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DIVISION III
STATE OF WASHINGTON
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NO. 291413

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION III

SHOU SHIA WANG, *et al.*
Respondents/Cross Appellants

v.

TA CHI, INC., *et al.*
Appellants/Cross Respondents

APPEAL FROM THE SUPERIOR COURT
FOR COUNTY OF DOUGLAS
THE HONORABLE JOHN HOTCHKISS

RESPONDENTS'/CROSS APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Shou Shia Wang spent five years of her life dedicated to developing and making the Ta Chi orchard operation profitable. The two persons responsible for hiring her, Dr. Michael Chuang and Master Xien Tien, solicited Ms. Wang's help because of her experience as an orchard manager, fruit exporter, and fruit marketer. The trial court found that:

Ta Chi investors, including the Master, were not familiar with the orchard business and that is why they sought out Ms. Wang. These investors not only wanted to take advantage of Wang's experience, but also wanted Wang to find orchard property, become involved in the negotiation and purchase of orchard property, and run the orchard business to a profitable outcome for not only the investors, but also the Master's Temple.

(CP 1775 ¶ 45.)

The trial court further found that Ms. Wang used her best efforts to create a profitable orchard operation for Ta Chi:

Wang did use her best efforts to create an orchard as requested by the Master and others. Wang increased the size of the orchard from 63 acres to approximately 218 acres. Exhibit 12(6)(c), Exhibit 12(7)(h)...Wang worked hard and the fees paid were at or below market value...

(CP 1795 ¶¶ 180-181.)

Ms. Wang received no expressions of gratitude for her efforts, but rather was accused of theft, mismanagement, and breach of fiduciary duty. The persons responsible for making these allegations, Mr. and Mrs. Shen, served as Ta Chi's president and secretary. (CP 1771 ¶¶ 23-24.) However,

they had no involvement in hiring Ms. Wang and had little involvement in the development or operation of the orchard. Indeed, the trial court found:

Although Ta Chi makes allegations that Wang was leading it astray, if she was doing so, it was primarily because the Ta Chi officers and directors [Mr. and Mrs. Shen] had their eyes closed... The Ta Chi corporate officers and directors were not assuming their duty to be aware of the affairs of the corporation.

(CP 1782 ¶¶ 92-93.)

Speaking for Ta Chi and Lotus at trial, the Shens claimed that their ignorance of facts was the basis for Ms. Wang's liability for breach of duty for nondisclosure. In particular, the Shens claimed they were ignorant of the fact that Ms. Wang was Summer Fruit's agent during negotiations for Lotus to purchase Summer Fruit's assets. The evidence was undisputed, however, that the Shens knew Ms. Wang was the manager of Summer Fruit (RP 863:9-864:11; RP 942:1-4) and that Ms. Wang told Lotus' vice president, Herman Chen, of her ownership interest in Summer Fruit. It was Mr. Chen who was principally responsible for establishing Lotus and for purchasing the cold storage facility and packing lines. (RP 1001:17-1002:4.)

The court's conclusion that Ms. Wang breached a duty to Lotus by failing to disclose her identity as an agent or owner of Summer Fruit is unsupported by substantial evidence or the court's own findings of fact, and was therefore error.

In describing Ms. Wang's responsibilities as Ta Chi's manager, the trial court found:

Wang was given *carte blanche* authority to do most anything she felt was in the best interest of this business. The investors allowed Wang to do anything and report back. Ta Chi allowed Wang to borrow money, set up bank accounts, decide what varieties of trees to plant, when to harvest, when to fertilize, where to market fruit, how to market fruit and pay the bills. Mrs. Shen sent Wang money and allowed her to spend large sums of money in her total discretion...Although Ta Chi authorized Wang to do what she thought was in Ta Chi's best interest, she did report back to the investors. Correspondence introduced at trial demonstrates fairly consistent correspondence from Wang to the investors, but very little correspondence from the investors back to Wang, until around 2007 when the relationship began to deteriorate.

(CP 1775 - 1776 ¶¶ 46-47.)

Despite having found that Ms. Wang had authority to do what she felt was in Ta Chi's best interest, the court, without explanation, found that Ms. Wang breached a duty to Ta Chi by having Ta Chi pay legal costs associated with defending a lawsuit arising from the Highland Orchard lease. (CP 1797-1798 ¶¶ 204-205.) All witnesses who testified on this issue agreed that entering into the Highland Orchard lease was a sound business decision. No witnesses or evidence suggested otherwise. Ta Chi presented no evidence as to how nondisclosure of the properly executed lease constituted a breach of duty or caused any damages. No evidence supported the court's conclusion that Ta Chi was damaged by a failure to disclose the Highland lawsuit. The court's findings of fact and conclusions of law to the contrary were error.

II. REPLY

A. Ms. Wang breached no duty to Lotus in the Summer Fruit sale transaction because she was not Lotus' agent.

The Ta Chi/Lotus arguments and authorities relating to the Summer Fruit transaction improperly assume that Ms. Wang served as Lotus' agent in negotiating the Summer Fruit purchase. The Lotus arguments fail because Ms. Wang was not Lotus' agent for that transaction.

The Washington Supreme Court defines an agency relationship as “a consensual relation between two persons created by law by which a principal has a right to control the conduct of the agent and the agent has a power to affect the legal relations of the principal.” *Moss v. Vadman*, 77 Wn.2d 396, 403, 463 P.2d 159 (1969)(citing *W. Seavy on Agency* s 3 (1964)). Ms. Wang was not Lotus' agent for the Summer Fruit transaction because (1) Ms. Wang never consented to serving as Lotus' agent for the Summer Fruit transaction, (2) Lotus had no control over Ms. Wang's conduct in the transaction, and (3) Ms. Wang had no authority to act on Lotus' behalf for purposes of the Summer Fruit transaction.

1. Ms. Wang did not consent to act as the Lotus agent for purposes of the Summer Fruit transaction.

Ms. Wang was not Lotus' agent for the Summer Fruit transaction because at no point did she consent to being under Lotus' control:

Consent and control are the essential elements of an agency. The relationship is created by law, but if no factual pattern exists which gives rise to an agency, then no agency exists despite the intent of either or both of the parties. Because of this, one may believe that he has

created an agency when in fact the relationship is that of a seller to buyer.

Moss v. Vadman, 77 Wn.2d 396, 403, 463 P.2d 159 (1969)(citations omitted).

In discussing the need for both consent and control, the Washington State Supreme Court, in *Moss v. Vadman*, stated:

Plaintiffs apparently intended to create an agency relationship. To that end they sent Vadman a letter of authority to make an offer for the option on the Mottman tract. This might be interpreted as a manifestation of consent by plaintiffs that Vadman act for them and subject to their control. Vadman, however, had no intent to create an agency. He did not consent to the agency, and more importantly, he did not submit himself to the control of the plaintiffs as to any of his subsequent actions.

The actions of the plaintiffs and Vadman suggest the relationship of buyer and seller as between them, rather than that of principal and agent.

The burden of establishing an agency rests upon the one who asserts it.

Moss v. Vadman, 77 Wn.2d at 402-3 (citations omitted).

Lotus presented no evidence at trial that Ms. Wang manifested any consent to act as Lotus' agent in the Summer Fruit transaction. Furthermore, Lotus presented no evidence that it manifested its intent for Ms. Wang to serve as its agent in this transaction. Such evidence is required to demonstrate an agency relationship exists. Furthermore, Ms. Wang made clear that she was not acting as Lotus' agent and claimed no right to control decisions relating to Lotus. In a letter to Mrs. Shen in September 2007, Ms. Wang stated the following:

I received the 8/30 letter. There are few points in which need to be clarified: the reason for the apple line installation delay was clearly explained in my 8/26 letter, the most important reason is because Lotus Fruit did not make payments on time. I disagree with what was stated in your 8/30 letter that it was caused by "lack of communication between you and me." *Initially, when Lotus Fruit first started, you identified Herman who was fully authorized to be in charge of all coordination of financial matters, he is the one who communicated with you, not I. My responsibility is to turn over the invoices after receiving them, you and Herman were to arrange for payment schedule, I have no authority to question,* please explain the facts clearly and not to distort the facts. I will not accept this obscure criticism. If it were my responsibility, I would bear the load, *I did not have any authority to be involved in your financial arrangements and coordination,* I hope that you would recollect the circumstances at that time in detail and truly understand and face the facts and not to randomly and wrongly accuse others.

(Ex. 11(50)(a).)(emphasis added)

In one of several examples of Lotus' misrepresentations of fact, or of taking statements out of context, Lotus, at page 36 of its Reply, claims that Ms. Wang "stipulated before trial that she negotiated the purchase of the cherry line for Lotus," citing to Ms. Wang's pretrial statement. The pretrial statement to which Lotus references actually states the following:

Ms. Wang helped negotiate purchase of the packing line and storage facility, with the storage facility purchase price below its appraised value. The Ta Chi officers and directors knew that Ms. Wang was part owner and operator of the Summer Fruit and Jong Seng facilities. Ms. Wang signed the Jong Seng

sale documents as "managing partner" and "seller".

(CP 669.)

Ms. Wang did not stipulate before trial that she represented Lotus in the packing line purchase. To the contrary, she negotiated the transaction but as the owner and seller of Summer Fruit. The very reference Lotus cites makes clear Ms. Wang's claim that the Lotus (Ta Chi) officers and directors knew Ms. Wang was part owner and operator of Summer Fruit. She did not consent to and could not be Lotus' agent for negotiating terms of sale between Summer Fruit and Lotus.

Lotus presented no evidence that Ms. Wang agreed to serve as its agent in the Summer Fruit sale transaction. Because no evidence existed that Ms. Wang consented to act as Lotus' agent, the court's finding of an agency relationship was not supported by substantial evidence.

2. Lotus did not have control over Ms. Wang's conduct for the purposes of the Summer Fruit sale.

Lotus president Mr. Shen admitted at trial that he represented Lotus in negotiating certain aspects of the Summer Fruit sale with Ms. Wang:

- Q. Do you recall negotiating with Ms. Wang for purchase of the Summer Fruit equipment and being concerned about making sure depreciation was included . . .
- A. First of all, I represented the company to talk to her. I was hoping that the company can join in together so that we can do this together. And also, when you buy something, since the equipment had been used for several years, so there should be depreciation. Because she told me the

packing business is very profitable, so I say if that's the case, if they can join in together, that would be better . . . for this particular issue, I also asked Jack Wu to talk to her on my behalf as well, but was not successful.

(RP 864:25-865:1-20.)

Mr. Shen testified that he believed Summer Fruit was owned by a friend of Ms. Wang's father, and that Ms. Wang "was helping them to manage the place." (RP 874:12-19.) However, when Mr. Shen attempted to negotiate the Summer Fruit purchase price with Ms. Wang, she indicated she could not help him:

Q. (BY MR. AXEL) So when you discussed depreciation with Ms. Wang, did she then convey to you a message back from the Summer Fruit owners?

A. She said I can't.

Q. You can't depreciate the equipment?

A. That's why I asked Jack Wu to talk to them on my behalf.

Q. To talk to the owners of Summer Fruit?

A. Yes.

(RP 875:10-18.)

Ms. Wang would not attempt to change the terms of the sale at Mr. Shen's request. Realizing that they had no control over Ms. Wang in negotiating the sale, the Shens turned to Jack Wu. The actions of the Shens and Ms. Wang demonstrate that the Shens (Lotus) had no right of control over Ms. Wang and no reasonable expectation that they could control her as

Lotus' agent. The trial court's conclusion that Ms. Wang was Lotus' agent in the Summer Fruit transaction failed to consider that Lotus did not control Ms. Wang in the Summer Fruit sale, which constitutes an error as a matter of law.

3. Ms. Wang could not act on Lotus' behalf for purposes of the Summer Fruit transaction.

Ms. Wang could not be Lotus' agent for the purposes of the Summer Fruit transaction because she did not have the power to act on Lotus' behalf to effect the purchase of Summer Fruit. Ms. Wang did not have authority to sign loan documents on Lotus' behalf, nor did she have authority to sign the Summer Fruit purchase and sale agreement for Lotus. Again, in her letter to Mrs. Shen with respect to Lotus Ms. Wang stated: "If it were my responsibility, I would bear the load, *I did not have any authority to be involved in your financial arrangements and coordination....*" (Ex. 11(50)(a).)(emphasis added)

It was Mrs. Shen (Li-Chu Feng), and not Ms. Wang, who signed the Summer Fruit purchase agreement on behalf of Lotus. (Ex. 8(1).) Ms. Wang lacked power and authority to change Lotus' legal position in the Summer Fruit transaction, a fact that the trial court ignored. The trial court's failure to address whether Ms. Wang actually had authority to act on Lotus' behalf in the Summer Fruit transaction constituted error, because such a finding was necessary to the court's holding that Ms. Wang was Lotus' agent in this transaction.

4. Lotus failed to establish facts that Ms. Wang's relationship with Lotus rose to the level of a fiduciary.

The trial court found:

Plaintiff was a fiduciary for the defendant in most aspects of her relationship with the defendant. On the other hand, the establishment of the fiduciary relationship is not based merely on the fact that the plaintiff was an agent of the defendant. Additional facts of that relationship are necessary. The facts in this case show that when it came to the transaction between Jong Seng and Ta Chi, the defendant was put on notice of the fiduciary relationship as to this transaction did not exist.

(CP 1807:1-7.)

As the trial court recognized, an agent is not necessarily a fiduciary of her principal. Something more is needed than just the relationship of employer and employee. None of the facts presented at trial demonstrated that Ms. Wang was Lotus' fiduciary in the Summer Fruit transaction.

Lotus claims, "Wang suggests that managers are not fiduciaries. But managers and employees can be, and often are, agents and fiduciaries (citing *Crisman v. Crisman*)." (Appellant's Reply Br. 33.) Lotus also admits: "The scope of their agencies and fiduciary duties will of course depend on the nature of their jobs." (Id.) No Washington case supports Lotus' assertion that an employee is a fiduciary of her employer by virtue of the employment relationship alone. The Washington State Supreme Court has explained that the existence of an agency relationship alone does not create a fiduciary relationship:

Whether a fiduciary relationship emanates from such an arrangement, or grows out of it, depends in each case on the particular circumstances. The fiduciary relationship usually derives in part from an agency however created, whether expressly or by implication of law or fact, to which are added such circumstances as may induce the principal to relax the care and vigilance which the law ordinarily requires of him and he would customarily exercise on his own behalf.

Moon v. Phipps, 67 Wn.2d 948, 954, 411 P.2d 157 (1966)(citations omitted).

Lotus cites to only one Washington case in which an employee was found to be an agent and fiduciary, *Crisman v. Crisman*, 85 Wn.App. 15, 931 P.2d 163 (1997). But other facts and circumstances in that case beyond just the employment relationship led to the court's decision that a fiduciary relationship existed. In *Crisman*, Valerie Crisman asked her twin brother Robert and a man named Richard Uhlich to manage and operate her jewelry business. After Crisman purchased a second jewelry store at a local mall, Robert and Uhlich oversaw a liquidation sale of the new store's inventory, but misappropriated \$100,000 and a bag of gems from the liquidations sale.

Citing *Moon v. Phipps*, the court stated:

A fiduciary relationship arises between an agent and a principal when the agent, without the knowledge and consent of the principal, exercises dominion and control over the principal's property sufficient to alienate the principal's right to the property. *Moon v. Phipps*, 67 Wn.2d 948, 955-56, 411 P.2d 157 (1966). Once a fiduciary relationship arises, the agent has a duty to act in the utmost good faith, to fully disclose all facts relating to his interest in and his actions involving the affected property, and to deliver all benefits

derived from or inuring to the property from the breach to the principal. *Moon*, 67 Wn.2d at 956, 411 P.2d 157.

In this instance, Uhlich and Robert, acting as Crisman's agents, transferred corporate funds they received from the liquidation sale to their own benefit without Crisman's knowledge or consent. They were acting as Crisman's fiduciaries and, consequently, owed her an affirmative duty of disclosure. As Uhlich and Robert did not disclose their actions to Crisman, they breached this duty, and their silence constitutes an affirmative act of misrepresentation.

Crisman, 85 Wn.App. at 22.

The facts in *Crisman* bear no resemblance to the facts here. Ms. Wang lacked authority to sign on Lotus' behalf to complete the Summer Fruit purchase. Unlike the managers in *Crisman*, Ms. Wang did not exercise dominion and control over Lotus' assets in the Summer Fruit purchase.

Gilliland v. Mount Vernon Hotel Co., 51 Wn.2d 712, 321 P.2d 558 (1958) is similar to the case at hand. *Gilliland* was not merely a dispute between a landlord and tenant. There, the tenant had leased and managed a hotel from the Maltby-Thurston Hotels Inc. ("Maltby-Thurston"). Maltby-Thurston sold the hotel to new owners ("MVH") who subsequently engaged in a lease dispute with Gilliland. MVH paid Gilliland a monthly salary to manage the hotel while negotiating a settlement with Gilliland over the breached lease. At the time they entered into the settlement agreement, Gilliland owned a promissory note which he acquired from Maltby-Thurston

on which MVH owed \$13,500. Gilliland did not tell MVH about his ownership of the note until after settling the claims under the lease.

The Court in *Gilliland* found that, despite MVH asking Gilliland to speak to Maltby-Thurston about acquiring the note for them, their failure to make any other inquiry of Maltby-Thurston precluded them from recovery. The Court stated, "Appellant did not inquire of the officers of Maltby-Thurston Hotels, Inc., although they were readily accessible by telephone. Appellant was not misled, but its officers were careless." *Gilliland*, 51 Wn.2d at 715.

Although MVH stated they had confidence in Gilliland and appreciated his generosity in managing the hotel, the Court held no fiduciary relationship existed. *Gilliland*, 51 Wn.2d at 715-716.

Lotus similarly argues that Ms. Wang was its fiduciary because she was its manager and employee, yet the fact of an employment relationship alone does not create a fiduciary relationship. Even if Ms. Wang was considered Lotus' agent for the Summer Fruit transaction, additional special circumstances that would reasonably cause Lotus to relax its vigilance and care in the Summer Fruit transaction must have been present for Ms. Wang's role to rise to the level of a fiduciary in this transaction. None existed.

Lotus claims that an agency relationship can exist between counter parties, citing *Liebergessell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980). However, *Liebergessell* involved special circumstances where a borrower attempted to assert the defense of usury in order to estop a widower from

collecting on a legitimate debt the borrower owed to her. This was not a simple “borrower and lender” case as Lotus claims, but a case where the Court found a “special” relationship between the borrowers who:

Made it a practice to obtain funds for their business in this manner: by borrowing substantial sums from “unmarried ladies” who presumably are not aware of financial arrangements or usury laws, to set illegal interest rates, and then to threaten to defend suits brought for recovery on notes evidencing the loans with charges of usury instead of paying off the notes.

Liebergesell, 93 Wn.2d at 886.

Similarly, in *Moon* special circumstances existed beyond just an agency that led to a finding of a fiduciary relationship:

The evidence in this case discloses a number of circumstances which, when added to the agency, support the court’s finding of a fiduciary relationship...**When, therefore, by virtue of an agency relationship, an agent, without the knowledge and consent of his principal, acquires dominion over and control of his principal's property in such a way that the agent possesses a legal power to alienate the principal's interests in or possessor rights thereto, the agent has transformed the agency into a fiduciary relationship...**

Moon, 67 Wn.2d at 955-56 (emphasis added)(citations omitted).

Ms. Wang had no power to treat the Lotus property as her own. Mr. and Mrs. Shen both knew that Ms. Wang served only as the Lotus manager. They likewise knew that she served as the manager of the Summer Fruit facility. (RP 863:9-864:11; RP 942:1-4.) Even if they did not know she was

an owner of Summer Fruit, they had no right to rely upon her acting as Lotus' fiduciary, knowing she owed a duty of loyalty to Summer Fruit (the Shens claim to have thought that Ms. Wang managed Summer Fruit for her father's friend who was the owner). *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 741, 935 P.2d 628 (1997). A fiduciary relationship cannot exist when the parties have conflicting business interests. *Id.* at 743. *See also Gilliland*, 51 Wn.2d at 715-716.

5. Lotus Vice President Herman Chen knew Ms. Wang owned Summer Fruit, knowledge imputed to Lotus.

Lotus argues that after February 2007 Herman Chen "had no substantive role in Lotus or Ta Chi." (Appellant's Reply Br. 39.) Lotus claims they believed Ms. Wang was the Lotus agent negotiating the purchase of Summer Fruit. They make this claim while testifying that they knew Ms. Wang served as Summer Fruit's manager. (RP 863:9-864:11; RP 942:1-4.)

Lotus improperly cites to deposition testimony the trial court refused to consider at trial to argue that Ms. Wang never spoke to Mr. Chen about the Summer Fruit sale.¹ Besides taking that testimony out of context, Lotus ignores the evidence produced at trial that clearly established Mr. Chen's intimate involvement in the purchase and construction of the packing line:

Q. (BY MR. SIDERIUS) Ms. Wang, previously you testified about plans to expand the packing line. Do you recall

¹ Ta Chi assigned error to the court's failure to consider deposition testimony that was not offered against a witness who testified at trial. Yet Ta Chi now cites to the very deposition testimony not considered by the court. The basis for Ms. Wang's objection to this trial tactic is evidenced by Ta Chi now citing to deposition testimony that is taken out of context and for which Ms. Wang had no opportunity to explain at trial. The cited testimony was not part of the trial and should not be considered on appeal.

that testimony?

A. Yes, I do.

Q. Who were those discussions with?

A. You mean the packing line or warehouse?

Q. The packing line.

A. Cherry or apple?

Q. The whole process of the project.

A. Oh, project.

Q. Yes. Who did you have discussions with about expanding the packing line facilities?

A. Oh, we discuss about that with Mrs. Shen and also Herman Chen that time.

(RP 330:6-19.)

Herman Chen was personally involved in establishing Lotus as a company and remained involved until at least August 2007:

Q. Was a separate company set up for purchase of the packing line?

A. Correct.

Q. Was that Lotus Fruit?

A. The packing line, yes, is Lotus Fruit.

Q. What was your involvement in formation of Lotus Fruit?

A. Initially when it was formed, I was personally in charge.

Q. Were you appointed as a director?

A. Mrs. Shen appointed me.

Q. Did you serve as an officer of Lotus Fruit?

A. Yes.

Q. (BY MR. SIDERIUS) Mr. Chen, I'm going to hand you Exhibit Number 29. That's called a notice of final agreement. If you'll look at the signature lines, did you sign this agreement?

A. No. Oh, yes, I did.

Q. And how did you sign it?

A. Oh, this document, Mrs. Shen brought it over to my home for my signature.

Q. Did you sign it as vice president of Lotus Fruit?

A. Yes.

Q. And is that dated?

A. Where is the date?

A. August 31st.

Q. (BY MR. SIDERIUS) Thank you. Of what year?

A. 2007.

(RP 1001:17 – 1003:3.)

Mr. Chen further testified that he was aware of Ms. Wang's ownership of Summer Fruit at the time of the packing line purchase:

Q. (BY MR. SIDERIUS) Now, Mr. Chen, are you aware that Lotus eventually

purchased the packing line equipment?

A. That Lotus Fruit bought the apple storage?

Q. No. Eventually bought the packing line.

A. Yes.

Q. And were you aware before that purchase that Mr. Wu and Ms. Wang were the owners of Summer Fruit?

A. Yes.

(RP 100:2 – 11.)

The undisputed evidence at trial showed that Mr. Chen was Vice President of Lotus at the time Lotus purchased Summer Fruit, and that he was aware of Ms. Wang's ownership interest in Summer Fruit. That knowledge is imputed to Lotus, and Lotus, therefore, lacks any basis to claim that Ms. Wang breached a fiduciary duty in the Summer Fruit sale by nondisclosure of her ownership interest in Summer Fruit. No substantial evidence supported a finding that the principals of Lotus were unaware of Ms. Wang's ownership interest in Summer Fruit.

B. Ms. Wang breached no duty to Ta Chi in her execution of the Highland Orchard lease and in defending Ta Chi during the Highland lawsuit.

All of the Ta Chi legal authorities cited in support of its claims relating to the Highland Orchard lease involve damages due from an agent on finding that an agent breached a fiduciary duty to its principal. Ms. Wang does not challenge those authorities. However, Ta Chi completely ignores that it presented no evidence at trial that Ms. Wang breached a duty to Ta Chi

by execution of the Highland Orchard lease. Ta Chi continues to point to the events it claims occurred *after* the lease execution, such as a nondisclosure of the lease or the legal fees incurred in successfully defending against the Highland lawsuit, as the events giving rise to the breach of fiduciary duty. The court's findings of non-disclosures occurring after lease execution were likewise the basis for the court's conclusion that a breach of duty occurred. (CP 1798 – 1790, ¶¶ 136–142.)

In yet another example of improper argument, Ta Chi states that “[h]ad Ta Chi found out about the Highland lease, Wang would have been fired.” (Appellant’s Reply Br. 43.) Not only does that statement lack any support from the trial court record, it contradicts the specific court finding that “Wang was given *carte blanche* authority to do most anything she felt was in the best interest of this business.” (CP 1775-1776 ¶¶ 46-47.)

Ms. Wang, Gasper Orozco, her orchard manager, and Ms. Wang’s expert witness, David Burnett, all testified that entering into the Highland lease was a prudent business decision. (RP 1094-1095; RP 234-237; RP 1205-1206.) Ta Chi never disputed this fact. Ta Chi submitted no evidence at trial to suggest that this lease was entered into for anything other than Ta Chi’s best interest. The court made no findings to the contrary.

Ta Chi does not explain how its officers’ or directors’ knowledge of the lease or of the lawsuit would have affected the lawsuit outcome or how any damages resulted from its officers’ or directors’ ignorance of the lawsuit.

The court found that Ms. Wang had authority to enter into the Highland lease on Ta Chi's behalf. The execution of the lease, therefore, could not be the basis for finding a breach of duty. Ta Chi does not challenge this finding. And if no breach of duty occurred by execution of the lease, no breach of duty could occur by defending a lawsuit brought under the lease, regardless of the Ta Chi directors' knowledge of the lease or lawsuit. Indeed, Ta Chi won the lawsuit brought against it by the Highland partnership.

The court found that Ms. Wang received approximately \$12,000 profit from the Highland lease, a claim Ms. Wang disputes. Even if that were true, Ms. Wang's retention of any profit would still not subject her to liability for costs of defending the Highland lawsuit. At worst, under the authorities cited, she would be liable for return of any profit.

Ta Chi argues that it is entitled to any Highland lease profit. Ta Chi at the same time argues it should not be liable for attorney's fees defending the lawsuit arising from the lease. Ta Chi cannot affirm the contract by claiming the profit made under the lease and disaffirm the legal fees incurred in successfully defending a lawsuit arising from the lease.

Ta Chi falsely represents that Ms. Wang has made concessions regarding the Highland lease, such as that she maintained a "secret" bank account, or made a profit from the Highland opportunity. (Appellant's Reply Br. 42.) Ms. Wang makes no such concessions. Rather, she claims that entering into the Highland lease was a prudent business decision at the time it was made and within her authority as Ta Chi's manager.

The court, in finding Ms. Wang responsible for the Highland lawsuit legal fees, essentially imposed a duty upon her as manager to cover any losses associated with the contract. A business manager is not the guarantor of every contract entered into on behalf of her employer. The court made Ms. Wang the guarantor of the Highland lease and an insurer against any losses. Ms. Wang did not assume the role as guarantor or insurer and she received no compensation for such roles.

Ms. Wang used her own funds for the operation of the Highland orchard because Ta Chi had no money. She thought this lease would produce a profit for Ta Chi, and she gave Ta Chi that business opportunity rather than taking it herself, which she could have done. Ta Chi would have realized the profit that everyone expected, had it not been for an early freeze.

If Ms. Wang truly tried to conceal the legal fees, she would not permit them to appear on an annual cash flow report to the shareholders. (Ex. 5(4)(c) [\$28,752]; Ex. 5(5)(c) [\$49,158].) The Ta Chi officers never inquired as to why they were paying such high legal fees. They chose to remain ignorant.

C. Ms. Wang is entitled to her attorney's fees.

The court found that Ms. Wang used her best efforts in operating the Ta Chi orchard. The court found that she provided services at or below market value. If the appellate court reverses the trial court on the Summer Fruit and Highland Orchard issues, Ms. Wang will be entitled to recover her attorneys' fees as an employee defending herself against the Ta Chi claims.

III. CONCLUSION

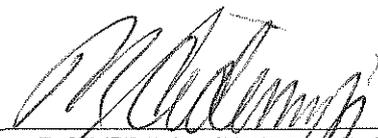
Ms. Wang respectfully requests this Court:

1. Affirm the trial court's award in her favor for the loans she made to Ta Chi;
2. Affirm the trial court's denial of damages to Ta Chi; and
3. Reverse the trial court's ruling with respect to the Summer Fruit sale agreement, Highland Orchard lease and the court's denial of her attorney's fee request.

SUBMITTED this 2nd day of March, 2011.

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By



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