

Court of Appeals No. 71902-5
BEFORE THE WASHINGTON STATE COURT OF APPEALS
DIVISION ONE

VELOCITY CAPITAL PARTNERS,
Appellant

vs.

LASHER, HOLZAPFEL, SPERRY & EBBERSON, P.L.L.C., a
Washington Limited Liability Company, and EUGENE WONG, an
individual,

Respondents

On Appeal from the King County Superior Court
Case No. 12-2-39494-6 SEA

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I. INTRODUCTION.....	1
II. ASSIGNMENTS OF ERROR.....	3
III. STATEMENT OF THE CASE.....	4
A. Wong and the Lasher Firm Had a Complex History with VCP and Hazelrigg that Pre-Dated the K&S Transaction.....	4
B. The K&S Loan Transactions.....	8
1. <i>Wong Takes Charge of Documenting and Closing the March 2008 VCP-K&S Loan Transaction</i>	8
2. <i>Wong Takes Charge of Documenting and Closing the July/August 2008 VCP-K&S Loan Transaction</i>	11
3. <i>VCP Discovers That Wong Did Not Obtain Signed Loan Documents for the July/August 2008 Loan, and Sues K&S and Kingen For Default on Both Loans</i>	16
IV. ARGUMENT	18
A. Standard of Review.....	18
B. The Lower Court Erred by Finding that VCP’s Claims were “Time Barred”	19
C. Genuine, Material Issues of Fact Exist As to whether Defendants Owed A Duty to Plaintiff and Breached the Standard of Care and Their Fiduciary Duties.....	23
1. <i>Wong and the Lasher Firm Owed a Duty to VCP to Ensure that the Loan Transactions Were Properly Documented and Closed</i>	24
2. <i>Wong and the Lasher Breached Their Duty of Care and their Fiduciary Duty Owed to VCP</i>	27
3. <i>Wong and Lasher’s Conduct Both Breached The Standard Of Care and Their Fiduciary Duty by Violating RPC 1.7</i>	31

D. Genuine, Material Issues of Fact Exist As to whether Defendants Actions were the Proximate Cause of Plaintiffs’ Damages	34
1. <i>Whether Plaintiffs would Have Received a “Better Result” But- for the Negligence of the Defendants is for the Trier of Fact to Decide</i>	35
2. <i>Defendants were the “Legal Cause” of Plaintiff’s Damage</i>	38
E. Defendants Do Not Escape Liability Due to the Actions of Hazelrigg.....	39
1. <i>Defendants Are Collaterally Estopped From Asserting That Their Duties To VCP were Cut-Off by the Conduct of Hazelrigg or TRH Lenders as an “Intervening Cause”</i>	39
2. <i>Defendants Did Not Prove That Hazelrigg Or Others Were An Intervening Cause To The Breach Of Wong’s Duties</i>	44
V. CONCLUSION.....	46
Appendices.....	48

TABLE OF AUTHORITIES

CASES

<i>Brust v. Newton</i> , 70 Wash.App. 286, 293, 852 P.2d 1092 (1993).....	4, 34
<i>Castro v. Stanwood School Dist. No. 401</i> , 151 Wash.2d 221, 224, 86 P.3d 1166 (2004).....	18
<i>Christensen v. Grant Cnty. Hosp. Dist. No. 1</i> , 152 Wn.2d 299, 306, 96 P.3d 957, 960-61 (2004)	40
<i>Cook, Flanagan & Berst v. Clausing</i> , 73 Wash.2d 393, 395, 438 P.2d 865 (1968).....	23
<i>Cotton v. Kronenberg</i> , 111 Wash.App. 258, 264, 44 P.3d 878 (2002).....	24
<i>Daugert v. Pappas</i> , 104 Wash.2d 254, 704 P.2d 600 (1985)	34
<i>Davis v. Davis Wright Tremaine, L.L.P.</i> , 103 Wn. App. 638, 14 P.3d 146 (2000).....	21
<i>Eckerson v. Ford's Prairie School Dist.</i> 11, 3 Wash.2d 475, 101 P.2d 345 (1940).....	44
<i>Eriks v. Denver</i> , 118 Wn.2d 451, 457-58 (1992).....	24, 31
<i>Esmieu v. Schrag</i> , 88 Wn.2d 490	32
<i>Fosbre v. State</i> , 70 Wash.2d 578, 424 P.2d 901 (1967)	44
<i>Gustafson v. City of Seattle</i> , 87 Wn.App. 298, 302 (1997).....	24
<i>Hartley v. State</i> , 103 Wn.2d 768, 779, 698 P.2d 77, 83 (1985).....	38
<i>Hash by Hash v. Children's Orthopedic Hosp. and Medical Center</i> , 110 Wn.2d 912, 757 P.2d 507 (1988).....	19
<i>Hizey v. Carpenter</i> , 119 Wash. 2d 251, 830 P.2d 646 (1992)	23, 24

<i>Herron v. Tribune Pub'g Co.</i> , 108 Wash.2d 162, 169, 736 P.2d 249 (1987)	18
<i>In re: Disciplinary Proceeding against Burtch</i> , 162 Wash.2d 873, 891 (2008).....	25
<i>Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.</i> , 109 Wn. App. 655, 659, 37 P.3d 309, 312 (2001).....	19
<i>Marshall v. AC & S, Inc.</i> , 56 Wash.App. 181, 185, 782 P.2d 1107 (1989)	1
<i>Martini v. Post</i> , 313 P.3d 473 (2013).....	34
<i>Mason v. Bitton</i> , 85 Wash.2d 321, 534 P.2d 1360 (1975).....	44
<i>Micro Enhancement Int'l, Inc. v. Coopers & Lybrand</i> , 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).....	32
<i>Nielson v. Eisenhower & Carlson</i> , 100 Wash.App. 584, 999 P.2d 42 (2000).....	34
<i>Pelton v. Tri-State Mem'l Hosp., Inc.</i> , 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).....	18
<i>Ski Acres, Inc. v. Kittitas County</i> , 118 Wash.2d 852, 854, 827 P.2d 1000, 1002 (Wash.,1992).....	18
<i>Smith v. Acme Paving Co.</i> , 16 Wn. App. 389, 396-97, 558 P.2d 811, 816- 17 (1976).....	44
<i>State v. Jacobsen</i> , 74 Wash.2d 36, 442 P.2d 629 (1968).....	44
<i>Van Dyke v. White</i> , 55 Wn.2d 601, 613 (1960).....	24
<i>Van Noy v. State Farm Mut. Auto. Ins. Co.</i> , 142 Wn.2d 784, 792, 797-8, 16 P.3d 574 (2001).....	32
<i>VersusLaw v. Stoel Rives</i> , 127 Wash. App. 309, 111 P.3d 866 (2005)	35
<i>Walker v. Bangs</i> , 601 P. 2d 1279, 92 Wash. 2d 854 (1972).....	24

RULES

RPC 1.4(a) and (b) 31
RPC 1.7 31

TREATISES

Mallen, *Legal Malpractice*, § 20:2, “The Standard of Care Defined” (2013
ed.) 23
Mallen, *Legal Malpractice*, §15.2 and §15.22 (2014 ed.). 32

I. INTRODUCTION

This is an appeal from an order of former King County Superior Court Judge Joan DuBuque, who granted summary judgment in favor of defendants. The matter was a legal malpractice and breach of fiduciary duty action brought by plaintiff Velocity Capital Partners, LLC (“VCP”), against the firm of Lasher, Holzapfel, Sperry & Ebberson, PLLC, and its member, Eugene Wong (“Wong”).

This case is about the simple failure of Wong and the Lasher firm getting signed loan documents on a transaction that *Wong* has conceded he was responsible for “closing.”¹ The action dealt with the relationship between VCP, on the one hand, and Wong and the Lasher firm on the other. Wong and the Lasher firm had a years long, relationship with Thomas Hazelrigg III (“Hazelrigg”) and his related entities and associates, including Scott Switzer (“Switzer”) and Joseph Kimm (“Kimm”).² This relationship pre-dated Wong’s retention by VCP and went as far back as 2003.³ Hazelrigg had told others that Eugene Wong was one of the best

1 In prior sworn *deposition* testimony, Wong flat-out contradicted many of his statements in his declaration submitted in support of defendants’ motion, rendering his declaration testimony suspect. See *Marshall v. AC & S, Inc.*, 56 Wash.App. 181, 185, 782 P.2d 1107 (1989). In addition, Wong and his defense counsel submitted untimely subsequent declaration testimony (see CP 1177-1186) to further contradict his deposition testimony. This was rejected by the trial court (CP 1172).

2 In addition to representing Hazelrigg, Switzer and their entities in numerous loans and real estate transactions, Lasher lawyers also represented those gentlemen in litigation matters as well. CP 698 [Deposition Transcript of Eugene Wong dated 2/11/12, page 12:3-12 (Exhibit 21)]; CP 813-853 [See also Exhibit 29 to the Declaration of Brian H. Krikorian (Bingo Investments lawsuit)]

3 CP 698 [Deposition Transcript of Eugene Wong dated 2/11/12, page 12:3-12

“closing attorneys” in Seattle.⁴ Hazelrigg regularly steered business to Wong and the Lasher firm for real estate and loan closings.⁵ Wong closed and/or participated in “lots” of transactions for Hazelrigg and his entities before being introduced to plaintiff VCP.⁶

In 2008, Hazelrigg brokered and escrowed two (2) loans for an entity known as K&S Developments, LLC (“K&S”) owned by Switzer and Gerry Kingen. Switzer approached VCP as a “funder” for this loan. As with all the other loans brokered and/or escrowed by Hazelrigg and his entities, Wong and the Lasher firm acted as VCP’s closing attorneys. VCP funded two loans for K&S—however Wong and the Lasher firm failed to fully document and obtain signed documents for the second loan—even though VCP funded the loan through Hazelrigg’s escrow. This resulted in VCP having an unenforceable loan guarantees against Switzer and Gerry Kingen, and K&S. VCP later settled its claim against Mr. Kingen at a substantial reduction and sued Wong and Lasher for malpractice.

As will be demonstrated below, VCP provided ample evidence and facts giving rise to genuine triable issues of fact on all elements of its claims, and the defenses raised by Wong and the Lasher firm in their

(Exhibit 21)]

4 CP 866 [Deposition of Joseph Kimm, p. 46:18 to 47:15 (Exhibit 30)]

5 *Id.*; See CP 894 [Deposition Transcript of Scott Switzer, page 215:1 to 216:24 (Exhibit 31)]

6 CP 698, 700, 712 [Deposition Transcript of Eugene Wong dated 2/11/12, page 12:3-12; 21:7-16; 69:4-13; (Exhibit 21)]; CP 867-868 [Deposition of Joseph Kimm, page 50:6 to 52:3; 124:1 to 125:1 (Exhibit 30)].

Motion for Summary Judgment. Accordingly, Judge DuBuque's order should be reversed and this matter remanded for trial.

II. ASSIGNMENTS OF ERROR

- The lower court erred by granting summary judgment and finding that (i) that there were no issues of fact as to the running of the statute of limitations; and, (ii) erroneously finding that the statute of limitations began to run in January of 2009—when the parties signed a loan extension, and therefore VCP's action was time barred;
- The lower court erred in finding that no triable issues of fact existed as to duty and breach of the standard of care;
- The lower court erroneously found that no triable issues of material fact existed as to the issues of causation in the underlying action, ignoring the *clear* and *ample* evidence and facts establishing that plaintiffs' had established a causal link between the breach of duty of the defendants, and the damages suffered by VCP;
- The lower court erroneously found that there was no "legal causation" between VCP's damages and the actions of the defendants;
- The lower court further erred, as a matter of law, by disregarding plaintiff's right to have the trier of fact decide the

issues of proximate cause and damages in a legal malpractice action as required by Washington law, disregarding *Brust v. Newton*, 70 Wash.App. 286, 293, 852 P.2d 1092 (1993) and other case authority;

- The lower court erred by finding no issues of fact as to VCP's claim of breach of fiduciary duty; and,
- The lower court erred by not finding that defendants were collaterally estopped from arguing a lack of duty, a limited scope of representation, and lack of causation, and intervening cause, which were contradicted by findings and conclusions of law of Judge Bruce Heller in the matter of *Foundation Management, Inc., Velocity Capital Partners, LLC v. Lasher, Holzapfel, Sperry & Ebberson, PLLC*, King County Superior Court Case No. 10-2-33106-9SEA.

III. STATEMENT OF THE CASE

A. WONG AND THE LASHER FIRM HAD A COMPLEX HISTORY WITH VCP AND HAZELRIGG THAT PRE-DATED THE K&S TRANSACTION

In late 2006, Jeff Sakamoto was introduced to Kimm, who in-turn, introduced Mr. Sakamoto to Switzer and Hazelrigg, and the latter two gentlemen discussed their respective lending "business models" with Mr.

Sakamoto.⁷ CFG and Hazelrigg recommended that VCP interview and use Wong of the Lasher firm to act as the “Lender’s” attorney in closing its transactions.⁸ Switzer, a member of CFG and a participant in the underlying loan transaction, testified that CFG would regularly “direct” prospective lenders to use Wong.⁹ Mr. Sakamoto interviewed Wong comprehensively and wanted to make sure that Wong would act independent of CFG and Hazelrigg and would ensure that the all the legal necessities of VCP’s transactions would be looked out for. Mr. Sakamoto specifically told Wong that he did not know Hazelrigg or Switzer, and that he was considering making his first foray into business with them. Mr. Sakamoto asked Wong if Hazelrigg and his associates could be trusted. Wong responded that Hazelrigg was a shrewd businessman, that Wong had a history with Hazelrigg, and that he had never observed Hazelrigg to do anything improper or wrong. Mr. Sakamoto advised Wong that he wanted to make sure that Wong and the Lasher firm were protecting VCP’s interests *only* in any transaction. Wong assured Mr. Sakamoto that he would be able to provide *independent* legal counsel for VCP in closing its loans.¹⁰

Relying upon Wong’s assurances, VCP used the Lasher firm, and

7 CP 895-914 [Declaration of Jeff Sakamoto, ¶¶5-7]. Mr. Sakamoto’s father had an acquaintance with Kimm, and suggested that Mr. Sakamoto reach out to Kimm for business opportunities in lending.

8 *Id.* Declaration of Jeffrey Sakamoto, ¶¶12 and 13

9 CP 894 [Deposition Transcript of Scott Switzer, page 215:1 to 216:24 (Exhibit 31)]

10 CP 895-914 [Declaration of Jeffrey Sakamoto, ¶¶15-20]

specifically Wong, as its closing lawyer on financial transactions over the next two (2) years.¹¹ VCP participated in approximately 6 to 8 different loan transactions that were either brokered or initiated *through Hazelrigg, Switzer* and/or *CFG*.¹² VCP used Wong in virtually all of those transactions, and continued to rely and place its trust in Wong as its lawyer to ensure these transactions were properly documented and VCP's interests were protected.¹³ Wong testified that he believed that he (Wong) was *operating* under a unique "business model" whereby (in Wong's mind) VCP deferred all decisions making to Hazelrigg, and that Hazelrigg and his various entities were responsible for "getting the loan closed".¹⁴ It was not a foreign concept to Wong and the Lasher firm that Hazelrigg would regularly take unilateral steps to see to it that a loan was closed; in fact, very often Wong unilaterally took his "marching orders" from Hazelrigg and not his clients (i.e. the third party lenders such as VCP—including closing a deal without the lender's involvement).¹⁵ Wong cited to this "business model" employed by Hazelrigg, and as the common "method and procedure" in which he handled all VCP's loans:

11 *Id.* [Declaration of Jeffrey Sakamoto, ¶¶22-24]

12 CP 894 [Deposition Transcript of Scott Switzer, page 215:1 to 216:1 (Exhibit 31)]; CP 702, 712 [Deposition Transcript of Eugene Wong dated 2/11/12, page 26:6-18; 69:4-19 (Exhibit 21)]; CP 895-914 [Declaration of Jeffrey Sakamoto ¶22-24]

13 *Id.* [Declaration of Jeffrey Sakamoto, ¶25]

14 CP 700-702, 708 [Deposition Transcript of Eugene Wong dated 2/11/12, page 18:4 through page 19:5; page 22:4 to 23:21; 26:12 to 29:22; 52:2-11 (Exhibit 21)].

15 CP 713 [Deposition Transcript of Eugene Wong dated 2/11/12, page 73:8-18 (Exhibit 21)]; CP 804-5 [Findings of Facts and Conclusions of Law, Conclusions #4 and #5 (Exhibit 28)]

A (Wong). I don't recall a specific document, but to go back to how Centurion was in the business of putting loans together, ***it was Centurion's business model to procure, underwrite, bundle loans, and get them closed.***

And Centurion was *in the business of finding various investors* who wanted to place loans with Centurion, and the ***business model would have these lenders defer and rely upon Centurion to perform Centurion's core functions to get loans closed.*** And that ... has been the consistent expectation of Foundation Management and VCP Capital as well.

Q. Okay, and how do you know that?

A. Through the dealings with the parties. ***That was the method and procedure of how these loans ended up on my desk and were closed for ... the five or six loans that I closed for VCP.***¹⁶
(Emphasis added)

It was *not* uncommon for Wong to finalize a loan, and then send Mr. Sakamoto the closing documents week, if not months, after the loan had closed and funded.¹⁷ Mr. Sakamoto relied and trusted that Wong was handling the process to completion. In fact, as seen below, the March 2008 K&S loan closed and Wong sent the final documents to Switzer –

¹⁶ CP 700-2, 710 [Deposition Transcript of Eugene Wong dated 2/11/12, page 18:4 through page 19:5; page 22:4 to 23:21; 26:12 to 29:22; 52:2-11 (Exhibit 21)]. VCP does not concede that the “business model” that Wong claims existed—in his view—was, in fact, what plaintiff believed Wong’s obligations were. In fact in his Findings of Facts and Conclusions of Law, Judge Bruce Heller rejected Mr. Wong’s interpretation of this “model,” finding that while the parties “operated under a common business model”, ***“neither Mr.. Hazelrigg nor CFG had any power, express or implied, to bind the plaintiffs....”*** CP 804-5 [Conclusion of Law, ¶¶4 and 5]. (Emphasis added). As argued *infra*, plaintiff submits that Wong and the Lasher firm are collaterally estopped from now taking a different position to suit their needs.

¹⁷ CP 895-1041 [See Jeff Sakamoto Declaration ¶¶24 and 25; See Exhibits 1, 2 and 3 thereto]

but never provided them to *his own client*.¹⁸

B. THE K&S LOAN TRANSACTIONS

Following the very same “business model” Wong used in *every* VCP closing, in 2008, Wong undertook the duty to document, close and act as the “lender’s counsel” in the two loans VCP made to K&S. His duties included drafting, notarizing and ultimately recording each loan.¹⁹ It was not a “secret” to Wong that these loans were being “bundled” and “facilitated” by defendants’ long-time client, Hazelrigg—just like all the other VCP loans Wong had handled. And it was certainly no secret that Wong (improperly) continued to defer all “decisions” to Hazelrigg.²⁰

1. Wong Takes Charge of Documenting and Closing the March 2008 VCP-K&S Loan Transaction

In March of 2008 K&S, through its member Switzer (who was also a member of CFG), requested that VCP lend K&S the sum of \$560,000. On March 14, 2008, Denise Tallman of CFG emailed Wong and Kimm and enclosed an “Executive Summary” of the proposed loan.²¹ As with the prior VCP loans Wong handled, this loan was coordinated through

18 CP 727 [Exhibit 22]

19 CP 993-1001; 1006-1009 [Exhibits 4 through 6, 9 and 10 to the Declaration of Jeffrey Sakamoto]; See also Declarations of Paul Brain and John Strait [CP 1069-1137]

20 CP 700-2, 710 [Deposition Transcript of Eugene Wong dated 2/11/12, page 18:4 through page 19:5; page 22:4 to 23:21; 26:12 to 29:22; 52:2-11 (Exhibit 21)]. CP 1006-1009 [Exhibits 9 and 10 to the Declaration of Jeffrey Sakamoto]; CP 731 [Exhibit 23 to the Declaration of Brian H. Krikorian]

21 CP 993-4 [Exhibit 4 to the Declaration of Jeffrey Sakamoto]

Hazelrigg and one of his entities, TRH Lenders.²² Within three (3) days, Wong emailed Mr. Kimm, Switzer, and *copied* Ms. Tallman and Mr. Sakamoto with an email “[a]s counsel for the Lender (sic)”, and enclosed the necessary loan documents.²³

The documents for the March 2008 loan were signed on March 21, 2008. ***Wong notarized the documents on that date.***²⁴ However, it was not until April 4, 2008 that Wong sent an email to Hazelrigg, Switzer, Kimm and Ms. Tallman, copied to Jeff Sakamoto, that indicating: “We’ve recorded as of today on VCP’s 560K loan to K&S Developments, LLC (sic).”²⁵ While defendants made much of the fact that the loan was likely funded before the documents were recorded—it was ***Wong*** who notarized the documents *on March 21, 2008*, admittedly accepted the duty to record them, and kept them in his possession for over two weeks. Defendants have never explained why Wong waited nearly 3 weeks to record the documents—and in fact in deposition testimony he acknowledged that this was a common occurrence in loans he closed with Hazelrigg and others, and that “it can be days, it can be weeks, it can be months” after he “prepares” the documents that the loan gets recorded.²⁶

In Wong’s declaration in support of defendants’ Motion for

22 CP 891 [Deposition of Scott Switzer, Page 42:7-14 (Exhibit 31)]

23 CP 995-6 [Exhibit 5 to the Declaration of Jeffrey Sakamoto]

24 CP 118-161, CP 158 [Exhibit 8 to the Declaration of Timothy Shea]

25 CP 1000-1001 [Exhibit 6 to the Declaration of Jeffrey Sakamoto]

26 CP 656-7 [Deposition Transcript of Eugene Wong dated 11/16/12, page 239:8 to 243:17 (Exhibit 20)]

Summary Judgment, he asserted that “neither VCP nor TRH discussed the specifics of their loan disbursement practices with me” and that “through discovery in this case, I have learned that TRH acted as a the disbursement escrow agent...” (Emphasis added).²⁷ This statement is, however, flat-out contradicted by Wong’s prior deposition testimony. ***In November 2012*** (a month before this case was filed), Wong testified that he was well aware that this is how VCP and other CFG/TRH loans were regularly funded based upon “other loan transactions” that he had been “involved with where the funding took place without my involvement or handling of funds”.²⁸ Wong further testified that he was aware that there were “staff people” at CFG who “handled disbursements for VCP” related to internal funding.²⁹ Wong admitted that it was common for Hazelrigg to “internally” fund loans that Wong was involved in (meaning “in a general sense between lender and borrower directly, without escrow or my involvement”), and that he was *aware* Hazelrigg often instigated this unilaterally.³⁰

On April 10, 2008, Switzer emailed Wong directly and asked that Wong send him “final signed documents” for the March 2008 loan. Wong emailed Switzer, and copied Mr. Kimm, Ms. Tallman and Jody at CFG as

27 CP 576-582 [Wong Declaration ¶3]

28 CP 635, 655-8 [Deposition Transcript of Eugene Wong dated 11/16/12, page 154:17 to 155:18; 233:2 to 238:6; 244:2 to 248:7 (Exhibit 20)]

29 CP 649 [Deposition Transcript of Eugene Wong dated 11/16/12, page 209:21 to 210:14]

30 CP 635, 655 [Deposition Transcript of Eugene Wong dated 11/16/12, page 154:17 to 155:18; 235:10-18]

follows:

Attached please find copies of the original executed loan documents. ***Tom said he was going to handle the funding internally.*** I do need to collect the fees and costs of \$5,085.00, and would appreciate a check so that I can get the title insurance and recording fees paid for. (Emphasis added)³¹

Although he identified himself as the “Lender’s counsel”, Wong did not copy Jeff Sakamoto or anyone at VCP on this email and, in fact, ***never*** provided a copy of the closing documents to VCP at the time.³²

2. Wong Takes Charge of Documenting and Closing the July/August 2008 VCP-K&S Loan Transaction

On July 17, 2008, Switzer sent to Jeff Sakamoto, ***on CFG letterhead***, a request for an “additional \$500,000” loan to cover costs to build a new Starbuck’s pad on the same property the March 2008 loan was secured by.³³ Again, Hazelrigg and TRH Lenders acted as facilitators for this loan, and Wong was aware of that fact.³⁴ On July 30, 2008, Wong sent an email to Switzer, copied to Jeff Sakamoto, Subject: VCP 560K Loan to K&S Developments (sic). In his email, Wong stated that he was attaching a “loan documentation package for the above-referenced loan,

31 CP 727 [Exhibit 22 to the Declaration of Brian H. Krikorian]; CP 646*7 [Deposition Transcript of Eugene Wong dated 11/16/12, page 199:25 to 200:25; 202:5-15]

32 CP 727 [Exhibit 22 to the Declaration of Brian H. Krikorian]; CP 1025-1030 [Exhibits 17 and 18 to the Declaration of Jeffrey Sakamoto]; CP 648 [See also Deposition Transcript of Eugene Wong dated 11/16/12, 208:9-20].

33 CP 1002-3 [Exhibit 7 to the Declaration of Jeffrey Sakamoto]

34 CP 1006-9 [See Exhibit 9 and 10 to the Declaration of Jeffrey Sakamoto]; CP 733 [Exhibit 24 to the Declaration of Brian H. Krikorian]

which Scott asked me to prepare and mirror the terms of the last 560K loan by VCP to K&S.” Wong concluded by stating: “Please let me know if you have any questions, *and return the fully executed documents to me for final processing as follows....*” (Emphasis added).³⁵

Unlike the prior package, for the first time, Wong included a “Consent to Common Representation (Lender, Scott, and Gerry to execute).”³⁶ According to Wong, this document was purportedly drafted “to ensure that the parties were aware of our representation of Centurion and VCP in this transaction, with Switzer being part of the borrowing group. It was to make the parties aware that he was -- also had some involvement with Centurion.”³⁷ Wong testified that he sent the letter out “in the abundance of caution”, but did not believe there to be a “direct conflict.”³⁸ Wong said that despite Hazelrigg’s involvement as facilitator of the loan, the fact that Wong knowingly took instructions from “Tom”, as well as Switzer’s direct involvement in the loan, he did not believe that CFG had an “important” or “significant” role in the two loan transactions.³⁹ Wong qualified his testimony that the “conflict” waiver he had sent to the parties contained language that did not apply (in his mind)

35 Appendix 6 (CP 1006 [Exhibit 9 to the Declaration of Jeffrey Sakamoto])

36 Appendix 10; CP 1019 and 733 [See Exhibit 24 to the Declaration of Brian H. Krikorian]

37 CP 625 [Deposition Transcript of Eugene Wong dated 11/16/12, Page 116:15-25]

38 CP 633 [Deposition Transcript of Eugene Wong dated 11/16/12, Page 146:15 to page 147:20]

39 *Id.* at 147:21 to 148:18

to this transaction, and that much of what he wrote was “an oversight”.⁴⁰

In his testimony, Wong evidenced confusion as to whom the letter properly applied to: i.e. CFG, K&S, Gerry Kingen, or VCP.⁴¹

Despite his testimony that he did not think that CFG or Hazelrigg had a “significant” or “important” role in the transaction, on July 31, 2008, at 5:57 p.m., Wong sent another email – this time directed to **Hazelrigg** and Switzer – and copying Jeff Sakamoto. In the July 31, 2008 email, Wong stated that:

Pursuant to instructions from Tom, the title insurance has been waived by Lender on this loan. Attached please find a new set of documents for execution....”

...

Please return the original executed documents to me for processing and recording. (Emphasis added).⁴²

Within a minute *after* sending the previous email indicating that “Tom” had “instructed” Wong to make the changes and sending out revised paperwork, Wong emailed Mr. Sakamoto, asking to “confirm that VCP has agreed to, and is comfortable, waiving the title insurance on this

40 CP 640-643 [*Id.* at 175:3 to 178:8; 178:17 to 180:23; 180:25 to 186:25]

41 *Id.*: See also CP 780-786 [Exhibits 25 and 26] – identical “conflict” letters, containing the same language that Wong now claims was an “oversight”, which were drafted in other unrelated loan transactions he documented and closed for Velocity. Wong acknowledged the often used a “form letter” and didn’t tailor his “common representation” letters to specific client problems. Again, he called this an “oversight”. CP 641 [Deposition Transcript of Eugene Wong dated 11/16/12, page 179:13 to 180:8]

42 Appendices 5 and 6 (CP 1008-9 [Exhibit 10 to the Declaration of Jeff Sakamoto])

loan.”⁴³ On August 11, 2008, Switzer asked Hazelrigg if he knew “when we can finish the VCP loan.” Hazelrigg responded “hopefully this week.”⁴⁴ Within a minute of authoring the last email, Hazelrigg sent an email to Switzer stating, “Where are the final papers *to send to Jeff? Tom.*” (Emphasis added).⁴⁵ Again, following the past pattern and practice of the parties, VCP was trusting Wong to work with Hazelrigg and ensure that the transaction closed properly. VCP had no idea from this email the papers had not been signed or the loan had—or had not—closed.⁴⁶

In that regard, Switzer testified that he signed the July 2008 Loan documents for K&S and he signed his personal guaranty, and gave them back to Hazelrigg, who he believed would send them on to Kingen for signature.⁴⁷ Switzer further testified that *his* reading of the July 31, 2008 email from Eugene Wong (Exhibit 10 to the Sakamoto Declaration) indicated that the signed documents were to be returned to Wong upon signature, and that Wong would “close out the escrow.”⁴⁸ Switzer testified that he believed (based upon Wong’s July 31, 2008 emails) that Wong had “*taken on the responsibility*” of acting as the “closing agent” and that had he done so responsibly, he would have had possession of the

43 CP 895-1041, CP 1010 [Declaration of Jeff Sakamoto, ¶43, Exhibit 11]

44 CP 895-1041, CP 1012-13 [Declaration of Jeff Sakamoto at ¶44, Exhibit 12]

45 *Id.* at ¶45, CP 1014 [Exhibit 13]

46 *Id.*

47 CP 892 [Deposition Transcript of Scott Switzer, page 49:21 to 50:5 (Exhibit 31)]

48 CP 893 [*Id.* at 208:20 to 209:19]

signed closing documents before the loan was funded.⁴⁹ There is no corroborating evidence to Wong's testimony that he ever contacted or notified VCP that he had not received the signed documents or that they did not close. In keeping with his exact same conduct in closing the March 2008 Loan, and other loans Wong had closed for VCP, it was not uncommon for Wong and Lasher to keep the original documents in their possession without notifying VCP.⁵⁰ Thereafter Hazelrigg funded the loan to K&S. K&S then began to make double interest only payments on Notes 1 and 2 from September 5, 2008. The Notes were due and payable on January 30, 2009.

When K&S could not repay the notes, VCP negotiated an extension of the maturity date to April 30, 2009, for a payment of \$22,400.⁵¹ In January of 2009, a Loan Maturity Agreement was prepared by Mr. Sakamoto, and both Gerry Kingen and Switzer *individually* signed the loan extension in January of 2009, and acknowledged that VCP had made loans in both March and July 2008, and that the money was due and owing.⁵² Although the document said that both loan documents were attached to the extension—they were not. Mr. Sakamoto did not make any conclusions as to whether both loans had indeed been signed off by the

49 CP 894 [*Id.* at 213:8-23]

50 CP 895-1041 [Declaration of Jeff Sakamoto, ¶¶24-27; Exhibits 1, 2 and 3 thereto; see also CP 787 [Exhibit 27]]

51 See Appendix 11 (CP 1022; Exhibit 16 to the Declaration of Jeffrey Sakamoto)

52 *Id.*

parties, since both Mr. Kingen and Switzer signed the loan extension and acknowledged that the loans were “due” and being extended.⁵³ Ultimately K&S defaulted on paying the extension fee, as well as paying the amounts due and owing on each Note.

3. VCP Discovers That Wong Did Not Obtain Signed Loan Documents for the July/August 2008 Loan, and Sues K&S and Kingen For Default on Both Loans

By late 2009, it became clear that K&S was not going to perform under the loans. At that time, Wong advised Mr. Sakamoto that neither he nor a member of his firm could sue Switzer because the firm had *a conflict of interest*. Wong recommended VCP contact Alex Kleinberg of the Eisenhower Carlson firm in Tacoma, Washington. After consulting with the Eisenhower firm, on December 14, 2009, Mr. Sakamoto sent an email to Wong requesting that the signed documents.⁵⁴ After sending these emails Mr. Sakamoto also called Wong, who told Mr. Sakamoto that he would “look” for the documents and get back to Jeff. Wong never told Mr. Sakamoto that the July 2008 loan had never closed.⁵⁵

Also on December 14, 2009, Jody Liebetau of K&S asked Wong for a copy of the documents on December 14, 2009. In keeping with Wong’s stated practice of relying upon the direction of Hazelrigg, Wong *asked Hazelrigg* if it was “okay” to give Jody copies—but *did not ask*

53 CP 895-914 [Declaration of Jeff Sakamoto ¶¶54-67]

54 CP 895-914 [Declaration of Jeff Sakamoto ¶¶56-57]; CP 1025-30 [Exhibits 17 and 18]

55 CP 895-914 [Declaration of Jeff Sakamoto ¶58]

VCP. Nowhere in this email does Wong express surprise that they were asking for copies of the loan documents for the 2nd loan.⁵⁶ Wong never told Mr. Sakamoto in writing, or orally, that he did not have copies of the 2nd K&S Loan. It was not until several days or weeks after the December 14, 2009 email exchange that Mr. Sakamoto finally learned, for the first time, that there were no signed documents for Loan #2 at all.⁵⁷

On May 13, 2011, VCP filed suit against K&S and Gerald Kingen, individually. Kingen denied liability under various theories on Note 1 and Note 2, but specifically argued that there did not exist any signed documentation for Note 2, and there was no signed guaranty or commercial note in existence. Kingen denied ever signing any of the documentation related to Note 2, and denied any liability to VCP on Note 2, based upon the non-existence of either originals or copies related to Note.⁵⁸ As of November 28, 2012, K&S owed VCP approximately \$1,500,000 on Note 1 and on Note 2. In an effort to mitigate its damages, and to resolve its claims against K&S and Kingen short of trial, VCP agreed to settle its claims on Note 1 for \$1,000,000. Kingen refused to negotiate or settle any claim for Note 2 based upon the fact that VCP had no signed documentation of that loan.⁵⁹

56 CP 895-914 [Declaration of Jeff Sakamoto ¶59]; CP 731 [Exhibit 23 to the Declaration of Brian H. Krikorian]

57 CP 895-914 [Declaration of Jeff Sakamoto ¶60].

58 CP 895-914 [Declaration of Jeff Sakamoto ¶¶61-67]; Exhibit 19 thereto

59 *Id.*

VCP filed the within action against the Lasher firm and Wong on December 12, 2009.

IV. ARGUMENT

A. STANDARD OF REVIEW

The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court. *Castro v. Stanwood School Dist. No. 401*, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004); *Herron v. Tribune Pub'g Co.*, 108 Wash.2d 162, 169, 736 P.2d 249 (1987). See also *Ski Acres, Inc. v. Kittitas County*, 118 Wash.2d 852, 854, 827 P.2d 1000, 1002 (Wash.,1992). A summary judgment motion can only be sustained if there is no genuine issue of material fact, looking at all evidence and inferences in the light most favorable to the nonmoving party. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).

CR 56(c) provides in part that “[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” The burden of showing that there is no genuine issue of material fact falls upon the party moving for summary judgment. *Hash by Hash v. Children's Orthopedic*

Hosp. and Medical Center, 110 Wn.2d 912, 757 P.2d 507 (1988). ***If the moving party does not sustain its burden, summary judgment should not be granted, regardless of whether the non-moving party has submitted affidavits or other evidence in opposition to the motion. Id.***

B. THE LOWER COURT ERRED BY FINDING THAT VCP'S CLAIMS WERE "TIME BARRED"

Under the "discovery rule," the statute of limitations does not start to run on an attorney malpractice claim until the client "discovers, or in the exercise of reasonable diligence should have discovered *the facts which give rise to his or her cause of action.*" *Janicki Logging & Const. Co., Inc. v. Schwabe, Williamson & Wyatt, P.C.*, 109 Wn. App. 655, 659, 37 P.3d 309, 312 (2001). The facts supporting each of the essential elements of the cause of action—i.e., duty, breach, causation, and damages in a malpractice action—*must be known before the statute begins to run. Id. at 659-60.* In their motion defendants argued that VCP's claims were time barred because it "knew, or should have known, on August 11, 2008" that loan documents had not been executed.⁶⁰ In the alternative, defendants argued that VCP knew, or should have known by January 5, 2009, that there were no signed documents because they were not attached to the Loan Maturity Agreement.⁶¹ The lower court agreed with the latter

60 CP 51 [Motion, page 23]

61 *Id.*

ruling, finding that Mr. Sakamoto knew, or should have known, there were no signed loan documents from Loan #2, because *no* documents were attached to the Loan Maturity Agreement. The court clearly erred in finding that VCP's claims were barred by the statute of limitation.

First—there is no evidence that VCP “knew or should have known” in August of 2008 that the loan had not been properly closed and/or documented. As argued *infra*, the March 2008 loan was properly documented and closed by Wong—and Wong *never* told VCP of that fact nor did Wong provide documents to VCP at the time of closing. Wong also testified that in many cases the transactions he “closed” would often be recorded and closed, weeks and months after he obtained the signed documents. As such, there is no clear, undisputed evidence that VCP would have “known” that the loan was not properly documented in August 2008—especially since Mr. Sakamoto confirmed with Switzer that the funds had been received and disbursed in both loans.⁶²

Second—the mere fact that the loan documents were not attached to the Loan Maturity Agreement signed in January 2009 would not have given Mr. Sakamoto sufficient knowledge that Wong had committed malpractice, or breached his duties, by failing to obtain signed documents in the 2nd loan. Again—the *signed* March 2008 loan documents were not attached to the Loan Maturity Agreement either, and there is no dispute

62 CP 895-914 [See Declaration of Jeffrey Sakamoto ¶¶36 and 47]

that this loan was documented properly and closed by Wong. Of greater significance is the fact that in the Loan Maturity Agreement, both Switzer and Mr. Kingen signed the same, and **acknowledged** the funds due to VCP **were in fact owed**.⁶³ As such, it would make no sense for Mr. Sakamoto or VCP to conclude that Wong had *not* properly closed the 2nd Loan, when the borrower and its guarantors are **acknowledging the money is due and owed pursuant to that loan**.⁶⁴ There is simply no logical or evidentiary explanation how this incongruity would have put VCP “on notice” that it had a claim *for malpractice* against Mr. Wong. In truth, the first clear notice VCP had that documents were not properly signed for the July 2008 loan was on or after December 14, 2009 when Wong confirmed he did not have them to Jody Liebetrau, and Mr. Sakamoto later determined that Wong had never obtained signed documents.

Finally—in order for the statute of limitations to accrue, facts supporting *all* elements of malpractice must be known to the plaintiff. *Davis v. Davis Wright Tremaine, L.L.P.*, 103 Wn. App. 638, 14 P.3d 146 (2000). That would not have occurred until VCP was aware it had suffered some damage directly caused by the breach of duty. Again, according to defendants and the trial court, this allegedly occurred in January of 2009, when the underlying debtors signed a Loan Maturity

63 See Appendix 11

64 *Id.*

Agreement that *acknowledged* the debt was owed, but did not attach either loan agreement. However, at this point, VCP had no “notice” or knowledge that it had a malpractice claim against the defendants—to the contrary, it had a signed extension agreement, and for all VCP knew at this time, K&S was going to pay the loan off.

In addition to the arguments above, VCP submits that this would not have put VCP on “notice” that it had a malpractice claim, since VCP had not suffered any damage as of January 2009, nor did it had knowledge of that fact. That did not occur until Mr. Kingen disavowed his obligation under the 2nd Loan, and (at the earliest) when VCP had to hire counsel in the K&S litigation, when Mr. Kingen repudiated the 2nd loan, or (at the latest) when VCP settled the case in late 2012 at a discount due to the undocumented 2nd Loan. In either case, there is no dispute that VCP filed this action well within the time to do so, since it filed the lawsuit on December 12, 2012.⁶⁵

As such, the trial court erred by finding that the statute of limitations had commenced in January 2009, or that no genuine issues of fact remained as to that issue.

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65 CP 1-10

C. GENUINE, MATERIAL ISSUES OF FACT EXIST AS TO WHETHER DEFENDANTS OWED A DUTY TO PLAINTIFF AND BREACHED THE STANDARD OF CARE AND THEIR FIDUCIARY DUTIES

The trial court erred in finding no genuine issues of fact existed as to the existence of a duty owed to VCP, and its breach by the Lasher firm and Wong. An attorney has a duty to exercise “that degree of care, skill, diligence and knowledge commonly possessed and exercised by a reasonable, careful and prudent lawyer in the practice of law in this jurisdiction.” *Cook, Flanagan & Berst v. Clausing*, 73 Wash.2d 393, 395, 438 P.2d 865 (1968).

The standard of care should be consistently and accurately defined. Determining the reasonableness of the lawyer's conduct requires consideration of the following criteria: (1) the requisite skill and knowledge; (2) the degree of skill and knowledge to be possessed and exercised; (3) the effect of local considerations and custom; and (4) any special abilities possessed by the lawyer. Each of these criteria is discussed in the following sections.

Mallen, *Legal Malpractice*, § 20:2, “The Standard of Care Defined” (2013 ed.). “A translation of these considerations into a standard of care is that an attorney should exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances.” *Id.*, citing to *Hizey v. Carpenter*, 119 Wash. 2d 251, 830 P.2d 646 (1992).

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1. Wong and the Lasher Firm Owed a Duty to VCP to Ensure that the Loan Transactions Were Properly Documented and Closed

All lawyers and law firms in Washington owe the duties of a reasonably competent lawyer under the same and similar circumstances on a statewide basis to their clients (see *Walker v. Bangs*, 601 P. 2d 1279, 92 Wash. 2d 854 (1972)). “The standards of the legal professional require undeviating fidelity of the lawyer to his client. No exceptions can be tolerated.” *Van Dyke v. White*, 55 Wn.2d 601, 613 (1960). In *Eriks v. Denver*, 118 Wn.2d 451, 457-58 (1992), the Washington Supreme Court held that an attorney’s violation of the Rules of Professional Conduct constituted a violation of his fiduciary duties and that the RPCs are broadly interpreted so as to protect the public. *Eriks*, 118 Wn.2d at 461. The Rules of Professional Conduct may be considered in cases other than legal malpractice to determine liability, including breaches of fiduciary duty.⁶⁶ See *Eriks*, supra; *Cotton v. Kronenberg*, 111 Wash.App. 258, 264, 44 P.3d 878 (2002). Whether an attorney breached the RPC is a question of law and does not require the opinion of an expert. *Eriks v. Denver*, at 457-58 (1992); *Gustafson v. City of Seattle*, 87 Wn.App. 298, 302 (1997);

⁶⁶ In addition, and contrary to the argument made by defendants, plaintiffs and their expert can rely upon the Rules of Professional Conduct to form a basis for the standard in care in Washington. See *Hizey v. Carpenter*, 119 Wash.2d. 251, 830 P.2d 646 (1992)—holding that “Such testimony may not be presented in such a way that the jury could conclude it was the ethical violations that were actionable, rather than the breach of the legal duty of care. In practice, this can be achieved by allowing the expert to use language from the CPR or RPC, but prohibiting explicit reference to them.”

In re: Disciplinary Proceeding against Burtch, 162 Wash.2d 873, 891 (2008).

In this case, there is no dispute that defendants were the attorneys for VCP. Wong repeatedly referred to himself as the “lender’s” counsel or attorney. Defendants owed plaintiff a duty of care to provide services within the standard of care of attorneys in the state of Washington. VCP submitted sufficient evidence, including two (2) expert witness declarations, that Wong undertook the duty to take *all* actions incumbent upon an attorney in the State of Washington to provide undivided loyalty to VCP, and to ensure that the transactions Wong drafted and supervised, closed properly.⁶⁷ Contrary to the arguments made by the defendants and their expert in their motion, Wong’s duties were not “carved out” with a scalpel in the August 2008 K&S Loan transaction, but remained consistently the same during *all* of the loans Wong closed for VCP in the almost 2 years he represented it.

Moreover, contrary to Christopher Brain’s expert opinion, or the defendants’ arguments, VCP has *never* claimed that Wong had a duty to act as an escrow agent, or that it was Wong’s duty to ensure that funds were “timely” disbursed. Nor does VCP contend that either of these issues caused or impacted its damages in the underlying dispute. The evidence establishes that Wong and VCP’s history together goes beyond

⁶⁷ See the Declaration of Paul Brain; Declaration of John Strait (CP 1069-1137)

just the July 2008 K&S loan transaction, but encompassed a nearly 2-year pattern and routine that was followed in every single loan transaction Wong was hired to close. By Wong’s own sworn testimony—this was a “business model” he followed, and how “*loans ended up on my desk and were closed*” for all of VCP’s loans. In viewing Wong’s duties in the context of his wide-ranging relationship with VCP, he owed VCP a duty of care when he undertook to document and “close” (*his words*) the July 2008 K&S loan—just as he had done in the prior 4 to 6 loan transactions.⁶⁸ Those duties encompassed: (i) providing VCP with will all information necessary to make informed judgments about the transaction; (ii) properly drafting the loan documents; (iii) carrying out his responsibility to ensure the paper work was properly signed and recorded (just as he did in the March 2008 transaction); (iv) properly disclosing all known and potential conflicts of interest between plaintiff, VCP, Switzer and CFG, *as well as* the clear conflict that Lasher had with respect to its pre-existing relationship with CFG; and, (v) fully and adequately communicating *and* taking instructions from his client – VCP – and not other third parties.⁶⁹

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68 *Id.*

69 *Id.*

2. *Wong and the Lasher Breached Their Duty of Care and their Fiduciary Duty Owed to VCP*

In his declaration, plaintiff's real estate attorney expert, Paul Brain, opined that Wong breached the duty of care owed to VCP, by failing to (i) properly document the July 2008 loan; (ii) diligently ensure that Hazelrigg and his company, TRH Lenders, did not release any money until Wong had received signed, and notarized, documents for the July 2008 loan from the borrowers, and recorded them; (iii) draft proper escrow instructions that would direct escrow, i.e. TRH, not to disburse the funds; and (iv) properly protect VCP's interests in "closing" the hard money loan before the moneys were disbursed.⁷⁰

In his declaration, Professor John Strait opined that by failing to obtain and transmit the signed documents with regard to July 2008, defendants breached the reasonable standard of care for a reasonably competent lawyer with minimum competence and due diligence obligations owed to Velocity, and that absent an express limitation on its scope, defendants cannot now claim that they did not owe any duties to VCP beyond drafting the documents.⁷¹ Professor Strait also opined that defendants breached the standard of care by failing to investigate and

70 CP 1069-1075 {Declaration of Paul Brain, ¶15}

71 Determining whether an attorney/client relationship exists, and the scope of that relationship, necessarily involves questions of fact. Summary judgment is proper on a factual issue only if reasonable minds could reach but one conclusion on it. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71, 74-75 (1992)

communicate with Velocity regarding the completion of the July 2008 transaction, as well as their failure to adequately explain and identify (likely unwaivable) conflicts of interest.⁷²

In the instant case it is clear that actions of Wong in the summer of 2008 were inconsistent with both the duty of care he owed to VCP—as well as his prior conduct in closing the March 2008 loan, and other VCP loans. Specifically, in March 2008, Wong received instructions from Denise Tallman (of CFG) about the proposed loan –not VCP, and knew this loan was coordinated through one of Hazelrigg’s entities, TRH Lenders. This was completely consistent with Wong’s perceived “business model.”⁷³ Within three (3) days, Wong prepared loan documents for the March 2008 “[a]s counsel for the Lender (sic).” The borrowers signed the documents for the March 2008 loan on March 21, 2008 (8 *days* after Ms. Tallman’s email) and **Wong** notarized the documents on that date.⁷⁴ Wong did not advise anyone until April 4, 2008 that the loan had recorded.⁷⁵ Wong admitted that it was a common occurrence in loans he closed with Hazelrigg and others, and that “it can be days, it can be weeks, it can be months” after he “prepares” the

72 CP 1076-1137 [Declaration of Professor Strait, ¶¶11-18; 19-25; 26-27]

73 CP 713 [Deposition Transcript of Eugene Wong dated 2/11/12, page 73:8-18 (Exhibit 21)]; CP 804-5 [See Findings of Facts and Conclusions of Law, Conclusions #4 and #5 (Exhibit 28)]; CP 895-914 [Declaration of Jeffrey Sakamoto, ¶30]0

74 CP 118-161, CP 158 [Exhibit 8 to the Declaration of Timothy Shea]

75 CP 1000 [Exhibit 6 to the Declaration of Jeffrey Sakamoto]

documents that the loan gets recorded and closed.⁷⁶ Finally, on April 10, 2008, *Switzer* (both a borrower and concurrent client of Wong) emailed Wong directly and asked that Wong send him “final signed documents” for the March 2008 loan. Wong emailed Switzer, and copied Mr. Kimm, Ms. Tallman and Jody at CFG attaching the copies of the loan documents, and acknowledging that “Tom” had told him that he was going *to handle the funding internally*.⁷⁷ Although he acknowledged he was the “Lender’s counsel”, Wong did not copy Jeff Sakamoto or anyone at VCP on this email and, in fact, never provided a copy of the closing documents to VCP at the time.⁷⁸

Wong’s duties were no different with the 2nd loan in July/August of 2008. Once again, Hazelrigg and TRH Lenders acted as facilitators for this loan, and Wong was aware of that fact. On July 30, 2008, Wong sent an email directed to Switzer, Subject: VCP 560K Loan to K&S Developments (sic). In his email, Wong stated that he was attaching a “loan documentation package for the above-referenced loan, *which Scott asked me* to prepare and mirror the terms of the last 560K loan by VCP to K&S.” Wong concluded by stating: “Please let me know if you have any

76 CP 656-7 [Deposition Transcript of Eugene Wong dated 11/16/12, page 239:8 to 243:17]

77 CP 727 [Exhibit 22 to the Declaration of Brian H. Krikorian]; CP 646-7 [Deposition Transcript of Eugene Wong dated 11/16/12, page 199:25 to 200:25; 202:5-15]

78 CP 1025-1030 [Exhibit 17 and 18 to the Declaration of Jeffrey Sakamoto, and ¶¶34-36 thereto]; CP 893 [Deposition Transcript of Eugene Wong dated 11/16/12, 208:9-20]

questions, *and return the fully executed documents to me for final processing as follows....*” (Emphasis added).⁷⁹ By its very terms, this email directed to Switzer—*not* VCP—advised Switzer to sign and return the documents “for final processing”. Based upon his prior conduct, and his stated “methods and procedures” for “every loan”, Wong was clearly aware that he had a duty to ensure that Switzer (a *concurrent* client of his and the Lasher firm) sign the documents and report any irregularities to VCP.⁸⁰

Despite his testimony that he did not think that CFG or Hazelrigg had a “significant” or “important” role in the transaction, on July 31, 2008, at 5:57 p.m., Wong sent another email – this time directed to *Hazelrigg* and Switzer. In the July 31, 2008 email, Wong stated “Tom” had authorized the waiver of title insurance and to “[p]lease return the original executed documents to me for processing and recording.”⁸¹ Again, this was directed to Hazelrigg and Switzer (not VCP) and instructed the former two individuals to return the documents *to Wong*, in keeping with Wong’s stated practice to “defer” to Hazelrigg and to rely upon Hazelrigg to close the deal.

79 CP 1006 [Exhibit 9 to the Declaration of Jeffrey Sakamoto]

80 Switzer, himself, testified that based upon these emails he was assuming that Wong was accepting the responsibility to finalize and “close” the transaction. See CP 894

81 CP 1008 [Exhibit 10 to the Declaration of Jeffrey Sakamoto]

A lawyer is charged with providing all information necessary for the client to make an informed decision. See RPC 1.4(a) and (b) and comments thereto. Comment [1] makes it clear that “reasonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation. See also Comment [5]. Following the past pattern and practice of the parties, VCP was trusting Wong to work with Hazelrigg and ensure that the transaction closed properly. VCP would have had no idea from any of Wong’s communications that the documents had not been signed or the loan had—or had not—closed.⁸²

At a minimum, the trial court erred in finding that no genuine issues of fact existed as to the existence of a duty owed to VCP by Wong and the Lasher firm, and a breach of that duty.

3. *Wong and Lasher’s Conduct Both Breached The Standard Of Care and Their Fiduciary Duty by Violating RPC 1.7*

RPC 1.7 provides, in part, that “[e]xcept as provided in paragraph (b), a lawyer ***shall not represent a client*** if the representation involves a concurrent conflict of interest. In *Eriks*, supra, the Washington Supreme Court upheld the finding of a breach of fiduciary duty where the attorney, Denver, simultaneously represented both investors and promoters in a security investment. Mallen, in his seminal treatise *Legal Malpractice*,

82 CP 895-914 [Declaration of Jeff Sakamoto, ¶¶24-27; Exhibits 1, 2 and 3 thereto]

describes the attorney’s fiduciary obligations as “twofold: (1) confidentiality; and (2) undivided loyalty.” See Mallen, *Legal Malpractice*, §15.2 and §15.22 (2014 ed.).

The attorney’s duty of disclosure is therefore consistent with the duty of fiduciaries, generally, “to inform the beneficiaries **fully of all facts which would aid them in protecting their interests.**” *Esmieu v. Schrag*, 88 Wn.2d 490 (emphasis added), *quoted with approval*, *Van Noy v. State Farm Mut. Auto. Ins. Co.*, 142 Wn.2d 784, 792, 797-8, 16 P.3d 574 (2001), (Talmadge, J., concurring) (fiduciary’s duties include “loyalty, care, and full disclosure”); *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand*, 110 Wn. App. 412, 433-34, 40 P.3d 1206 (2002).

Wong has testified that it was the Lasher firm’s practice to obtain conflict of interest waivers in transactions such as the underlying transaction.⁸³ Although the participants were exactly the same—Wong *did not* prepare or circulate a conflict of interest waiver in the March 2008 loan. In the July 2008 loan, Wong drafted a “common representation waiver”—but did not clearly or adequately disclose that there was a conflict of interest between the parties, the Lasher firm and Hazelrigg. What is remarkable is that Wong testified that he sent the letter out “in the abundance of caution”, but did not believe there to be a “direct conflict.”⁸⁴

83 CP 704 [Deposition Transcript of Eugene Wong dated 2/11/12, Page 38:4-15 (Exhibit 21)]; CP 780, 787 [Exhibits 25 and 27]

84 CP 633 [Deposition Transcript of Eugene Wong dated 11/16/12, Page 146:15 to

Wong further qualified his testimony that the “conflict” waiver he had sent to the parties contained language that did not apply (in his mind) to this transaction, and that much of what he wrote was “an oversight” and based upon a “form.”⁸⁵ In his testimony, Wong evidenced a “confusion” as to whom the letter properly applied to: i.e. CFG, K&S, Gerry Kingen, or VCP.⁸⁶

The facts hardly support that there are no genuine issues of fact when it comes to the duty owed by defendants to VCP and their clear breaches of both the standard of care, and their fiduciary duties. Again the facts clearly established that Wong continued to have misplaced (or conflicted) loyalties and blurred the lines as to which he took instruction from. As argued, *infra*, the King County Superior Court (through Judge Bruce Heller) had already made a binding finding that Wong had violated his fiduciary duties, and breached the standard of care, in a similar loan transaction involving Hazelrigg (i.e. one of the 6 to 8 that Wong and the Lasher firm had “closed” for VCP). The trial court was simply in error in finding that no triable issues of fact existed as to Wong and the Lasher firm’s breach of fiduciary duty.

page 147:20]. See Comment [7] to RPC 1.7: “Directly adverse conflicts can also arise in transactional matters. For example, if a lawyer is asked to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer could not undertake the representation without the informed consent of each client.”

85 CP 640-643 [*Id.* at 175:3 to 178:8; 178:17 to 180:23; 180:25 to 186:25]

86 *Id.*

**D. GENUINE, MATERIAL ISSUES OF FACT EXIST AS TO
WHETHER DEFENDANTS ACTIONS WERE THE PROXIMATE
CAUSE OF PLAINTIFFS' DAMAGES**

It is the general rule in Washington that in a legal malpractice action, whether a plaintiff would have prevailed in an underlying matter, is a question of fact for the jury. *Brust v. Newton*, 70 Wash.App. 286, 293, 852 P.2d 1092 (1993):

The Washington Supreme Court has held that in most instances the question of cause in fact is for the jury... In such a case it is appropriate to allow the trier of fact to decide proximate cause. In effect the second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney's negligence. Thus, it is obvious that in most legal malpractice actions the jury should decide the issue of cause in fact. (Citations omitted.) *Daugherty*, 104 Wash.2d at 257-58, 704 P.2d 600. (Emphasis added). *Id.* ...Although no Washington court has previously addressed the issue in precisely this context, it follows that if it is for the trier of fact to decide "whether the client would have fared better but for [the attorney's] mishandling" of his case, *Daugert*, 104 Wash.2d at 257, 704 P.2d 600, it is also for the trier of fact to decide the extent to which that is true. *Id.* at 294

See also *Nielson v. Eisenhower & Carlson*, 100 Wash.App. 584, 999 P.2d 42 (2000); *Daugert v. Pappas*, 104 Wash.2d 254, 704 P.2d 600 (1985); *Martini v. Post*, 313 P.3d 473 (2013):

The plaintiff, however, ***need not prove cause in fact to an absolute certainty.*** *Gardner v. Seymour*, 27 Wash.2d 802, 808, 180 P.2d 564 (1947). It is sufficient if the plaintiff presents evidence that "allow[s] a reasonable person to conclude that the harm *more probably than not happened* in such a way that the moving party should be held liable." *Little*, 132 Wash.App. at 781, 133 P.3d 944 (citing *Gardner*, 27 Wash.2d at 808-09, 180 P.2d 564). *The*

evidence presented may be circumstantial as long as it affords room for “reasonable minds to conclude that there is a greater probability that the conduct relied upon was the [cause in fact] of the injury than there is that it was not.” Hernandez v. W. Farmers Ass’n, 76 Wash.2d 422, 426, 456 P.2d 1020 (1969). (Emphasis added)

Id. at 478. See *VersusLaw v. Stoel Rives*, 127 Wash. App. 309, 111 P.3d 866 (2005): “Proximate cause may be determined as a matter of law *only when reasonable minds could reach but one conclusion.*” (Emphasis added).

1. Whether Plaintiffs would Have Received a “Better Result” But-for the Negligence of the Defendants is for the Trier of Fact to Decide

As the courts stated in *Brust* and *Versus-Law*, supra, the “second trier of fact will be asked to decide what a reasonable jury or fact finder would have done but for the attorney’s negligence” unless “reasonable minds could reach but one conclusion.” In this case, defendants argued to the trial court that Wong was not the “proximate cause” of VCP’s damages, because VCP is “putting the car before the horse”, to wit: according to defendants, VCP could have avoided any damages irrespective of Wong’s failure to carry out his duties to properly, and responsibly, close the transaction, if it did not “allow” Hazelrigg to disburse the funds. Defendants’ (and Christopher Brain’s) “interpretation” of the facts is strictly limited by their myopic view of only those facts that

support their theory—and nothing else.

According to the “common business model” that Wong regularly followed, it was not uncommon for VCP and other lenders who made loans through Hazelrigg, to regularly advance funds to Hazelrigg and his entities. Wong knew this, and was aware of this from the many loans he closed for both VCP and others. Wong has conceded he knew that Hazelrigg often funded loans, including the March 2008 K&S loan, “internally”.⁸⁷ By Wong’s own admission, the perceived “model” *Wong* followed in every loan he closed through Hazelrigg was that the “lenders defer[ed] and rel[ied] upon Centurion to perform Centurion's core functions to get loans closed.”⁸⁸ Wong has admitted that he closed numerous deals this way for Hazelrigg independent of VCP, both before and after VCP retained Wong.

The evidence clearly shows that Wong was aware that Hazelrigg would regularly take unilateral steps to see to it that a loan was closed; in fact, very often Wong took his “marching orders” directly from Hazelrigg and not his clients—including closing a deal without the lender’s involvement.⁸⁹ In the March 2008 K&S loan, for example, Wong took the following acts in keeping with his stated “business model” and his duties

87 CP 727 [Exhibit 22 to the Declaration of Brian H. Krikorian]; CP 646-7 [Deposition Transcript of Eugene Wong dated 11/16/12, page 199:25 to 200:25; 202:5-15]

88 CP 700-2, 710 [Deposition Transcript of Eugene Wong dated 2/11/12, page 18:4 through page 19:5]

89 CP 713 [Deposition Transcript of Eugene Wong dated 2/11/12, page 73:8-18 (Exhibit 21)]; CP 791 [Conclusions of Law #4, 5, 7 and 8]

to VCP: (i) he drafted the documents; (ii) he notarized the documents; (iii) he recorded the documents; and, (iv) he acknowledged instructions “from Tom” that TRH funded the loan internally. Wong completed all of those actions without ever notifying VCP after each and every step—sometimes not even copying VCP on his emails. In fact—Wong sent final, signed documents to the borrower (Switzer) but *never* sent final documents to VCP. It certainly raises an issue of fact that, if Wong regularly conducted himself in this matter, when it came to the July 2008 loan VCP had every right to expect that Wong would follow the same “methods”, and protect VCP’s interests in that particular loan.

When Wong received instructions *from Switzer* to document the July 2008 loan, Wong—once again—followed his “business model”. He emailed documents to Switzer and Hazelrigg, directing each of them – not VCP—to return the documents to him for processing and recording.⁹⁰ He took instructions again from “Tom” that he would eliminate title insurance, and then *after the fact*, received approval from VCP.⁹¹ When Jody Liebetrau asked for a copy of the signed documents in December 2009, Wong asked “Tom” if it was okay—*not VCP* or Mr. Sakamoto.⁹² It is important to note that there is absolutely no evidence that Wong advised VCP that he was taking a *different* role in the July 2008 K&S loan than he

90 CP 1006-1009 [Exhibits 9 and 10 to the Declaration of Jeffrey Sakamoto]

91 *Id.*

92 CP 731 [Exhibit 23 to the Declaration of Brian H. Krikorian]

had in any other transaction. Once more, it was VCP's expectation that Wong would act as "lender's counsel" and ensure that the documentation was properly signed and documented before the funds were disbursed. Looking at all favorable inferences from the evidence, there is no question that issues of fact remain as to whether Wong's failure to carry out his duties in properly "closing" the July 2008 loan proximately caused VCP's damages.

2. Defendants were the "Legal Cause" of Plaintiff's Damage

Legal causation rests on policy considerations as to how far the consequences of defendant's acts should extend. It involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. If the factual elements of the tort are proved, determination of legal liability will be dependent on "mixed considerations of logic, common sense, justice, policy, and precedent." *Hartley v. State*, 103 Wn.2d 768, 779, 698 P.2d 77, 83 (1985). In essence, "legal causation" asks how far the consequences of defendant's acts should extend and involves a determination of whether liability should attach as matter of law given the *existence* of cause in fact. *Id.*

Defendants rested their argument to the trial court, on the proposition that Wong owed "no duty" to VCP to "monitor escrow" or "provide escrow instructions to TRH." [CP 48 (Motion, page 20)], and to

do so would “expand” his scope of duties. As argued above, this argument rested upon a weak foundational basis, and a limited view of the facts. In fact Wong has testified that his job was to document and “close” VCP’s loan. These duties encompassed being more than a “scrivener” and Wong’s actions, statements, and conduct over an almost 2 year span prove that.⁹³ Moreover, this argument pre-supposes that Wong’s actions did cause, in fact, the damages. If so, the same facts that support a cause-in-fact finding support a legal causation finding as well.

Without a doubt the facts present in the record could not have led the trial court to find “reasonable minds could reach but one conclusion”. As such, defendants’ motion on both legal and cause-in-fact should have been denied—not granted.

E. DEFENDANTS DO NOT ESCAPE LIABILITY DUE TO THE ACTIONS OF HAZELRIGG

1. Defendants Are Collaterally Estopped From Asserting That Their Duties To VCP were Cut-Off by the Conduct of Hazelrigg or TRH Lenders as an “Intervening Cause”

Defendants argued to the trial court that Wong had no duty to ensure that the transaction closed, and that any liability of Wong was “cut-off” by the intervening actions of Hazelrigg and TRH lenders, whom

⁹³ CP 1006-1009 [Exhibits 9 and 10]; CP 1069-1075 [Declaration of Paul Brain, ¶11]. Once again, Wong and defendants made a similar argument in the *Foundation* case, and Judge Heller rejected this argument—CP 791 [Conclusion of Law #s 2 and 3 of Exhibit 28)].

Wong (according to defendants) had no involvement with. The problem for defendants is that they have already tried to make this argument once, and the Honorable Bruce Heller of the King County Superior Court rejected it. Defendants were therefore collaterally estopped from arguing that they had no duties to VCP, and that those duties were somehow “eliminated” by the actions of third parties. In her ruling, Judge DuBuque rejected this argument, finding that Judge Heller’s findings were limited and that Wong’s duties in this transaction were different. However, by Wong’s own admission, every loan he “closed” was handled the “same”, and the trial court erred in not accepting the findings of Judge Heller.

Collateral estoppel, or issue preclusion, bars re-litigation of an issue in a subsequent proceeding involving the same parties. It is distinguished from claim preclusion “in that, instead of preventing a second assertion of the same claim or cause of action, it prevents a second litigation of issues between the parties, even though a different claim or cause of action is asserted.” *Christensen v. Grant Cnty. Hosp. Dist. No. 1*, 152 Wn.2d 299, 306, 96 P.3d 957, 960-61 (2004). For collateral estoppel to apply, the party seeking application of the doctrine must establish that (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding, (2) the earlier proceeding ended in a judgment on the merits, (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier

proceeding, and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied. *Christensen* at 307.

VCP and defendants previously litigated identical issues in *Foundation Management, Inc/VCP Capital Partners, LLC v. Lasher, Holzapfel, Sperry & Ebberson, et al.* King County Superior Court Case No. 10-2-33106-9SEA. In the *Foundation* case, VCP and a co-lender, Foundation Management, Inc., sued Wong and the Lasher firm for legal malpractice and breach of fiduciary duty. In that case the players were similar: Hazelrigg acted as the facilitator and the loan broker; Wong acted as Foundation and VCP's "closing attorney"; both Foundation and VCP funded the loan *through* Hazelrigg (a fact known to Wong). In that case, at the 11th hour, one of the guarantors of the loan backed out. The Court found that Wong did not advise his clients (VCP and Foundation) of that fact, but instead, allowed Hazelrigg to take control over the loan, insert himself as a guarantor and member of the borrowing entity, and close the loan without advising Foundation or VCP of the change in circumstances.

In the *Foundation* case, Wong and the Lasher firm made similar arguments as they do here. In that case, Wong argued that VCP and Foundation had "deferred" all decision making to Hazelrigg and his entities; that Hazelrigg was the "independent" broker of VCP and Foundation; Wong also argued that Foundation and VCP operated under a unique "business model" whereby they allowed Hazelrigg and his entity,

CFG, to control the loan and closing; Wong admitted knowing that the funds often closed internally and conceded that every loan he closed on behalf of Foundation *and* VCP operated under the same “model”.

The trial in that case resulted in the following findings on the merits in favor of VCP and Foundation, and against these same defendants:

- That VCP and defendants operated “according to a common business model whereby CFG and CF, working with Mr. Wong to draft all necessary documents, would package and broker the loan and the lenders would approve of the brokered terms....Mr. Wong’s duty was *to work with* CFG and CF to package the loan while keeping the plaintiffs apprised of developments through emails containing relevant documents.⁹⁴ (Emphasis added)
- Although the operative business model called for Mr. Hazelrigg and CFG to act as brokers and facilitators of the North Montana loan, the court concludes that neither Mr. Hazelrigg nor CFG was acting as either plaintiff’s agents in the transaction. Neither Mr. Hazelrigg nor CFG had any power, express or implied, to bind the plaintiffs.... Mr. Wong’s failure to notify Mr. Sato and Mr. Sakamoto of the material changes was *contrary to the operative business model*, **not** part of it, and he *was not justified* in believing that Mr. Hazelrigg could make binding decisions on behalf of the plaintiffs without notification.⁹⁵ (Emphasis added)

In his findings, Judge Heller further found that Wong breached that standard of care by “failing to fully communicate to plaintiffs the final terms of the NMG loan transaction prior to closing *and by closing the loan*

94 CP 791, Conclusion of Law #4

95 *Id.*, Conclusion of Law #5

without obtaining their approval of these terms” (Emphasis added);⁹⁶ that “[a]ccording to the operative business model employed in this transaction, Mr. Wong *was not justified* in treating Mr. Hazelrigg as the plaintiffs’ agent” (Emphasis added);⁹⁷ that defendants breached the standard of care and their fiduciary duties by failing to fully communicate all facts to plaintiffs, and by failing to fully inform VCP and Foundation of “actual, and potential, direct conflicts in the NMG transaction”, using an identical conflict waiver as was submitted by Wong in the July 2008 transaction.⁹⁸

All of the above findings clearly estopped Wong and the Lasher firm from *now* raising those issues again (i.e. that Wong had “no duty”, that Hazelrigg was an “independent agent” of VCP, that Wong was not responsible for “closing” the loan transactions, that Wong was not charged with closing the loan transaction of the 2nd Loan, that Wong owed no duty to VCP to ensure the loan transactions were properly closed, etc.). These same defenses were rejected once—and by Wong’s own admission he followed the exact same “model” in every loan he closed for VCP.

The trial court erred in finding that both Wong’s prior admissions, and Judge Heller’s findings, did not prevent Wong from creating a “new story” about his obligations and duties to VCP. Again—and at a minimum—this raised an issue of fact for the jury to decide whether

96 *Id.*, Conclusion of Law #7

97 *Id.*, Conclusion of Law #8

98 *Id.*, Conclusion of Law #s 14, 15, 21 and 23

Wong's duties in the K&S transactions were any different than "every" other transaction of VCP's that "landed on his desk."

2. *Defendants Did Not Prove That Hazelrigg Or Others Were An Intervening Cause To The Breach Of Wong's Duties*

While there may be more than one proximate cause of an injury, the concurring negligence of a third party does not necessarily break the causal chain from original negligence to final injury. *State v. Jacobsen*, 74 Wash.2d 36, 442 P.2d 629 (1968). Where a defendant's original negligence continues, and contributes to the injury, the mere fact another's intervening negligent act is a further cause of the injury does not prevent defendant's act from constituting a cause for which he is liable. *Mason v. Bitten*, 85 Wash.2d 321, 534 P.2d 1360 (1975); *Eckerson v. Ford's Prairie School Dist.* 11, 3 Wash.2d 475, 101 P.2d 345 (1940). Moreover, the intervening negligent act of another will not supersede the original actor's negligence as a proximate cause of an injury where the original actor should reasonably foresee the occurrence of such an event. *Fosbre v. State*, 70 Wash.2d 578, 424 P.2d 901 (1967). Once again, a finding that an intervening cause cuts-off liability can only be sustained if "all reasonable men" would agree. See *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 396-97, 558 P.2d 811, 816-17 (1976).

Defendants made the baseless argument that "after July 31, 2008,

VCP stopped relying on Mr. Wong for completion of the loan transaction” and relied “solely on TRH.” Defendants cited to no evidence to support this proposition—nor can they. To the extent the court relied upon this argument to support its ruling in favor of defendants, it was in error.

If anything the wealth of evidence in the record suggests otherwise—and establishes that not only did VCP rely upon Wong to “complete” the transaction—but also Wong *himself* admitted that this was how he closed “every” transaction of VCP’s that “landed on his desk.” Again, defendants’ argument begs the question that only a trier of fact can answer: Is Wong to be believed that in this *one* transaction, he did everything different than he had done in dozens of transactions before? VCP respectfully submits that reasonable minds can differ on this issue and the trial court erred in finding that Wong’s duty was somehow “cut-off” in July of 2008.

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V. CONCLUSION

For all of the foregoing reasons, VCP respectfully submits that the trial court erred by (i) finding that VCP's claims were barred by the statute of limitations; and, (ii) by finding that no triable issues of fact existed to any of the elements of legal malpractice and breach of fiduciary duty. Accordingly, the order granting summary judgment should be reversed and this matter remanded for trial.

Dated: September 29, 2014

LAW OFFICES OF BRIAN H. KRIKORIAN

A handwritten signature in black ink, appearing to read "Brian H. Krikorian". The signature is fluid and cursive, with the first name being the most prominent.

By

Brian H. Krikorian, WSBA #27861
Attorneys for Appellant

I, Brian H. Krikorian, declare:

On September 29, 2014, I caused to be served the Appellants'

Opening Brief

on :

Joel Wright, WSBA #8625
Timothy Shea, WSBA #39631
Lee Smart, P.S., Inc.
1800 One Convention Place
701 Pike Street
Seattle, WA 98101-3929

- Rules
- by ABC Legal Messenger
 - United States First Class Mail
 - E-service as allowed by the King County Superior Court Local
 - Email service
 - Facsimile Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: September 29, 2014

By /s/ Brian H. Krikorian
WSBA #27861
4100 194th Street SW, Suite 215
Lynnwood, WA 98036
Telephone: (206) 547-1942
Fax: (425) 732-0115
Email: bhkrik@bhklaw.com

SEP 29 2014 3:44 PM
COURT OF APPEALS
STATE OF WASHINGTON

Appendices

Appendix 1	Email dated 3/14/08 (CP 994-997)
Appendix 2	Email dated 3/17/08 (CP 999)
Appendix 3	Email Dated 4/4/08 (CP1001)
Appendix 4	Email Dated 4/10/08 (CP 728)
Appendix 5	Email Dated 7/30/08 (CP1007)
Appendix 6	Email Dated 7/31/08 (CP1009)
Appendix 7	Email Dated 8/11/08 (CP 1013)
Appendix 8	Email Dated 8/11/08 (CP 1015)
Appendix 9	Email Dated 8/12/08 (CP 1017)
Appendix 10	Conflict Waiver dated July 30, 2008 (CP1019)
Appendix 11	Loan Maturity Agreement (CP 1023)
Appendix 12	Email Dated 12/14/09 (CP1025)
Appendix 13	Email Dated 12/14/09 (CP 732)
Appendix 14	Email Dated 12/14/09 (CP1029)

Appendix 1 Email dated 3/14/08 (CP 994-997)

Dean Messmer

From: Denise <denise@centurionfg.com>
Sent: Friday, March 14, 2008 3:52 PM
To: Eugene W. Wong
Cc: 'Joseph E. Kimm, Jr'
Subject: SeaTac Center
Attachments: 20080314152413664.pdf; 20080314153418661.pdf

Eugene,

Attached is an executive summary and the title report on a new loan (In the amount of \$560,000) we are putting on this property (3rd lien) which is owned by Scott Switzer and Gerry Klingen.

We are hoping to close fairly quickly so please let us know what else you will need from us to complete this transaction.

Thanks.

Denise Tallman
Vice President
Centurion Finance
10500 N.E. 8th Street, Suite 1825
Bellevue, WA 98004
425-637-3646
425-638-0225 - Fax
425-241-9395 - Cell
denise@centurionfg.com

No virus found in this outgoing message.

Checked by AVG.

Version: 7.5.519 / Virus Database: 269.21.7/1329 - Release Date: 3/14/2008 12:33 PM

SEATAC CENTER

SEATAC, WASHINGTON

LOAN REQUEST SUMMARY

Loan Purpose:	To provide borrower with funds to payoff existing 3rd Deed of Trust.										
Type of Loan:	Mezzanine										
Loan Amount:	\$560,000										
Collateral for Loan:	3rd deed of trust on subject property										
Term:	6 months plus one six-month extension option										
Amortization:	Interest Only										
Interest Rate:	15%										
Current Values:	<table border="1" style="width: 100%; border-collapse: collapse;"> <thead> <tr> <th style="width: 30%;">Property</th> <th style="width: 20%;">Value</th> <th style="width: 20%;">Debt</th> <th style="width: 30%;">Equity</th> </tr> </thead> <tbody> <tr> <td>SeaTac Center</td> <td style="text-align: right;">\$24,185,000</td> <td style="text-align: right;">\$12,360,000</td> <td style="text-align: right;">\$11,825,000</td> </tr> </tbody> </table>			Property	Value	Debt	Equity	SeaTac Center	\$24,185,000	\$12,360,000	\$11,825,000
Property	Value	Debt	Equity								
SeaTac Center	\$24,185,000	\$12,360,000	\$11,825,000								
Loan to Value:	51%										
Property Address:	15247 International Blvd SeaTac, Washington 98188										
Borrowers: Guarantors:	K&S Development <ul style="list-style-type: none"> • Scott Switzer—Net Worth \$29,296,000 • Gerald Kingen—Net Worth \$46,182,000 										
Location:	<p>The property is currently improved with a 2 story wood-frame commercial building containing net rentable area of 62,567 s f. Also, a lease has been signed with Starbucks for a 1,803 store with an annual rent of \$69,307.32. Starbucks will be located in front of the current retail project and should be complete by the end of 2008.</p> <p>SeaTac Center has an approved development agreement with the City of SeaTac to build a 17-story residential tower that will consist of 450 units. This new tower will only occupy the current parking lot and will not disturb the existing retail/office building.</p> <p>Sound Transit is completing the 154th Street Transit Station which will serve as a major airport service and commuter light rail link station beginning in 2009. Because of the property's excellent corner location and freeway visibility, the property will serve as the gateway location for the City of SeaTac and its planned South Riverton Heights and South 154th Street Transit oriented development.</p>										

SEATAC CENTER

SEATAC, WASHINGTON

LOAN REQUEST SUMMARY

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CHICAGO TITLE INSURANCE COMPANY
701 FIFTH AVENUE, #3400, SEATTLE, WA 98104

A.L.T.A. COMMITMENT
SCHEDULE A

Order No.: 1257659

Title Unit: U-06 Customer Number: K&S DEVELOPMENTS
Phone: (206)628-5610 Buyer(s): K & S DEVELOPMENTS, LLC
Fax: (206)628-9717
Officer: SAVIDIS/CAMPBELL/MINOR/EISENBREX

Commitment Effective Date: FEBRUARY 13, 2008 at 8:00 A.M.

1. Policy or Policies to be issued:

ALTA Owner's Policy Amount: \$0.00
Premium:
Tax:

Proposed Insured:

Policy or Policies to be issued:

ALTA Loan Policy Amount: \$300,000.00
EXTENDED POLICY (6/17/2006) Premium: \$561.00
LOAN REFINANCE/JUNIOR MORTGAGE Tax: \$ 49.93
RATE

Proposed Insured:
CENTURION FINANCE

Policy or Policies to be issued:

ALIA Loan Policy Amount: \$0.00
Premium:
Tax:

Proposed Insured:

2. The estate or interest in the land which is covered by this Commitment is:

FEE SIMPLE

3. Title to the estate or interest in the land is at the effective date hereof vested in:

K & S DEVELOPMENTS, LLC, A WASHINGTON INACTIVE LIMITED LIABILITY COMPANY

4. The land referred to in this Commitment is described as follows:

SEE ATTACHED LEGAL DESCRIPTION EXHIBIT

Appendix 2Email dated 3/17/08 (CP 999)

Dean Messmer

From: Eugene W. Wong
Sent: Monday, March 17, 2008 6:07 PM
To: 'Joseph E. Kimm, Jr'; 'Scott G. Switzer'
Cc: 'Denise'; 'jeff@bridgeportcap.com'
Subject: VCP 560K Loan to K & S Developments, LLC
Attachments: 560K Loan Documents (Drafts) (S619320).PDF

Gentlemen -

As counsel for the Lender, attached for review please find the following documents to effect the above-referenced loan:

1. Disbursement Summary & Authorization.
2. Commercial Promissory Note.
3. Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing.
4. UCC Financing Statement.
5. Guaranty (Kingen and Switzer).
6. Borrower's Certificate.
7. Certificate and Indemnity Agreement Regarding Hazardous Substances.

It is my understanding that we're targeting a Wednesday close. Let me know if the schedule has changed.

Regards,
Eugene

Eugene W. Wong
LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC
2600 Two Union Square
601 Union Street
Seattle, WA 98101-4000
P: (206) 654-2486
F: (206) 340-2563
www.lasher.com

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Appendix 3 Email Dated 4/4/08 (CP1001)

Dean Messmer

From: Eugene W. Wong
Sent: Friday, April 04, 2008 4:21 PM
To: 'T.R. H'; 'Scott G. Switzer'; 'Joseph E. Kimm, Jr'; 'Denise'
Cc: 'jeff@bridgeportcap.com'
Subject: FW: Recording Info K & S Development 1257659

We're recorded as of today on VCP's 560K loan to K & S Developments, LLC.

From: Eisenbrey, Keith [<mailto:Keith.Eisenbrey@ctt.com>]
Sent: Friday, April 04, 2008 2:11 PM
To: Rebekah Grant; Eugene W. Wong
Subject: Recording Info K & S Development 1257659

Rebekah & Eugene

The DT and UCC are now of record:

DT	20080404000967	\$145
UCC	20080404000968.	\$ 43

Please let me know if there is anything else I can do for you, and have a great weekend!

Keith E. Eisenbrey
Commercial Title Officer
Chicago Title Insurance
701 5th Avenue, Suite 3300
Seattle, Washington 98104
Phone (206) 370-3132
Fax (206) 628-9717
Email: Keith.Eisenbrey@ctt.com

Appendix 4 Email Dated 4/10/08 (CP 728)

Scott Switzer

From: Scott Switzer
Sent: Thursday, April 10, 2008 11:45 AM
To: 'Eugene W. Wong'
Subject: K and S loan

Hi Eugene:

Would you please send me copies of the final signed documents for this \$500,000 loan? Is there anything that is unfinished?

Thanks,

Scott

CP 728. Appendix 4

Dean Messmer

From: Eugene W. Wong
Sent: Thursday, April 10, 2008 6:20 PM
To: 'Scott G. Switzer'
Cc: 'jody@centurlonfg.com'; 'Joseph E. Kimm, Jr'; 'Denise'
Subject: VCP 560K Loan to K & S
Attachments: Final Loan Documents (Executed) (S629383).PDF

Scott -

Attached please find copies of the original executed loan documents. Tom said that he was going to handle the funding internally. I do need to collect the fees and costs of \$5,085.00, and would appreciate a check so that I can get the title insurance and recording fees paid for.

Thanks,
Eugene

Eugene W. Wong
LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC
2600 Two Union Square
601 Union Street
Seattle, WA 98101-4000
P: (206) 654-2486
F: (206) 340-2563
www.lasher.com

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CP 729

Appendix 5 Email Dated 7/30/08 (CP1007)

Dean Messmer

From: Eugene W. Wong
Sent: Wednesday, July 30, 2008 10:53 AM
To: 'Scott G. Switzer'
Cc: 'jeff@bridgeportcap.com'
Subject: VCP 560K Loan to K&S Developments
Attachments: 560K II Loan Documents (Execution Set) (5676108).PDF

Importance: High

Gentlemen - attached please find the loan documentation package for the above-referenced loan, which Scott asked me to prepare and mirror the terms of the last 560K loan by VCP to K&S. Jeff - I presume VCP has performed all of its underwriting for and approved the loan unless you indicate otherwise.

Please let me know if you have any questions, and return the fully executed documents to me for final processing as follows:

1. Disbursement Summary & Authorization (Borrower to execute).
2. Commercial Promissory Note (Borrower to execute).
3. Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing (Borrower to execute in the presence of a notary). This DOT is expected to be in 4th mortgage lien position, but we will not know for sure until the DOT is recorded and title insurance has been obtained later this week or next week.
4. UCC Financing Statement (for your reference only).
5. Borrower's Certificate (Borrower to execute).
6. Certificate and Indemnity Regarding Hazardous Substances (Borrower to execute).
7. Guaranty (Gerry and Scott to execute in the presence of a notary).
8. Consent to Common Representation (Lender, Scott, and Gerry to execute).

Eugene

Eugene W. Wong
LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC
2600 Two Union Square
601 Union Street
Seattle, WA 98101-4000
P: (206) 654-2486
F: (206) 340-2563
www.lasher.com

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Appendix 6 Email Dated 7/31/08 (CP1009)

Dean Messmer

From: Eugene W. Wong
Sent: Thursday, July 31, 2008 5:57 PM
To: 'T.R. H'; 'Scott G. Switzer'
Cc: 'jeff@bridgeportcap.com'
Subject: VCP 560K Loan to K&S
Attachments: 560K II Loan Documents (Execution Set v2) (S677003).PDF

Gentlemen -

Pursuant to instructions from Tom, the title insurance has been waived by the Lender on this loan. Attached please find a new set of documents for execution - the only difference from the set emailed yesterday is the revised Disbursement Summary & Authorization deleting the charge for title insurance. The documents are as follows:

1. Disbursement Summary & Authorization (Borrower to execute).
2. Commercial Promissory Note (Borrower to Execute).
3. Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing (Borrower to execute in the presence of a notary). This DOT is expected to be in 4th mortgage lien position, but we will not know for sure until the DOT is recorded and title insurance has been obtained later this week or next week.
4. UCC Financing Statement (for your reference only).
5. Borrower's Certificate (Borrower to execute).
6. Certificate and Indemnity Regarding Hazardous Substances (Borrower to execute).
7. Guaranty (Gerry and Scott to execute in the presence of a notary).
8. Consent to Common Representation (Lender, Scott, and Gerry to execute).

Please return the original executed documents to me for processing and recording.

Eugene

Eugene W. Wong
LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC
2600 Two Union Square
601 Union Street
Seattle, WA 98101-4000
P: (206) 654-2486
F: (206) 340-2563
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Appendix 7 Email Dated 8/11/08 (CP 1013)

Do you know the status of completing the K and S loan.

Page 1 of 1

Scott Switzer

From: T.R. H [trh2@msn.com]
Sent: Monday, August 11, 2008 5:56 PM
To: Scott Switzer
Cc: jeff@bridgeportcap.com
Subject: Re: Do you know the status of completing the K and S loan.

hopefully this week

----- Original Message -----

From: Scott Switzer
To: T.R. H
Sent: Monday, August 11, 2008 5:55 PM
Subject: Do you know the status of completing the K and S loan.

Hi Tom:

Do you know when we can finish the Velocity loan?

Scott

CP 1013, Appendix 7

11/8/2012

SWITZER000710

Appendix 8 Email Dated 8/11/08 (CP 1015)

Do you know the status of completing the K and S loan.

Page 1 of 1

Scott Switzer

From: T.R. H [trh2@msn.com]
Sent: Monday, August 11, 2008 5:57 PM
To: Scott Switzer
Cc: jeff@bridgeportcap.com
Subject: Re: Do you know the status of completing the K and S loan.

Where are the final papers to send to Jeff? Tom

----- Original Message -----

From: Scott Switzer
To: T.R. H
Sent: Monday, August 11, 2008 5:55 PM
Subject: Do you know the status of completing the K and S loan.

Hi Tom:

Do you know when we can finish the Velocity loan?

Scott

CP 1015, Appendix 8

11/8/2012

SWITZER000711

Appendix 9 Email Dated 8/12/08 (CP 1017)

Scott Switzer

From: T.R. H [trh2@msn.com]
Sent: Tuesday, August 12, 2008 10:48 AM
To: jeff@bridgeportcap.com
Cc: Scott Switzer
Subject: Re: Do you know the status of completing the K and S loan.

Thanks

----- Original Message -----

From: jeff@bridgeportcap.com
To: T.R. H
Cc: Scott Switzer
Sent: Tuesday, August 12, 2008 10:45 AM
Subject: RE: Do you know the status of completing the K and S loan.

I received a commitment for \$250k last night to fund the remainder of this loan....

We will be receiving funds from their brokerage, so as soon as funds come in they will be wired up.

Thanks,

Jeff

Jeffrey D. Sakamoto, RFP, CMPS
President
p: 503.534.3657
f: 866.532.3840
c: 503.544.8480
jeff@bridgeportcap.com

----- Original Message -----

Subject: Re: Do you know the status of completing the K and S loan.
From: "T.R. H" <trh2@msn.com>
Date: Mon, August 11, 2008 5:56 pm
To: "Scott Switzer" <scott@centurionfg.com>
Cc: <jeff@bridgeportcap.com>

hopefully this week

----- Original Message -----

From: Scott Switzer
To: T.R. H
Sent: Monday, August 11, 2008 5:55 PM
Subject: Do you know the status of completing the K and S loan.

Hi Tom:
Do you know when we can finish the Velocity loan?

Scott

**Appendix 10 Conflict Waiver
dated July 30, 2008(CP1019)**

July 30, 2008

Via Email Only:

Velocity Capital Partners, LLC (jeff@bridgeportcap.com)
Mr. Jeffrey D. Sakamoto
4800 S.W. Meadows Rd., Ste. 300
Lake Oswego, OR 97035

K & S Developments, LLC
Mr. Scott G. Switzer
10500 N.E. 8th Street, #1725
Bellevue, WA 98004

Re: Consent to Common Representation

Dear Gentlemen:

You have requested that this law firm prepare documentation to effect a loan of \$560,000.00 (the "Loan") by Velocity Capital Partners, LLC, an Oregon limited liability company ("VCP" or "Lender") to K & S Developments, LLC, a Washington limited liability company ("Borrower"). The Loan is to be secured by the Borrower's pledge of real property in King County, Washington. As you know, my office currently represents the Lender. However, my office also represents Centurion Financial Group, LLC, a Washington limited liability company ("Centurion"), a company in which Scott G. Switzer is a member. Mr. Switzer is also a member of the Borrower. Because of Mr. Switzer's involvement with both Borrower and Centurion, there is a potential conflict of interest that the Washington Rules of Professional Conduct for Attorneys (the "RPCs") require that we bring to your attention even though we are only representing the Lender on this transaction.

Section 1.7 of the RPC's state that a lawyer shall not represent a client ". . .if the representation of that client may be materially limited by the lawyer's responsibilities to another client, unless: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to the affected client; and (2) each affected client gives informed consent, confirmed in writing." For example, this rule applies here because the parties have differing opinions as to the terms of the Loan, and differing preferences as to how the Loan is to be enforced.

CP 1019, Appendix 10

Velocity Capital Partners, LLC
K & S Developments, LLC
July 30, 2008
Page 2

The primary advantages of the common representation in connection with the Loan are that you will save time and legal fees in having one lawyer prepare the documents evidencing the Loan. These advantages are juxtaposed by the aforementioned incompatibilities between a borrower and its lender with respect to preferred lien priority, foreclosure objectives, loan terms, and default provisions. Currently, there do not appear to be any material differences of opinion among you regarding major legal issues or the terms of the Loan. However, in the capacity as counsel for each of you, we may however, unintentionally fail to advise one of you of a risk or possible benefit that is peculiar to your own situation. Another risk of common representation is that we will be forced to withdraw from further representation if we believe we cannot represent the interests of VCP and Borrower, or either one of you believes there is a conflict of interest that requires our withdrawal from representation.

Obviously, at any time throughout the handling of this matter, one or more of you may choose to seek independent counsel. If any party becomes uncomfortable with this firm's representation, we understand that the use of alternate counsel should and will be made. We are happy to further discuss any of the foregoing issues with you. If you consent to this firm's representation of Lender in connection with the Loan, please execute a copy of this letter and return it to me prior to the closing of the Loan.

Thank you for your attention to this matter.

Very truly yours,

Eugene W. Wong

DIRECT LINE: (206) 654-2486 EMAIL: wong@lasher.com

The undersigned hereby consent to the common representation of Lender by Lasher Holzapfel Sperry & Ebberson PLLC in the foregoing matter:

VELOCITY CAPITAL PARTNERS, LLC
an Oregon limited liability company

K & S DEVELOPMENTS, LLC
a Washington limited liability company

By: Jeffrey D. Sakamoto
Its: Manager

By: Gerald Kingen
Its: Member

Velocity Capital Partners, LLC
K & S Developments, LLC
July 30, 2008
Page 3

By: Scott G. Switzer
Its: Member

Scott G. Switzer, Personally

Appendix 11 Loan Maturity Agreement (CP 1023)

**LOAN MATURITY EXTENSION
EFFECTIVE
JANUARY 5th, 2009**

This LOAN MATURITY EXTENSION (the "EXTENSION") is effective as of the 5th Day of January, 2009 by Velocity Capital Partners, LLC, an Oregon limited liability company, Holder ("VELOCITY") to K & S Developments, LLC, a Washington limited liability company (K & S).

RECITALS

- A. WHEREAS, K & S executed a Commercial Promissory Note dated March 19th, 2008 in the amount of FIVE HUNDRED AND SIXTY THOUSAND DOLLARS (\$560,000 U.S.), in favor of VELOCITY, its "Holder", a copy of which shall be attached hereto as Exhibit A (the "Note"); and
- B. WHEREAS, the Note provided for a due date of September 19, 2008 (the "Maturity Date"); and
- C. WHEREAS, K & S executed a Commercial Promissory Note dated July 31st, 2008 in an additional amount of FIVE HUNDRED AND SIXTY THOUSAND DOLLARS (\$560,000 U.S.), in favor of VELOCITY, its "Holder", a copy of which shall be attached hereto as Exhibit B (the "Note II"); and
- D. WHEREAS, the Note II provided for a due date of January 31, 2009 (the "Maturity Date"); and
- E. WHEREAS, the parties reached an oral understanding with respect to an amendment and extension of the Notes and wish reduce their understanding with respect to an amendment and extension of the Note in writing.

AGREEMENT

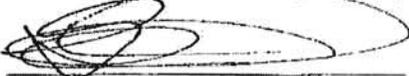
NOW, THEREFORE, in consideration for the covenants and agreements hereinafter set forth, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties agree as follows:

- 1. VELOCITY maintains the interest rate at fifteen percent (15%) per annum and modifies the Maturity Date of all indebtedness under the Loan as to K & S to be due on April 30, 2009.
- 2. As its consideration for the benefits of this EXTENSION, K & S agrees to pay VELOCITY an Extension Fee, in an amount equal to TWENTY TWO THOUSAND FOUR HUNDRED DOLLARS (\$22,400 US).
- 3. This EXTENSION shall be construed and interpreted under the laws of the State of Washington and venue shall lie in King County, City of Seattle

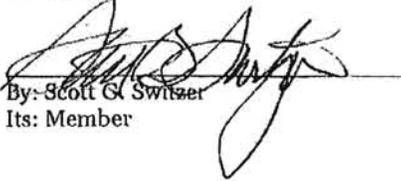
4. Nothing in this EXTENSION shall be deemed in any way to create between the parties any relationship of partnership, joint venture, or association, and the parties disclaim any existence thereof.
5. This EXTENSION, and any exhibits hereto, along with the Loan documents executed in connection with the Original Loans constitute the final and complete "Agreement", and supersede all prior correspondence or agreements between the parties relating to the subject matter hereof.
6. This EXTENSION cannot be changed or modified other than by a written agreement by VELOCITY and K & S.

K & S:

K & S DEVELOPMENT, LLC,
a Washington limited liability company



By: Gerald Kingen
Its: Member



By: Scott G. Switzer
Its: Member

VELOCITY:

VELOCITY CAPITAL PARTNERS, LLC,
an Oregon limited liability company

By: Jeff Sakamoto
Its: Manager

Appendix 12 Email Dated 12/14/09 (CP1025)

Dean Messmer

From: jeff@bridgeportcap.com
Sent: Monday, December 14, 2009 11:04 AM
To: Eugene W. Wong
Subject: RE: VCP 560K Loan to K & S Developments, LLC

Hi Eugene,

Can you scan in and email me the executed loan docs on the two \$560k loans that we made to K&S developments. We need those asap. I don't have the executed docs.

Thanks!

Jeff

Jeff Sakamoto
Managing Member
p: 503.534.3657
f: 866.532.3840
c: 503.544.8480
jeff@bridgeportcap.com

----- Original Message -----

Subject: VCP 560K Loan to K & S Developments, LLC
From: "Eugene W. Wong" <wong@lasher.com>
Date: Mon, March 17, 2008 6:06 pm
To: "Joseph E. Klmm, Jr" <joe@centurlonfg.com>, "Scott G. Switzer" <scott@centurlonfundnggroup.com>
Cc: "Denise" <denise@centurlonfg.com>, <jeff@bridgeportcap.com>

Gentlemen -

As counsel for the Lender, attached for review please find the following documents to effect the above-referenced loan:

1. Disbursement Summary & Authorization.
2. Commercial Promissory Note.
3. Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing.
4. UCC Financing Statement.
5. Guaranty (Klmm and Switzer).
6. Borrower's Certificate.
7. Certificate and Indemnity Agreement Regarding Hazardous Substances.

It is my understanding that we're targeting a Wednesday close. Let me know if the schedule has changed.

Regards,
Eugene

Eugene W. Wong

LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC

2600 Two Union Square

601 Union Street

Seattle, WA 98101-4000

P: (206) 654-2486

F: (206) 340-2563

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Appendix 13 Email Dated 12/14/09 (CP 732)

Eugene W. Wong

From: T.R. H <trh2@msn.com>
Sent: Monday, December 14, 2009 8:32 AM
To: Eugene W. Wong
Subject: Re: Velocity Capital Notes

yes

----- Original Message -----

From: Eugene W. Wong
To: T.R. H
Sent: Monday, December 14, 2009 8:17 AM
Subject: FW: Velocity Capital Notes

Ok to provide Jody with copies???

From: Jody Liebetrau [<mailto:Jody@centurionfg.com>]
Sent: Thursday, December 10, 2009 1:19 PM
To: Eugene W. Wong
Subject: Velocity Capital Notes

Hi Eugene,

Could you please provide me with copies of the fully executed Notes for K&S Developments and Velocity Capital. They were done in March of 2008 both for \$560,000. Jeff Sakimoto said that you have the fully executed copies.

Thank you for your help.

Jody Liebetrau
K&S Developments, LLC
425.732.2533

Appendix 14 Email Dated 12/14/09 (CP1029)

Dean Messmer

From: jeff@bridgeportcap.com
Sent: Monday, December 14, 2009 11:08 AM
To: Eugene W. Wong
Subject: [FWD: VCP 560K Loan to K&S]
Attachments: 560K II Loan Documents (Execution Set v2) (S677003).PDF

Eugene,

Please see below....This is the 2nd loan.....final copies we supposed to be sent to you to be recorded....this is the last I heard on this.

Jeff Sakamoto
Managing Member
p: 503.534.3657
f: 866.532.3840
c: 503.544.8480
jeff@bridgeportcap.com

----- Original Message -----

Subject: VCP 560K Loan to K&S
From: "Eugene W. Wong" <wong@lasher.com>
Date: Thu, July 31, 2008 5:57 pm
To: "T.R. H" <trh2@msn.com>, "Scott G. Switzer" <scott@centurionfundlngrgroup.com>
Cc: <jeff@bridgeportcap.com>

Gentlemen -

Pursuant to instructions from Tom, the title insurance has been waived by the Lender on this loan. Attached please find a new set of documents for execution - the only difference from the set emailed yesterday is the revised Disbursement Summary & Authorization deleting the charge for title insurance. The documents are as follows:

1. Disbursement Summary & Authorization (Borrower to execute).
2. Commercial Promissory Note (Borrower to Execute).
3. Deed of Trust, Security Agreement, Assignment of Leases and Rents and Fixture Filing (Borrower to execute in the presence of a notary). This DOT is expected to be in 4th mortgage lien position, but we will not know for sure until the DOT is recorded and title insurance has been obtained later this week or next week.
4. UCC Financing Statement (for your reference only).
5. Borrower's Certificate (Borrower to execute).
6. Certificate and Indemnity Regarding Hazardous Substances (Borrower to execute).
7. Guaranty (Gerry and Scott to execute in the presence of a notary).
8. Consent to Common Representation (Lender, Scott, and Gerry to execute).

Please return the original executed documents to me for processing and recording.

Eugene

Eugene W. Wong
LASHER HOLZAPFEL SPERRY & EBBERSON, PLLC
2600 Two Union Square
601 Union Street
Seattle, WA 98101-4000
P: (206) 654-2486
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