Sterling from notifying WCI; (c) the Construction Loan Agreement did not authorize disclosure of David Alan Development LLC's financial information; and, (d) Sterling had no legal duty to notify WCI of the cessation of advances on Rita. (App. Br. 28-35)***

WCI argues that Sterling had a duty "in equity and good conscious" to warn WCI of the "real fact" that Sterling was not funding the Rita Business Loan Agreement. (App. Br. 28) Plaintiff cites *Lacy v. Wozencraft*, 188 Okla. 19, 20 (1940), for the "equity in good conscious" argument.

WCI's citation to *Lacy* is inapplicable because the "equity and good conscience" duty is only triggered by the satisfaction of promissory estoppel elements – none of which exist here as to Sterling. *Id.* at 20.

In its argument, WCI selectively cites a portion of the Rita Business Loan privacy notice and argues that the notice required Sterling to disclose to WCI that Sterling was not funding the Rita loan. WCI's argument is not supported by the terms of the contract or the law. (App. Br. 29).

The privacy notice that was part of the Rita Business Loan Agreement contractually obligated Sterling to protect David Alan Development, LLC's "customer information." (CP 322) Customer information means "non public personal information about a consumer or a consumer's current or former relationship with Sterling Savings Bank." *Id.*

WCI argues that such disclosure would have been warranted pursuant to a "fraud investigation." WCI's argument – and entire factual

recitation – presumes the existence of a fraud. Although WCI's brief is laced with allegations that Sterling ostensibly knew of the "fraud" Milne was allegedly perpetuating on WCI, the record is void of such evidence. WCI cites no evidence that satisfies the nine elements of fraud. *Beckendorf v. Beckendorf*, 76 Wn.2d 457, 462 (1969). WCI ignores the fact that Sterling was in the dark as to the David Alan, Ltd. – WCI relationship. For all Sterling knew David Alan, Ltd.'s multi-millionaire president David Milne had arranged WCI to be paid via a separate fund source. WCI's argument implies that (a) not only was Sterling required to disclose customer information to WCI, but also (b) to investigate David Alan, Ltd. – an entity with whom Sterling had no relationship – on behalf of WCI – an entity with whom Sterling had no relationship – to ensure WCI was not being defrauded.

Sterling's adherence to its privacy policy is in accord with the law. Disclosing David Alan Development, LLC's financial information and its relationship with Sterling, to stranger WCI, would have subjected Sterling to violations based on state, federal, and common law. *See* RCW 19.215 *et seq.*; RCW 9.35.010 *et seq.*; 15 U.S.C. § 6801 *et seq.*; *Tokarz*, 33 Wn. App. at 459. (Bank has no duty to disclose customer information.) *Accord Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 586-589 (1961). Sterling's non-notification of WCI concerning the financial status and its

financial relationship with David Alan Development, LLC was appropriate and proper.

WCI further argues that the Rita Business Loan Agreement expressly authorized disclosure to WCI, because it allowed Sterling to contact a contractor "for any other purpose." (App. Br. 29 & CP 792)

Washington courts consistently hold that a contract should be read so that all of the contract's provisions are effectuated. *See Colorado Structures*, 161 Wn.2d at 588. This rule requires that the "for any other purpose" of the Rita Business Loan Agreement language be read in conjunction with the agreement's privacy notice. (*Compare* CP 792 with CP 322) The "for any other purpose" language means that Sterling had the right to communicate with a contractor to verify the disbursement of construction funds (none of which were disbursed here). (CP 792) The privacy notice forbade disclosure of information germane to Sterling's relationship with David Alan Development, LLC. (CP 322) The cessation of advances on the Rita Business Loan Agreement is germane to Sterling's relationship with David Alan Development, LLC and could not be disclosed to WCI.

Refusing to recognize that when WCI contacted Sterling it was told that no loan advances would be made, WCI argues that Sterling had to disclose to WCI the cessation of advances to WCI because of: (i)

Sterling's superior knowledge; (ii) unique circumstances; and, (iii) Sterling's partial disclosure. (App. Br. 30-35)

WCI cites *Haberman v. WPPSS*, 109 Wn.2d 107, 166-168 (1987), for the proposition that a party's superior knowledge gives rise to a duty to disclose. (App. Br. 31) *Haberman* is distinguishable; it addressed whether a fraud claim could be asserted where one party to a transaction had a duty to speak to another based on that party's superior knowledge. *Id.* at 166.

First, no fraud claim against Sterling has ever been made. Second, Sterling – unlike the parties in *Haberman* – was not a party to the David Alan Ltd.-WCI construction contract. Third, *Haberman's* holding utilized Restatement (Second) Torts, §§ 531-533 – 551's emphasis on the acts of a "maker of [the] fraudulent misrepresentation" who was a party to the underlying business transaction. *Id.* at 167-168. *Haberman* does not apply to Sterling because (a) David Alan Development, Ltd. and WCI were not parties to the David Alan Development, LLC-Sterling transaction and (b) Sterling did not make any fraudulent representation.

WCI argues that if negligence concepts applied, then Sterling had a duty to inform WCI. (App. Br. 30-31.) There is no claim of negligence against Sterling. No duty was owed by Sterling to a noncustomer.

WCI states that Sterling created "secret material facts." Sterling created no facts. Milne defaulted on the Cook Loan. Sterling properly

chose to cease advances under the Rita Loan. Milne had knowledge of the cessation of advances on the Rita Loan. Milne did not disclose the cessation to WCI. These are facts of Milne's creation – not Sterling's

WCI argues that "special circumstances" gave rise to a duty by Sterling to inform WCI of the cessation of advances on the Rita project. (App. Br. 32-34) WCI cites *Tokarz* in support. There were no special circumstances.

Tokarz does not apply as WCI intends. *Tokarz* involved a lawsuit against a bank by its customer when: (a) the customer hired a contractor (another customer of the bank) to build a house; (b) the bank lent the customer money for the construction; (c) the bank separately lent the contractor money for five other unrelated construction projects; (d) the bank subsequently discovered that the five unrelated projects were subject to liens against the contractor; (e) the bank did not advance funds to the contractor; and, (f) the contractor defaulted, the customer fired the contractor and claimed that the bank should have informed the customer of the contractor's inability to perform other contracts as doing so would have saved customer the costs of completing the customer's house. *Tokarz* at 457-458. The Court upheld the summary judgment dismissal of the customer's complaint, holding that a bank owes no fiduciary duty to its customers, and stated "the general rule [is] that a bank is under a duty not

to disclose the financial condition of its customers [i.e. the contractor]," to another one of its customers. *Id.* at 459 (emphasis added).

Tokarz allows a similar conclusion with respect to Sterling because of its holding and the fact that relationship between Sterling, David Alan, Ltd. and WCI is even more attenuated than the relationship addressed in *Tokarz*⁵ where no duty existed on the bank to tell one of its customers about the financial condition of another one of its customers.

WCI argues that Sterling's partial disclosure gave rise to a duty to disclose the cessation of funding on Rita because of Sterling's dealings with WCI on the Cook Addition project two months after the Rita project started. (App. Br. 32)

Washington courts consistently hold that "course of dealing" evidence does not prevail over express contract terms. *Seattle-First Nat'l Bank v. Westwood Lumber, Inc.*, 65 Wn. App. 811, 823 (1992). Sterling's relationship with WCI on the Cook project has no bearing on Sterling's relationship (or lack thereof) with WCI on the Rita project. The terms of the Rita Loan – of which WCI is not a party – control and evidence that Sterling owed no tort or contractual obligation to WCI.

⁵ WCI argues that *Tokarz* is distinguishable because the bank, in *Tokarz*, derived no special benefit. *Tokarz* is not distinguishable; Sterling has derived no special benefit from its relationship with David Alan Development, LLC. In fact, Sterling's trustee sale purchase of the Rita property was for an amount "less than the debt owed" on the Rita Business Loan Agreement. (CP 1169)

3. *The principles of equitable estoppel, estoppel in pais, estoppel by acquiescence cannot be extended to Sterling.* (App. Br. 35-37)

Equitable estoppel cannot be, as WCI contends, used offensively. WCI's only pled estoppel claim against Sterling was equitable estoppel - WCI admitted the same in writing and in open court. (CP 77; RP 8)

Washington courts consistently hold that equitable estoppel cannot be used offensively. *Greaves v. Medical Imaging Systems, Inc.*, 124 Wn.2d 389, 397 (1994); *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73-74 (2005); *McCormick v. Lake Wash. School Dist.*, 99 Wn. App. 107, 117 (1999).

Estoppel *in pais*, which contains the same elements as equitable estoppel, does not apply because it is a doctrine primarily used by the wronged party to defeat an improperly obtained statute of limitations defense. *Ross v. Harding*, 64 Wn.2d 231, 238 (1964); *Central Heat, Inc. v. Daily Olympian*, 74 Wn.2d 126, 134 (1968). Further, in order for equitable estoppel or estoppel *in pais* to apply, the proponent must establish that it reasonably relied on the representations of another. *See Sorenson v. Pyeatt*, 158 Wn.2d 523, 538 (2006). Here, there were no representations.

The reoccurring theme spanning the estoppel doctrines are inconsistent acts, conduct, or statements upon which a party reasonably

relied. There are no inconsistent acts, conduct, or statements by Sterling let alone the existence of any reasonable reliance.⁶

E. Assignment of Error No. 2 – Issue No. 3: Equitable subrogation or equitable subordination does not apply because WCI has not paid any debt. (App. Br. 37-38)

WCI assigns error to the trial court's determination that the doctrine of equitable subrogation does not apply. WCI argues that the doctrines of equitable subrogation, (or equitable subordination), allows the subordination Sterling's lien to WCI's lien because the doctrine is based on a rule that is not "fixed." (App. Br. 37) This argument is contrary to the law and does not recognize that all liens have been extinguished by the recent foreclosure sale.

Washington courts consistently hold that a party asserting an equitable subrogation claim must establish: (a) the existence of a debt for which that party is liable; (b) the satisfaction of that party's debt by the party claiming subrogation; and, (c) that the subrogee's payment of the debt was in furtherance of a duty – not a voluntary act. *Livingston v. Shelton*, 85 Wn.2d 615, 618-620 (1975); *Goodrich v. Fahey*, 55 Wn.2d

⁶ Page 35 of WCI's brief alludes to an estoppel by acquiescence argument; however, the body of WCI's brief does not address the merits of an estoppel by acquiescence argument. Accordingly, respondent will not address WCI's estoppel by acquiescence argument. Respondent did address WCI's estoppel by acquiescence argument at the trial court level and invites the Court to consider that briefing if required. (CP 955)

692, 694 (1960); *In re Farmers' & Merchs.' State Bank of Nooksack*, 175 Wn. 78, 86 (1933). WCI has not satisfied any of these elements.

While WCI contends that the equitable subrogation doctrine is not a "fixed rule", the requirement remains that a party claiming benefit of the doctrine pay the debt of another. *Tri-City Constr. Council, Inc. v. Westfall*, 127 Wn. App. 669, 674 (2005). WCI has not paid any claims in order to be substituted to the rights of any party.

F. Assignment of Error No. 2 – Issue No. 4: WCI has no unjust enrichment claim because (a) WCI was not a party to the David Alan Development, LLC – Sterling transaction and (b) because Sterling was not unjustly enriched. (App. Br. 39-41)

WCI assigns error to the trial court's ruling that its unjust enrichment claim failed. WCI contends that Sterling was unjustly enriched as a result of WCI's work on the Rita Project. WCI's argument fails under the law and the facts.

Washington Courts consistently hold that an unjust enrichment claim: (a) cannot be asserted against a non-party to a contract; and, (b) fails for lack of any enrichment, let alone unjust enrichment. *Farwest Steel Corp. v. Mainline Metal Works, Inc.*, 48 Wn. App. 719, 731-733 (1987) (lender's failure to inform a non-party of the status of a loan does not support unjust enrichment claim); *Dargt v. Dargt/DeTray LLC*, 139 Wn. App. 560, 576 (2007); *Town Concrete Pipe v. Redford*, 43 Wn. App. 493,

502 (1986). "Enrichment alone will not suffice to invoke the remedial powers of a court of equity. It is critical that the enrichment be unjust both under the circumstances and as between the two parties to the transaction [and] the mere fact that a third person benefits from a contract between two other persons does not make such third person liable in quasi-contract, unjust enrichment, or restitution." *Farwest*, at 731-733.

WCI's unjust enrichment claim failed because Sterling was not a party to the contract between WCI and David Alan, Ltd. Sterling did not acquiesce in or encourage David Alan, Ltd.'s contract with WCI, nor did Sterling entice WCI to perform work under the David Alan Ltd.-WCI construction contract.

WCI's unjust enrichment claim failed because Sterling was not enriched, as the land was sold at foreclosure sale for less than Sterling's debt. (CP 1169) Sterling is owed over \$1.5 million on the Rita Business Loan Agreement and the Rita project is not complete. (CP 372; RP 66).

WCI cites *Irwin Concrete, Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190 (1982), and numerous foreign decisions as contrary authority. WCI's authorities are distinguishable and do not represent Washington law.

Sun Coast is distinguishable because in *Sun Coast* the contractor-plaintiff's work (a) helped the lender close out its loan and (b) the plaintiff

commenced work at the direct urging of the lender. *Id.* 193-195. No such facts exist here.

The foreign authorities WCI cites are distinguishable for similar reasons. *Blosam Contractors, Inc. v. Republic Mortgage Investors*, 353 So.2d 1225, 1226 (1977) (involving contractor "execute[ing] its acceptance" to borrower-lender agreement: not the case here); *Embree Constr. Group Inc. v. Rafcor, Inc.*, 330 N.C. 487, 489-90 (1992) (involving bank paying contractor directly and a completed construction project: not the case here); *Swinerton & Walberg Co. v. Union Bank*, 25 Cal.App.3d 259, 266-263 (1972) (involving general contractor signing Building Loan Agreement between borrower and bank and completed project: not the case here); *Miller v. Mountain View Sav. & Loan Ass'n.*, 238 Cal.App.2d 644, 663 (1965) (involving case superseded by statute and payment by bank to escrow agent who represented contractors: not the case here).

WCI's unjust enrichment claim fails as to Sterling.

G. Assignment of Error No. 2 – Issue No. 6: The record does not support WCI's tortious interference with a business expectancy claim against Sterling.⁷ (App. Br. 47-48)

⁷ WCI's Assignment of Error No. 2 – Issue 6's heading indicates that WCI intends to address the trial court's denial of WCI's aiding and abetting a fraud claim. Sterling's argument regarding the aiding and abetting a fraud claim is set out on pages 44 through 48.

WCI assigns error to the trial court's dismissal of its tortious interference with a business expectancy claim.⁸ WCI claims that WCI's "valid contract" and Sterling's knowledge of the same gives rise to its tortious interference with a business expectancy cause of action. (App. Br. 47) No facts to exist to support such a claim.

A tortious interference with a business expectancy claim requires: (1) the existence of a business expectancy; (2) the defendant's knowledge of the expectancy; (3) the defendant's intentional interference with the business expectancy; (4) improper purpose or means by the defendants; and (5) damage. *See Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 157 (1997).

WCI failed to establish the "business expectancy" element of the claim. Washington courts hold that the "business expectancy" element of a tortious interference claim is not established, by a third party against the lender, if the lender's acts are toward the borrower. *See Miller v. U.S. Bank NA*, 72 Wn. App. 416, 428 (1994). Since Sterling's actions were toward David Alan Development, LLC (its borrower) WCI cannot establish the first element of the tortious interference claim. *Id.* at 428.

⁸ WCI characterizes its tortious interference with a business expectancy claim as "tortious interference with a contract." WCI never pled "tortious interference with a contract" - it pled "tortious interference with a business expectancy." Sterling addresses Assignment of Error Number No. 2 – Issue 6 as a tortious interference with a business expectancy claim.

WCI failed to establish "intentional interference" as it was required to show that Sterling had a duty of non-interference, that the interference was wrong beyond the fact of the interference itself, and that the interference was intentional, not incidental. *Pleas v. City of Seattle*, 112 Wn.2d 794, 804 (1989). Sterling owed no duty to WCI, a non-customer, to see that the Rita Business loan funds were properly disbursed by David Alan Development, LLC, and to see that David Alan, Ltd. performed its contract with WCI. *See supra* at 32.

WCI failed to establish the "improper purpose" element of the tortious interference with a business expectancy claim. WCI was required to establish that Sterling pursued an improper objective in harming WCI. *Omega Envtl., Inc. v. Gilbaroco, Inc.*, 127 F.3d 1157, 1166 (9th Cir. 1997). A party does not act with an improper objective where, as here, it is: (a) asserting its rights pursuant to a contract in furtherance of its economic interest; or, (b) exercising its legal interests; or, (c) asserting an arguable interpretation of existing law. *Id.* at 1166; *Leingang*, 131 Wn.2d at 157. Washington courts hold that as a "general rule...a bank is under a duty **not** to disclose the financial condition of its customers." *Tokarz*, 33 Wn. App. at 459 (emphasis added).

Sterling's exercise of the cessation of advance remedy expressly allowed in the Rita Loan Agreement is a permissible assertion of its rights

in order to maximize its economic interests. Sterling believed it would not be paid on the Cook and Rita Business Loan Agreements because of the financial condition of guarantors David Alan Development, LLC, Virginia Milne, and David Milne's materially changed. This change, caused by James Alan, LLC's default on the Cook Loan and failure to remedy the same after being given four months to do so by Sterling, imposed a manifest financial obligation on guarantors David and Virginia Milne, and David Alan LLC. Sterling, being of the (correct) belief that it would not be paid for further disbursements on the Rita loan, properly exercised its rights to protect its economic interests.

Sterling properly exercised its legal interests by not informing a stranger, WCI, of David Alan Development, LLC's default.

State, federal and common law, coupled with Sterling's contractually bargained for privacy policies, required non-disclosure of such information. *See generally* RCW 9.35.010; RCW 19.215 *et seq.*; 15 U.S.C. § 6801. *Accord Peterson v. Idaho First Nat'l Bank*, 83 Idaho 578, 586, 589 (1961).

The trial court correctly ruled that WCI failed to establish the elements needed for a tortious interference of a business expectancy claim.

H. Assignment of Error No. 1 – Issue No. 1 and Assignment of Error No. 2 – Issue No. 6: WCI's Aiding and Abetting a Fraud

claim was properly denied by the trial court because it was futile. (App. Br. 41-45)

WCI assigns error to the trial court's denial of allowing amendment of the complaint for an aiding and abetting a fraud claim. WCI cites CR 15(a) for the blanket rule that amendment shall be freely granted as justice requires. WCI ignores the exception to this rule that allows a court, at its discretion, to deny a motion to amend that is futile or based on a legal theory not recognized in Washington. *Ino Ino, Inc.*, 132 Wn.2d at 142; *Doyle v. Planned Parenthood of Seattle – King Co., Inc.*, 31 Wn. App. 126, 132 (1982).

WCI's aiding and abetting fraud claim was futile. WCI petitioned the trial court to recognize an "aiding and abetting a fraud" cause of action as stated in Restatement 2nd (Torts) §876. Washington has not adopted Restatement §876. *Martin v. Abbott Laboratories*, 102 Wn. 2d 581, 596-598 (1984); *McKasson v. State*, 55 Wn. App. 18, 28 n. 10 (1989); *Thomas v. Casey*, 49 Wn.2d 14, 17-18 (1956).⁹

WCI contends that foreign decisions are enough to persuade the Court to adopt Restatement § 876. The cases WCI cites are legally and

⁹ WCI cites *Westview Investments Ltd. v. U.S. Bank Nat'l Ass'n*, 133 Wn. App. 835, 853-54 (2006) and *Davin v. Dowling*, 146 Wn. 137, 138-140 (1927) for authority that Washington recognizes Restatement §876. *Westview's* citation to Restatement §876 was based on *Martin Laboratories* – the Supreme Court decision that rejected adopting Restatement § 876. *Id.* at 854. *Davin* is legally and factually distinguishable because it addressed conversion and involved the bank directly interacting with the individual who was later found to be at fault for conversion. *Davin*, at 139.

factually distinguishable. The cases are legally distinguishable because there has been no finding of fraud here. The cases are factually distinguishable because, as the trial court was advised, Sterling was not a party to the contract upon which the underlying (and alleged) fraud was based. (RP 31) Sterling's relationship with David Alan Development, LLC and WCI's relationship with David Alan, Ltd. illustrate the futility in allowing the complaint to be amended to include an aiding and abetting a fraud claim.

Applying the elements of Restatement § 876, and WCI's citation to *Wells Fargo Bank v. Arizona Laborers*, 201 Az. 474, 38 P.3d 12 (2002), further illustrates the futility of WCI's motion. Restatement §876, applied under these facts, required proof that (1) Sterling acted in concert with Milne pursuant to a common design; or, (2) knew Milne's conduct constituted a breach of duty to WCI and Sterling gave substantial encouragement to Milne to so act; or, (3) Sterling gave substantial assistance to Milne and Sterling's own actions breached a duty to WCI. There are no allegations or facts that Sterling acted in concert with Milne; no facts that Sterling knew of, and substantially assisted in, Milne's "fraud", nor are there facts that Sterling gave substantial assistance to Milne. Thus, § 876 does not apply

Arizona Laborers is distinguishable as well. First, *Arizona Laborers* involved an allegation that a bank "aided and abetted" the developer's fraud by cloaking the developer with a "false appearance of financial vigor" so as to induce another lender to fund a tri-party agreement involving the bank, developer, and plaintiff. 38 P.3d at 17-18, 19. The *Arizona Laborers* court found the tri-party contractual relationship compelling in determining the viability in the "aiding and abetting" fraud claim. *See Id.* at 22-23. No such relationship exists between Sterling and WCI. Second, *Arizona Laborers* held that "aiding and abetting liability is based on proof of scienter...the defendants must know that the conduct they were aiding and abetting was a tort." *Id.* at 23. None of WCI's four complaints alleged scienter – the "mental state consisting [of an] intent to deceive, manipulate, or defraud" – as to Sterling. *See Black's Law Dictionary* at 1081 (7th ed. 2000)

The other cases WCI cites are distinguishable for the same reason. *Adelphia Recovery Trust v. Bank of America N.A.*, 624 F. Supp.2d 292, 308 (S.D.N.Y. 2009) (involving direct collusion between bank and wrongdoer to defraud company: no allegation of that here); *Dale v. Ala Acquisitions, Inc.*, 203 F. Supp.2d 694, 697 (S.D. Miss. 2002) (involving RICO claim against employer who aided and abetted employee's fraud: no allegation of that here); *El Camino Resources Ltd. v. Huntington Nat'l*

Bank, 2009 US Dist. Lexis 13143, *3-5, (2009) (involving allegation that bank aided and abetted fraud by laundering money and that doing so (a) "substantially" assisted the wrongdoer and (b) proximately caused the violation: no allegation of that here); *Norman v. Brown, Todd & Heyburn*, 693 F. Supp. 1259, 1264 (D. Mass. 1988) (involving aiding and abetting allegation in RICO case and holding that abetting party must "substantially assist" in fraud and be knowledgeable of the fraud: no allegation of that here).

WCI's attempt to add an "aiding and abetting" claim was futile. WCI's four different complaints contained no allegation that Sterling "substantially assisted" David Alan Development, LLC, David Milne, Virginia Milne or David Alan Ltd. in David Milne's alleged decision not to pay WCI. Quite the contrary. WCI's complaints contain no allegation as to Sterling's scienter. Sterling did not cloak David Alan Development, LLC with "a false appearance of financial vigor" – it ceased advancing money as allowed under the contract that it had entered into with David Alan Development, LLC. Proper exercise of contractual rights is not a fraud nor does it evidence the aiding of the same.

WCI's motion to amend was futile and the trial court properly ruled accordingly.

I. Assignment of Error No. 1 – Issue No. 2: Sterling demonstrated that the Aiding and Abetting a Fraud claim was prejudicial, the trial court exercised its discretion and agreed. (App. Br. 45)

The trial court additionally properly denied the amendment because the "aiding and abetting" fraud claim was prejudicial.

A motion to amend may be denied if the non-moving party establishes hardship or prejudice. *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 166 (1987). Factors evidencing prejudice include hardship, jury confusion and the introduction of a remote issue. *Id.* at 166. A trial court's denial of a motion for leave to amend the complaint is reviewed under the abuse of discretion standard. *Tagliani v. Colwell*, 10 Wn. App. 227, 233 (1973).

Sterling argued that requiring it to defend against a cause of action not recognized under Washington law would result in undue hardship as it would be difficult for Sterling to develop a defense to a legal scheme that did not exist in Washington. (CP 111; RP 14-15, 35-37)

Sterling argued that requiring it to defend against an unrecognized cause of action would result in jury confusion as a jury could confuse David Alan, Ltd.'s breach of its WCI construction contract with Defendant Sterling's proper exercise of its contract remedies allowed under the David Alan Development, LLC – Sterling Business Loan Agreement. Thus, the

aiding and abetting claim would distract the jury from the contractual thrust of WCI's claims against Sterling. *Id.*

Sterling argued that requiring it to defend against an "aiding and abetting a fraud" claim would also cause unfair prejudice by introducing a remote issue. It is undisputed that banks, at this stage in our country's history, are viewed in an unfavorable light. Accordingly, equating Sterling's exercise of its contract rights with conduct tantamount to "aiding and abetting" a fraud would unfairly prejudice Sterling.

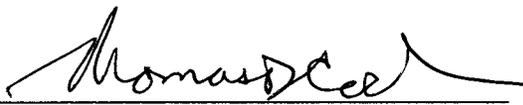
The trial court properly exercised its discretion in considering the above factors in denying WCI's motion to amend.

CONCLUSION

There are no factual or legal grounds that allow any claims by WCI against Sterling. The trial court acted properly in all regards. The judgment should be affirmed.

Respectfully submitted this 6th day of April, 2010.

Witherspoon Kelley

By: 

Thomas D. Cochran, WSBA 5910
Duane M. Swinton, WSBA 8354
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Attorneys for Respondent

150 Fed.Appx. 605, 2005 WL 2250740 (C.A.9 (Wash.))
 (Not Selected for publication in the Federal Reporter)
 (Cite as: 150 Fed.Appx. 605, 2005 WL 2250740 (C.A.9 (Wash.)))

H

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
 Ninth Circuit.
 H. Stanley GASS; et al., Plaintiffs-Appellants,
 v.
 CWCAPITAL LLC, Defendant-Appellee.
 No. 04-35167.

Submitted Sept. 12, 2005.^{FN*}

FN* The panel unanimously finds this case suitable for decision without oral argument. See Fed. R.App. P. 34(a)(2).

Decided Sept. 16, 2005.

Background: Borrowers sued lender, asserting claims for promissory estoppel and negligent misrepresentation. The United States District Court for the Western District of Washington, Ronald B. Leighton, J., denied borrowers' second motion to reconsider dismissal of promissory estoppel claim and their motion for leave to file second amended complaint, and granted summary judgment on negligent misrepresentation claim. Borrowers appealed pro se.

Holdings: The Court of Appeals held that:

- (1) lender did not make promise sufficient to support promissory estoppel claim;
- (2) denial of second motion to reconsider was not abuse of discretion;
- (3) denial of motion for leave to file second amended complaint was not abuse of discretion;
- (4) denial of motion for leave to file second amended complaint did not violate borrowers' First

Amendment right to petition the government; and (5) lender was not liable for negligent misrepresentation.

Affirmed.

West Headnotes

[1] Estoppel 156 ↪85

156 Estoppel
 156III Equitable Estoppel
 156III(B) Grounds of Estoppel
 156k82 Representations
 156k85 k. Future Events; Promissory Estoppel. Most Cited Cases
 Lender did not make promise sufficient to support borrowers' claim for promissory estoppel, based upon lender's alleged negligent misrepresentation of amount of cash that borrowers would need at closing to borrow through lender funds necessary to construct apartment complex, inasmuch as lender's hypothetical financial scenario underlying claim was unsigned, was subject to adjustment, and was merely an application, rather than commitment to lend.

[2] Federal Civil Procedure 170A ↪1840

170A Federal Civil Procedure
 170AXI Dismissal
 170AXI(B) Involuntary Dismissal
 170AXI(B)5 Proceedings
 170Ak1839 Vacation
 170Ak1840 k. Grounds and Objections. Most Cited Cases
 Denial of second motion to reconsider dismissal of borrowers' promissory estoppel claim against lender was not abuse of discretion, given that district court fully reviewed previously undocketed response to motion to dismiss and properly found that there was no manifest error in its earlier ruling.

[3] Federal Civil Procedure 170A ↪851

150 Fed.Appx. 605, 2005 WL 2250740 (C.A.9 (Wash.))
 (Not Selected for publication in the Federal Reporter)
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170A Federal Civil Procedure
 170AVII Pleadings and Motions
 170AVII(E) Amendments
 170Ak851 k. Form and Sufficiency of
 Amendment. Most Cited Cases
 Denial of borrowers' motion to file second amended
 complaint in action against lender was not abuse of
 discretion, inasmuch as there was no factual basis
 for borrowers' proposed claims under Racketeer In-
 fluenced and Corrupt Organizations Act (RICO)
 and Washington Consumer Protection Act, and bor-
 rowers' attempts to include lender's counsel as de-
 fendants in those claims were futile, frivolous, and
 abuse of process. 18 U.S.C.A. § 1961 et seq.;
 West's RCWA 19.86.010 et seq.

[4] Constitutional Law 92 ⚡ 1435

92 Constitutional Law
 92XV Right to Petition for Redress of Griev-
 ances
 92k1435 k. In General. Most Cited Cases
 (Formerly 92k91)

Federal Civil Procedure 170A ⚡ 839.1

170A Federal Civil Procedure
 170AVII Pleadings and Motions
 170AVII(E) Amendments
 170Ak839 Complaint
 170Ak839.1 k. In General. Most Cited
 Cases
 Denial of borrowers' motion for leave to file second
 amended complaint in action against lender did not
 violate borrowers' First Amendment right to peti-
 tion the government. U.S.C.A. Const.Amend. 1.

[5] Banks and Banking 52 ⚡ 100

52 Banks and Banking
 52III Functions and Dealings
 52III(A) Banking Franchises and Powers,
 and Their Exercise in General
 52k100 k. Torts. Most Cited Cases
 Lack of showing that borrowers suffered damages
 as a result of lender's purported misrepresentation

of amount of cash that borrowers would need at
 closing to borrow through lender funds necessary to
 construct apartment complex precluded lender's li-
 ability for negligent misrepresentation.
 *606 H. Stanley Gass, Vancouver, WA, pro se.

Ute Lindsay Gass, Vancouver, WA, pro se.

Bonnie Hochman Rothell, Monica E. Monroe,
 Washington, DC, for Defendant-Appellee.

Appeal from the United States District Court for the
 Western District of Washington Ronald B.
 Leighton, District Judge, Presiding. D.C. No. CV-
 03-05364-RBL.

Before: REINHARDT, RYMER, and HAWKINS,
 Circuit Judges.

MEMORANDUM ^{FN**}

FN** This disposition is not appropriate
 for publication and may not be cited to or
 by the courts of this circuit except as
 provided by Ninth Circuit Rule 36-3.

**1 H. Stanley Gass and Ute Lindsay Gass appeal
 pro se the district court's denial of their second mo-
 tion to reconsider the dismissal of a promissory es-
 toppel claim, denial of their motion for leave to file
 a second amended complaint, and grant of summary
 judgment on the claim of negligent misrepresenta-
 tion in connection with the brokerage of a mortgage
 loan. We have jurisdiction pursuant to 28 U.S.C. §
 1291. We review for abuse of discretion *607 the
 denial of a motion to reconsider, *see Herbst v.*
Cook, 260 F.3d 1039, 1044 (9th Cir.2001), and a
 motion for leave to amend, *see Chodos v. West*
Publ'g Co., 292 F.3d 992, 1003 (9th Cir.2002). We
 review de novo the grant of summary judgment.
See Delta Sav. Bank v. United States, 265 F.3d
 1017, 1021 (9th Cir.2001). We affirm.

[1][2] Appellants contend that appellee negligently

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misrepresented the amount of cash appellants would need at closing in order to borrow through appellee the funds necessary to construct an apartment complex. The district court correctly noted that the hypothetical financial scenario that appellee prepared, and that appellants relied upon to support their claim of promissory estoppel, was unsigned, subject to adjustment, and merely an application rather than a commitment to lend. Consequently, appellants did not show that appellee made a promise sufficient to support a claim for promissory estoppel. *See Jones v. Best*, 134 Wash.2d 232, 950 P.2d 1, 5 (1998). The district court did not abuse its discretion in denying appellants' second motion to reconsider because it fully reviewed the previously undocketed response to the motion to dismiss and properly found there was no manifest error in its earlier ruling.

[3][4] The district court did not abuse its discretion in denying appellants' motion to file a second amended complaint because there was no factual basis for appellants' Racketeer Influenced and Corrupt Organizations Act ("RICO") and Washington Consumer Protection Act ("CPA") claims and appellants' attempts to include appellee's counsel as defendants in the RICO and CPA claims were futile, frivolous, and an abuse of process. *See Moore v. United Kingdom*, 384 F.3d 1079, 1088 (9th Cir.2004). Appellants' contention that the district court's denial of their motion to amend violated their first amendment right to petition the government is also without merit.

[5] The district court properly granted summary judgment on appellants' claim of negligent misrepresentation because they have failed to raise a genuine issue of material fact to show that they suffered damages as a result of the purported misrepresentation. *See J & J Food Centers, Inc. v. Selig*, 76 Wash.2d 304, 456 P.2d 691, 695 (1969), cited in *Burgess v. Premier Corp.*, 727 F.2d 826, 833 (9th Cir.1984).

Appellants' remaining contentions lack merit.

AFFIRMED.

C.A.9 (Wash.),2005.
 Gass v. CWCapital LLC
 150 Fed.Appx. 605, 2005 WL 2250740 (C.A.9
 (Wash.))

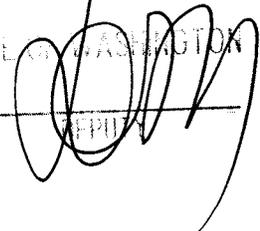
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DIVISION II

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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

CERTIFICATE OF SERVICE

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MATTHEW Z. CROTTY, WSBA #39284
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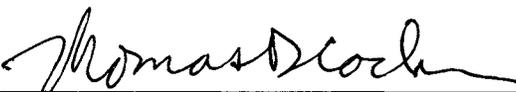
I, the undersigned, certify that on the 6th day of April, 2010, I caused a true and correct copy of the RESPONDENT'S RESPONSE BRIEF to be forwarded, with all required charges prepaid, by the method(s) indicated below, to the following parties:

<p>H. Peter Sorg, Jr. Sorg PLLC 19125 North Creek Pkwy., Suite 120 Bothell, WA 98101 Phone: (206) 295-6172 Fax: (425) 483-1058 Attorney for Plaintiff</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax) <input checked="" type="checkbox"/> E-Mail: pete@sorgpllc.com</p>
<p>David and Virginia Milne 15820 – 24th Drive SE Mill Creek, WA 98012 Defendants Pro Se</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax) <input type="checkbox"/> E-mail: davidmilne1@msn.com</p>
<p>David Alan Development, LLC 13617 – 48th Drive SE Snohomish, WA 98296</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax) <input type="checkbox"/> E-mail:</p>
<p>David Alan Ltd. 914 – 164th St. SE #1713 Mill Creek, WA 98012</p>	<p><input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax) <input type="checkbox"/> E-mail:</p>

<p>Duane M. Swinton Witherspoon, Kelley, Davenport & Toole 422 W. Riverside Ave., Suite 1100 Spokane, WA 99201 Phone: (509) 624-5265 Fax: (509) 458-2728 Attorney for Action Mortgage and Sterling Savings Bank</p>	<input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax) <input type="checkbox"/> E-mail: dms@wkdtlaw.com
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<p>Bryce Haggard Dille 317 S. Meridian Puyallup, WA 98371-5913 Phone: (253) 848-3513 Fax: (253) 845-4941 Attorney for CES NW, Inc.</p>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax) <input type="checkbox"/> E-mail: bryced@cdb-law.com
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<p>Alexander A. Friedrich Yusen & Friedrich 215 NE 40th St., Suite C-3 Seattle, WA 98105-6567 Phone: (206) 545-2123 Fax: (206) 545-6828 Attorney for Developers Surety & Indemnity Co.</p>	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Hand Delivered <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Telecopy (Fax) <input type="checkbox"/> E-mail: firm@yusenandfriedrich.com
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