

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

William Newcomer,
Plaintiff, Respondent and Cross-Appellant,

and

2009 Newcomer Family, LLC, Apex Apartments LLC, Apex
Apartments II LLC, and Apex Penthouse Condos LLC,
Plaintiffs and Cross-Appellants,

v.

Michael Cohen and Julie McBride,
Defendants, Appellants and Cross-Respondents.

APPELLANTS' OPENING BRIEF

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INTRODUCTION

This appeal from a judgment of more than \$4 million under the Washington State Securities Act (“WSSA”) arises out of a real estate development project that was doomed by the Great Recession of 2008. Plaintiff first invested in 2005 and continued to invest through the recession, even while expressing dissatisfaction with the project. As the downturn unfolded, he went on to invest even more capital in a second phase carried out by newly created entities. Only when it became clear, many years later, that his investment would not bear fruit did Plaintiff file this action in 2014, alleging violations of the WSSA.

The judgment should be reversed in its entirety for four independent reasons. First, to recoup his losses, Plaintiff seized upon events in 2005 and 2006 of which he was on actual or constructive notice many years before he commenced this action in 2014. The action was time-barred for that reason and should not even have proceeded to trial.

Second, the misrepresentations and omissions in 2005 and 2006 to which Plaintiff pointed related to insignificant details of a major project and accordingly were not material. That means Defendant did not violate the WSSA, which requires reversal.

Third, even if the oral misrepresentations or the alleged omissions were material, Plaintiff could not have reasonably relied on them because

the formal, written documents presented to and executed by Plaintiff made accurate disclosures and did not omit material facts.

Fourth, not a shred of evidence established that Plaintiff suffered any compensable damages under the WSSA; in the absence of such evidence, Plaintiff was nonetheless awarded rescissionary relief to which he was not entitled because he had disposed of the securities years earlier. Under the WSSA's remedy provision, Plaintiff was entitled only to damages because he no longer held the securities. However, he failed to establish *any* damages authorized by the WSSA.

Finally, even if the judgment is not reversed in its entirety, it must be modified downward because it awards relief for Plaintiff's entire series of investments when the misrepresentations and omissions can only be said to be in connection with Plaintiff's original investment.

ASSIGNMENTS OF ERROR

1. Did the trial court err in denying Cohen's motions for summary judgment and directed verdict and in entering judgment on the verdict because Newcomer's WSSA claims were barred by the statute of limitations? CP 717 (denial of summary judgment), 1580 (denial of directed verdict), 1660 (special verdict); CP 1805 (judgment).

2. Did the trial court err in denying Cohen's motions for summary judgment and directed verdict and in entering judgment on the verdict

because no reasonable juror could conclude that the misrepresentations or omissions on which Newcomer based his WSSA claim were material? CP 1580 (denial of directed verdict); CP 1660 (special verdict); CP 1805 (judgment).

3. Did the trial court err in denying Cohen's motions for summary judgment and directed verdict and in entering judgment on the verdict because no reasonable juror could find that Newcomer reasonably relied on Cohen's alleged misrepresentations and omissions? CP 717 (denial of summary judgment), 1580 (denial of directed verdict), 1660 (special verdict); CP 1805 (judgment).

4. Did the trial court err in denying Cohen's motion for summary judgment and directed verdict and in entering judgment on the verdict even though Newcomer failed to submit evidence of damages? CP 1580 (denial of directed verdict); CP 1660 (special verdict); CP 1805 (judgment).

5. Did the trial court err in instructing the jury that it could award either recessionary relief or damages when only damages were recoverable? CP 1580 (denial of directed verdict); CP 1654 (jury instruction 15); CP 1660 (special verdict); CP 1805 (judgment).

6. Did the trial court erroneously enter judgment against the marital community of Cohen and his former wife, Julie McBride, after wrongly

denying a directed verdict on the marital community's liability? CP 1580 (denial of directed verdict); CP 1805 (judgment).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Should the judgment should be reversed in its entirety because no reasonable juror could conclude that Newcomer was not on actual or constructive notice of his WSSA claims more than three years before filing this action? Assignment of Error No. 1.

2. Should the judgment be reversed in its entirety where no reasonable investor would have found it material that Cohen (1) satisfied \$350,000 of his initial \$800,000 capital contribution in future services rather than cash, consistent with all written disclosures but contrary to oral statements; (2) signed a formal written contract for the business to pay a company that Cohen owned \$400,000 for construction management services without notifying Newcomer, when the payment had previously been disclosed and execution of the contract was expressly authorized by the LLC Agreement; or (3) did not inform members of a short term, zero-interest loan from a related entity that the LLC Agreement permitted him to accept without disclosure to Newcomer? Assignment of Error No. 2.

3. In the alternative, should the judgment be reduced by \$1,902,650.21 where, even if the alleged misrepresentations and omissions were material to Newcomer's investments of \$1,072,997 in 2005 and

2006, they were not material to his subsequent investments totaling \$1,236,555? Assignment of Error No. 2.

4. Should the judgment be reversed in its entirety because Newcomer could not reasonably rely on alleged statements that were directly contradicted by all formal documents related to his investment, including an Offering Introduction (prospectus), the LLC Agreement, and loan documents related to a \$9.4 million loan that Newcomer personally guaranteed? Assignment of Error No. 3.

5. In the alternative, should the judgment be reduced by \$1,902,650.21 where, even if Newcomer reasonably relied on misrepresentations and omissions in connection with his investment of \$1,072,997 in 2005 and 2006, he did not reasonably rely on them in connection with his subsequent investment of an additional \$1,236,555? Assignment of Error No. 3.

6. Should the judgment be reversed in its entirety because the evidence did not establish damages under the formula prescribed by RCW 21.20.430? Assignment of Error No. 4.

7. Should the judgment be reversed in its entirety because the court's instructions erroneously authorized the jury to award recessionary relief, which it did, when only a damages remedy was authorized? Assignment of Error No. 5.

8. Should the judgment be reversed as to the marital community because the evidence at trial did not support that aspect of the judgment, the issue was not argued to the jury, the jury was not instructed on the issue and the jury made no findings on the community's liability in the special verdict? Assignment of Error No. 6.

STATEMENT OF THE CASE¹

A. In 2005, Newcomer Invested in Apex I.

In late 2004 or early 2005, Defendant Michael Cohen approached Plaintiff William Newcomer about investing in Apex Apartments LLC ("Apex I"), a company formed to build and operate two luxury apartment buildings on the highest point in Tacoma. Ex. 1 at 1; RP 308-09. Newcomer considers himself at least a "somewhat" sophisticated investor. RP 625 ("I'd like to think that I know what I'm doing"). In the 1980s, Newcomer held a securities license and acted as a commercial real estate broker. RP 305-06, 422, 625.

Cohen presented Newcomer with an Offering Introduction ("OI") that described the proposed investment in detail. RP 308-09. The OI explained that construction of the buildings would proceed in two phases

¹ Pursuant to the standards of review, all genuine disputes of fact at trial are resolved, and all reasonable inferences are drawn, in Newcomer's favor. *Wylie v. Stewart*, 197 Wash. 215, 219, 84 P.2d 1004 (1938).

(“Phase I” and “Phase II”) and contained two pro formas detailing the anticipated costs and revenues for each phase. *See* Ex. 1 at 3, 6–7. Phase I, which included construction of the first building and a pad for the second building, would cost approximately \$12 million in total. Most of that sum, \$9.4 million, would be provided by a bank loan. Ex. 1 at 6. The remaining \$2.7 million would be raised from investors “to provide operating capital for reimbursable expenses” and to meet the lender’s requirement of a minimum of \$2.6 million in investor equity. Ex. 1 at 1.

As initially conceived, Cohen and Ken Thomsen would each contribute \$900,000 for a one-third interest in Apex I (Ex. 1 at 4), and they were looking for nine other investors to contribute \$100,000 each. Ex. 1 at 4. Newcomer told Cohen that he would “invest \$900,000” to “be equal partners” with Cohen and Thomsen. RP 315. But because Cohen had already received commitments from three smaller investors at \$100,000 each, Cohen, Newcomer, and Thomsen each agreed to contribute \$800,000 for a 30 1/3-percent interest in Apex I. RP 316.

The OI stated that Cohen and Thomsen would act as the managing members of Apex I. Ex. 1 at 4. C&M Construction Management LLC (“C&M”), a company owned by Cohen, would “provide all management and accounting functions for this project” and be paid “10% of the hard costs of construction for these services.” Ex. 1 at 4; *see also* RP 323–24.

The OI estimated the “hard costs” for Phase I at about \$8.1 million. Ex. 1 at 6. Accordingly, the OI disclosed that C&M would earn a fee of approximately \$810,000 for its work on Phase I; ultimately, however, C&M sought and received a total fee of only \$750,000. Ex. 17; Ex. 44; Ex. 47 at 4; RP 1007.

The OI explained that a portion of the managing members’ investment would consist of “\$350,000 . . . in the form of deferred equity.” Ex. 1 at 4, 6. The “deferred equity [would] be deducted from the monthly loan draws for construction management and general requirements until fully contributed.” *Id.* In other words, C&M would contribute \$350,000 of future services, rather than cash to be used to pay for those services. RP 315–16, 321.

Newcomer struck out by hand those provisions of the OI with which he did not agree (RP 319), but he did not strike through the provision for deferred equity. Ex. 1 at 4–5. However, Newcomer testified that he called Cohen and objected to that provision (*see* RP 316), and that Cohen “said that he would exclude this from the final contract.” RP 319.

Later, when Newcomer received the proposed Apex I LLC Agreement (Ex. 2), he reviewed it to “look[] for the things that Mike and I had discussed, because that was foremost in my mind at that point, because we had just gone over them.” RP 321. He concluded that the “credit that

might be given to the manager in the amount of \$350,000” had been “taken out” (RP 321), but the document contradicts his testimony. The agreement was, in fact, silent on that point, leaving in place the statutory rule that members could contribute future services as capital. *See* pp. 49–51, *infra*. Newcomer signed the agreement on March 11, 2005. Ex. 83A; RP 458.

A “couple of days” before he signed, Cohen had called Newcomer to ask him to deposit \$250,000 because Apex I was about to close on the building site. Newcomer said he would “do that if both you and Ken put in your \$250,000.” RP 327. Cohen replied, “We’ve probably put in more than that.” *Id.* That statement was correct: by March 3, Cohen had deposited \$325,000 in cash. Ex. 73 at 1–2. Newcomer paid his \$250,000 contribution on March 11, 2005. Ex. 83A; RP 326.

Newcomer paid the remaining \$550,000 on or about May 5, 2005. Ex. 83B; RP 327. Here again, before doing so, Newcomer asked Cohen, “Have you and Ken both contributed your \$800,000 in cash?” (RP 328), Cohen replied, “Yes, we have.” RP 328. However, on cross-examination, Newcomer admitted that he could not recall with whom he had this conversation: Cohen or his bookkeeper Leann Scherbinske. RP 501, 663–64. By May 18, 2005, Cohen had contributed \$450,000 in cash, as the OI had represented. Ex. 73. Meanwhile, on April 30, 2005, Apex I booked a

journal entry in Cohen's name for the \$350,000 in deferred equity to be credited against C&M's management fees as they came due, just as the OI had described. Ex. 40; *see also* Ex. 2 at 4, Schedule 3; RP 323–24, 998–99. The next day, May 1, Apex I executed a \$400,000 “contract for services” with C&M for the remaining balance of the \$750,000 construction management fee. Ex. 3. Steve Yester, the chief development officer of Cohen's construction company, testified that the \$400,000 contract represented the cash portion of C&M's anticipated \$750,000 management fee. RP 1007. By January 2006, C&M had earned more than the \$350,000 in construction management fees that Cohen had deferred. Ex. 47 at 4.

B. As The LLC Agreement Provided, Cohen Managed Apex I's Cash Flow To Complete Construction of Phase I.

As Newcomer acknowledged, the LLC Agreement gave Cohen “complete discretion to manage and control the business.” RP 462. By signing it, Newcomer agreed that he was telling Cohen, “You don't have to check with me before you make loans or any of this other stuff.” RP 462–64; *see also* RP 465–67, 506–07; Ex. 2 §5.1 (LLC Agreement granted Cohen “complete authority, power and discretion to manage and control the business, affairs and property of [Apex I]”); Ex. 2 §5.1(ii) (authority “to borrow money from financial institutions, the Manager, Members, or Affili-

ates of the Manager or Members on such terms [as] the Manager deems appropriate”).

During the construction, Apex I took out loans to manage its cash flow. *See* Ex. 77; RP 1108. One, which Newcomer later objected to, was a \$360,000 no-interest, short-term loan to Apex I from Point Ruston LLC, another one of Cohen and Thomsen’s real-estate development vehicles. *See* Ex. 8; RP 695, 699, 1109. The loan was made in July or August 2005 and repaid by August 15 of that year. *See* Ex. 6; Ex. 8; RP 341–43, 677, 1109.

Moreover, in July 2006, Apex I requested additional capital for the start of the construction of Phase II. Ex. 8 at 1–2. Newcomer contributed \$272,997 on August 9, 2006. Ex. 83C; RP 341.

Beginning in September 2006, Apex I accepted additional loans from Point Ruston at eight-percent interest to obtain operating capital. Exs. 9, 77. Those interest-bearing loans eventually totaled \$3,499,983.95, including interest. Ex. 77; RP 621–22. Some of that debt was repaid in cash, some was eventually forgiven and credited toward Cohen and Thomsen’s capital contributions, and some was never repaid. Ex. 77; RP 1055–56.

The first building was completed in October 2006 and fully occupied by February 2008. Ex. 8; Ex. 9; Ex. 47 at 4.

C. In Spring 2008, The Business Was Restructured Into Several Different Entities.

In March 2008, at Newcomer's request, the business was restructured. Ex. 10; RP 993–96. Newcomer wanted to own a direct interest in the real estate as a tenant in common, rather than indirectly as a member of a LLC, because that would allow him to defer taxes on any profits through a future nontaxable Section 1031 exchange. RP 996. However, the lender would not permit that change with regard to Phase II (the second building), which had not been completed. *See* Exs. 9–10. Accordingly, only the first building (Phase I) was converted to a tenancy in common ownership. Ex. 67; RP 995–96.

To effectuate that change, Newcomer withdrew as a member of Apex I on March 5, 2008, and two new entities were formed: Newcomer Apex I TIC, LLC (“Newcomer TIC”), solely owned by Newcomer, and Apex Apartments I TIC, LLC (“Apex TIC”), owned by the remaining members of Apex I. Exs. 10–13; RP 424–25, 427, 995–96. Apex I then deeded 30 1/3-percent of the Phase I real estate to Newcomer TIC and the remainder to Apex TIC. Ex. 67; RP 924. The two TIC entities entered into a contract whereby Apex I continued to manage the Phase I building that was now co-owned by Newcomer TIC and Apex TIC. Ex. 15. Apex I became manager of both “TIC” entities. Ex. 12 §5.1; Ex. 13 §5.1.

Meanwhile, a new entity, Apex Apartments II, LLC (“Apex II”), was formed to hold and develop Phase II. Ex. 10; RP 535. On March 10, 2008, Newcomer, Cohen, and the other Apex I investors acquired interests in Apex II in proportion to their original percentage interest in Apex I. Ex. 14 at 4; §8.1–2; *see also* RP 425–26. The Phase II real estate was transferred from Apex I to Apex II. Ex. 10; Ex. 14 §8.1, Schedule 1, Ex. A. Cohen was appointed Apex II’s manager, and the investors executed an Apex II LLC Agreement substantively identical to the Apex I LLC Agreement. Ex. 14 §5.1.

In anticipation of proceeding with Phase II construction, Cohen asked the investors for more operating capital in February 2008. Ex. 9 at 1–2. Ex. 9 at 1. The letter also predicted that Apex II would obtain “permanent financing [of about \$21 million] for building 2 in about a year,” which would “generat[e] enough cash to repay all capital contributions at that time.” *Id.* On March 21, 2008, Newcomer contributed \$326,555. Ex. 83D; RP 348.

D. In Late 2008, Newcomer Became Concerned About Losses And The Information He Had Received.

By September 2008, the Great Recession had struck. Apex’s lender went out of business, and Apex II was unable to obtain permanent financing for the now-completed Phase II building. RP 1043–44. The Phase II

building was not filling quickly with tenants, as had Phase I. RP 1044–45. Cohen testified that, in Tacoma, there were “upwards of 10 projects that had dramatic effects” caused by the recession. RP 1046. A competing luxury apartment building about two blocks away, the Pacifica, was twice notified of imminent foreclosure. RP 1044–45, 1053. And at least six other local real estate developments went bankrupt or were lost to foreclosure during the recession. RP 1053–54.

In December 2008, Apex II held an investors’ meeting at which Newcomer was “concerned” to learn that more cash was needed and that he would not, as he expected, be receiving a capital distribution. Ex. 74; RP 362–63. At the same time, Newcomer learned of the interest-bearing loans that Apex I had accepted from Point Ruston, and was not happy. Exs. 74, 77; RP 620–21. Newcomer testified that “for the whole next year, we [*i.e.*, Newcomer and Cohen] had many—we had meetings and many conversations on that.” RP 621. In addition, Newcomer “constantly expressed [his] concerns about the accounting.” RP 363; *see also* Ex. 74.

Newcomer nonetheless invested another \$910,000 in 2009 in three installments: \$400,000 on February 26, 2009; \$410,000 on May 18; and \$100,000 on July 14. Ex. 83E–G; RP 350. Cohen and Thomsen invested the same additional amount, with Cohen satisfying \$230,669.20 of his

share by forgiving debt that was owed to Point Ruston and unpaid management fees due C&M, as well as accrued interest. Ex. 77.

E. In 2009, Newcomer Received Financial Information That Surprised And Alarmed Him, And He Demanded An Audit.

On May 15, 2009, Newcomer received financial statements, one of which included a breakdown of C&M's management fees. *See* Ex. 17. The statements showed that Apex I—as required under the Construction Management Contract—had paid C&M management fees of \$400,000 in cash for Phase I and that C&M's unpaid Phase II management fees had been applied, with interest, toward Cohen's portion of the August 2006 and March 2008 capital contributions. Ex. 17.

On October 12, 2009, Newcomer received an accounting of the Point Ruston interest-bearing loans. Exs. 74, 77. It showed that (1) Apex I, acting on its own account and as manager of the TIC entities, had accepted interest-bearing loans from Point Ruston totaling \$3,499,983.95 (including interest) from 2006 through 2010; (2) Apex I had avoided having to repay \$1,140,669.20 of this amount by applying it to capital contributions for Cohen and Thomsen; and (3) Apex I had repaid Point Ruston \$864,839.26 in cash. Ex. 77; RP 621–22. However, the July 2006, zero-interest loan was not listed. Bookkeeper Scherbinske testified that she had created the spreadsheet as an internal document for the purpose of calculating and

recording loan interest; the July 2006 loan, being interest free, was not included. RP 671–72, 677.

Two days after receiving the loan information. Newcomer wrote Cohen to state that he was “shocked” to discover the loans and that the eight-percent interest rate was unfair. Ex. 74. Newcomer demanded an audit, complaining that he “asked for monthly statements and h[as] not received them,” that “there are just too many figures floating around,” and that he “can’t make heads or tails out of” the project’s finances. *Id.*

F. Despite A Substantial Cash Infusion From Another Investor in 2010, Both Buildings Were Sold At A Loss In 2014.

In October 2010, Apex II—which still had been unable to obtain permanent financing and whose construction loan was coming due—needed additional capital. In mid-October, the members (including Newcomer) agreed to grant a 35-percent preferred equity stake in Apex II to a new member, James Weymouth, in exchange for \$4.3 million. Ex. 19 at 1, Schedule 2; Ex. 26 at 1, Schedule 1; RP 1146. In addition, despite his concerns, and a year after he demanded an audit, Newcomer loaned Apex I \$600,000 at a 20-percent interest rate. Ex. 27; RP 618–19.

Ultimately, the Great Recession took its toll, and these infusions were not enough to repay Apex’s creditors. RP 1055. In January 2014, Apex I, as manager of Apex TIC and Newcomer TIC, and Apex II, on its own

behalf, agreed to sell their interests in the two apartment buildings at a loss. *See* Ex. 34; RP 1054–55. Because the sales proceeds were insufficient to pay all secured creditors (Ex. 23 §5.6; RP 1155, 1164–65), Cohen and Thomsen obligated themselves for the additional \$1.6 million needed to close. RP 1055. Selling the business rather than allowing foreclosure saved Cohen, Thomsen, and Newcomer from personal liability on the loans. RP 1056.

G. Newcomer Filed This Action.

In the last months of 2013, Newcomer retained legal counsel and conducted an inspection of Apex’s records. *See, e.g.*, RP 332, 472–73. Newcomer thereby obtained some of the documents on which he based this action: a ledger listing Cohen’s \$350,000 deferred equity contribution, a copy of the \$400,000 services contract between Apex and C&M, and an August 15, 2006 check for \$359,376.58 from Apex to Point Ruston to repay the zero-interest loan. *See* RP 344, 498, 505–06. On January 14, 2014—and more than four years after he sent his October 2009 email demanding an audit—Newcomer filed this action. CP 1–19.

Cohen unsuccessfully sought summary judgment on the WSSA claim on the grounds that the alleged representations and omissions were not material and that Newcomer’s action, alleging causes of action for breach

of fiduciary duty and violation of WSSA, among others, was barred by the three-year statute of limitations. CP 253–54, 716–17.

Newcomer had also named various of the Apex entities as co-plaintiffs in an attempt to bring derivative actions on behalf of them. *See* CP 723, 810. However, he never took the appropriate steps to prosecute the case as a derivative action, such as making a litigation demand, serving the companies, and hiring corporate counsel. *See* CP 722–23, 810–11; RP 57–58. Shortly before trial, he moved to amend his complaint in an effort to begin pursuing the derivative claims, but the trial court denied the motion. CP 935–36. Accordingly, the case went to trial with two plaintiffs: Newcomer and 2009 Newcomer Family LLC (“Newcomer LLC”) (CP 1580, 1805–06), a family owned entity to which Newcomer had disposed of his interest in Apex II at some point prior to trial. Ex. 19, Schedule 1; Ex. 26 at 1, Schedule 1; Ex. 75; RP 426.²

During trial, Newcomer “elected to rely exclusively on the [WSSA] claim” (RP 1287) and did not oppose Cohen’s motion for a directed verdict on the breach of fiduciary duty claim. RP 894; CP 1580, 1641. The court further limited Newcomer to pursuing four theories under the WSSA

² Newcomer LLC had two members: Newcomer as trustee for his revocable living trust and Robert Newcomer, as trustee of the Casee N. Uranker Irrevocable Trust. Ex. 75 at 3, Schedule 1. Newcomer was the managing member. *Id.* at 5.

at trial: “(1) the representation by Cohen that he invested \$350,000 [cash] for the first capital contribution; (2) representations or omissions relating to management fees; (3) representations or omissions relating to loans between Point Ruston and the Apex entities; [and] (4) . . . representations or omissions relating to interest on management fees.” CP 2197.

Apparently realizing that his claims related to the interest-bearing loans were time-barred because he had known about those loans since 2009 at the latest (*see* pp. 13–16, *supra*), Newcomer testified that he “was not complaining about the fact that there [were other] loans between Point Ruston and Apex.” RP 623. He persisted, however, in claiming that the no-interest loan should have been disclosed to him and was material, even while admitting that the governing documents permitted the loan and did not require disclosure. RP 624–25.

The case was further narrowed when the court granted Cohen’s motion for a directed verdict on Newcomer’s theory related to interest on management fees, because Newcomer knew this fact since 2009 and accordingly the statute of limitations had run. RP 956–57; CP 1580. The trial court also dismissed plaintiff Newcomer LLC from the action because Newcomer had testified during his case in chief that he purchased each of the securities at issue “personally” rather than in his capacity as manager of Newcomer LLC. CP 1580; RP 424, 927.

The jury returned a special verdict for Newcomer on the WSSA claim. CP 1660. The special verdict form identified each of Newcomer's four investments with the amounts. CP 1660. The jury was instructed to select between two measures of recovery for each investment: rescissionary relief or damages. CP 1654. During closing arguments, Newcomer's counsel called the damages remedy a "trick." RP 1231. The jury awarded Newcomer the rescissionary relief he sought: the full purchase price of his securities, \$2,309,552. CP 1660. After the addition of prejudgment interest and attorneys' fees, the trial entered judgment on the verdict in the amount of \$4,060,987.46. CP 2294.

STANDARDS OF REVIEW

Each assignment of error presents a question of law subject to de novo review. *City of Seattle v. State, Dep't of Labor & Indus.*, 136 Wn.2d 693, 697, 965 P.2d 619 (1998) ("[a]ll questions of law are reviewed de novo"). More specifically:

- **Statute of limitations:** "[A]pplication of the discovery rule" to a statute-of-limitations defense "presents a question of law [where] the pertinent facts are susceptible of but one conclusion" *Richardson v. Denend*, 59 Wn. App. 92, 95, 795 P.2d 1192 (1990).
- **Materiality:** "While materiality is generally a mixed question of law and fact, we may decide the issue as a matter of law if reasonable minds could not differ on the question." *Ki Sin Kim v. Allstate Ins. Co.*, 153 Wn. App. 339, 355, 223 P.3d 1180 (2009), *as amended* (Jan. 6, 2010) (citation and internal quotation marks omitted).

- **Reasonable reliance:** “[W]here . . . no rational person could find the plaintiff reasonably relied on the defendant's representation, the trial court can decide that question as a matter of law.” *Hawkins v. Empres Healthcare Mgmt., LLC*, — Wn. App. —, No. 72949-7-I, 2016 WL 1180336, at *7 (Ct. App. Mar. 28, 2016).
- **Requirement that misrepresentation or omission be “in connection with” a securities transaction:** The question of whether misrepresentations or omissions occurred in connection with a sale is reviewed de novo. *Helenius v. Chelius*, 131 Wn. App. 421, 431, 120 P.3d 954 (2005).
- **Damages:** “Legal errors in jury instructions are reviewed de novo” *Paetsch v. Spokane Dermatology Clinic, P.S.*, 182 Wn.2d 842, 849, 348 P.3d 389 (2015). “The a[pp]ropriate measure of damages . . . involves a legal question reviewable on appeal.” *Merchant v. Peterson*, 38 Wn. App. 855, 860 n.1, 690 P.2d 1192 (1984). “[D]amages questions are usually discretionary and therefore for the trier of fact, *so long as damages fall within the range of relevant evidence.*” *Womack v. Von Rardon*, 133 Wn. App. 254, 262, 135 P.3d 542 (2006) (emphasis added).
- **Whether Judgment Against the Marital Community Conforms to the Verdict:** The Court reviews the record de novo to determine whether judgment against the marital community was entered in conformity with the jury’s verdict. *Swenson v. Stoltz*, 36 Wash. 318, 324, 78 P. 999 (1904).

SUMMARY OF ARGUMENT

The written prospectus—called an Offering Introduction (“OI”)—explained that the Apex project would be capitalized by the promoters and investors in the amount of \$2.7 million. Of that sum, \$900,000 would come from investors and \$1.8 million from Defendant Michael Cohen and his co-promoter, Ken Thomsen. The OI accurately explained that of the

total \$2.7 million in initial capital, \$350,000 would be in “deferred equity,” consisting of future construction management services, valued at 10 percent of the hard construction costs, from a company Cohen owned. Some of these details changed by agreement—such as that Cohen, Thomsen, and Plaintiff William Newcomer would each invest an equal amount. As part of those changes, Cohen’s contribution was reduced to \$800,000. But a constant in all of the writings was that at least \$350,000 of Cohen’s contribution would be in deferred equity.

Newcomer’s principal claim was that, contrary to all writings presented to him, he was led to believe the \$350,000 deferred equity component would be eliminated and that Cohen would contribute—and had contributed—all \$800,000 of his initial investment in cash. In fact, the venture proceeded exactly as the formal offering documents had disclosed it would. Newcomer claimed in this action that it was material that the business started off with a \$350,000 in “deferred equity” —*i.e.*, an in-kind contribution of future services—instead of receiving \$350,000 in cash that would then be used to pay Cohen’s company for those same services.

Statute Of Limitations. Although Newcomer originally invested in 2005, he did not file this action until 2014. His claim was barred by the three-year statute of limitations, because he was on inquiry notice of his claim well before 2011.

In 2005, before and after the alleged oral misrepresentations that no deferred equity would be employed, Newcomer represented to the project lender in writing that the promoters *were* contributing a significant portion of their capital in the form of deferred equity. In fact, he represented that the promoters would contribute more than double the originally proposed amount of \$350,000 in deferred equity, rather than cash. He therefore knew in 2005 that the promoters' capital contribution was not all cash, just as the OI had disclosed, causing the three-year limitations period to commence. *See* Part I(A)(1), *infra*.

Moreover, in late 2008, Newcomer was—in his words—“shocked” that the business had been kept afloat by loans from Cohen and Thomsen and that it needed even more money from investors. In October 2009, he was *again* surprised to be asked for more funds, and he complained that he had not received financial information that he had requested. Moreover, he found that the information he had received was confusing. Based on his mounting concerns, he demanded an audit, but he failed to follow up or pursue any other inquiry for four-and-a-half years.

Had he inquired, he would have confirmed that, consistent with the OI, Cohen's initial capital contribution had not been entirely in cash. As a result, he is charged with knowledge of what that investigation would have revealed. For that reason, the statute of limitations expired no later than

2012, well before plaintiff filed this action in 2014. *See* Part I(A)(2), *infra*. By delaying bringing this action so long and holding the investment in hope of realizing significant gain, Newcomer improperly used the WSSA as “investment insurance” that protected him from loss even while he maintained the possibility of profit. *See* Part I(A)(3), *infra*.

Lack Of Materiality. There is no basis in the record—none—to find that the representation that Cohen’s capital contribution would be all cash, rather than mostly cash plus a \$350,000 “deferred equity” contribution to cover anticipated construction management fees, was material to a reasonable investor.

To begin with, the first phase of construction was a \$12 million project, of which the \$350,000 in question represented less than three percent. Moreover, if the \$350,000 had been contributed in cash, it would simply have been paid out as Cohen’s company rendered construction management services. There was no dispute that the services were performed, that they were worth \$350,000, and that Cohen’s affiliated construction company became entitled to receive that amount over the first ten months of the project.

No objectively reasonable investor would think that a company putting up a \$12 million building would be undercapitalized if it had a right to \$350,000 in construction management services as opposed to \$350,000 in

cash to pay for those same services. The facts that *were* truly material—including the provision of construction management services by an affiliate of Cohen in return for a 10-percent-of-hard-costs fee—were fully disclosed. *See* Part II(A)(1), *infra*.

No Reasonable Reliance. A second element of a WSSA violation is that the Plaintiff's reliance on the misrepresentation or omission be reasonable. Here, the OI unambiguously explained that a portion of Cohen's capital contribution would be \$350,000 in "deferred equity." Newcomer thought the LLC Agreement reflected the alleged oral promise to eliminate the "deferred equity" feature from the transaction. In fact, however, the LLC Agreement did no such thing. It was silent on the subject, and as a result RCW 25.15.190 permitted the contribution of capital to take the form of a promise to contribute future services. RCW 25.15.190 (2015) (capital contribution may consist of an "*obligation to . . . perform services*") (emphasis added). Newcomer's claimed reliance on an oral statement that, in his view, materially changed the deal described in multiple formal writings *without obtaining any confirmation of that modification in the applicable transaction documents* was unreasonable. *See* Part II(A)(2)(a), *infra*.

In addition, after Newcomer paid part of his original capital contribution in supposed reliance on the statement that deferred equity *would be*

eliminated, he claimed further reliance upon an oral representation that Cohen *had paid* his capital contribution entirely in cash. That claimed reliance was also unreasonable because Newcomer signed bank documents shortly before and shortly after completing his initial investment that showed the promoters' capital contribution was partly in the form of "deferred equity." Accordingly, his claimed reliance on an oral statement to the contrary was unreasonable as a matter of law. *See* Part II(A)(2)(b), *infra*.³

No Legally Compensable Damages. The judgment must be reversed for yet another fundamental reason: Newcomer failed to establish damages under the WSSA. Under the WSSA, a plaintiff who no longer owns the securities may recover only money damages based on the difference between the amount paid for the securities and their value on the date that the plaintiff disposed of them. Newcomer had disposed of the securities at

³ Newcomer also asserted two claimed omissions, both of which were immaterial. The first was a written contract by which Cohen's construction management company would be paid \$400,000, and which Newcomer was concerned reflected an additional, unauthorized payment. But undisputed evidence established that the \$400,000 was the cash portion of the fully disclosed 10-percent construction management fee—which Newcomer admitted that he knew about and agreed to. This claim of an actionable omission was frivolous. *See* Part II(B), *infra*.

The second claimed omission was Cohen's failure to disclose a zero-interest, one-month loan of about \$360,000 to the business from a company related to Cohen. In fact, as Newcomer admitted, the loan was fully authorized by the applicable LLC Agreement, and Cohen was not obligated to disclose it. In any event, the short-term, interest-free loan was beneficial—not prejudicial—to the venture. This claim of an actionable omission was also frivolous. *See* Part II(C), *infra*.

issue between 2008 and 2010 to two legally distinct entities that he controlled. But Newcomer failed to present *any* evidence of loss under the statutory standard. The trial court nonetheless authorized the jury to award a rescissionary remedy consisting of the entire investment, plus interest, and it did. That award was legally unauthorized, and as a result the judgment must be reversed in its entirety. *See* Part III, *infra*.

No WSSA Violation As To Subsequent Investments. Even if the judgment could be sustained as to Newcomer's initial investments in 2005 and 2006, it must be reversed as to his subsequent investments in 2008 and 2009 for two independent reasons.

First, by the time of those subsequent investments, the first building had been completed and Newcomer had already disposed of his securities in the first phase of the project. Cohen's construction company had provided more than \$350,000 in construction management services, and as a result the business was in the same position it would have been had Cohen contributed the \$350,000 in cash and later paid it to his construction company for those now-completed services. Likewise, the zero-interest, short-term loan had been fully repaid, so the failure to disclose it was no longer relevant, if it ever was. For this reason, at the very least, the judgment must be reduced by \$1,902,650.21 to \$1,941,516.01 and the matter remanded for redetermination of fees and costs. *See* Part IV(A) & (C), *infra*.

Second, at Newcomer’s request, the venture was restructured into multiple legal entities in early 2008. His subsequent acquisitions of securities in the new entities were not in connection with—and wholly irrelevant to—his original investment in the original entity. Accordingly, the judgment must be reduced to \$1,941,516.01 and the matter remanded for redetermination of fees and costs. *See* Part IV(B) & (C), *infra*.

No Marital Community Liability. Even if any part of the judgment could be sustained, the portion naming the marital community of Cohen and his former wife, Julie McBride, as a judgment debtor must be reversed. The mere fact that McBride and Cohen were married when Newcomer invested is not sufficient to impose liability on the community. In addition, the issue of community liability was never argued before the jury, the jury was not instructed on the point, and (unsurprisingly) the jury made no finding of community liability in the special verdict. *See* Part V, *infra*.

ARGUMENT

I.

THE STATUTE OF LIMITATIONS BARS NEWCOMER’S WSSA CLAIM.

A claim under the WSSA must be brought three years from the date “a violation . . . either was discovered by such person or would have been

discovered by him or her in the exercise of reasonable care.” RCW 21.20.430(4)(b). Either actual or constructive knowledge commences the three-year period. Constructive knowledge arises when a plaintiff is on “notice of facts sufficient to prompt a person of average prudence to inquire into the presence of an injury.” *Mayer v. City of Seattle*, 102 Wn. App. 66, 76, 10 P.3d 408 (2000). When that occurs, then the plaintiff is “deemed to have notice of all facts that reasonable inquiry would disclose.” *Id.* “The question of due diligence, with respect to the discovery rule, is a question of fact unless reasonable minds could reach but one conclusion.” *Burns v. McClinton*, 135 Wn. App. 285, 300, 143 P.3d 630 (2006), *as amended* (Feb. 13, 2008). The plaintiff bears the burden of demonstrating “impediments to an earlier prosecution of the claim.” *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000); *Interlake Porsche & Audi, Inc. v. Buchholz*, 45 Wn. App. 502, 518, 728 P.2d 597 (1986) (same).

The Washington Supreme Court “emphasize[s] the exercise of due diligence by the injured party.” *In re Estates of Hibbard*, 118 Wn.2d 737, 746–47, 826 P.2d 690 (1992). That requirement reflects “the practical and policy considerations underlying statutes of limitations,” including “that stale claims may be spurious and generally rely on untrustworthy evidence.” *Id.* at 745. In addition, “society benefits when it can be assured

that a time comes when one is freed from the threat of litigation.” *Id.*
“[C]ompelling one to answer a stale claim is in itself a substantial wrong.”
Id. Cases like this one show why the statute of limitations exists.

Each of the asserted misrepresentations or omissions occurred in connection with Newcomer’s 2005 purchase of Apex I securities. The last one occurred in July 2006, when Apex I accepted an interest-free, short-term loan from Point Ruston without disclosure to Newcomer. Accordingly, Newcomer forced Cohen to defend himself against accusations of oral misrepresentations in 2005 and managerial actions that took place as long ago as ten years before trial. *See Hibbard*, 118 Wn.2d at 747. That long delay is particularly troubling because the alleged oral misrepresentations directly contradicted every formal, written transactional document that addressed Cohen’s initial contribution to Apex I. Indeed so much time had passed that, Newcomer could not even remember whether Cohen or his bookkeeper Scherbinske made one of the alleged misrepresentations on which the judgment is based. *See p. 9, supra.*

A. Newcomer’s Claim That Cohen Misrepresented That His Initial Contribution Was All-Cash Is Time-Barred.

Undisputed evidence demonstrates that, even in 2005, Newcomer was on inquiry notice that the oral representations Cohen would pay (or had paid) his entire \$800,000 initial contribution in cash could be incorrect.

Additional facts placed him on inquiry notice again in 2008 and 2009. Because this action was not filed until January 13, 2014 (CP 1), it is barred by the three-year statute.

1. Newcomer Was On Inquiry Notice in 2005.

Newcomer testified that the last of Cohen’s oral misrepresentations took place on May 5, 2005. *See* pp. 8–9, *supra*; RP 328, 500–01, 663–66. Shortly before and shortly after that, Newcomer received *and signed* two loan documents that directly conflicted with Cohen’s supposed statements.

On April 28, 2005, Newcomer, who was a personal guarantor on the Phase I Construction loan of \$9.4 million, signed a commitment letter to the project lender. Ex. 109; RP 518–22, 1004, 1008.⁴ That document identified \$750,000 of the investors’ total equity as “[c]ontributed equity,” a category distinct from “[c]ash.” Ex. 109 at 3 (Ex. A). Newcomer admitted that this was a representation to the bank that the \$750,000 represented “sweat equity.” RP 522; *see also* RP 527–28. That was *more than double* the amount of deferred equity disclosed in the OI. And on May 20, 2005, Newcomer signed final loan documents that included *another*

⁴ Exhibit 109 was not admitted in evidence but Newcomer was impeached with it. RP 516.

schedule reflecting \$750,000 in deferred equity. Ex. 4; RP 523–28 (Newcomer); RP 998–99 (Yester).

The April and May 2005 bank documents put Newcomer on inquiry notice that the deferred equity contribution described in the OI had not been eliminated. To the contrary, the documents showed that the permissible amount of deferred equity had *increased*. That would have aroused a reasonable investor’s suspicion that the deferred equity contribution disclosed in the OI—*which had never been altered or contradicted by any subsequent agreement or writing*—remained part of the deal.⁵

On the stand, Newcomer admitted that his representation to the bank regarding deferred equity was “a false statement that I made. I looked at that [the April 28, 2005 document, Ex. 4] and saw the 750 and thought that it was from the bank, and as I further looked at it [today], it clearly shows that it’s from the investors, not the bank column.” RP 549–50; *see also* RP 527.

Yet Newcomer did nothing to investigate why he was being asked to make (and made) representations to the lender that were contrary to Cohen’s oral comments, even though Newcomer was on guard against

⁵ Cohen testified that while the bank was willing to allow \$750,000 of deferred equity, he stuck to \$350,000 because “he had put out the term of 350 and stuck with that understanding, as far as the members were concerned.” RP 993.

such inconsistencies. If he had seen documents in 2005 inconsistent with Cohen's representation that he would contribute \$800,000 in cash, Newcomer "wouldn't have gone along with that" and it "would have been a big surprise." RP 518.

The undisputed facts showed that he *was* presented with a "big surprise" that would have placed a reasonable investor on inquiry notice. No reasonable juror could conclude otherwise. *Douglass*, 101 Wn. App. at 257 (affirming summary judgment where investor unreasonably assumed a real estate project was "dead" and failed to check public records that would have revealed an allegedly fraudulent transfer).

2. Additional Information Put Newcomer On Heightened Inquiry Notice In 2008 And 2009.

On October 14, 2009, Newcomer emailed Cohen with a list of complaints. Newcomer wrote that "the first time I was made aware we had a problem at Apex was last December. I had been expecting a large distribution but instead found a large capital call was needed." Ex. 74. He had been "shocked" to learn that Cohen and Thomsen had "made loans to the partnership without my knowledge." *Id.* He also noted that he had "asked for monthly statements and ha[d] not received them." *Id.*

He went on to complain that what information he had received was contradictory and confusing. "When I have ask[ed] for information I can-

not make anything balance. I am told you don't have a financial statement per se. I've asked for simple income and expense statements and been told they come from different departments and I never get what I'm after." *Id.* And, Newcomer complained, "I've got 3 different loan schedules for you and Ken and they are all different." *Id.* "There was some information that dropped off the spread sheets at the end of '07', to re-appear at the start of '08' with a different amount." *Id.*

He could not "make heads or tails" of the finances and asked, "How can I put more money into something I don't understand?" *Id.* He complained that he could not accurately calculate the "total, *including deferred management,*" that Cohen and Thomsen had "*fronted the partnership.*" *Id.* (emphasis added). Based on all of this, he wrote, "I think we need an audit." *Id.* Newcomer did not claim—much less prove—that Cohen misled Newcomer with any false or incomplete documents after this request. RP 484–87 (at trial, Newcomer pointed to the following documents, all of which predate his demand for an audit: the LLC Agreement, an unproduced bank statement, and a statement of owners' capital (Ex. 17) given to him in May 2009).⁶

⁶ Newcomer claimed that a May 15, 2009 spreadsheet (Ex. 17) deterred him from investigating (RP 369) but it was not relevant. True, the spreadsheet does not call out the \$350,000 in deferred equity. But that did not change the fact that Newcomer was on
(continued . . .)

Newcomer's October 2009 email epitomizes inquiry notice. He stated that (a) he had been "shocked" the business needed more capital when he had been told it would be making distributions; (b) he had not received financial information he had requested; and (c) what information he had received was confusing and contradictory. "A prospective plaintiff who reasonably suspects that a specific wrongful act has occurred is on notice that legal action must be taken." *Giraud v. Quincy Farm & Chem.*, 102 Wn. App. 443, 451, 6 P.3d 104 (2000) (affirming summary judgment). "[T]he law does not require a smoking gun in order for the statute of limitations to commence." *Id.* at 450–51; *see also id.* at 450 ("when a plaintiff is placed on notice by some appreciable harm occasioned by another's wrongful conduct, the plaintiff must make further diligent inquiry to ascertain the scope of actual harm").

Once Newcomer was on inquiry notice, he was "deemed to have notice of all facts that reasonable inquiry would disclose." *Mayer*, 102 Wn. App. at 76. Had he followed up, he would have discovered that Cohen had not made his initial \$800,000 capital contribution entirely in

(. . . continued)

inquiry notice in 2005, causing the limitations period to expire in 2008, before he received the spreadsheet. *See* Part I(A)(1), *supra*. Nor does the May 2009 spreadsheet alter the fact that Newcomer was subsequently on inquiry notice in October 2009, when he demanded an audit, causing the limitations period to expire in 2012. (See text above.)

cash. Indeed, Newcomer's own testimony demonstrated that all he had to do was ask. When Newcomer went with his lawyer to Cohen's office in 2013, prior to filing this action, he "got the records that showed that Mike had not put in the full \$800,000 in cash." RP 498; *see also* Ex. 44; RP 684 (accounting produced in connection with this action). He offered no evidence to establish that a similar request in 2009 would not have uncovered the \$350,000 deferred equity contribution. *Interlake Porsche*, 45 Wn. App. at 518 ("the burden is upon the plaintiff to show that the facts constituting the fraud were not discovered or could not have been discovered until within three years prior to the commencement of the action"). Because Newcomer waited four years until 2013 to conduct an investigation that he had every reason to make in 2009, the three-year statute bars his claim.

3. Newcomer's Delay In Investigating Or Seeking Rescission Reflects A Misuse Of The WSSA.

There is an additional reason why allowing Newcomer's long-delayed claim should not have been entertained: by failing to timely investigate and seek relief, he used the WSSA as "investment insurance" to hold on to the possibility of profit without assuming risk of loss. *See Tregenza v. Great Am. Commc'ns Co.*, 12 F.3d 717, 722 (7th Cir. 1993) ("These plaintiffs waited patiently to sue. If the stock rebounded from the cellar

they would have investment profits, and if it stayed in the cellar they would have legal damages.”)

Until a few weeks before the entire Apex project was sold at a loss in 2014, Newcomer believed the project would turn around. RP 529 (“I could have walked away from the million five, or I could have contributed the \$900,000 when I was assured it was still a good project and we were going to make our money”); RP 1146 (things “were looking okay” in October 2010 despite the need for Weymouth’s \$4.3 million investment). In the hope of a return on his investment, Newcomer took no action on information that he had possessed as early as 2005. If Newcomer believed he might have had viable securities claims, he should have investigated and pursued his rights, including rescission.

The law—and particularly the concept of inquiry notice—frowns on this kind of wait-and-see tactic. “If actual discovery were required, investors could extend the time for filing suit simply by refusing to investigate possible fraud.” *New England Health Care Emps. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 499 (6th Cir. 2003). That would allow them to “wait to see whether a poorly performing stock recovered, reap investment profits if it did, and sue for damages if it did not.” *Id.* That is exactly what happened here. This “[h]eads I win, tails you lose” approach is impermissible. *Trogenza*, 12 F.3d at 722.

B. Newcomer's Other WSSA Theories Were Also Time-Barred.

Having established that Newcomer was on inquiry notice of his claim that Cohen misled him about Cohen's use of deferred equity, we turn to Newcomer's claim that the C&M management contract and the no-interest loan were not disclosed in violation of the WSSA. The Court need not address these claims independently because—had Newcomer acted diligently when he was on inquiry notice of accounting and record-keeping irregularities—he would have followed up by asking questions, reviewing records or insisting upon an audit or accounting. Had he done any of those things, he would have discovered these supposed omissions along with Cohen's contribution of \$350,000 in deferred equity.

However, even looking at these two omission-based theories independently, Newcomer was on inquiry notice well before 2011 and, accordingly, these claims were also barred by the statute of limitations.

1. Newcomer Was On Notice Since 2005 That Apex I Would Pay C&M \$400,000 For Services.

Newcomer claimed that the \$400,000 services contract between Apex and C&M came as a surprise to him when he discovered it in 2013 and caused him concern that an additional or unauthorized payment had been made. RP 472–73. That was not the case, as the contract related to the

\$400,000 cash portion of C&M's construction management fee that the OI had disclosed. *See pp. 52–53, infra.*

Besides the OI, Newcomer was on notice of the \$400,000 in payments in May 2009. He received financial statements in May 2009 that reflected Apex I's payment to C&M of \$400,000 in fees for supervising the construction of Phase I. Ex. 17; *see also* Ex. 44; RP 998–99, 1005–08. Consequently, he was on inquiry notice no later than 2009 that Apex had paid \$400,000 to C&M. The undisputed evidence in the record demonstrates that this sum represents the amount due under the contract. *See pp. 7, 9–10, supra.* Had he investigated in 2009, he could have obtained the contract itself.

In addition, the extreme concern Newcomer expressed over the state of the Apex entities' finances, record-keeping, and financial reporting in his October 14, 2009 email to Cohen established his inquiry notice of the contract. Had he investigated, he would have uncovered any allegedly improper payment, which is the thrust of this theory. He proved no impediment to such an investigation.

2. Newcomer Was On Inquiry Notice Since 2008 About the Zero-Interest Loan.

In February 2008, Cohen informed Newcomer that a “cash deficit” in Phase I's financing “has been floated by the Phase 2 financing and *inves-*

tor loans.” Ex. 9 (emphasis added); RP 528–29. In addition, Newcomer learned that Point Ruston had made a number of interest-bearing loans to Apex at a December 2008 investor meeting. Ex. 74; RP 620–21.

In his October 2009 email, he stated that he had been “shocked” to learn this information. By the time he wrote that email, he possessed a ledger showing that Apex I had accepted \$3,262,057.48 in loans from Point Ruston that had accrued \$237,926.47 in interest. Ex. 77; RP 621–22. In his own words, Newcomer “knew [at that time] that there were a whole bunch of Point Ruston loans.” RP 622–23.

Newcomer sat on this information for over four years and, when he filed his complaint in this action, he based his claim on Cohen’s supposed failure to disclose any of the loans. CP 15 ¶2.24. However, Cohen’s summary judgment motion demonstrated that Newcomer had known of the millions of dollars in interest-bearing loans more than three years before he brought this case. *Id.* Accordingly, Newcomer at trial dropped the claim that failure to disclose the interest-bearing loans violated the WSSA. RP 623. He claimed only that he should have been informed of one particular loan: the July 2006, short-term, zero-interest loan. RP 623–24. Through happenstance, that was the only loan not disclosed in the spreadsheet he received in 2009. *See p. 15, supra.*

Newcomer was on inquiry notice of that loan by 2009 at the latest. *See, e.g., Robert L. Kroenlein Trust ex rel. Alden v. Kirchhefer*, 764 F.3d 1268, 1280 (10th Cir. 2014) (“A plaintiff is on inquiry notice whenever circumstances exist that would lead a reasonable plaintiff of ordinary intelligence, through the exercise of reasonable due diligence, to discover his or her injury”) (internal citation and punctuation omitted). Had he exercised reasonable diligence by asking to review the Apex entities’ records in 2009, that would have uncovered the zero-interest loan, just as his 2013 inspection of those records quickly uncovered “missing” information with respect to Newcomer’s other theories. *See* RP 497–98 (discussing how the 2013 pre-suit investigation “revealed” the \$350,000 deferred equity contribution); RP 505–06 (same with respect to the \$400,000 contract).

II.

COHEN DID NOT VIOLATE THE WSSA IN CONNECTION WITH THE ISSUANCE OF SECURITIES FOR APEX I.

A person violates the WSSA by (1) making a misrepresentation or omission (2) in connection with the sale of securities (3) that is material and (4) upon which the purchaser reasonably relied. RCW 21.20.010(2); *Hines v. Data Line Sys., Inc.*, 114 Wn.2d 127, 134–35, 787 P.2d 8 (1990).

The evidence, construed in Newcomer's favor as must be done in light of the jury's verdict, shows that Cohen did not violate the WSSA.

A. Cohen Did Not Violate The WSSA By Stating He Would Contribute (Or Had Contributed) His Initial \$800,000 Entirely In Cash.

According to Newcomer, Cohen said—prior to signing the LLC Agreement—that he would not contribute any of his initial \$800,000 in the form of deferred equity. *See* p. 8, *supra*. Newcomer also testified that, after he signed the LLC Agreement but before he completed payment of his \$800,000 initial contribution, Cohen or his bookkeeper said Cohen had paid his own \$800,000 contribution entirely in cash. *See* p. 9, *supra*. For three independent reasons, Cohen did not violate the WSSA by making these statements.

1. The Representations Were Immaterial.

“A ‘material fact’ is one to which a reasonable [person] would attach importance in determining his or her choice of action in the transaction in question.” *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 114, 86 P.3d 1175 (2004) (some internal quotation marks omitted); *see also United States v. Bingham*, 992 F.2d 975, 976 (9th Cir. 1993) (“Materiality must be judged in the context of the ‘total mix’ of information available to investors”). This is an objective, “reasonable investor” standard and does not turn on what Newcomer subjectively considered material. When rea-

sonable minds could not disagree on whether a representation or omission would alter the total mix of information, lack of materiality is established as a matter of law. *See Gauthier v. Wood & Iverson*, 49 Wash. 8, 12, 94 P. 654 (1908); *In re Metro. Sec. Litig.*, 532 F. Supp. 2d 1260, 1290 (E.D. Wash. 2007). Materiality is judged at the time of the investment. *See Go2net, Inc. v. Freeyellow.Com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590 (2006) (en banc); *Guarino*, 122 Wn. App. at 114.

Newcomer never disputed that the OI fully disclosed that C&M, a company affiliated with Cohen, would provide construction services in return for 10 percent of the project's hard costs. The OI estimated those costs would total roughly \$8.1 million (Ex. 1 at 6), which would generate an \$810,000 fee—more than the \$750,000 C&M was actually paid. Nor did Newcomer dispute that the \$350,000 of C&M's services that Cohen contributed as part of his initial capital contribution were actually worth \$350,000. The key issue, then, is timing: would it matter to a reasonable investor whether Cohen (a) contributed \$350,000 in cash to Apex I, which sum would thereafter be disbursed for Phase I management services or (b) made a commitment to provide those same services at no charge to Apex I. The answer is “no” as a matter of law, as Newcomer and his accounting expert confirmed.

Newcomer acknowledged that the purpose of the investors' initial contributions was "to get the project going, to start the construction." RP 317–18. Cohen's commitment to provide \$350,000 in management services fulfilled that purpose and was functionally equivalent to paying in cash. That no doubt explains why the project lender was willing to treat up to \$750,000 in deferred equity as if it were cash. *See* Ex. 1 at 4, 6; Ex. 4; Ex. 109, Ex. A; RP 988. Indeed, Newcomer "accepted" this approach with regard to Cohen making subsequent capital contributions by applying C&M's unpaid management fees to Cohen's capital account as a journal entry. RP 490–91; *see also* RP 368–69. Booking an obligation to provide future services over a relatively short period as a journal entry in lieu of cash is no different. Newcomer's expert witness, Cary Deaton, confirmed that from an accounting standpoint, a company's valuation would be identical if it had \$350,000 in cash versus a commitment to provide \$350,000 in services over the next several months. RP 811–12.

Indeed, the case Newcomer relied on in the trial court shows how immaterial his asserted misrepresentation was. CP 444. In *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005), the court held that it was material to a party investing \$10 million that the business actually had a negative net worth, not \$25 million in cash as had been represented. Here, there was no "shortfall" *at all*. Apex received the

benefit of \$350,000 in construction services without having to shell out cash to pay for them. As Newcomer acknowledged, the purpose of contributing cash was to pay for construction. RP 317–18 (“it’s . . . to get the project going, to start the construction”).

The reasons Newcomer offered as to why he subjectively believed the difference between \$350,000 in cash and \$350,000 in services was material were objectively unreasonable and accordingly failed as a matter of law. First, Newcomer testified that had he known Cohen would not honor his verbal agreement to contribute all \$800,000 in cash, then Newcomer would have distrusted Cohen. RP 499. But this theory, if accepted, would eviscerate the WSSA materiality element. If an investor could invoke the WSSA for an otherwise immaterial misrepresentation by claiming that the misrepresentation impeached the promoter’s honesty, then materiality would be written out of the statute. *See Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 659–660 (4th Cir. 2004) (“‘integrity concerns’ . . . are merely derivative of the misrepresentation that was the basis for the suit”).

Second, Newcomer testified that “it’s important that we all have the same amount of money, have the same skin in the game, so to put it. We can all make the same amount, we can all raise or fall together.” RP 316–17. But it is undisputed that Cohen contributed \$800,000, the same as

Newcomer. The only issue is whether making a portion of that contribution in future services, which freed Apex from the future obligation to pay \$350,000 in fees, was materially different from contributing \$350,000 from which those fees would then be paid. There was no material difference. *Cf. Golberg v. Sanglier*, 96 Wn.2d 874, 881 & n.2, 639 P.2d 1347, *amended*, 96 Wn.2d 874, 639 P.2d 489 (1982) (misrepresentation about source of funds was immaterial).

Third, Newcomer testified that “at the beginning of a project, you’re always strapped for money. . . . You always have to come back and get more money. . . .” RP 316–17. But there was no objective reason at the time of Newcomer’s initial investment to think Apex I in particular would be “strapped for money” if it had an entitlement to \$350,000 in services as opposed to having \$350,000 cash on hand to pay for the same services over the ensuing months. That is particularly so when the \$350,000 was a very small percentage of the project’s projected costs, most of which were being funded by a large bank loan.

Newcomer also relied on Deaton’s opinion that there was a material difference between Cohen’s deferred equity contribution and a contribution in cash (RP 779), but this opinion cannot support the verdict because his testimony starkly conflicted with the law. For instance, he testified over objection that an investor’s false representation about contributing

capital in cash “would be material *regardless of the amount involved*, because now we’re starting to get into the realm of, you know, ethical issues, legal issues.” RP 861–62 (emphasis added); *see also* RP 863 (testifying that loans from Point Ruston were material “*regardless probably of the amount . . . because we are dealing with a related party*”) (emphasis added). But as already discussed above, standing alone “integrity concerns” cannot be material. *See* p. 45, *supra*.

Moreover, contrary to Deaton’s view, the relative significance and dollar value of a representation or omission in the context of an overall business *are* legally relevant. Here, the \$350,000 in deferred equity was immaterial in an absolute sense to Phase I, which was estimated to cost \$12 million. Ex. 1 at 6; *see also* RP 324 (the actual hard cost of building the project substantially matched the estimate). No reasonable investor would be concerned about a three-percent component of such a venture consisting of an in-kind contribution of services as contrasted with cash followed by payment for those services. *See Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 547 (8th Cir. 1997) (\$6.8 million overstatement of assets immaterial because, “[t]aken in context, this amount represented only 2% of Gateway’s total assets”); *cf. Guarino*, 122 Wn. App. at 114 (“materiality . . . depends on a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in

light of the totality of the company activity”) (internal quotation marks omitted) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 238, 108 S. Ct. 978 (1988)).

Deaton’s testimony was also internally inconsistent and illogical. He praised the “flexibility” of cash and testified that deferred equity “limit[s] the options . . . of the LLC . . . owners” in deciding “whether they’re going to pay those management fees on time or try to negotiate those management fees.” RP 856–57. But he failed to explain how a \$350,000 cash contribution earmarked for construction services could “flexibly” be applied to some other expense. *See Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 19, 390 P.2d 677 (1964) (expert testimony “must be based upon tangible evidence rather than upon speculation and hypothetical situations”); *Melville v. State*, 115 Wn.2d 34, 41, 793 P.2d 952 (1990) (“An opinion of an expert which is simply a conclusion or is based on an assumption is not evidence which will take a case to the jury”). The management fees were not subject to negotiation. They had been agreed to ahead of time, as Newcomer acknowledged. *See pp. 52–53, infra.*

In short, no reasonable investor would have believed that contributing \$350,000 in construction services soon to be rendered rather than cash—followed by payment of the same amount for those services—was material to the proposed investment in Apex I. Either way, the first building would

be—and was—constructed consistent with the pro forma budget in the OI.

See pp. 6–7, supra.

2. Newcomer Did Not Reasonably Rely On The Representations.

a. The Oral Statements Were Contradicted By The OI And The LLC Agreement.

Newcomer acknowledged that any significant change in the Apex I business plan the OI described should be “reduced to writing” in the LLC Agreement “because it was our final agreement.” RP 320. Because Cohen’s statement that he would make all of his \$800,000 initial contribution in cash contradicted the OI, Newcomer checked the LLC Agreement to confirm the change had been made. *See p. 8, supra.* He concluded that the \$350,000 in deferred equity “was taken out.” RP 321; *see also* RP 328–30, 485 (“in the LLC Agreement, [Cohen] said he was putting in cash”).

However, the Agreement said no such thing; it neither expressly permitted nor prohibited capital contributions in the form of future services. *See* Ex. 2 §8.1, Schedule 1. Section 8.1 stated that each member would “contribute” the amount set forth on Schedule 1, which was \$800,000 for each of the three principal members. The Agreement did not specify in what *form* that contribution would be made, and the Washington LLC Act expressly allowed contribution of services.

The version of the LLC Act in effect at the time of formation provided: “The contribution of a member to a limited liability company may be made in cash, property or services rendered, or *a promissory note or other obligation to contribute cash or property or to perform services.*” RCW 25.15.190 (2015) (emphasis added).⁷ The LLC Act governs matters a LLC agreement does not address. *See* RCW 25.15.018(2) (“To the extent the limited liability company agreement does not otherwise provide for a matter described in subsection (1) of this section, this chapter governs the matter”); *RSD AAP, LLC v. Alyeska Ocean, Inc.*, 190 Wn. App. 305, 320, 358 P.3d 483 (2015) (partnership agreements).

Newcomer’s disregard of the OI’s description of the deferred capital arrangement and his legally incorrect conclusion that it had been superseded by the LLC Agreement were unreasonable as a matter of law. *See Stewart v. Estate of Steiner*, 122 Wn. App. 258, 266 n.9, 93 P.3d 919 (2004) (reasonable reliance is judged based on an objective standard); *Hearst Commc’ns Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (when interpreting contracts, a party’s subjective intent is not considered). Moreover, as next shown, the unreasonableness of

⁷ The Legislature amended the LLC Act, effective January 1, 2016, but the amendments do not apply retroactively. RCW 25.15.905 (“This chapter does not affect an action commenced, proceeding brought, or right accrued before January 1, 2016”).

Newcomer's incorrect interpretation of the LLC Agreement should have become more apparent in light of subsequent documents presented to—and signed by—Newcomer.

b. The Oral Statements Also Were Contradicted By Loan-Related Documents That Newcomer Signed Before Completing His Initial Contribution.

Newcomer could not reasonably rely on the alleged representations for the independent reason that he signed bank documents that contradicted the representations. Newcomer signed and returned financial statements to the project lender on April 28 and May 20, 2015, in connection with his personal guarantee of the \$9 million construction loan for Apex. RP 518–22, 524–26, 998–99, 1004, 1008; Exs. 4, 109. Each document identified \$750,000 of investor equity as “[c]ontributed equity,” a category distinct from other entries that were in “[c]ash.” Ex. 109 at 3 (Ex. A); *see also* Ex. 4 (referring to \$750,000 of “Borrower Equity” consisting of “Developer’s Fees & Overhead”). Newcomer admitted that this was a representation to the bank that up to \$750,000 could be in the form of “sweat equity.” RP 522; *see also* RP 528; pp. 31–33, *supra*.

Newcomer could not reasonably rely on an oral representation directly at odds not only with the OI but also with signed loan commitment documents regarding a loan worth more than \$9 million that he was personally guaranteeing. As already noted, Newcomer himself acknowledged that

the written documents should reflect any material change in the deal. *See* pp. 8, 49, *supra*. Accordingly, his reliance on any prior oral statement to the contrary was unreasonable.

B. Cohen Did Not Violate The WSSA By Not Disclosing A \$400,000 Contract For Construction Services.

Newcomer claimed at trial that Cohen failed to tell him about the May 1, 2005 “contract for services” between Apex and C&M before Newcomer paid the remaining \$550,000 of his initial contribution. *See* Ex. 3. This aspect of his securities fraud claim was frivolous: the undisputed evidence showed that this contract merely documented the arrangement disclosed in the OI whereby C&M would provide services to Apex I in return for a 10-percent management fee. *See* p. 7, 9–10, *supra*.

The contract provided for Apex I to pay C&M a fee of \$400,000 because Apex had booked the \$350,000 in deferred equity the day before. Ex. 40; RP 1002–03, 1007. That amounted to a total fee of \$750,000, well less than the \$810,000 fee disclosed in the OI. *See* p. 7, *supra*. Newcomer testified that he understood and “[a]bsolutely” agreed to C&M receiving that fee. RP 323–24; *see also* Ex. 2 at 4, Schedule 3 (LLC Agreement).

Newcomer suggested that the contract might reflect an additional, unauthorized payment (RP 473), but he offered no evidence of such a

payment.⁸ To the contrary, he conceded that he had no understanding of the services contract beyond what appeared on its face (RP 472–73) and admitted he could offer nothing but speculation:

I didn't know about this until 2013 when we were getting the documents. I had no idea what this was. And I was asked if I had ever seen this, and I said, "I've never seen this. What is it?" . . . [W]hat I understand from looking at it is Mike has agreed to pay Mike a \$400,000 consulting fee. That's all I understand at this point. (RP 472–73)

Newcomer claimed a failure to disclose based on the services contract's reference to C&M as a "Consultant," rather than "Construction/Manager," but the label was immaterial. It was indisputably disclosed that Apex I would pay C&M \$400,000 for its services (in addition to the \$350,000 in deferred equity).

C. Cohen Did Not Violate The WSSA By Not Disclosing A Zero-Interest Loan To Apex I.

Newcomer claimed that Cohen violated the WSSA by failing to disclose a loan from Point Ruston, Cohen's affiliated entity, to Apex I in July 2006. This roughly \$360,000 loan was interest-free to Apex I and repaid

⁸ Newcomer sought to leave the jury with the impression that it was somehow "shady" for Cohen to sign the services contract on behalf of both Apex I and C&M, *i.e.*, being on both sides of the deal. RP 472–73; *see also* RP 340. But on cross, Newcomer grudgingly admitted that Cohen had the authority to execute the document on behalf of both parties. RP 473 ("I guess it's legal"); *see also* Ex. 2 §5.1(vi), (viii) (Manager's authority to enter into contracts). He further admitted that Cohen had no obligation under the LLC Agreement to check with him before executing contracts on behalf of Apex. RP 462–67.

in about a month. Ex. 8; RP 695, 699, 1109. Newcomer claimed that he would not have invested \$272,997 in August 2006 had he known of this loan. RP 341–44.

As a matter of law, no WSSA violation occurred for two independent reasons: (1) the LLC Agreement disclosed Apex’s ability to take loans from entities affiliated with its members without notice; and (2) the short-term, no-interest loan was not material.

1. The LLC Agreement Disclosed That Apex Could Accept Loans From Entities Affiliated With Cohen.

The LLC Agreement expressly provided that Cohen would have the authority, as Apex I’s manager, “to borrow money from financial institutions, the Manager, Members, or *Affiliates of the Manager* or Members on such terms [as] the Manager deems appropriate.” Ex. 2 §5.1(ii) (emphasis added).

Newcomer conceded that this provision “allow[ed] for these loans and fees,” but he nonetheless maintained that “[i]t was not the right thing to do.” RP 506–07; *see also* RP 462–67. But the WSSA does not permit a plaintiff to establish a violation based on the plaintiff’s self-serving opinion of what is “the right thing to do.” Because the LLC Agreement that Newcomer signed disclosed Apex’s ability to borrow funds from member affiliates “on such terms as the Manager deems appropriate” and because

Newcomer expressly agreed to those terms by signing, no WSSA violation occurred.

Even Newcomer conceded on the stand that, by signing the LLC Agreement, he agreed that Cohen “would have complete discretion to manage and control the business,” and that Newcomer was effectively saying, “*You don’t have to check with me* before you make loans or any of this other stuff.” RP 462–64 (emphasis added); *see also* RP 465–67, 506–07.

2. The Short-Term, Zero-Interest Loan Was Not Material.

Moreover, the short-term, zero-interest loan was objectively immaterial to Apex’s finances. It *benefited* Apex I. It bore no interest and was a drop in the bucket compared to both the nearly \$12 million the investors expected to spend building Phase I and the nearly \$3 million in interest-bearing loans Point Ruston made to Apex I. Newcomer singled out this inconsequential transaction from the millions of dollars in interest-bearing loans only because his claim as to those other loans was obviously time barred. *See* pp. 39–41, *supra*. But because the no-interest loan was immaterial to Apex’s overall finances and only benefited Apex, it cannot as a matter of law support the judgment.

III.

NEWCOMER SUFFERED NO DAMAGES.

Even if Newcomer had established a claim under the WSSA, he failed to establish legally compensable damages. The jury awarded him rescissionary relief—the total amount Newcomer invested plus interest—only because the trial court erroneously instructed the jury that it could award rescissionary relief *or* damages. That instruction was erroneous as a matter of law because only damages were available to Newcomer based on the undisputed evidence. *See Merchant v. Peterson*, 38 Wn. App. 855, 860 n.1, 690 P.2d 1192 (1984) (“The a[pp]ropriate measure of damages, as compared with the amount of damages awarded, involves a legal question reviewable on appeal”). Because Newcomer failed to prove any damages under the correct measure, he could not recover as a matter of law.

The WSSA establishes two mutually exclusive, alternative remedies for a plaintiff who establishes a violation of the Act:

- A plaintiff *who still owns* the security at issue is entitled to rescissionary relief: recovery of “the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security.” RCW 21.20.430(1); *see also Windswept Corp. v. Fisher*, 683 F. Supp. 233,

239 (W.D. Wash. 1988) (buyer must tender the security to seek purchase price as remedy).

- A plaintiff *who no longer owns* the security may recover damages in “the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.” RCW 21.20.430(1).

The court instructed the jury it could apply either one of these measures. CP 1654 (Jury Instruction No. 15); *see also* RP 1354 (“The jury was given the question with two different ways to calculate damages”). That was erroneous.

The undisputed evidence at trial demonstrated that only the second remedy—damages—was appropriate in this case. Newcomer had “personally purchased” securities in Apex I and later Apex II (RP 424, 927), but he no longer “personally own[ed] them” by the time of trial. RP 428; RP 1330. By that time, Newcomer had disposed of his Apex I security for a real property interest held by Newcomer TIC. And he had conveyed his personal interest in Apex II to the newly created Newcomer LLC. *See* pp. 11–13, 18, *supra*.

The reason that the WSSA provides for an alternative remedy in damages when the purchaser no longer owns the security is because the plaintiff can no longer tender the securities to the defendant, making rescission

impossible. *See* RCW 21.20.430(1); *Windswept Corp.*, 683 F. Supp. at 239. In no event may the plaintiff keep the securities *and* obtain damages. That could lead to an impermissible windfall, as a simple example demonstrates.

Imagine that an investor purchases a share of stock for \$100. The stock falls in value to \$40, and the investor disposes of it by gifting it to a family member. The investor subsequently sues the promoter for rescission under the WSSA and seeks damages of \$100. If the investor were to be permitted to obtain a judgment for \$100 as “rescission,” without tendering the security, the result would be an unjustified windfall: the investor would be allowed to give away something worth \$40 (indeed, to a family member) and then recover the full price he paid for that security, \$100. The correct result, if a plaintiff were able to prove a violation of the WSSA in connection with the stock purchase, would be a damages award of the amount that “would be recoverable upon a tender” (\$100 in this example) less the value of the security when it was disposed of (\$40), a net award of \$60 plus eight-percent interest on that sum from the date of disposition.

Newcomer failed to introduce any evidence to establish damages under this formulation. He did not introduce any expert testimony concerning the value of the securities on the dates he disposed of them. He

did not even establish the date on which his interest in Apex II was transferred to Newcomer LLC. That failure of proof was fatal to his claim as a matter of law. In addition, Newcomer admitted that the securities were worth what he paid for them: they “had equal value at the time he disposed of them.” RP 431; *see also* RP 428–29, 1331 (according to Newcomer’s counsel, “Mr. Newcomer indicated that [on the date of transfer] he still valued [his interest in Apex I] at \$800,000”).

Newcomer sought to brush off his failure to prove damages in three ways. First, with regard to Apex I only, he testified that he received no payment in exchange for the transfer of those securities to Newcomer TIC. RP 568. But that was irrelevant to the statutory measure of damages. The statute turns upon “the *value* of the security when the buyer disposed of it” (RCW 21.20.430(1) (emphasis added)), not the *consideration* received. That is an entirely sensible result because the promoter of an investment has no control over whether the investor sells the security at a reasonable price or literally gives it away. A below-market or gratuitous transfer by the original buyer of the security cannot create or increase liability for the investment promoter who sold the security to the original buyer.⁹

⁹ Notably, even if what Newcomer received in exchange *were* relevant, the fact that he did not receive “payment” does not mean he did not receive *consideration*. The transfer resulted in his wholly owned LLC, Newcomer TIC, holding a 30 1/3-percent
(continued . . .)

Second, Newcomer attempted to cast his transfer of the Apex II securities to Newcomer LLC as “a simple name change” that did not terminate his ownership of those securities. RP 430. He testified that he “own[ed] them [the Apex II securities] through his trust, which he owns a hundred percent.” RP 426–27. Newcomer laid no foundation to offer such opinions, referring vaguely to the advice of a lawyer who did not testify and admitting that he “probably just [did not] understand it fully.” RP 428, 430. The undisputed evidence established that Newcomer LLC was a LLC, *not* a trust. And contrary to his testimony, Newcomer, as trustee of his revocable trust, owned only 99 percent of Newcomer LLC. Another trust owned the remainder. Ex. 75, Schedule 1. The jury was correctly instructed that “[a] disposition to a legal entity has the same legal effect as a disposition to a human being.” CP 1655 (Jury Instruction 16). No reasonable juror adhering to that instruction could have determined that Newcomer still owned the Apex II securities himself.

(. . . continued)

interest in the Phase I real estate, as he had requested. Newcomer did not prove what that real estate interest was worth at that time, just as he did not prove what the value of his holding in Apex I was at the time he transferred it. Absent evidence to the contrary, it must be presumed that Newcomer’s interest in Newcomer TIC was equal to the value of the contributed shares of Apex I.

Third, Newcomer's counsel resorted to telling the jury that the proper measure of damages was a "trick" (RP 1231; *see also* 1224–25, 1267), encouraging them to apply the wrong standard. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 174 Wn.2d 851, 876–77, 281 P.3d 289 (2012) (ambiguous instruction was prejudicial because "the incorrect statement was actively urged upon the jury during closing argument"). That tactic compounded the prejudice to Cohen from the erroneous instruction and would ordinarily compel reversal for a new trial before a correctly instructed jury.

However, because Newcomer failed to prove *any* damages under the applicable standard, the evidence does not support the verdict and the court should have granted Cohen's motions for a directed verdict and for judgment as a matter of law. *See* CP 1283–86, 1835. Accordingly, the judgment should be reversed outright with no remand for retrial. *See, e.g., Malyon v. Pierce Cty.*, 131 Wn.2d 779, 813, 935 P.2d 1272 (1997) (en banc) (remand for further findings unnecessary where there was "no evidence in the record" that supported injunction).

IV.

COHEN DID NOT VIOLATE THE WSSA IN CONNECTION WITH NEWCOMER'S 2008 AND 2009 CONTRIBUTIONS.

The Court need reach this argument only if it rejects the arguments in Parts I (limitations) and III (no damages)—both of which, if accepted, independently require reversal—and does not agree with the arguments in Parts II(A), (B) or (C) as to at least one misrepresentation or omission. In that event, the judgment should still be reduced by \$1,902,650.21 for two independent and alternative reasons.

A. Once Phase I Was Complete, None Of The Misrepresentations Or Omissions Was Material.

By the time Newcomer made his 2008 and 2009 investments, the misrepresentations and omissions made in 2005 and 2006 in connection with Apex I were not material. *See Guarino*, 122 Wn. App. at 115 (“Materiality is determined relative to the date of the sale, not merely the date of any communications”).

That is because by the time of the 2008 and 2009 investments, Phase I was complete and C&M had provided the \$350,000 of promised services. Ex. 47 at 4; *see also generally supra*, pp. 9–10, 43. Also by that time, Apex I had paid C&M the \$400,000 cash portion of C&M’s fee for Phase I. *Id.* In short, the balance sheet of Apex I looked exactly as it would have had Cohen paid his entire initial capital contribution in cash in 2005

and C&M had received \$750,000 cash in management fees instead of only \$400,000 by 2006. The zero-interest loan from Point Ruston to Apex was likewise no longer on the books because Apex I repaid it in August 2006. Ex. 6; RP 341–43.

For this reason alone, Newcomer cannot recover the \$1,236,555 in contributions he made in 2008 and 2009 or the \$666,095.21 in related prejudgment interest. *See* CP 1660 (items 3 and 4 of special verdict); CP 1801 ¶3, 1805; RCW 21.20.430(1). Accordingly, the judgment should be reduced by \$1,902,650.21 and the matter remanded for a redetermination of fees and costs. *See* Part IV(C), *infra.*

B. The Misrepresentations And Omissions In 2005 And 2006 Were Not In Connection With Newcomer’s Acquisition In 2008 Of Interests In Two New Entities: Newcomer TIC and Apex II.

Even if the 2005 and 2006 misrepresentations and omissions were somehow material to Newcomer’s investments years later, the separate identities of Newcomer TIC and Apex II must be respected. No evidence or argument was adduced below to support treating Apex I, Newcomer TIC and Apex II as a single entity. To the contrary, Newcomer urged that each payment he made was a separate investment. RP 237, 1227.

Each of Newcomer’s alleged misrepresentations or omissions—the promise to pay the initial contribution in cash, the services contract with

C&M, and the zero-interest loan—occurred in connection with Newcomer’s investment in Apex I. Those representations or omissions were not in connection with the subsequently formed Newcomer TIC or Apex II entities, the only entities in which Newcomer was a member after March 2008. Consequently, Newcomer cannot recover the \$1,236,555 in contributions he made to these entities (Ex. 83) or the \$666,095.21 in related prejudgment interest. The judgment should be reduced by \$1,902,650.21 and the matter remanded for a redetermination of fees and costs. *See* Part IV(C), *infra*.

C. If The Judgment Is Modified, The Fee And Costs Award Must Be Vacated And Reconsidered.

If the judgment is modified downward, then the trial court’s award of attorneys’ fees and costs must be vacated so that the award may be reconsidered in light of the different outcome. Courts must, of course, segregate attorneys’ fees incurred in pursuing successful claims and theories from those related to failed claims and theories. *See Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994) (plaintiff could recover only those fees incurred in his “successful constructive discharge claims,” not his “unsuccessful claim of constructive discharge”). The same is true of Newcomer’s costs award. *See Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659, 665, 989 P.2d 1111 (1999) (remanding for trial

court “to consider Brand’s ‘very limited success at trial,’ and to segregate costs and fees attributable to Brand’s successful claims”).

In addition, the trial court should be directed to disallow as costs the amount Newcomer incurred to retain his accounting expert, Deaton. CP 1698. The WSSA does not grant authority to award costs, such as expert witness fees, that are not otherwise authorized by statute. *See* RCW 4.84.010, 21.20.430(1); *see Hume*, 124 Wn.2d at 674–75 (“Absent a statute that expressly allows expanded cost recovery, . . . plaintiffs are not entitled to such generous cost awards [that include expert witness fees]”).

V.

**THE JUDGMENT SHOULD BE REVERSED AS TO THE
MARITAL COMMUNITY OF MICHAEL COHEN AND
JULIE MCBRIDE.**

The Court need reach this argument only if it does not reverse the judgment in its entirety. If the judgment is only modified downward or is affirmed, then the Court should reverse it as to “the marital community composed of Michael Cohen and Julie McBride” (CP 1805), which is named as a judgment debtor along with Cohen. The community was made a judgment debtor by the trial court based solely on the fact that Julie McBride was married to Cohen when the events at issue took place. CP 1802; RP 898. No evidence was introduced—nor any argument made—that McBride could be held liable directly under the WSSA.

Accordingly, the trial court erred in granting judgment against the former marital community.

A marital community can be held liable for the acts of one spouse in certain circumstances, such as when the acts were carried out for the benefit of the community. *See deElche v. Jacobsen*, 95 Wn.2d 237, 245, 622 P.2d 835 (1980). Whether the community could be held liable based on Cohen's conduct was a disputed issue. Newcomer alleged that "[a]ny and all acts taken by Cohen were made for the benefit of the marital community" (CP 12 ¶1.5), a point disputed in the answer (CP 21 ¶1.5). This issue was not argued to the jury (*see* RP 1207–34), the jury was not instructed on it (CP 1641–58), and the special verdict form did not call for the jury to decide the issue. CP 1660.

The Washington Supreme Court reversed the inclusion of a marital community on a judgment under virtually identical circumstances in *Swenson v. Stoltz*, 36 Wash. 318, 324, 78 P. 999 (1904):

The complaint alleges and the answer denies that the obligation was for the benefit of the community. That subject was therefore in issue. Personal recovery against the husband alone was asked, with the additional demand that it should be enforced against the property of the community. The only question submitted to the jury was that of the personal liability of the husband. We fail to find in the record any request from either party that the question of community liability should be submitted to the jury. They therefore did not pass upon the subject, and the verdict contains no finding concerning it. . . . We cannot say that this judgment is in conformity to the verdict, except as to the personal liability of the husband. (36 Wash at 324)

Likewise, here, the trial court never submitted the question of community liability to the jury and therefore lacked any basis to include the community in the judgment.

The trial court may have relied on the representation by Newcomer's counsel that, notwithstanding the naming of the community as a judgment debtor, "those defenses [to executing a judgment against community property] are going to be available to [McBride] even if a judgment is entered against the marital community." RP 898. That was a concession that the relevant issues were unadjudicated and confirms that the judgment cannot stand as to the community.

CONCLUSION

For the reasons set forth in Parts I, II and III above, the judgment should be reversed with directions that a defense judgment be entered. Alternatively, for the reasons discussed in Part IV, the judgment should be reduced to \$1,941,516.01, and the fee and cost award should be vacated and the matter remanded for reconsideration of the amount of the fee and cost award.

If the judgment is not reversed in its entirety, then it should be modified to remove Julie McBride and the marital community for reasons stated in Part V.

DATED: June 1, 2016.

Respectfully,

ARNOLD & PORTER LLP
JEROME B. FALK, JR.
SEAN M. SELEGUE

By 

SEAN M. SELEGUE

*Attorneys for Defendants, Appellants and
Cross-Respondents
Michael Cohen and Julie McBride*

APPENDICES

Appendix A - RCW 4.84.010

Appendix B - RCW 21.20.010

Appendix C - RCW 21.20.430

Appendix D - RCW 25.15.190 (2015)

Appendix E - Jury Instruction No. 15

Appendix F - Objections to Jury Instruction No. 15

West's Revised Code of Washington Annotated
Title 4. Civil Procedure (Refs & Annos)
Chapter 4.84. Costs (Refs & Annos)

West's RCWA 4.84.010

4.84.010. Costs allowed to prevailing party--Defined--Compensation of attorneys

Effective: July 26, 2009
Currentness

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

- (1) Filing fees;
- (2) Fees for the service of process by a public officer, registered process server, or other means, as follows:
 - (a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.
 - (b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;
- (3) Fees for service by publication;
- (4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;
- (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
- (6) Statutory attorney and witness fees; and
- (7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

4.84.010. Costs allowed to prevailing party--Defined--Compensation..., WA ST 4.84.010

Credits

[2009 c 240 § 1, eff. July 26, 2009; 2007 c 121 § 1, eff. July 22, 2007; 1993 c 48 § 1; 1984 c 258 § 92; 1983 1st ex.s. c 45 § 7; Code 1881 § 505; 1877 p 108 § 509; 1869 p 123 § 459; 1854 p 201 § 367; RRS § 474.]

West's RCWA 4.84.010, WA ST 4.84.010

Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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West's Revised Code of Washington Annotated
Title 21. Securities and Investments (Refs & Annos)
Chapter 21.20. Securities Act of Washington (Refs & Annos)
Fraudulent and Other Prohibited Practices

West's RCWA 21.20.010

21.20.010. Unlawful offers, sales, purchases

Currentness

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:

- (1) To employ any device, scheme, or artifice to defraud;
- (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or
- (3) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

Credits

[1959 c 282 § 1.]

West's RCWA 21.20.010, WA ST 21.20.010

Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

West's Revised Code of Washington Annotated
Title 21. Securities and Investments (Refs & Annos)
Chapter 21.20. Securities Act of Washington (Refs & Annos)
Civil Liabilities

West's RCWA 21.20.430

21.20.430. Civil liabilities--Survival, limitation of actions--Waiver of chapter void--Scienter

Currentness

(1) Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010, 21.20.140 (1) or (2), or 21.20.180 through 21.20.230, is liable to the person buying the security from him or her, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

(2) Any person who buys a security in violation of the provisions of RCW 21.20.010 is liable to the person selling the security to him or her, who may sue either at law or in equity to recover the security, together with any income received on the security, upon tender of the consideration received, costs, and reasonable attorneys' fees, or if the security cannot be recovered, for damages. Damages are the value of the security when the buyer disposed of it, and any income received on the security, less the consideration received for the security, plus interest at eight percent per annum from the date of disposition, costs, and reasonable attorneys' fees.

(3) Every person who directly or indirectly controls a seller or buyer liable under subsection (1) or (2) above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker-dealer, salesperson, or person exempt under the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable.

(4)(a) Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.

(b) No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140 (1) or (2) or 21.20.180 through 21.20.230, or more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care. No person may sue under this section if the buyer or seller receives a written rescission offer, which has been passed upon by the director before suit and at a time when he or she owned the security, to refund the consideration paid together with interest at eight percent per annum from the date of payment, less the amount of any income received on the security in the case of a buyer, or plus the amount of income received on the security in the case of a seller.

21.20.430. Civil liabilities--Survival, limitation of actions--Waiver of..., WA ST 21.20.430

(5) No person who has made or engaged in the performance of any contract in violation of any provision of this chapter or any rule or order hereunder, or who has acquired any purported right under any such contract with knowledge of the facts by reason of which its making or performance was in violation, may base any suit on the contract. Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this chapter or any rule or order hereunder is void.

(6) Any tender specified in this section may be made at any time before entry of judgment.

(7) Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

Credits

[1998 c 15 § 20; 1986 c 304 § 1; 1985 c 171 § 1; 1981 c 272 § 9; 1979 ex.s. c 68 § 30; 1977 ex.s. c 172 § 4; 1975 1st ex.s. c 84 § 24; 1974 ex.s. c 77 § 11; 1967 c 199 § 2; 1959 c 282 § 43.]

West's RCWA 21.20.430, WA ST 21.20.430

Current with all laws from the 2015 Regular and Special Sessions and Laws 2016, chs. 1 and 2

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West's Revised Code of Washington Annotated
Title 25. Partnerships (Refs & Annos)
Chapter 25.15. Limited Liability Companies (Refs & Annos)
Article V. Contributions

This section has been updated. [Click here for the updated version.](#)

West's RCWA 25.15.190

25.15.190. Form of contribution (*Effective until January 1, 2016*)

Effective: [See Text Amendments] to December 31, 2015

The contribution of a member to a limited liability company may be made in cash, property or services rendered, or a promissory note or other obligation to contribute cash or property or to perform services.

Credits

[1994 c 211 § 501.]

West's RCWA 25.15.190, WA ST 25.15.190

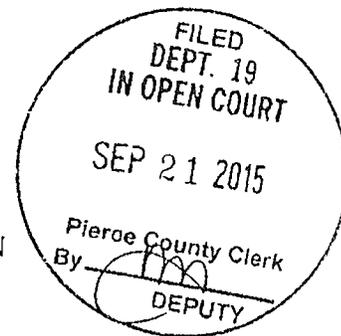
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14-2-05136-6 45582320 CTINJY 09-24-15



SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR PIERCE COUNTY

01-1
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9/24/2015
549

WILLIAM NEWCOMER, a married individual as his separate estate; 2009 NEWCOMER FAMILY, LLC, a Washington limited liability company; WILLIAM NEWCOMER on behalf of APEX APARTMENTS, LLC, as a derivative action; 2009 NEWCOMER FAMILY, LLC on behalf of APEX APARTMENTS II, LLC and APEX PENTHOUSE CONDOS, LLC, as a derivative action,

Plaintiffs,

v.

MICHAEL COHEN and JANE DOE COHEN, husband and wife; and the marital community composed thereof; KEN THOMSEN and JANE THOMSEN, husband and wife, and the marital community composed thereof; MC APEX, LLC, a Washington limited liability company; AMC FAMILY, LLC, a Washington limited liability company,

Defendants.

NO. 14-2-05136-6

COURT'S INSTRUCTIONS
TO THE JURY

INSTRUCTION NO. 15

With respect to the Washington State Securities Act, it is the duty of the court to instruct you as to the measure of damages. By instructing you on damages the court does not mean to suggest for which party your verdict should be rendered.

If you find for Plaintiff on the claims under the Washington State Securities Act, then you must determine the amount of damages, if any. If the Plaintiff still owns the security, the damages are the amount Plaintiff paid in connection with the purchase of the security. Plaintiff is not required to show that the untrue statement or omission actually caused them to incur losses.

If the Plaintiff no longer owns the security, the amount of damages are the amount for which the security was initially purchased less the value of the security when Plaintiff disposed of it.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE
DEPARTMENT 19

WILLIAM NEWCOMER, a married individual as his separate estate, et al.,)	
)	
Plaintiffs,)	Court of Appeals
)	No. 48233-9-II
vs.)	
)	Pierce County
MICHAEL COHEN and JANE DOE COHEN, husband and wife, and the marital community composed thereof, et al.,)	Superior Court
)	No. 14-2-05136-6
)	VOLUME XI
Defendants.)	

VERBATIM REPORT OF PROCEEDINGS

September 17, 2015 - AM Session
Pierce County Courthouse
Tacoma, Washington
before the
HONORABLE PHILIP K. SORENSEN

1 before I get to that.

2 MR. BECK: Okay, Your Honor. First off, we
3 take exception with the Court not giving our Supplemental
4 Instruction 10, which is the same thing as our original
5 10, with a typo of the plaintiff's name being corrected.

6 We also take objection to the Court's
7 Instruction 15. First off, there is insufficient evidence
8 to support the instruction based on the fact that he
9 currently possesses any of these securities. Therefore,
10 it should not be given in the form it is in Instruction
11 15.

12 Second, there's insufficient evidence
13 presented to allow the jury to make any assessment of what
14 the value was at the time of transfer. That actually
15 would go to, you know, kind of the whole concept of all of
16 this and relates to our motion to dismiss. And I
17 understand the Court's ruling on it, but I'm just stating
18 that.

19 Additionally, the Court's Instruction 15
20 includes this first section of the statute. I guess it
21 dovetails with the fact that there's not sufficient
22 evidence to support it and whether it's even a question
23 the jury should be contemplating and deciding as opposed
24 to a question of law for the Court.

25 THE COURT: Whether he owns it or not?

1 MR. BECK: Well, what the mechanism of the
2 damages would be here. And in part, yes, whether he owns
3 it or not, you know, whether the documents admitted into
4 evidence established that he does not, and so there really
5 is no reasonable question that would have a jury be
6 entertaining that question. It's setting up an issue
7 where we've got a jury deciding something that they,
8 frankly, shouldn't be.

9 MR. JONES: Then, may I comment briefly on
10 plaintiffs' objection or request for the word "received,"
11 "value received" to be added? That's not in the statute.
12 The statute references less the value of the security when
13 the buyer disposed of it. It's not necessary that he
14 necessarily received a value.

15 THE COURT: It had a worth of some sort.

16 MR. JONES: Exactly, exactly.

17 MS. EDRINGTON: And the "received" comes,
18 again, from the case.

19 THE COURT: Okay.

20 MR. KNIGHT: Just one -- we have all three of
21 our counterparts up here. Thank you, Your Honor.
22 Perhaps, you know, the one-word change to clarify this, we
23 ask that the value be defined by the case. I understand
24 the Court's position on that.

25 If the words "actual price" are not put in

1 here for "value" because of Your Honor's ruling, it does
2 seem necessary to have the word "received," keeping
3 "value" vague or undefined, less the "value received,"
4 adding the one word "received" in. The case talks about
5 an out-of-pocket measure of damages. To have a value of
6 something in a transaction without an understanding of
7 whether the value was transferred or not is an incomplete
8 part of -- the notion of a disposition is that it was
9 transferred from one person or entity to another person or
10 entity.

11 Here, without the language -- the counterpart
12 to the language "disposition," that one word "received,"
13 it's a little bit incomplete. You can sell a car for a
14 certain amount of money, and if they didn't pay you the
15 money, you didn't get the money. So, the "received" is an
16 important part of the statute.

17 THE COURT: Okay. I've heard everybody's
18 argument, and I am going to give the instruction as it's
19 currently drafted.

20 MS. EDRINGTON: The next objection is to
21 Instruction Number 16.

22 THE COURT: What's your objection?

23 MS. EDRINGTON: That it's being given at all.

24 THE COURT: Okay.

25 MS. EDRINGTON: Plaintiffs' position is that

1 it's extraneous to the claims and confusing to the jury.
2 The instruction is basically saying -- again, our guy is
3 basically saying that a transfer from a person to an
4 entity -- -- excuse me -- the instruction states, a
5 disposition to a legal entity has the same legal effect as
6 a disposition to a human being. From the plaintiff's
7 perspective, it has little to no bearing on the elements
8 at issue and is confusing to the jury.

9 THE COURT: Mr. Beck.

10 MR. BECK: Your Honor, we talked about this
11 informally before. One of the questions that's being teed
12 up for the jury is whether he owns the securities and
13 whether he disposed of them, and without some guidance of
14 what the law means, it would be entirely impossible for
15 the jury to make that assessment.

16 THE COURT: I essentially agree with that. I
17 am going to give the instruction.

18 MS. EDRINGTON: From the plaintiffs'
19 perspective, those are the only objections. We will,
20 however, take exception to the Court not granting
21 Plaintiffs' Instruction Number 6, which states that the
22 Securities Act is a remedial statute, and the general
23 notion of that instruction is to inform the jury that the
24 law in Washington is that the Securities Act is to be
25 construed in favor of the investor. That is the lens with

GORDON THOMAS HONEYWELL

June 01, 2016 - 3:14 PM

Transmittal Letter

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Court of Appeals Case Number: 48233-9

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Appellants' Opening Brief filed with Motion for Leave to File over-length brief

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