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STATE OF WASHINGTON
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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

WILLIAM NEWCOMER, *et al.*
Respondent,

v.

MICHAEL COHEN, *et al.*
Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case is about dishonesty. Michael Cohen lied to William Newcomer to get Newcomer to invest in limited liability companies controlled by Cohen. In addition, Cohen withheld information from Newcomer about the financial health of the investments. Cohen then set up a scheme to cover up the misrepresentations and omissions from Newcomer and to sell additional securities to Newcomer.

Newcomer agreed to invest \$800,000 in cash, in a project known as the Apex Apartments, based on Cohen's express representation that Cohen would also invest \$800,000 in cash.

Newcomer made his capital contribution as agreed. Cohen did not. Cohen's cash contribution was \$350,000 short. Without telling Newcomer, Cohen credited his capital account with a \$350,000 non-cash journal entry for unearned management fees instead of investing cash as agreed.

As a result of Cohen's failure to contribute \$350,000 in cash, the project was underfunded. Without disclosure to Newcomer, Cohen placed the Apex project in debt to Point Ruston, LLC – a company owned by Cohen, by secretly borrowing \$360,000 from Point Ruston, LLC.

Cohen also secretly obligated the Apex project to pay another one of Cohen's companies a \$400,000 fee for founding and organizing the Apex opportunity.

Whenever Newcomer would ask for additional information, Cohen would repeat the false statements he made, and provided Newcomer with false written records to conceal the fact that Cohen had not contributed the capital he claimed.

Without disclosing these significant debts to Newcomer, Cohen sought additional money from Newcomer. Over four separate capital calls, Cohen convinced Newcomer to invest \$2,309,552.

After discovering Cohen's deceitful actions, Newcomer brought this action under the Washington State Securities Act ("WSSA"), and tendered the securities back to Cohen. Following a three week trial, the jury found Cohen violated the WSSA with respect to every single investment he sold Newcomer. The jury awarded Newcomer damages in the amount of the consideration he paid for the securities as provided for by the WSSA. Cohen's appeal repeats the arguments he made to the jury.

II. RESTATEMENT OF THE CASE¹

A. Cohen marketed an investment opportunity and negotiated its terms.

In late 2004, Cohen began marketing an investment in the form of a membership interest in a limited liability company. The company was to develop an apartment project near the Tacoma Mall. RP 308. It is undisputed the LLC membership interests are securities, that sale of the

¹ A chronology of events is attached hereto as Appendix I.

investment is governed by the WSSA, and that Cohen is a control person of the securities sold. CP 943.

Cohen approached multiple investors, and presented the investors with different proposals, titled "offering introductions." RP 1057. The different offering introductions had different terms. *See* Exs. 1, 69. For example, one offering introduction proposed that "Mike Cohen ... intends to purchase a 10% interest for \$200,000." Ex. 69 at 4. Another offering introduction proposed "Mike Cohen and Ken Thomsen ... intend to invest \$900,000 each for 1/3 interests." Ex 1 at 4. None of the offering introductions were signed by Cohen or any of the other investors. RP 1073.

After Cohen sent the offering introduction to Newcomer, they had a telephone call in which they discussed several changes that would need to be made in order for Newcomer to invest. RP 308-09. For example, the offering introduction provided to Newcomer awarded Cohen and another proposed manager 15% of the profits "for organizing and managing the venture..." Ex. 1 at 4. Newcomer requested that Cohen remove that provision from the final agreement. RP 318. The offering introduction also proposed "Of the \$1.8 Million investment by the Managers, \$1.45 Million is cash and \$350,000 is in the form of deferred equity." Ex. 1 at 4.

Newcomer requested several changes to this proposal. RP 319, 321. First, in order to be equal investors. Cohen's initial contribution

would be \$800,000 instead of \$900,000. RP 316, 571. Second, and more importantly, both Cohen and Newcomer would make their contributions in cash without any deferred equity. RP 316 (“[W]e would each put in \$800,000 in cash. There would not be the deferred equity.”); RP 325, 328, 571 (“So, each, Mike and Ken and myself, would put in \$800,000 cash...”). Newcomer and Cohen discussed the change “that we would each put in \$800,000 in cash.” RP 316; *see also* RP 528. There would not be the deferred equity.” RP 316. To Newcomer, it was “important that we all have the same amount of money, have the same skin in the game, so to put it.” RP 316-17.

Newcomer made some notes on the offering introduction for his personal file. RP 314. Prior to discovery, the offering introduction with Newcomer’s personal file notes was never provided to Cohen. RP 1073. The oral discussion between Newcomer and Cohen was reduced to writing in the form of the Apex Apartments, LLC Limited Liability Company Agreement. Ex. 2; RP 320.

B. Cohen formed Apex Apartments, LLC and collected contributions from investors.

On February 16, 2005, Cohen formed Apex Apartments, LLC. Ex. 2. Including Cohen, there were six total members of Apex Apartments, LLC. Section 8.1 of the agreement provides of the members will contribute the amount set forth in Schedule 1, which states:

Member	Capital Contribution
MC Apex, LLC (Michael Cohen)	\$800,000
AMC Family I, LLC (Kenneth Thomsen)	\$800,000
William Newcomer	\$800,000
Eckstein Investments, LLC (Todd Eckstein)	\$100,000
Entrust Northwest, LLC (William Donahoe)	\$100,000
R B & F Property Management, LLC (Roger Fierst)	\$100,000

Ex. 2, Schedule 1.

Before signing the Agreement, Newcomer reviewed the Agreement to make sure allowing for deferred equity be treated as capital was removed. RP 320-21. Newcomer found, “as [they] had agreed, it was taken out.” RP 321.

In addition to removing the reference to the deferred equity, the Apex Apartments, LLC Agreement provides clarity by specially providing for the form in which capital contributions may be made. Ex. 2, § 8.3.1. The Agreement specifically provides that “money” and “property” would be contributed to a member’s capital account. Ex. 2, § 8.3.1. The Agreement does not provide for the contribution of services or deferred equity to a member’s capital account. Ex. 2, § 8.3.1.

C. Cohen misrepresented his capital contribution.

From the very beginning, Cohen made fraudulent misrepresentations to Newcomer. Cohen represented that his initial capital contribution was cash only. RP 316, 325, 328, 571; *see also* Ex. 2, Schedule 1. That representation was false. Ex. 43; RP 669-70, 1075.

Cohen is now forced to admit that he in fact did not contribute \$800,000 in cash, but that \$350,000 was in the form of a non-cash journal entry for unearned management fees. RP 669-70.

On May 5, 2005, Newcomer called Cohen's office to confirm that Cohen had in fact invested \$800,000 in cash. RP 328. Cohen's office confirmed, "Yes, we have." RP 328. No investor other than Cohen knew that Cohen in fact did not contribute the cash he claimed. RP 638, 654. When asked about Cohen's initial investment, Roger Fierst another investor, testified that he "thought [Cohen] was putting in \$800,000 in cash." RP 638. Similarly, investor Todd Eckstein testified he believed Cohen's initial \$800,000 investment "was all cash." RP 654.

Cohen repeated this misrepresentation to Newcomer multiple times to cover up the misrepresentation and continue to get Newcomer to invest. RP 328, 369, 451, 587-88, 607; Ex. 17; *see also* Ex. 2. In early 2009, Newcomer requested an accounting of the capital contributions. RP 345-46, 362, 364. Cohen, through his bookkeeper Leanne Scherbinske, provided him a document that purported to show Cohen's capital contributions. RP 688; *see also* Ex. 17. The document showed certain management fees that Cohen previously earned as Manager applied to his capital contributions in 2006, 2008 and 2009. Ex. 17. However, the document specifically excluded the \$350,000 journal entry made in 2005. Ex. 17; RP 687-88. Scherbinske testified that the numbers on Exhibit 17

are “wrong.” RP 681. Exhibit 17 is a false representation of Cohen’s capital contribution. RP 681, 687-88. Newcomer relied on this misrepresentation as he continued to invest in 2009. RP 337, 369.

The misrepresentation on Exhibit 17, given to Newcomer in 2009, is particularly evident when compared against Exhibit 43 that Cohen was compelled to produce in discovery in 2014. *See* Exs. 17, 43. Exhibit 43 shows the actual non-cash items that make up Cohen’s capital contributions. Ex. 43. The 2009 document states, “Deferred Fees applied to capital” in the amount of \$1,012,100, while the 2014 document reflects a total of \$1,362,100. *See* Exs. 17, 43. The exhibits show exactly a \$350,000 difference – the amount Cohen claimed, yet failed, to invest in cash. *See* Exs. 17, 43; RP 564.

Between 2009 and 2014, no additional management fees became due because construction was completed. RP 686-87. The 2009 number is lower because Cohen attempted to hide his \$350,000 journal entry from Newcomer. RP 681, 687.

D. Cohen agreed to pay himself an additional \$400,000 from Apex Apartments, LLC without disclosing it to the investors.

The Apex Apartments, LLC Agreement provides that a company owned by Cohen, C&M Construction Management, LLC, will serve as construction manager. Ex. 2, Schedule 3. The Apex Apartments, LLC Agreement gives Cohen’s company a fee equal to ten percent (10%) of the

total project costs. Ex. 2, Schedule 3. All the investors signed the Apex Apartments, LLC Agreement and consented to this fee. *See* Ex. 2. The total project costs were estimated to be between \$30 and \$40 million. RP 324. This means Cohen's company would earn between \$3 and \$4 million in management fees. *See* RP 324.

However, on May 1, 2005, without notice to the investors, Cohen executed a "contract for services" that obligated Apex Apartments, LLC to pay Cohen's company an additional sum of \$400,000 for "founding and organizing" the opportunity. Ex. 3. The undisclosed contract provided:

The Members (Management) of Apex Apartments, LLC wish to compensate Mike for founding and organizing this opportunity and, in recognition of him having the most experience of the management group, retain his additional services to provide for the independent evaluation of the performance of the staff Construction Manager and Superintendent which will supervise and direct the construction as well as the subcontractors and suppliers employed by the Construction Manager.

Ex. 3 (emphasis added).

The Agreement is signed only by Cohen. *See* Ex. 3. Cohen did not disclose this contract to Newcomer. RP 339. Cohen did not tell Fierst or Eckstein that Apex would be paying him a \$400,000 founding fee. RP 639, 655. This opportunity fee materially impacted the investment.

E. Cohen borrowed funds on behalf of Apex Apartments, LLC without disclosing it to the investors.

Because Cohen's cash capital contribution was short by \$350,000, the entity was underfunded which required Apex Apartments, LLC to borrow additional funds. RP 574, 623. To make up for the \$350,000 Cohen failed to contribute, Cohen secretly borrowed \$360,000 from Point Ruston, LLC on behalf of Apex Apartments, LLC. Point Ruston, LLC is a large commercial and residential development in Tacoma and Ruston owned by Cohen. RP 695, 699. Newcomer is not a member of Point Ruston. RP 342. Other than Cohen and Thomsen's ownership, Point Ruston, LLC is not related to Apex Apartments, LLC. RP 342. Cohen did not disclose the loan, and resulting debt, to Newcomer. RP 343-44, 369-70.

Approximately three weeks after Cohen created a debt from Apex Apartments, LLC to Point Ruston, LLC, Cohen sought an additional capital call from the members of Apex Apartments, LLC. Ex. 8. The capital call request omitted to disclose that the funds collected would be used to repay a debt to a company controlled by Cohen.

On August 9, 2006, Newcomer complied with the capital call request and contributed an additional \$272,997. Ex. 83C; RP 371. The capital contribution was deposited into the account of Apex Apartments, LLC. Ex. 83C. At the time Newcomer made the capital contribution to

Apex Apartments, LLC, he did not know that Apex Apartments, LLC was in fact in debt to Point Ruston, LLC. RP 344.

On August 21, 2006, twelve days after Newcomer made the capital contribution to Apex Apartments, LLC, Cohen repaid the loan to Point Ruston, LLC. Ex. 6. Cohen did not tell Newcomer that his capital contribution would be used to repay a debt to an entity controlled by Cohen. RP 344.

On February 20, 2008, Cohen sought an additional capital contribution on behalf of Apex Apartments, LLC, in the amount of \$326,555. Ex. 9. Newcomer's capital contribution, made payable to "Apex Apartments, LLC" was made on March 21, 2008. Ex. 83D. At the time Newcomer made that capital contribution, Cohen failed to disclose Apex Apartments, LLC repaid a debt to Point Ruston, LLC. RP 346-48. Moreover, at that time, Newcomer still did not know Cohen misrepresented his initial capital contribution. RP 348.

F. Cohen reorganized Apex Apartments, LLC.

In March 2008, Cohen reorganized the structure of how he managed the securities he sold to the investors. Exs. 10, 12-14; RP 372-73. Specifically, Cohen converted Apex Apartments, LLC into two separate TIC (tenant-in-common) entities and created Apex Apartments II, LLC.

On March 1, 2008, Cohen executed a Certificate of Corporate Resolution under which he proposed to form Apex Apartments II, LLC, to

conform to “lending guidelines.” Ex. 10. Apex Apartments II, LLC was to be formed “with the same Members and same percentage interests in the Company.” Ex. 10.

On March 10, 2008, Apex Apartments II, LLC was formed. Ex. 14. Newcomer was a member in his individual capacity with a 30 1/3 ownership interest, which is the same name, form, and percentage as Apex Apartments, LLC. Ex. 14, Schedule 1. Apex Apartments, LLC continued to exist; Cohen continued to manage the entity. Ex. 2.

Newcomer was a member of Apex Apartments II, LLC in his individual capacity. Newcomer signed the original March 10, 2008 Apex Apartments II, LLC Limited Liability Company Agreement in his individual capacity. Ex. 14 at 22.

For the signature block of the First Amended and Restated Limited Liability Company Agreement of Apex Apartments II, LLC, Cohen changed the signature block from Newcomer’s name to “2009 Newcomer Family Trust, LLC.” Ex. 19 at 19. No such entity exists, and the signature block prepared by Cohen is presumably an error intended to read “2009 Newcomer Family, LLC” of which Newcomer is a member. Ex. 75.

There is no evidence in the record that Newcomer ever withdrew or transferred his personal membership interest in Apex Apartments II, LLC. *See* RP 428. Section 12 of the Apex Apartments II, LLC Agreement

governs transferability. Ex. 14, § 12. There is no evidence the parties complied with Section 12 or otherwise transferred Newcomer's interest.

On March 20, 2008, Cohen changed the form of Apex Apartments, LLC by forming Apex Apartments I TIC, LLC and Newcomer Apex I TIC, LLC. Exs. 12-13. The manager of Apex Apartment I TIC, LLC and Newcomer Apex I TIC, LLC was Apex Apartments, LLC. Exs. 12 § 5.1, 13 § 5.1. Because Cohen remained the manager of Apex Apartments, LLC, he controlled both new entities. Ex. 2. § 5.1.

All of the members of Apex Apartments, LCC withdrew and became members of the new entities. Ex. 11. Newcomer became a member of Newcomer Apex I TIC, LLC, in his individual capacity, the same way he held his interest in Apex Apartments, LLC. Ex. 13, Schedule 1. All other members of Apex Apartments, LLC became members of Apex Apartments I TIC, LLC. Ex. 12, Schedule 1.

The original members of Apex Apartments, LLC did not make any new contributions for their interests in the TIC entities. Exs. 12, § 8.1, 13, § 8.1. Instead, Apex Apartments, LLC conveyed the real property it owned to the TIC entities by deed, with 30 1/3 percent conveyed to Newcomer Apex I, TIC, LLC and 60 2/3 percent interest conveyed to Apex Apartments I TIC, LLC. Ex. 67: RP 995-96.

Newcomer continued to own his securities in his individual capacity. RP 424, 428. When asked on cross examination, "...you don't

own any security interest anymore, personally, correct?" Newcomer testified, "No, that's not correct." RP 424. Concerning the securities at issue, Newcomer testified "I still own them." RP 428.

Newcomer did not receive any payment or consideration at the time of reorganization involving Apex Apartments, LLC and Newcomer Apex I, TIC LLC. RP 568.

On October 14, 2010, the Apex Apartments II, LLC Limited Liability Company Agreement was amended to allow an additional investor, JLW Apex, LLC, to purchase a preferred membership interest. Ex. 19.

In December 2008, Cohen sought an additional capital contribution from Newcomer of \$910,000. RP 350. Newcomer complied and made this additional contribution in three payments. RP 350; Ex. 83E-G. He first contributed \$400,000 on February 26, 2009. Ex. 83E. Then, relying on the May 15, 2009 representation, Newcomer contributed an additional \$410,000 on May 18, 2009, and \$100,000 on July 14, 2009, which were deposited in the account for Apex Apartments, LLC. Exs. 83F-G.

G. Newcomer discovered the misrepresentations in 2013 and timely filed this action.

In the fall of 2013, Newcomer retained counsel in order to compel production of information related to the Apex project that Cohen had repeatedly refused to provide. RP 498. Newcomer then discovered for the

first time that Cohen misrepresented his initial \$800,000 capital contribution. RP 332, 337, 497-98, 553, 574, 772.

Newcomer filed this action on January 13, 2014. CP 1. Cohen, on behalf of the entities he controlled, did not sell the Apex project until April of 2014. Ex. 76. During the course of discovery, Newcomer learned of additional misrepresentations and omissions made by Cohen in connection with the sale of securities. *See* Exs. 3, 6. Specifically, after filing suit, Newcomer discovered Cohen's omission of the \$400,000 opportunity contact and the \$360,000 loan from Point Ruston, LLC. identified above. *See* Exs. 3, 6.

Newcomer tendered his securities prior to judgment.² The jury returned a verdict in favor of Newcomer on every claim submitted, finding Cohen made a material misrepresentation or omission in connection with each of the four sales of securities, in violation of the WSSA. CP 1660-61. The jury awarded Newcomer damages consistent with the measure of damages provided for in RCW 21.20.430(1). CP 1660-61.

² Under RCW 21.20.430(6), a defrauded investor may tender his securities "at any time before entry of judgment." Evidence of tender need not be filed with the trial court. Newcomer properly tendered all securities he owned before judgment. Cohen did not raise any defense under RCW 21.20.430(6) and did not argue that Newcomer failed to tender the securities he owned. Accordingly, Newcomer's tender is not part of the record.

III. SUMMARY OF ARGUMENT

While Cohen's appeal repeats the facts he argued to the jury, Cohen does not dispute the jury instructions are correct statements of the law, and that the jury's verdict was within the scope of the evidence and law. Instead, Cohen argues the trial court erred in denying his motion for summary judgment, motion for a directed verdict, in entering judgment on the verdict, and that the jury should not have been provided the complete instruction on the statutory measure of damages.

Statute of limitations: Cohen argues this case is barred by the statute of limitations. The jury found Newcomer filed this lawsuit within three years of discovering Cohen's violations of the WSSA. When Newcomer inquired about key components of the investment between 2005 and 2013, Cohen repeated false statements, both orally and in writing that Newcomer reasonably relied on. Specifically, on May 15, 2009, Cohen provided Newcomer with a false statement of Cohen's capital account that omitted to disclose the \$350,000 non-cash journal entry that Cohen logged instead of investing cash as agreed. In addition, on October 16, 2013, Cohen again falsely stated that he had made his initial investment in cash. It was not until Newcomer retained counsel in late 2013 that he was able to compel the production of the information that revealed Cohen's misrepresentations and omissions. The jury, as trier of fact, determined Newcomer timely filed this lawsuit in January 2014.

Materiality: Cohen argues that the jury's verdict finding that the misrepresentations and omissions were material was wrong. Cohen told Newcomer that Cohen's initial cash capital contribution was \$800,000 – the amount of Newcomer's initial investment. That statement was false. Cohen's cash investment was \$350,000 short. Because the project required the full cash investment from each investor, Cohen's failure to invest the amount he claimed resulted in the project being underfunded. In order to attempt to make up for his shortfall, Cohen secretly borrowed \$360,000, placing the Apex project in debt to a company owned by Cohen. In addition, Cohen secretly paid himself \$400,000, for "founding and organizing" the investment. The jury determined these misrepresentations and omissions changed the financial strength of the company and are material facts a reasonable person would want to know before investing.

Reasonable reliance: Cohen argues that the jury's verdict finding Newcomer reasonably relied on Cohen's misrepresentations is wrong. Contrary to Cohen's assertion, the Apex Apartments, LLC Agreement states the form in which the members must make their capital contributions. While "money" and "property" are specifically included, services is conspicuously omitted. The written evidence, repeated misstatements Cohen made to Newcomer, and the testimony of other investors who also believed Cohen's initial investment was in cash provided substantial evidence to support the jury's finding.

Measure of damages: The only jury instruction that Cohen assigns error to is the measure of damages for a violation of the WSSA. However, the instruction is an objectively correct statement of the law and virtually identical to the language of the statute. Cohen does not contend that the instruction is an incorrect statement of the law. Instead, he assigns error to the Court giving the complete statutory measure of damages, which allowed both parties to argue their theory of the case.

The WSSA provides for a recession measure of damages. If the defrauded investor still owns the security, the measure of damages is “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 tender of the security.” RCW 21.20.430.

Here, Newcomer testified that he owned the securities up until the time of tender, which is supported by substantial evidence. It is undisputed that Newcomer did not receive any income from the security. Therefore, the jury’s award of the consideration paid for the security is consistent with the evidence and law.

If the defrauded investor 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.” RCW 21.20.430. “Value”

is the “actual price which the purchaser receives for the resale of the stock.” *Garretson v. Red-Co., Inc.*, 9 Wn. App. 923, 929, 516 P.2d 1039 (1973).

Cohen argues that Newcomer disposed of his securities due to a reorganization of how the securities were held. However, Newcomer did not receive any consideration as a result of the reorganization. The actual price received was zero. Therefore, even if Newcomer did dispose of the securities, the jury’s verdict awarding him the consideration paid is also consistent with the evidence and the law because he had not previously received any payment for the security.

Jury’s verdict: Cohen’s argument to adjust the judgment downward is unsupportable. The jury found Cohen violated the WSSA in connection with all four sales of securities. Newcomer testified that had he learned of Cohen’s misrepresentation or omissions, he would not have continued to invest. Those misrepresentations and omissions continued until 2013 – four years after Newcomer’s final investment. The jury’s verdict is consistent with the evidence and the law.

Community liability: Cohen’s argument that the judgment should not be against the marital community fails. Cohen admits he was married at the time of the violation of the WSSA and presented no evidence to rebut the presumption that his acts were for the benefit of the marital community.

IV. ARGUMENT

A. **The Washington State Securities Act is broadly construed to protect investors.**

The WSSA, codified at RCW 21.20 *et seq.*, is modeled after the federal Securities Act of 1933 and the Securities Act of 1934. *Sauve v. K. C., Inc.*, 91 Wn.2d 698, 700, 591 P.2d 1207 (1979). Our Supreme Court summarized the two “essential elements” of a securities fraud claim as “(1) a fraudulent or deceitful act committed (2) in connection with the offer, sale or purchase of any security.” *Kinney v. Cook*, 159 Wn.2d 837, 842, 154 P.3d 206 (2007). “The violation is in the misrepresentation itself; it is not how the misrepresentation affected the price of the stock.” *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 135, 787 P.2d 8 (1990). Scienter is not an element of securities fraud or misrepresentation under the Securities Act. *Aspelund v. Olerich*, 56 Wn. App. 477, 482, 784 P.2d 179 (1990).

The WSSA is a remedial statute. *Helenius*, 131 Wn. App. at 432. The primary purpose is “to protect investors from speculative or fraudulent schemes of promoters.” *Helenius*, 131 Wn. App. at 432; *see also Cellular Eng'g. Ltd. v. O'Neill*, 118 Wn.2d 16, 23, 820 P.2d 941 (1991) (“The Securities Act of Washington, RCW 21.20, is remedial in nature, its primary purpose being to protect investors from speculative or fraudulent schemes of promoters.”); *Guarino v. Interactive Objects, Inc.*,

122 Wn. App. 95, 109, 86 P.3d 1175, 1182 (2004). Courts broadly construe the Securities Act in favor of the investor. *Cellular Eng'g, Ltd.*, 118 Wn.2d at 23; *Helenius*, 131 Wn. App. at 432.

B. Newcomer timely filed this lawsuit.

Despite the fact that the jury found that Newcomer timely filed this lawsuit, Cohen argues the court erred in denying his motion for summary judgment, motion for a directed verdict, and for entering judgment on the verdict based on the statute of limitations.

Cohen's argument that the court erred is purely a factual argument. There is no dispute as to the applicable statute of limitations or discovery rule. The relevant statute of limitations provides:

No person may sue under this section ... 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.

RCW 21.20.430(4)(b).³

"Under the discovery rule, the statute of limitation for these actions begins only when the aggrieved party discovers, or should have discovered by due diligence, the fact of fraud or securities fraud and sustains some actual damage as a result." *Ives v. Ramsden*, 142 Wn. App. 369, 385, 174 P.3d 1231 (2008). Whether a plaintiff exercises due

³ The jury was properly instructed on the statute of limitations. CP 1653 (Instruction No. 14). Cohen does not assign error to Instruction No 14.

diligence presents a question of fact. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000).

The jury resolved the issues of fact surrounding the statute of limitations in Newcomer's favor. Due to Cohen's repeated misrepresentations, Newcomer did not have notice of facts sufficient to prompt further inquiry until late 2013 when he hired counsel and was able to compel production of certain information that led to this lawsuit.

1. Standard of Review: Application of the discovery rule is a question of fact reviewed for substantial evidence.

Cohen erroneously asserts this Court should review issues submitted to the jury de novo.⁴ As discussed below, questions of when Newcomer discovered the violations of the WSSA, whether the misrepresentations and omissions were material, and whether the misrepresentations were reasonably relied on, are all questions of fact.

Appellate courts "review factual determinations under the substantial evidence standard." *Bartel v. Zuckriegel*, 112 Wn. App. 55, 61-62, 47 P.3d 581 (2002). "'Substantial evidence' is evidence sufficient

⁴ Cohen erroneously asserts that the statute of limitations, materiality, reasonable reliance and damages are reviewed de novo. App. Br. at 20-21. Due to the factual inquiry required, the above matters are reviewed for substantial evidence. This is a distinct analysis from the standard of review for the trial court's denial of Cohen's CR 56 and CR 50 motions to which he assigns error. App. Br. at 3-4. A CR 56 motion is reviewed de novo in the light most favorable to the non-moving party. *Landstar Inway, Inc. v. Samrow*, 181 Wn. App. 109, 120, 325 P.3d 327 (2014). A CR 50 motion is reviewed de novo, viewing the evidence of the non-moving party and all inferences that can be drawn from it as true. *Faust v. Albertson*, 167 Wn.2d 531, 537, 222 P.3d 1208 (2009).

to persuade a fair-minded, rational person of the truth of the declared premise.” *Price v. Kitsap Transit*, 125 Wn.2d 456, 464, 886 P.2d 556 (1994).

“Unless there is a proper objection, jury instructions become the law of the case.” *Millies v. LandAmerica Transnation*, 185 Wn.2d 302, 313, 372 P.3d 111 (2016). Thus, the appellate courts “review the sufficiency of the evidence in light of the instructions given.” *Millies*, 185 Wn.2d at 313.

“Even where the evidence is conflicting, [appellate courts] need determine only whether the evidence most favorable to the respondent supports the challenged findings.” *Bartel*, 112 Wn. App. at 62; *see also Lundgren v. Kieren*, 64 Wn.2d 672, 677, 393 P.2d 625 (1964) (“[I]f the judgment of the trial court can be sustained upon any theory within the pleadings and the proof, it will not be reversed.”). Courts “strongly presume the jury's verdict is correct.” *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381, 389 (2005) “The weight given to conflicting evidence is for the trial court to decide – not us [the Court of Appeals].” *Bartel*, 112 Wn. App. at 63.

“Under the discovery rule, the statute of limitation for these actions begins only when the aggrieved party discovers, or should have discovered by due diligence, the fact of fraud or securities fraud and sustains some actual damage as a result.” *Ives v. Ramsden*, 142 Wn. App.

369, 385, 174 P.3d 1231 (2008). For purposes of the discovery rule, the plaintiff must know all the material elements of the WSSA violation. *Ives*, 142 Wn. App. at 385. Whether a plaintiff exercises due diligence presents a question of fact. *Douglass v. Stanger*, 101 Wn. App. 243, 256, 2 P.3d 998 (2000).

Here, the court properly denied Cohen's CR 56 and CR 50 motions because questions of fact existed that required resolution by a trier of fact. After being properly instructed on the law, the jury examined the above evidence and found that Newcomer timely filed this lawsuit. As the facts below demonstrates, the "evidence most favorable to the respondent supports the challenged findings" *Bartel*, 112 Wn. App. at 62. Therefore, this Court should not disturb the jury's verdict.

2. Newcomer did not discover Cohen's misrepresentation of the \$800,000 capital contribution until late 2013.

Newcomer's agreement to invest with Cohen was based on the premise that Cohen would invest the same amount in cash. RP 316-17, 442, 571. On May 5, 2005, at the outset of the investment, Newcomer inquired of Cohen's office as to whether Cohen had put in his "full \$800,000 in cash." RP 588. Newcomer was assured that Cohen had put in the \$800,000 in cash. RP 588. This representation was false. Cohen and his bookkeeper both admitted \$350,000 of Cohen's purported contribution

was a non-cash journal entry for unearned management fees. RP 681, 669-70, 1071.

Cohen repeated this false representation many times. On May 15, 2009, Newcomer sought information from Cohen related to capital contributions. RP 487. Cohen instructed his bookkeeper, Leanne Scherbinske, to provide Newcomer with a document that purported to show deferred management fees applied to Cohen's capital account. RP 681; Ex. 17. The document Scherbinske produced, Exhibit 17, is objectively false and specifically omits the \$350,000 non-cash journal entry that Cohen misrepresented had been paid in cash. Newcomer did not discover it was false until he obtained accurate accountings through discovery. Exs. 43, 44; RP 332, 498.

Scherbinske confirmed the document was prepared and given to Newcomer on May 15, 2009. RP 679. Scherbinske, testified the information she gave to Newcomer was wrong and not corrected until 2014:

Q. And your testimony today is that number [on Exhibit 17] is wrong?

A. It is wrong.

RP 681.

Q. In fact, the \$350,000 that you claim is deferred fees doesn't appear anywhere on Exhibit 17?

A. Yeah, technically, no.

Q. But it does appear in 2014 on Exhibit 44?

A. Yes.

...
Q. Thank you. And Exhibit 17, the 2009 document, that's what you provided Bill Newcomer?

A. Yes.

RP 687-88.

As late as October 16, 2013, Cohen continued to falsely claim that his initial capital contribution was all cash. Newcomer testified:

A. I had been assured he had put in the 800 [thousand], so that's what I took as gospel. As time went on, I was getting more and more concerned, and finally, on October 16th, 2013, Mike and I went to lunch at the Tacoma Yacht Club. At that meeting ... I said, "Mike, you know, I've always had a concern Did you actually put in your money in cash?" ...

Q. Just to make sure we are clear, with respect to the first \$800,000 capital contribution, did he make any representation about that capital contribution?

A. Yes. I asked him if he had put it in in cash, and he said, "Yes, I did, I put it in in cash."

RP 589.

Newcomer's testimony is corroborated by other investors who also believed, until shortly before trial, that Cohen had invested his full \$800,000 in cash. Fierst, another investor, testified that he believed Cohen invested "\$800,000 in cash" until July 2015. RP 638. Eckstein, yet another investor, testified that he believed Cohen's capital was "all cash" until a week before trial. RP 654.

3. Newcomer did not have knowledge of the \$360,000 Apex debt to Point Ruston until early 2014.

As a result of Cohen's failure to invest the \$350,000 in cash that he claimed he contributed, Apex was underfunded. Cohen, on behalf of Apex, needed to borrow the money he failed to invest. Sometime in 2006, Cohen borrowed the sum of \$360,000 from Point Ruston, LLC. RP 699. Point Ruston, LLC, is an entity controlled by Cohen. RP 342. Newcomer does not have any interest in Point Ruston, LLC. RP 342.

In 2009, Newcomer sought information from Cohen about Apex's loans. RP 345-46, 362, 364. Cohen directed Scherbinske to provide certain information to Newcomer, and Scherbinske provided an excel sheet with certain loans listed. Ex. 77; RP 699. It is undisputed that the sheet provided to Newcomer on October 12, 2009 omits the 2006 debt in the amount of \$360,000. Ex. 77; RP 699.

Newcomer did not discover the existence of the \$360,000 debt until after this lawsuit was filed and Cohen produced discovery in 2014. Ex. 6; RP 344. Cohen's argument that Newcomer was on inquiry notice of this undisclosed debt because certain other loans were disclosed is unpersuasive. This loan was intentionally omitted because it covered up Cohen's failure to make his capital contribution in cash.

4. Newcomer did not have knowledge of Cohen's \$400,000 opportunity fee until 2014.

On May 1, 2005, Cohen executed a \$400,000 contract, which authorized paying a company controlled by Cohen \$400,000 for "founding and organizing" the opportunity. Ex. 3. This fee and contract was not disclosed to Newcomer until discovery in this lawsuit. RP 340. Similarly, Cohen did not disclose this fee to Fierst. RP 639. Cohen did not inform Eckstein that Apex would be paying Cohen a \$400,000 fee. RP 655.

The \$400,000 opportunity fee is distinctly different than "the fee equal to ten percent (10%) of the total project costs" that C&M Construction Management was entitled to for supervising construction.

Cohen's argument that Newcomer should have known about this fee as a result of the offering introduction is misplaced. First, the offering introduction does not provide for any fee to Cohen for founding and organizing the opportunity or anything remotely equivalent. *See* Ex. 1. Second, even if there is a reading of the offering introduction to authorize such a fee, the offering introduction was simply the initial proposal. Nothing in the Apex Apartments, LLC Agreement, which is the final agreement among the parties, authorizes such a fee. The record demonstrates Newcomer did not know of Cohen's \$400,000 opportunity fee.

5. Newcomer filed this lawsuit once he had the information to do so.

Cohen's claim that Newcomer waited to see if this investment would be successful before bringing this lawsuit ignores the timeline of events. Newcomer filed this lawsuit on January 13, 2014, about three and half months before the property sold at a loss on April 30, 2014. *See* CP 1. Moreover, the delay in conducting an investigation was due to Cohen's refusal to provide complete information and Cohen's repeated misrepresentations about his capital contribution on May 15, 2009, and October 16, 2013. Ex. 17; RP 328, 369, 451, 587-88, 607.

C. Cohen's misrepresentations and omissions were material.

Cohen assigns error to the trial court's denial of his motion for summary judgment, motion for a directed verdict, and judgment notwithstanding the verdict. "because... the misrepresentations or omissions on which Newcomer based his WSSA claim were [not] material." App. Br. at 3. For the same reasons that the jury found that Cohen's misrepresentations and omissions were material, the court properly denied Cohen's motions.

"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*, 122 Wn. App. at 109. Whether or not a

misrepresentation or omission is material is a question of fact. *Hines*, 114 Wn.2d 127.⁵

A misrepresentation related to the undercapitalization of an entity is a material misrepresentation. *Livid Holdings Ltd. v. Salomon Smith Barney, Inc.*, 416 F.3d 940, 947 (9th Cir. 2005) (applying both Washington and federal securities law). In *Livid Holdings Ltd.*, the promoter of a security published an offering memorandum which stated the “private equity fund raising has been completed.” *Livid*, 416 F.3d at 945. This implied that the total amount the promoter of the security sought to raise had actually been received. *Livid*, 416 F.3d at 946-47. However, only one investor, *Livid*, contributed the full amount of its obligation; remaining investors agreed to fully contribute in the future. *Livid*, 416 F.3d at 944-45. Because the company’s capitalization was, in fact, less than represented, the Ninth Circuit held *Livid* sufficiently plead the company misrepresented a material fact. *Livid*, 416 F.3d at 947.

Here, similar to *Livid*, Cohen did not disclose that he was counting a credit for future services as his capital contribution. The amount and form of the capital contributions and capitalization of the Apex entities represent material facts. To this end, Cohen’s actual contribution represents a material fact a reasonable person would want to know prior to

⁵ The jury was properly instructed on materiality. CP 1647 (Instruction No. 8). Cohen does not assign error to Instruction No. 8.

investing. Because Cohen misrepresented the extent and form of his contribution Cohen made a material misrepresentation.

1. Standard of Review: Materiality of a misrepresentation or omission is a question of fact reviewed for substantial evidence.

Whether or not a misrepresentation or omission is material is a question of fact. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 109, 86 P.3d 1175, 1182 (2004). *Hines v. Data Line Sys. Inc.*, 114 Wn.2d 127, 787 P.2d 8 (1990); *see also Morris v. International Yogurt Co.*, 107 Wn.2d 314, 729 P.2d 33 (1986) (“In the context of the Securities Act, the issue of materiality has been treated as a question of fact.”).

As discussed below, the evidence presented supports resolving this question of fact in Newcomer’s favor. The Court properly denied Cohen’s CR 56 and CR 50 motions due to questions of fact which must be viewed in the light most favorable to Newcomer. Because evidence exists to show Cohen’s misrepresentations and omissions were material, the jury’s verdict should not be disturbed.

2. Cohen’s misrepresentation of his capital contribution is material.

Cohen’s statement that he had invested \$800,000 in cash when in fact \$350,000 of that contribution was in the form of a non-cash journal entry for unearned management fees is a material misrepresentation.

Cohen misconstrues the materiality element, arguing there is “no material difference” between a contribution in cash and a “contribution in future services.” App. Br. at 46. Cohen argues that “from an accounting standpoint, a company’s valuation would be identical” whether the books reflected a cash contribution or the right to receive future services.

However, the materiality element focuses on the investor using a reasonable person standard. In a claim brought under the WSSA, “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*, 122 Wn. App. at 114; *see also Aspelund*, 56 Wn. App. at 481-82 (“A “material fact is ‘a fact to which a reasonable [person] would attach importance in determining his [or her] choice of action in the transaction in question.’”) (quoting *Clausing v. DeHart*, 83 Wn.2d 70, 73, 515 P.2d 982 (1973) (alterations in original)). Therefore, the standard here is: would a reasonable person want to know that Cohen’s claim that he was investing \$800,000 in cash was false before investing themselves?

W. Cary Deaton offered his expert opinion that an LLC member would want to know that a portion of an investor’s capital contribution was non-cash.

- A. Would the fact that what was understood to be an 800,000-dollar capital contribution in cash, if that turned out to be instead a capital contribution that was some in cash and some in some other form, deferred management fees or loan forgiveness,

would that be a material fact to an LLC member like Mr. Newcomer?

Q. Yes, that's the question.

A. Yes, it would.

RP 779.

Moreover, Newcomer testified that had he known Cohen's representation was false he would have changed the course of action and chosen not to invest:

Q. If you had known that Mike Cohen did not contribute his capital contribution in cash, would you have made your capital contribution?

A. I would not have invested, because we had discussed it and come to terms on that, and if I had found out that wasn't the case, I simply wouldn't have invested.

RP 337.

Finally, Cohen's argument that cash is the same as a non-cash journal entry for fees due for future services ignores the timeline of events. Cohen's entity only earned the construction management fees upon commencement of construction. Ex. 2, Schedule 3. (Allocating management fee based on ten (10%) percent of "the hard costs of construction") Cohen appropriated his business entity's deferred fee on April 30, 2005. Ex. 43. However, as a matter of fact, construction did not begin – and Cohen's entity did not earn any fee – until May 2005. RP 335. This resulted in the project being undercapitalized at the beginning and required Cohen borrow \$360,000 from Point Ruston, LLC in early 2006.

3. Cohen's omission of a \$360,000 debt from Apex to Point Ruston is material.

Cohen argues the \$360,000 debt to a company he controls was not material because he had the right under the Apex Apartments, LLC Agreement to borrow money on behalf of Apex. However, Cohen's liability arises from his violation of the WSSA, not for a breach of the Apex Apartments, LLC Agreement.

Whether Cohen was allowed to take an action as the manager of an LLC is irrelevant to the analysis of whether an omission is material under the WSSA. Parties cannot contract away the protections of the WSSA. *Guarino*, 122 Wn. App. at 112.

In *Guarino*, two former officers of a company brought WSSA claims against a corporation and its control persons. *Guarino*, 122 Wn. App. at 107. The employees alleged the company made material omissions about the health of the company and omitted information concerning a prospective merger during the negotiation of severance packages and the repurchase of the employees' stock. *Guarino*, 122 Wn. App. at 101, 104, 107. The Court of Appeals reversed the trial court's dismissal of the WSSA claims finding that although the merger was lawful, failure to disclose it was a violation of the WSSA. *Guarino*, 122 Wn. App. at 132.

No authority has been cited for the proposition that parties can expressly or implicitly contract away provisions of the WSSA. If we held that by merely combining the stock buy-sell agreement with the provisions of the settlement of their unrelated severance compensation dispute, the parties then were not bound by the disclose or abstain requirements, we would be creating a rule allowing the parties to contract away the protections of WSSA. This we will not do.

Guarino, 122 Wn. App. at 123 (emphasis added).

A similar analysis applies here. Cohen cannot claim the Apex Apartments, LLC Operating Agreement, a contract, relieved him of the burden to comply with the WSSA. The question is not whether Cohen could borrow money on behalf of Apex Apartments, LLC. The salient question is whether the fact that Apex Apartments, LLC had an undisclosed debt was a fact a reasonable person would want to know before investing in the company. The jury properly found Cohen's misrepresentations and omissions material.

D. Newcomer reasonably relied on Cohen's misrepresentations.

Cohen argues that Newcomer did not reasonably rely on his misrepresentations. Washington has adopted the *Jackvony* factors to determine reasonable reliance under the WSSA.

They are (1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the

transaction; and (8) the generality or specificity of the misrepresentations.

Stewart v. Estate of Steiner, 122 Wn. App. 258, 274, 93 P.3d 919 (Div. I 2004) (citing *Jackvony v. RIHT Fin. Corp.*, 873 F.2d 411, 416 (1st Cir. 1989)).⁶ For an omission under the WSSA, reliance is implied. *Guarino*, 122 Wn. App. at 109. Reasonable reliance is a question of fact. *Guarino*, 122 Wn. App. at 109.

1. Standard of Review: Reasonable Reliance is a question of fact reviewed for substantial evidence.

Whether a party justifiably relied on a misrepresentation is a question of fact. *Shah v. Allstate Ins. Co.*, 130 Wn. App. 74, 84, 121 P.3d 1204 (2005); *Hawkins v. Empres Healthcare Mgmt., LLC*, 193 Wn. App. 84, 371 P.3d 84 (2016), *as amended on denial of reconsideration* (June 8, 2016) (“Normally, reasonable reliance presents a question of fact.”).

Here, the evidence demonstrates Newcomer reasonable relied on Cohen’s misrepresentation and this Court should not disturb the jury’s verdict.

2. The Apex Apartments, LLC Agreement does not put Newcomer on notice of Cohen’s failure to contribute capital.

The Apex Apartments, LLC Agreement requires capital contributions in the form of either “money” or “property.” Ex. 2, § 8.3.1.

⁶ The jury was properly instructed on reasonable reliance. CP 1649 (Instruction No. 10). Cohen does not assign error to Instruction No. 10.

Cohen erroneously states: “The Agreement did not specify in what *form* [the] contribution would be made...” App. Br. at 49 (emphasis in original). In fact, Apex Apartments, LLC Agreement does govern the form of capital contributions. It provides:

Each Unit Holder’s Capital Account will be increased by (1) the amount of money contributed by such Unit Holder to the Company; (2) the fair market value of property contributed by such Unit Holder to the Company (net of liabilities secured by such contributed property that the Company is considered to assume or take the property subject to under Code Section 752); (3) allocation’s to such Unit Holder of Net profits; (4) any items in the nature of income and gain that are specially allocated to the Unit Holder pursuant to Sections 9.2 and 9.3; and (5) allocations to such Unit Holder of income and gain exempt from federal income tax.

Ex. 2, § 8.3.1 (emphasis added).

The Agreement provides for contributions of “money” or “property.” Adjustments can also be made for income and profit. Ex. 2, § 8.3.1. Contributions in the form of services are conspicuously omitted. Therefore, Newcomer was not on notice that Cohen’s contribution would be in the form of deferred fees for future services.

3. The LLC Act, RCW Chapter 25.15 does not preclude Cohen’s liability under the WSSA.

Cohen’s argument that the provisions of Former RCW 25.15.190 (2015) control over the Apex Apartments, LLC Agreement is unpersuasive. The LLC Act operates to create default rules, which the parties may modify as a matter of contract. *See Bishop of Victoria Corp.*

Sole v. Corporate Bus. Park, LLC, 138 Wn. App. 443, 445, 158 P.3d 1183

(2007). In *Bishop*, this Court explained:

A member of an LLC is obligated to the LLC to perform any promise to contribute cash, property, or services to the LLC in exchange for his or her interest in the LLC. RCW 25.15.195(1), .190. The obligation to contribute to an LLC arises from the parties' contractual agreements.

Bishop, 138 Wn. App. at 445 (emphasis added).

Here, the Apex Apartments, LLC Agreement requires members contribute in money or property and conspicuously omits services as a form of allowed contribution.

Cohen offers no authority that Former RCW 25.15.190 (2015) precludes the members of an LLC from specifying the form that capital contributions may be made. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) (“Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.”).

In addition, Former RCW 25.15.800(2) (2015), in place at the time the parties contracted, provides. “It is the policy of this chapter to give the maximum effect to the principle of freedom of contract and to the enforceability of limited liability company agreements.” The terms of the LLC Agreement, which require capital contributions in the form of money or property control.

Finally, Former RCW 25.15.195(1) (2015) cited by Cohen reads:

“Except as provided in a limited liability company agreement, a member is obligated to the limited liability company to perform any promise to contribute cash or property or to perform services...” (Emphasis added). Thus, the very statute relied upon by Cohen defers to the Operating Agreement.

The LLC Act did not put Newcomer on notice that Cohen would contribute services. To the contrary, the LLC Agreement reflects Cohen agreed to make his capital contribution in a form other than services. The jury properly found that Newcomer reasonably relied on Cohen’s misrepresentations.

4. The bank loan does not put Newcomer on notice of Cohen’s failure to contribute capital.

The jury also correctly rejected Cohen’s argument that an exhibit to the Construction Loan Agreement put Newcomer on notice. Cohen points to the term “borrower equity” on Exhibit 4 and argues this means “sweat equity” in the form of deferred fees for work done. App. Br. at 51.

Exhibit 4 does not have anything to do with the concept of sweat equity or deferred capital contributions. RP 856. Instead, it provides that the updated cost estimate for the project is \$12,002,560, which will be paid for by a loan of \$9,400,000, and borrower equity of \$2,602,560. The

borrower equity was the capital contributions the members made to Apex Apartments, LLC. Ex. 4; RP 856.

Perhaps more important, the Construction Loan Agreement governs the relationship between Apex Apartments, LLC and the lender. It does not govern the relationship between the members of Apex Apartments, LLC. *See e.g.*, Former RCW 25.15.005(5) (2015) (operating agreement governs relationship between members and LLC). Nothing in Exhibit 4 provides that Cohen or his entity, MC Apex, LLC, would receive additional benefit by the bank not also given to the other members of Apex Apartments, LLC.

The jury correctly determined the bank loan documents do not put Newcomer on notice that Cohen would fail to make his capital contribution.

E. **The jury was properly instructed on the measure of damages, and rendered a verdict consistent with the evidence and law.**

1. **Standard of Review: When based on a matter of fact, a trial court's decision to give a jury instruction is reviewed for abuse of discretion.**

“A trial court's decision to give a jury instruction is reviewed de novo if based upon a matter of law, or for abuse of discretion if based upon a matter of fact.” *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009). “Jury instructions must be considered in their entirety.” *Kappelman*, 167 Wn.2d at 9. When an appellate court “reviews jury

instructions, it looks to the jury instructions as a whole, with the primary purpose of allowing both parties to fairly state their case.” *Rekhter v. State. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 120, 323 P.3d 1036 (2014). If the trial court need not “draw any legal conclusions to determine whether” the instruction is proper, the “trial court must merely decide whether the record contains the kinds of facts to which the [instruction] applies.” *Kappelman*, 167 Wn.2d at 6.

Here, the court considered facts concerning whether Newcomer still owned the securities or had disposed of a portion of them requiring the giving the full instruction. In doing so, the court stated “We've got securities that he does own and then securities that he has disposed of.” RP 1186. Accordingly, the decision to give the jury instruction including the complete statutory measure of damages is based on a question of fact and reviewed for abuse of discretion. As discussed below, because the instruction is a correct statement of law, allowed both parties to argue their theory of the case, and was required based on the factual issues, the court did not abuse its discretion.

2. The instruction given to the jury on the measure of damages is a correct statement of the law.

The instruction given to the jury on the measure of damages correctly state the law. Instruction 15 reads:

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 cause 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.

CP 1654.

The instruction is objectively accurate, it mirrors the language of RCW 21.20.430(1).

Cohen does not argue this instruction is an incorrect statement of the law. Instead, Cohen argues “the trial court erroneously instructed the jury that it could award rescissionary relief *or* damages.” App. Br. at 56 (emphasis in original). Cohen sought an instruction that only included the calculation for damages if the Plaintiff disposed of the security. CP 1596; RP 1187.

Cohen’s argument fails for two clear reasons. First, Newcomer argued before the trial court that he still held the securities personally. To this end, substantial evidence supports that the jury found Newcomer still

held his securities. Second, the measure of damages under either calculation is the same.

3. Newcomer still owned securities at the time of trial.

Newcomer argued, and presented evidence, that he owned all or some of the securities at the time of trial. The statutory measure of damages provides a purchaser of a security

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.

RCW 21.20.430(1).

The term “owns” in the context of the measure of damages for securities fraud is defined in federal case law interpreting the Securities Act of 1933 on which the WSSA is based. “Washington courts often look to federal court decisions interpreting analogous provisions of federal securities law to inform their interpretation of the WSSA.” *Helenius*, 131 Wn. App. at 448; *see also State v. Argo*, 81 Wn. App. 552, 558, 915 P.2d 1103 (1996); *Brin v. Stutzman*, 89 Wn. App. 809, 832, 951 P.2d 291 (1998). The WSSA mirrors the federal Act on the measure of damages. The federal Act provides a purchaser of a security:

may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon, upon the tender of such security, or for damages if he no longer owns the security...

15 U.S.C. § 77I.

The Federal District Court for the Eastern District of Missouri defined “owns” as used above in the Securities Act of 1933. The Court explained:

Just as the phrase “person purchasing” in § 12(2) should be interpreted to achieve the broad remedial purpose of § 12(2), it is the opinion of this Court that the term “owns” in the same provision should be interpreted liberally to achieve its remedial purpose. Obviously, the reason that a non-owner is limited to a damage remedy is that a non-owner cannot tender the security back to the defendant and thereby accomplish rescission. In the opinion of this Court, a purchaser is an owner for purposes of § 12(2) if said purchaser possesses sufficient control or authority to effectuate a tender of the securities in question. Elusive notions of legal, equitable, or beneficial title should not be controlling in a § 12(2) case. The case at bar is a striking illustration of how such notions can unnecessarily complicate a factually simple case.

...
Accordingly, this Court holds that the touchstone is whether plaintiff has sufficient indicia of ownership to effectuate a tender of the securities in question if it were to prevail on the merits of its right to rescission.

Monetary Mgmt. Grp. of St. Louis, Inc. v. Kidder, Peabody & Co., Inc.,
604 F. Supp. 764, 768 (E.D. Mo. 1985) (emphasis added).

Newcomer had a “sufficient indicia of ownership to effectuate a tender” for all of the securities he purchased from Cohen. The premise of

Cohen's argument is that Newcomer personally purchased the securities and subsequently transferred them to "two legally distinct entities that he controlled." App. Br. at 27. Newcomer disputes this allegation, which the jury determined in Newcomer's favor at trial. Nevertheless, Cohen does not dispute Newcomer controlled the entities Cohen claims now own the securities.

An analysis by entity in which Newcomer invested also shows Newcomer owned the securities sufficient to tender them to Cohen. With respect to Apex Apartments, LLC, in March 2008, Cohen changed the form of how the security was held by conveying a 30 1/3 % interest in the real property owned by Apex Apartments, LLC to Newcomer Apex I TIC, LLC and a 60 2/3% of the real property to Apex Apartments I TIC, LLC. Ex. 67; RP 995-96. No member was required to make any capital contribution to either TIC entity. Exs. 12, 13. Apex Apartments, LLC was the manager of both Newcomer Apex I TIC, LLC and Apex Apartments I, TIC, LLC. Exs. 12, 13. Cohen remained the manager of Apex Apartments, LLC. Ex. 2. Newcomer owned both his interest in Apex Apartments, LLC and in Newcomer Apex I TIC, LLC in his individual capacity. *See* Exs. 2, 13.

The membership interest in Newcomer Apex I TIC, LLC is a security, and Cohen was a control person. Washington courts apply the *Howey* definition of a security, which is "(1) an investment of money; (2)

a common enterprise; and (3) an expectation of profits deriving primarily from the efforts of the promoter or a third party.” *State*, 81 Wn. App. at 560 (citing *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293, 66 S.Ct. 1100, 90 L.Ed. 1244, 163 A.L.R. 1043 (1946)).

In December 2008, Cohen made a capital call on behalf of Apex Apartments, LLC in the amount of \$910,000. RP 350. Newcomer contributed the \$910,000 in three payments, each of which was made payable to Newcomer Apex I TIC, LLC, and deposited into the account of Apex Apartments, LLC. Ex. 83E-G. With respect to these securities, prior to tendering it in advance of judgment, Newcomer testified, “I still own them.” RP 428.

Newcomer also remains the owner of the securities he purchased in the form of membership units in Apex Apartments II, LLC. Newcomer was a member of Apex Apartments II, LLC in his individual capacity. Ex. 14. The Apex Apartments II, LLC Limited Liability Company Agreement was subsequently amended to allow an additional investor, JLW Apex, LLC, to purchase a preferred membership interest. Exs. 19, 26. For the signature block of the First Amended and Restated Limited Liability Company Agreement of Apex Apartments II, LLC, Cohen changed the signature block for Newcomer’s name to “2009 Newcomer Family Trust, LLC.” Ex. 19 at 19. No entity by that name exists. Presumably Cohen

intended to indicate 2009 Newcomer Family, LLC, an entity which Newcomer controls. RP 424.

However, Cohen produced no evidence that Newcomer withdrew from Apex Apartments II, LLC or formally transferred or sold his interest to 2009 Newcomer Family, LLC. Section 12 of the Apex Apartments II, LLC Limited Liability Company Agreement limits transfer or assignment of a member's interest. Ex. 14 at 17. It requires a member inform current members with a third-party's offer to purchase transferring unit member's interest. The remaining unit members enjoy a right of first refusal which they can elect within ten days of learning of the third-party's offer. Ex. 14 at 17. The transferor unit member must complete the transaction with the third-party purchaser or the other unit members within thirty-days of presenting the offer to the other unit members. Ex. 14 at 18.

In the event of a transfer other than a sale, such as a donative transfer of the economic interest, the member must sell the entirety of his remaining interest to the LLC "for a purchase price of \$100." Ex. 14 at 19.

The record contains no evidence the parties complied with, or attempted to comply with the requirements of Section 12.

Finally, the Limited Liability Company Agreement for 2009 Newcomer Family, LLC does not indicate any capital contribution in the form of an interest in Apex Apartments II, LLC. Ex. 75.

Newcomer owned securities at the time of tender, which required giving the jury the full statute on the measure of damages. The jury could correctly conclude Newcomer still owned the relevant securities at the time of trial.

4. Instruction 15 allowed both parties to argue their theory of the case to the jury.

Contrary to Cohen's argument, the trial court properly instructed the jury because Newcomer presented evidence he still owned the securities he purchased.

Courts must "permit instructions on a party's theory of the case where there is evidence supporting the theory." *Barrett v. Lucky Seven Saloon, Inc.*, 152 Wn.2d 259, 266, 96 P.3d 386 (2004). Failure to do so is a reversible error. *Barrett*, 152 Wn.2d at 266.

In addressing arguments on Instruction No. 15, the court stated:

I am including the delineation between if you own it, as opposed to if you don't own it. I think it is consistent with the statute, and I think it's consistent with the practical effect of what he have here. We've got securities that he does own and then securities that he has disposed of. So, I think it's important, for clarification, to indicate that there's a difference between paragraphs 2 and 3 [of Instruction No. 15].

RP 1186 (emphasis added).

The Court's instruction allowed Cohen to argue his theory that Newcomer sold all of his securities.

The instruction also allowed Newcomer to argue he still owned his securities at the time of trial. Moreover the instruction allowed Newcomer to argue that even if the reorganization of the Apex entities operated to dispose of the securities, he did not receive any payment as a result of the transfer or name change. Thus, Instruction 15 allowed both Cohen and Newcomer to argue their respective case and theories to the jury.

5. Even if Newcomer disposed of all or a portion of the securities, the jury's verdict is constant with the evidence and law.

Even if Newcomer disposed of all of the securities he purchased from Cohen, the jury's verdict is still consistent with the evidence and law because it is undisputed that he did not receive any payment from transferring the securities from his name to the name of an LLC. Therefore, under RCW 21.20.430, no amount should be deducted from the amount that would otherwise be recoverable upon a tender.

The measure of damages if a purchaser has disposed of a security is "the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it." This Court expressly defined "value" in the context of the WSSA in *Garretson*, 9 Wn. App. at 929.

Our conclusion is that 'value of the security' in RCW 21.20.430(1) means the actual price which the purchaser receives for the resale of the stock, and the measure of his damages is the difference between the acquisition price and the resale price.

Garretson, 9 Wn. App. at 929 (emphasis added).⁷ The court continued:

In suits under RCW 21.20.430(1) there will be no occasion to go beyond the resale price in arriving at the 'value of the security.' As stated above, where the purchaser owns the stock and tenders it to those responsible for selling it to him, he is entitled to receive back the price he paid (plus interest) for the stock. When he elects to retain the stock, he is denied a remedy. When he resells the stock, the price he receives will establish the existence of a market for the purpose of fixing his damages.

Garretson, 9 Wn. App. at 929.

Here, the undisputed evidence is that the actual price received by Newcomer for the transfer of the securities was zero.

- Q. When your interest was transferred from your individual name to the Newcomer Apex TIC entity, did you receive any payment for that transfer?
- A. No.

⁷ This Court issued the *Garretson* opinion in 1973. The opinion defined "value of" as used in RCW 21.20.430 to mean "the actual price... receive[d]." *Garretson*, 9 Wn. App. at 929. The legislature did not amend RCW 21.20.430, or alter the applicable language of the statute though the legislature amended RCW 21.20.430 eight (8) times since publication of the *Garretson* opinion in 1973. Laws of 1998, ch. 15 § 3; Laws of 1986, ch. 304 § 1; Laws of 1985, ch. 171 § 1; Laws of 1981, ch. 272 § 9; Laws of 1979, 1st Ex. Sess., ch. 68 § 30; Laws of 1977, 1st Ex. Sess., ch. 172 § 4; Laws of 1975, 1st Ex. Sess., ch. 84 § 24; Laws of 1974, Ex. Sess., ch. 77 § 11. This Court must presume the legislature "is familiar with past judicial interpretations of [RCW 21.20.430(1)]." *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887, 652 P.2d 948 (1982). "Legislative inaction following a judicial decision interpreting a statute often is deemed to indicate legislative acquiescence in or acceptance of the decision." *In re Wheeler*, 188 Wn. App. 613, 621, 354 P.3d 950 (2015) (alterations and quotes removed). "Where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language." *Wheeler*, 188 Wn. App. at 621.

Presumably, if the legislature disagreed with the *Garretson* interpretation, the legislature would revise the language of RCW 21.20.430. However, the legislature did not overrule the *Garretson* definition. Because the "statutory language remains unchanged after a court decision" this Court should not "overrule clear precedent interpreting the same statutory language." *Wheeler*, 188 Wn. App. at 621.

- Q. Did Newcomer Apex TIC I, LLC pay you anything at all?
A. No.
Q. Did Mike Cohen pay you anything at all?
A. No.
Q. Did Apex Apartments, LLC pay you anything?
A. No. It was just a transfer.
Q. Did you receive any consideration whatsoever?
A. None, no.

RP 568.

Even if Newcomer disposed of his securities, which Newcomer disputes, there is no evidence in the record that Newcomer received any payment or consideration for that transfer. *See* RP 568.

Therefore, because the “actual price which [Newcomer] receive[d]” was zero, the damages the jury awarded is consistent with RCW 21.20.430, regardless of whether Newcomer still owned or disposed of his securities. *Garretson*, 9 Wn. App. at 929.

6. A recession measure of damages applies whether or not the investor disposed of the securities.

The measure of damages puts the investor in the position he or she was in prior to purchasing the security, whether or not the security was disposed of. Interpreting the federal Securities Act of 1933, the United States Supreme Court recognized a rescissory measure of damages is employed in both cases.

[A] defrauded investor ... may sue either at law or in equity in any court of competent jurisdiction, to recover the consideration paid for such security with interest thereon, less the amount of any income received thereon. upon the

tender of such security, or for damages if he no longer owns the security. Thus, § 12(2) prescribes the remedy of rescission except where the plaintiff no longer owns the security. Even in the latter situation, we may assume that a rescissory measure of damages will be employed; the plaintiff is entitled to a return of the consideration paid, reduced by the amount realized when he sold the security and by any “income received” on the security.

Randall v. Loftsgarden, 478 U.S. 647, 655–56, 106 S. Ct. 3143, 3149, 92 L. Ed. 2d 525 (1986) (emphasis added); *see also* RCW 21.20.900 (requiring courts construe the WSSA to “make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation”).⁸

Under either rubric, the plaintiff receives the entirety of the consideration he paid for the offending securities. If the plaintiff still owns the security, he or she is entitled to a return of the consideration paid from the defrauding seller. If the plaintiff sold the security, he or she is entitled

⁸ Washington modeled RCW Chapter 21.20 after the Uniform Securities Act of 1956. *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 125, 744 P.2d 1032, 1048 (1987) *amended*, 109 Wn.2d 107, 750 P.2d 254 (1988) (“Washington’s securities fraud laws are modeled after the Uniform Securities Act. RCW 21.20.430 parallels section 410 of the Uniform Securities Act, which in turn is modeled after section 12(2) of the federal Securities Act of 1933.”).

The Comments to Section 410 of the Uniform Securities Act of 1956 clearly explain the measure of damages:

Measure of damages: The measure of damages, when the plaintiff is not in a position to tender back the security, is the same under Clauses (1) and (2). It is designed to be the substantial equivalent of rescission.

Comment, Uniform Securities Act § 410 (1956) (emphasis added). Clearly, both the Model Act and the parallel federal statute reflect the measure of damages under either rubric is the same. Cohen’s arguments to the contrary are not persuasive in light of Supreme Court interpretation of the federal Act and the comments to Section 410, which underpins RCW 21.20.430.

to a return of the consideration paid from the seller. However, in the latter formula, the statute reduces damages by the amount the buyer realized upon the second sale. This damage calculation simply furthers the purpose of the WSSA – “to protect investors from speculative or fraudulent schemes of promoters.”⁹ *Cellular Eng'g, Ltd*, 118 Wn.2d at 23.

7. If Instruction No. 15 was in error, it was a harmless error.

“An erroneous jury instruction is harmless if it is not prejudicial to the substantial rights of the part[ies] ..., and in no way affected the final outcome of the case.” *Blaney v. Int'l Ass'n of Machinists and Aerospace Workers, Dist. No. 160*, 151 Wn.2d 203, 211, 87 P.3d 757 (2004) (quotations omitted, alteration in original).

“Jury instructions are generally sufficient if they are supported by the evidence, allow each party to argue its theory of the case, and when read as a whole, properly inform the trier of fact of the applicable law.” *Fergen v. Sestero*, 182 Wn.2d 794, 802, 346 P.3d 708 (2015).

“The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact.” *Bunch*, 155 Wn.2d at 179. Courts “strongly presume the jury’s verdict is correct.” *Bunch*, 155 Wn.2d at 179. On appeal, courts take “all inferences in favor of the

⁹ RCW Chapter 21.20 seeks to protect investors. *Cellular Eng'g, Ltd*, 118 Wn.2d at 2. Thus, contrary to Cohen’s assertion, as a remedial statute, the Act focuses on preventing harm to the defrauded investor. Cohen’s analogy that focuses on the defrauding seller is misplaced.

verdict.” *Cedar River Water & Sewer Dist. v. King Cty.*, 178 Wn.2d 763, 777, 315 P.3d 1065 (2013), as modified (Jan. 22, 2014).

Here, Cohen does not argue that Instruction No. 15 is an incorrect statement of law. Without question, Instruction No. 15 accurately states the measure of damages as provided in RCW 21.20.430(1). Instead, Cohen argues the instruction should only have included the measure of damage applicable to a purchaser who no longer owns the security. However, the instruction did not impact the outcome of the case because it still allowed Cohen to argue his theory of the case and provided the correct law to the jury.

8. Closing arguments on the measure of damages were proper, and Cohen failed to preserve an objection.

Cohen argues that in closing argument Newcomer’s counsel encouraged the jury to “apply the wrong standard.” App. Br. at 61. That is a misreading of the closing argument.

In context, Newcomer’s argument asked the jury to find that Newcomer “never disposed of his securities.” RP 1224. The closing argument further asks the jury to find that, if Newcomer disposed of some or all of the securities, that he “didn’t receive anything of value for the transfer” and no amount should be subtracted from the consideration paid for the security. RP 1231.

Even if there was a proper objection to the closing argument, Cohen waived the objection by failing to object or seek a curative instruction.

“[A]bsent an objection to counsel's remarks, the issue of misconduct cannot be raised for the first time in a motion for a new trial unless the misconduct is so flagrant that no instruction could have cured the prejudicial effect.” *Collins v. Clark Cty. Fire Dist. No. 5*, 155 Wn. App. 48, 94, 231 P.3d 1211 (2010).

In *Collins*, the defendant alleged the plaintiff's attorney opined on the evidence during closing arguments. However, the defendants “did not object to any portion of [the plaintiff's] argument either during, or immediately after, closing argument” but instead “first raised the issue in their post-trial motions.” *Collins*, 155 Wn. App. at 95. In rejecting the defendant's arguments, this Court explained, “[A]ssuming, without deciding, that [counsel's] comment was improper, Defendants failed to object or to request a curative instruction. Because they did not preserve this argument for appeal, we need not further consider it.” *Collins*, 155 Wn. App. at 97 (citing RAP 2.5(a)).

Here, because Cohen offered no objection during closing argument, the issue has been waived.

F. **This Court should not reduce the jury award because the jury found Cohen violated the WSSA in connection with all four sales of securities.**

1. **Standard of Review: Damages are a question of fact reviewed for substantial evidence.**

“The jury is given the constitutional role to determine questions of fact, and the amount of damages is a question of fact.” *Bunch v. King Cty. Dep't of Youth Servs.*, 155 Wn.2d 165, 179, 116 P.3d 381 (2005); “[W]hether rescission is the applicable remedy depends on whether the securities can be recovered. This determination is a question of fact.” *Helenius v. Chelius*, 131 Wn. App. 421, 434–35, 120 P.3d 954 (2005). *See also Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 645, 771 P.2d 711 (1989), *amended*, 780 P.2d 260 (1989) (“At issue in the present case is whether the measure of damages is a question of fact within the jury's province. Our past decisions show that it is indeed.”)

2. **Cohen's misrepresentations and omissions were in connection with all four sales of securities.**

For each of the four capital contributions Newcomer made, the jury separately found Cohen liable under the WSSA. Cohen's request to go behind the jury award and adjust the judgment downward should be rejected. Cohen's claim is based on the reorganization of the Apex entities in March 2008, and he argues “the separate identities of Newcomer TIC and Apex II must be respected.” App. Br. at 63.

Cohen's argument that the 2008 capital call was made by Apex Apartments II, LLC is directly contradicted by the evidence. Cohen made the 2008 capital call by letter dated February 20, 2008. The letter is signed "Michael Cohen, Manager, Apex Apartments, LLC." Ex. 9. There is no mention in the capital call letter of Apex Apartments II, LLC. *See* Ex. 9. In fact, Apex Apartments II, LLC was not formed until March 10, 2008. Ex. 14 at 4. Newcomer's capital contribution was made on March 21, 2008 (after Apex Apartments II, LLC was formed), but was made payable to Apex Apartments, LLC. Ex. 83D. All documentary evidence indicates the 2008 capital contribution was made only to Apex Apartments, LLC.

Newcomer's 2009 capital contributions were made payable to Newcomer Apex I, TIC, LLC, the successor to Apex Apartments, LLC. Importantly, however, the deposit slips show the 2009 capital contributions were deposited into the account for Apex Apartments, LLC. Exs. 83E, 83F. The evidence shows that the Apex project continued as a single project managed by Cohen from the first capital contribution through judgment in this case.

If, at any point, Newcomer had learned that Cohen misrepresented his initial capital contribution, Newcomer would not have continued to invest. *See* RP 337, 344, 345, 348, 434. With respect to Newcomer's March 21, 2008 capital contribution in the amount of \$326,555, Newcomer testified:

- Q. When you made this \$326,555 capital call, had you become aware that Mike Cohen had, in fact, not contributed \$800,000 in cash?
- A. No.
- Q. If you had known that at the time you made this capital call, would you have made it?
- A. No.
- Q. If you had known that money on the first capital call went to Point Ruston, would you have paid this?
- A. No.
- Q. And if you had known about that \$400,000 contract for services for Mike Cohen to Mike Cohen, would you have still continued to invest?
- A. No.
- Q. Why not?
- A. Well, I might not be the brightest light, but you don't keep throwing money at something that you are not being dealt with straightly. I mean, I was kept in the dark and didn't know what was going on, obviously, and I had been misinformed.
- Q. When you say "misinformed" --
- A. Lied to.

RP 347-48.

At the time Newcomer made every one of his capital contributions – including the contributions in 2008 and 2009 – he believed Cohen's initial capital contribution was all cash, did not know about the undisclosed debt, and did not know that Cohen had received an additional \$400,000 founder's fee.

In addition, on May 15, 2009, Cohen provided Newcomer with a document that falsely stated Cohen's initial capital contribution. Ex. 17. Just three days later, on May 18, 2009, Newcomer made a capital

contribution of \$410,000 relying on the false representation. On July 14, 2009 Newcomer made his final capital contribution. Exs. 83F, 83G.

Due to the new and repeated misrepresentations, the nature of this investment as a single project, the jury properly found that Cohen separately violated the WSSA with respect to each capital call. The jury's verdict should not be disturbed.

G. Michael Cohen and the martial community of Michael Cohen and Julie McBride are proper judgment debtors.

- 1. Standard of Review: Whether a defendant has presented evidence to rebut the presumption that a liability incurred during marriage is a community liability is a question of fact reviewed for substantial evidence.**

"A debt incurred by either souse during marriage is presumed to be a community debt." *Oil Heat Co. of Port Angeles, Inc. v. Sweeney*, 26 Wn. App. 351, 353, 613 P.2d 169 (1980). Community property "presumptions are true presumptions. and in the absence of evidence sufficient to rebut an applicable presumption, the court must determine the character of property according to the weight of the presumption." *In re Estate of Borghi*, 167 Wn.2d 480, 484, 219 P.3d 932, 935 (2009), *as corrected* (Mar. 3, 2010). "It is well settled that this presumption may be overcome only by clear and convincing evidence." *Oil Heat Co.*, 26 Wn. App. at 353. Whether a party "present[ed] the necessary quantum of proof to overcome the presumption of community liability" requires a factual determination of

the evidence. *See Oil Heat Co.*, 26 Wn. App. at 354. The appellate court reviews evidence supporting factual inquires using the substantial evidence standard. *See Gorman v. Pierce Cty.*, 176 Wn. App. 63, 87, 307 P.3d 795, 807 (2013).

Here, Cohen was married at all relevant times and presented no evidence to rebut the presumption that his acts and omissions were for the benefit of the marital community, so the court did not err in entering judgment against the marital community.

2. Cohen presented no evidence to rebut the presumption that his misrepresentations and omissions were for the benefit of the marital community.

Cohen and McBride, both parties to this litigation, bore the burden of rebutting the presumption of community benefit. Thus, the judgment properly names both members of the community.

In his Answer, Cohen admits he was married to Julie McBride at the time of all relevant acts and the time the complaint was filed. CP 21.

“A debt incurred by either spouse during marriage is presumed to be a community debt.” *Oil Heat Co.*, 26 Wn. App. at 353; *Sunkidd Venture, Inc. v. Snyder-Entel*, 87 Wn. App. 211, 215, 941 P.2d 16, 18 (1997) (noting “general presumption that a debt incurred by either spouse during marriage is a community debt”). “Torts which can properly be said to be done in the management of community business, or for the benefit of the community, will remain community torts with the community and the

tortfeasor separately liable.” *Clayton v. Wilson*, 168 Wn.2d 57, 64, 227 P.3d 278 (2010).

“[T]his presumption may be overcome only by clear and convincing evidence.” *Oil Heat Co.*, 26 Wn. App. at 353; *see also Sunkidd Venture, Inc.*, 87 Wn. App. at 215. The burden of proof rests upon the party seeking to avoid the presumption of community debt. *Oil Heat Co.*, 26 Wn. App. at 356 (noting spouse rebutting community benefit “did not present the necessary quantum of proof to overcome the presumption of community liability”). “The fact that the community received no benefit from the contract is immaterial since the presumption of community liability will not be refuted if there was any expectation of community benefit from the transaction for which the debt was contracted.” *Oil Heat Co.*, 26 Wn. App. at 355.

Swenson v. Stoltz, 36 Wash. 318, 324, 78 P. 999 (1904), cited by Cohen, does not control. As expressed above, case law in the century since *Swenson*, reflects the party challenging community benefit bears the burden of persuasion. Moreover, in *Swenson*, “Personal recovery against the husband alone was asked.” *Swenson*, 36 Wash. at 324. In this case, the Special Verdict form was not limited to Cohen alone. The jury was asked to make a determination of the liability of “Defendants” in the plural form. CP 1660-61. The Special Verdict form was jointly drafted by the parties

with input from the court. RP 1194. Defendants did not object or take exception to the Special Verdict form. RP 1195.

Cohen argues, “No evidence was introduced – nor any argument made – that McBride could be held liable directly under the WSSA.” App. Br. at 65. However, by admitting Cohen and McBride were married, the presumption arises that the debt was for the benefit of the community. *Oil Heat Co.*, 26 Wn. App. at 353; *Sunkidd Venture, Inc.*, 87 Wn. App. at 215. As the marital community, either Cohen or McBride bore the burden of proof to rebut this presumption. Neither Cohen nor McBride elected not to present any evidence to rebut the presumption of community liability. Therefore, the Court properly included the marital community as a judgment debtor.

H. WSSA provides for an award of fees and costs.

RCW 21.20.430(1) provides for an award of reasonable attorney’s fees and costs to a defrauded investor who prevails on a WSSA claim. “Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well.” *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009); *see also* RAP 18.1. Therefore, Newcomer respectfully requests an award of reasonable attorney’s fees and costs on appeal.

V. CONCLUSION

For the reasons stated herein, Newcomer respectfully asks this Court to affirm the trial court and award Newcomer's reasonable attorney's fees and costs on appeal.

Respectfully submitted,

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APPENDIX I

Date	Event	Cite
2/16/2005	Apex Apartments, LLC formed, requiring Cohen and Newcomer to contribute \$800,000.	Ex. 2
3/11/2005	Newcomer contributes \$250,000 to Apex Apartments, LLC. (First of two payments toward the \$800,000 capital contribution.)	Ex. A3A
4/30/2005	Without notice to Newcomer, Cohen records a non-cash journal entry in the amount of \$350,000 for Cohen's initial capital contribution.	Ex. 43
5/1/2005	Without notice to Newcomer, Cohen obligates Apex Apartments, LLC to pay Cohen's company a \$400,000 opportunity fee.	Ex. 3
5/5/2005	Newcomer makes a \$550,000 capital contribution to Apex Apartments, LLC. (Second of two payments towards \$800,000 capital contribution).	Ex. 83B
Early 2006	Without notice to Newcomer, on behalf of Apex, Cohen borrows \$360,000 from Point Ruston, LLC.	RP 344
July/August 2006	Cohen makes a capital call on behalf of Apex Apartments, LLC requesting \$272,997 from Newcomer.	Ex. 8
8/9/2006	Newcomer makes a capital contribution to Apex Apartments, LLC in the amount of \$272,997.	Ex. 83C
8/21/2006	Without notice to Newcomer, Apex Apartments, LLC pays Point Ruston, LLC \$359,376.58.	Ex. 6
2/20/2008	On behalf of Apex Apartments, LLC, Cohen makes a capital call of Newcomer in the amount of \$326,559.	Ex. 9
3/1/2008	Cohen executes a Certificate of Corporate Resolution segregating the ownership of real property into Phase I and Phase II and resolving to form Apex Apartments II, LLC.	Ex. 10
3/10/2008	Apex Apartments II, LLC is formed.	Ex. 14
3/20/2008	Apex Apartments I TIC, LLC and Newcomer Apex I TIC, LLC are formed as a reorganization of Apex Apartments, LLC.	Ex. 12
3/21/2008	Newcomer contributes \$326,555 capital call to Apex Apartments, LLC	Ex. 83D

Dec. 2008	On behalf of Apex Apartments, LLC, Cohen makes a capital call of Newcomer in the amount of \$910,000	RP 350
2/26/2009	Newcomer contributes \$400,000 to Newcomer Apex I TIC, LLC, which is deposited in the account of Apex Apartments, LLC. (First of three payments for the \$910,000 capital call.)	Ex. 83E
5/15/2009	Cohen provides Newcomer a false accounting of Cohen's capital contributions, which excludes the \$350,000 non-cash journal entry Cohen made on 4/30/2005 for unearned management fees.	Ex. 17
5/18/2009	Newcomer contributes \$410,000 to Newcomer Apex I TIC, LLC, which is deposited in the account of Apex Apartments, LLC. (Second of three contributions towards the \$910,000 capital call.)	Ex. 83F
7/14/2009	Newcomer contributes \$100,000 to Newcomer Apex I TIC, LLC, which is deposited in the account of Apex Apartments, LLC. (Third of three contributions towards the \$910,000 capital call.)	Ex. 83G
10/16/2013	Cohen, again, falsely represents to Newcomer that Cohen's initial \$800,000 capital contribution was all cash.	RP 589
Late 2013	Newcomer was able to compel production of documents from Cohen and discovered for the first time that Cohen's \$800,000 capital contribution was in fact not all in cash.	RP 332; Ex. 43
1/13/2014	Newcomer filed this lawsuit	CP I
Early 2014	Through discovery of this lawsuit, Newcomer discovers Cohen's undisclosed \$400,000 opportunity fee and undisclosed \$360,000 debt to Point Ruston, LLC	RP 352. 347
4/30/2014	Cohen sold the Apex project to a third party for a loss.	Ex. 76

