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No. 73235-8-I
COURT OF APPEALS OF THE
STATE OF WASHINGTON, DIVISION ONE

JACK S. JUNELL and LYNN JUNELL, husband and wife; and P.I.C.
SENTRY RAIL, INC., a Washington limited liability company, d/b/a
GLASRAIL,

Appellants,

v.

RICHARD R. HATHAWAY, and SUSAN F. HATHAWAY, husband and
wife; and WESTPORT CAPITAL INVESTMENTS, LLC, a Washington
limited liability company,

Respondents.

BRIEF OF APPELLANTS

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I. INTRODUCTION

This is an appeal from summary judgment in favor of a corporate insider on corporate loans he has enforced at full value in violation of his promises and duties to the corporation, after purchasing them from the bank for a discounted price at which the bank was prepared to write off the remaining balance. Because of material questions of fact as to breach of fiduciary duty, breach of contract, fraud or negligent misrepresentation, and constructive trust, summary judgment should be reversed.

Jack S. Junell founded PIC Sentry Rail, Inc., d/b/a Glasrail (“Glasrail”) in 1997, to manufacture fiberglass railing for the housing industry using a patented process.¹ Glasrail started with an equipment loan from GE Capital; this debt was rolled over into Cascade Bank loans, which were later transferred to Opus Bank (the “Cascade loans”). Glasrail suffered financial reversals in the housing industry depression of 2008-2012, resulting in default.

Beginning in late 2001 or early 2002, Rick Hathaway became an investor in Glasrail, investing roughly \$1.3 Million based solely on oral agreements and the balance sheet. Rick² also became a regular business

¹ Citations to the record for all facts in the Introduction and Argument can be found in the Statement of the Case, section II *infra*.

² For ease of reference, and to avoid confusion with plaintiff co-counsel John Hathaway (no relation), these two principal parties will be referred to as “Rick” and “Jack”. No disrespect is intended.

advisor to Jack Junell, meeting with Jack nearly every week for over a decade. Rick assisted Jack and represented Glasrail in negotiations with Opus Bank over the Cascade loans. In October 2012 Opus offered to accept \$225,000 in full satisfaction of the Cascade loans. Glasrail was unable to raise the funds from outsiders. In late December 2012, or early January 2013, Rick met with Jack and his wife Lynn Junell, and agreed to loan the \$225,000 necessary to pay off the bank, to be paid back with interest out of the proceeds of the sale of the Junells' personal residence. Pursuant to this loan agreement, Rick, acting through his single-member LLC, Westport Capital Investments, LLC ("Westport"), purchased Glasrail's Cascade loans from Opus for \$226,250.

This dispute arose when Rick reneged on that oral agreement. The Junells sold their house and tendered \$253,000 to satisfy the oral loan agreement with interest, but Rick/Westport refused to accept the money in full satisfaction of the Cascade loans. Instead, to the detriment of Glasrail, Westport insisted on payment on the full face value of the loans, in an amount that Westport set at approximately \$880,000.

In December 2014, the Junells/Glasrail sued Rick/Westport for (inter alia) breach of contract, breach of fiduciary duty, and interference with contract. Rick/Westport counterclaimed for collection on the Cascade loans, to which Junells/ Glasrail interposed defenses, including

fraud and constructive trust. Within mere weeks of joinder of issues, the trial court granted an overly-hasty summary judgment in favor of Rick/Westport, despite substantial material questions of fact.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. Assignments of Error

1. The trial court erred in its Order Granting Defendants' Motion for Summary Judgment, entered March 20, 2015. CP 191-93.
2. The trial court erred in its Order Denying Plaintiffs' Motion for Continuance, entered orally on March 20, 2015, and in writing on March 27, 2015. CP 184-85, 692.
3. The trial court erred by entering Judgment Against Plaintiffs on April 17, 2015. CP 70-72.
4. The trial court erred in its Supplemental Judgment Against Plaintiffs for Attorneys Fees on April 24, 2015. CP 769-71.
5. The trial court erred in its Order Denying Motion for Reconsideration, entered May 4, 2015. CP 716.

B. Issues Pertaining to Assignments of Error

1. Are there disputed issues of material fact in the record that preclude entry of summary judgment, pertaining to:
 - a. Breach of fiduciary duty;
 - b. Breach of an oral loan agreement;
 - c. Fraud and/or misrepresentation; and
 - d. Constructive trust.
2. Did the trial court abuse its discretion by denying Plaintiffs a continuance for further discovery under CR 56(f)?

3. Did the trial court err in granting attorneys fees to Defendants?
4. Should Plaintiffs be awarded attorneys fees on appeal?

III. STATEMENT OF THE CASE

A. Statement of Facts

1. Glasrail's Founding, Equipment Loans, and Investors

Jack Junell founded Glasrail in 1997, to manufacture rustproof fiberglass railing for the housing industry, using a patented process. CP 195 ¶2, 200 ¶3. Glasrail started with an equipment loan from G.E. Capital, which was transferred to Cascade Bank in 2007. CP 195 ¶2, 200-01 ¶3. That loan and another taken in 2010 were later acquired by Opus Bank. As of 2012, the two Cascade loans totaled approximately \$600,000, and were Glasrail's only significant non-shareholder debt. CP 195 ¶2, 201 ¶3. The Cascade loans were collateralized with the assets of Glasrail, as well as backed by the Junells' personal guaranty, secured by deeds of trust on their personal residence. CP 410-11 ¶7 (2nd ¶7), sub (a)-(g); CP 422-47, 456-82.

In late 2001 or early 2002, Dan Frank introduced Jack to Rick Hathaway. Jack agreed to accept Dan Frank and Rick as investors to help cover its first-ever loss (due to an estimating error), rather than seeking additional loans. CP 201 ¶4; CP 353-54 (Rick Hathaway dep.5-6/lines 25-

14); CP 409 ¶3.³ Rick’s deposition testimony flips back and forth between calling this an investment and a loan, acknowledges that it was “undocumented,” and then says it would be “debt . . . convertible to equity in the company.” CP 354 (dep.6-7/lines 12-13, 22-2). Rick says that their joint investment was an initial sum that they could convert into 75-78% ownership in Glasrail. CP 354 (dep.8/lines 7-14).⁴

Both sides agree that over the ensuing years until at least 2013, Rick continued putting money into Glasrail without any formal documentation. CP 201 ¶6; CP 354 (dep.6-7/lines 22-7); CP 356 (dep.15/lines 2-6); CP 409 ¶3. Rick has done this both by depositing funds directly into Glasrail’s bank accounts, and by directly paying Glasrail trade creditors or suppliers. Sometimes Rick would be reimbursed, but more often he would not, often telling Jack to simply put the money back into the business. CP 202 ¶9. The only accounting for Rick’s investments was on Glasrail’s balance sheets, and Rick received copies. CP 354 (dep.8-9/lines 25-7). There are no promissory notes in the record

³ The reference to “dep.” herein is to the March 4, 2015 deposition of Rick Hathaway, which was the only deposition that there was time to take before summary judgment was granted on March 20, 2015. That deposition was never completed due to the unavailability of key Opus Bank records. CP 370 (dep.71-72).

⁴ Dan Frank’s investment was about \$250,000. CP 355 (dep.12/lines 8-10). Dan Frank also took a marketing job with the company, but was ineffective, and Jack and Rick worked together to persuade Dan to resign in May 2003, after which Dan has not been involved with Glasrail. CP 201 ¶5; CP 354-55 (dep.9-10/lines 25-16). Rick testified that he has a verbal agreement with Dan Frank to transfer Dan’s interest in Glasrail to Rick at any time for no consideration. CP 359 (dep.26-27/lines 16-12).

evidencing these transactions as “loans.” CP 354 (dep.6-7/lines 22-7). The Glasrail balance sheet for December 2013 shows Rick’s investment under “EQUITY”, “CAPITAL”, “Capital Investment RH”, in the sum of \$1,306,188.76. CP 321. Rick agrees with this figure, CP 359 (dep.26/lines 5-9), and admits that he never discussed being paid interest or obtaining any security for these contributions to Glasrail. CP 356 (dep.15/lines 7-14). Whether these are loans or equity contributions is a disputed issue of material fact.

2. Rick as Advisor and Confidante to Jack and Glasrail

From the time that Rick first became involved in Glasrail, Jack and Rick met regularly to examine company performance and accounting records, and, as Jack testified, “to provide me with advice regarding the conduct of Glassrail’s [*sic.*] business.” CP 201-02 ¶8; CP 195 ¶3. From 2002 to 2014 Jack and Rick met at least once a week in Jack’s office to examine orders, the profit and loss statements and balance sheet, cost information, and productivity. CP 202 ¶8. According to Jack: “Rick has a great deal of business, accounting and entrepreneurial experience that he provided to me and Glassrail at these weekly meetings.” CP 202 ¶9.

We discussed management of production, methods and practices for increasing sales, revenue projections, cost containment, every aspect of Glassrail’s operations.

CP 202 ¶8. Rick agrees that he met about once a week with Jack and reviewed Glasrail financials. CP 355 (dep.13/6-18); CP 357 (dep.19/lines 19-22). He testified that he would meet with Jack, and sometimes Jack's son Dan Junell, to go over the books, and to provide them with advice concerning how to operate the business. CP 356 (dep.16/lines 16-21). Rick also walked around the company premises talking to Glasrail employees about what they were doing, and taking an interest in how the product was built. CP 357 (dep.17-18/lines 19-2). Rick testified that he discussed with Jack the management flaws he perceived, and suggested how to correct them. CP 357 (dep.20/lines 19-22). Rick was such a close confidante that he even spoke to Jack's son Dan about trying to improve his relationship with his father. CP 357 (dep.21/lines 12-17).

Rick is a sophisticated entrepreneur with a good grasp of financial, corporate, and banking subtleties. There are many examples in the record. *E.g.*, CP 235-36 (Rick describes a letter of intent from a potential investor to Ray Sykes, Vice-President at Opus Bank, saying, "this transaction is actually being structured as an approximate \$610,000.00 recapitalization business loan"); CP 248-51 (Rick's "Old Guys Observation and Suggestion" to a potential investor results in an offer to purchase Glasrail); CP 232-33 (Rick's plan to keep Opus from filing Notice of Foreclosure, which he knows starts running of 90-day foreclosure-sale clock). One

searches in vain to find such guile and sophisticated business acumen in Jack's emails. *E.g.*, CP 271-72 (Jack laying out full position to adverse bidder for company, and conceding prior mistakes in negotiations); CP 506-10 (Jack's rambling email about possible bankruptcy triggers Rick's renunciation of all prior agreements; Jack then claims he "didn't mean it" and says, "I would never hurt you folks for anything").

3. Rick's Representation of Glasrail in Negotiations with Opus Bank for Satisfaction of the Cascade Loans

In 2012, prior to the time (in early 2013) when Westport/Rick acquired the Cascade loans, Rick acted in concert with and on behalf of Glasrail and Jack in negotiations with Ray Sykes, Opus Bank Vice-President, in an effort to obtain loan modification or relief. In May 2012, Rick and Jack met with Ray Sykes at Jack's office to discuss the Cascade loans. CP 358 (dep.22-23/lines 23-1).

Plaintiff's Counsel: What was your role in that discussion?

Rick Hathaway: *My role was trying to assist Jack in keeping Mr. Sykes from shutting down the company.*

CP 358 (dep.23/lines 14-16) (emphasis added). In carrying out this role, Rick received copies of Jack's/Glasrail's communications with Sykes/Opus, he helped Jack formulate responses to Mr. Sykes, and he directly assisted Jack in preparing some of the emails to Mr. Sykes. CP 358 (dep.23/lines 17-19; dep.24/lines 1-10, 15-17); *accord*, CP 202 ¶¶10, 12.

In mid-2012, Glasrail hired Bruce Barbour, a loan broker, to help locate outside financing, and Mr. Barbour led them to a venture capital firm called Quail Capital. CP 203-04 ¶13. Rick played an instrumental role in helping to secure a Letter of Intent (“LOI”) from Quail, and then leveraging that LOI in negotiations with Sykes/Opus. On July 5, 2012, at 7:26 a.m., Bruce Barbour emailed Jack about information needed by Quail for the LOI. CP 233. Less than an hour later Rick responded to Bruce, with a copy to Jack, showing his central role in the transaction:

Bruce – I assume we are all on the same page – that being that the ball is in Quigleys [Quail’s] court to either come up with an LOI for Opus or tell us he can’t do it.

Either way there is nothing for me to do until I know the answer to that question; at which time I will either deliver the LOI to Ray Sykes and beg for additional time to have Opus not record the Notice of Foreclosure or inform Sykes no LOI is forthcoming from Quigley and Sykes will do what he said Opus was going to do – which is record the Notice of Foreclosure early next week.

CP 232. Bruce responded to Rick ten minutes later: “Same page!!! . . . if OPUS can hold off . . . we can refinance Jack out of this loan so much quicker.” CP 232. Nine minutes later Rick replied to Bruce (copy to Jack): “If we get an LOI from Quigley [Quail] I will try and cut any deal possible with Sykes . . .” CP 232. Viewing reasonable inferences most favorably to the nonmoving parties, Rick was representing the interests of Jack and Glasrail in these negotiations with Opus.

The LOI from Quail to Glasrail was received later that day, by which Quail conditionally committed to loaning Glasrail \$250,000. CP 229-31. It was Rick – not Jack or Bruce – who discussed the LOI with Ray Sykes/Opus on behalf of Glasrail, including a sophisticated email sent the morning of July 6, stating:

Attached is LOI from Quail. As discussed it is fairly vague and subject to requirements. What it does not say is this transaction is actually being structured as an approximate \$610,000.00 recapitalization business loan. Of that amount approximately \$360,000 would pay off the first Deed of Trust position on Mr. and Mrs. Junell’s personal residence, approximately \$40,000.00 to pay off IRS tax liens on the business and loan broker, lender’s fees and legal and closing costs of approximately \$35,000.00. The [*sic.*] would leave approximately \$175,000.00 of net loan proceeds available to be paid to Opus Bank.

Accordingly, Jack is proposing to pay \$175,000.00 in ***full and complete settlement*** of the amounts due Opus Bank for loan numbers 5307072595 and 5303090337.

CP 235-36 (emphasis added). In this email Rick provided a sophisticated financial analysis, advocating on behalf of Jack/Glasrail for “full and complete” satisfaction of the Cascade loans.

Negotiations continued through various potential restructurings, with Rick involved at every step along the way. CP 203 ¶¶11, 12. A September 24, 2012, Opus Bank internal document recommending acceptance of a settlement states:

PIC’s outside investor, Rick Hathaway, is not a position [*sic.*] to inject any more than the \$1.6MM already funded....

Hathaway is aware that he may never recoup his investment. *Rick has and continues to assist Junell in managing the operations as well as to seek out additional/alternative financing.*

CP 213 (emphasis added). An email of September 25 from Jack to Sykes states that Jack “just finished up with Rick here discussing your offer in my office.” CP 225.

It is significant that the record shows that Opus Bank did not believe it was financially worth its while to vigorously pursue the Glasrail assets. The bank’s own internal analysis set the net equity of all collateral (personal and corporate) at roughly \$340,000, and the estimated recoverable equity after collection expenses at \$190,000. CP 246 (“Collateral Values”), CP 247 (“Strengths”).

Rick testified that he wasn’t concerned that the bank would execute on Glasrail’s assets because they weren’t worth anything to the bank. CP 360 (dep.31-32/lines 24-4). But they are worth something to Rick, so he is taking a much harder line.

Based on the bank’s analysis of the Junell/Glasrail collateral, on October 15, 2012, it gave the forgiveness that Jack and Rick had been working towards since May, 2012:

Opus Bank . . . agrees to accept \$225,000 in full settlement of the above [Cascade] loans so long as funds are received by the Bank on or before November 9, 2012.

CP 227; *see*, CP 203 ¶11.⁵

4. Rick's Oral Agreement to Loan the \$225,000 and Written Memoranda Confirming the Same

From the time that the bank made its offer, Rick was involved in discussions with Jack over how to pay the \$225,000. CP 359 (dep.28/lines 8-16). When Opus Bank VP Ray Sykes sent an email to Jack requesting a meeting in Everett for November 6, 2012, Rick was the one to respond: "I will be there as I am sure will Jack." CP 749-50. However, Jack/Glasrail was unsuccessful in raising the necessary funds from sources other than Rick, and Opus recommenced foreclosure against the Junell's residence. CP 359 (dep.28-29/lines 17-6).

At some point Jack came to Rick to ask that he lend the funds. The bank was still willing to take the \$225,000 in full satisfaction. CP 361 (dep.36-37/lines 24-6). The evidence, viewed most favorably to Junells/Glasrail, shows that Rick decided to loan the funds to cover the payoff amount requested by Opus Bank. According to Jack Junell's sworn declaration:

Rick and I and Lynn agreed that Rick would pay Opus Bank the \$225,000 to clear the loans and Lynn and I would undertake to reimburse Rick, with interest, from the proceeds of selling our house. Because we deeply trusted Rick, and he us, and because Rick's financial dealings with Glassrail had always been undocumented, we felt no need to create a written

⁵ Despite the deadline, subsequent events demonstrated that Opus remained willing to take \$225,000 even later, in January 2013, when the deal was finally closed by Rick.

record of our agreement with Rick regarding the \$225,000 loan, nor did Rick ask for one.

CP 204-05 ¶17. Lynn Junell's declaration (attached as Appendix A) provides more detail on this agreement. She says that "[a] few weeks after December 18, 2012 ... Jack and I were asked by Rick Hathaway to meet him at the Mukilteo Café." CP 196 ¶5. She remembers the approximate date because she finished radiation and chemotherapy for tonsil cancer on December 18, 2012. CP 196 ¶5. According to Lynn, she and Jack met Rick around 10:00 a.m., and Rick told her "that he wanted me present so that he could tell me personally what he was going to do *to clear the Cascade Bank loans.*" CP 196 ¶6 (emphasis added). Rick's plan was to loan the funds at modest interest: "Rick told us that he was going to pay the \$225,000 required by Opus Bank and that we could pay him back with interest from the proceeds obtained from selling our house." Appendix A - CP 196 ¶6. "Rick told us ... that after his deal with Opus Bank was done, instead of a \$600,000 debt, *all we would owe is \$225,000 plus 5½ percent interest,* which he said was a lot lower interest rate than what Opus Bank had been charging us on the two loans." CP 196 ¶7 (emphasis added). Furthermore, consistent with a friendly deal between trusted insiders: "Rick told us that we did not have to sell the house right away. He suggested that we wait and see if Glassrail's business picked up enough

for Glassrail's revenues to repay Rick the \$225,000 loan." CP 196 ¶6. Finally, according to Lynn, "Rick asked for our assurance that we would repay the loan, explaining that he had made a loan to a friend and it had not turned out well and he did not want that to happen" again, and Jack and Lynn both assured Rick "that we would repay the loan from proceeds of selling our house." CP 196-97 ¶8.

Rick initially told a different story, claiming that he refused to lend the \$225,000. CP 360 (dep.31/lines 4-9); CP 360 (dep.32/lines 14-16). Then Rick conceded that, "possibly due to the Christmas holidays; I can't remember specifically – I said, 'I'll buy the loans from the bank.'" CP 361 (dep.37/lines 13-17). Rick's memory was faint, but he admitted plenty:

Plaintiffs' Counsel: Do you recall a meeting that you had with Jack and Lynn Junell at the Mukilteo Café?

Rick Hathaway: Not specifically, no.

Q: Do you recall having a meeting with both of them together and telling them that they didn't have to worry about paying off those two loans anymore because you would take care of it and they would just have to pay you the \$225,000 back?

A: ***I remember telling them that I was going to buy the loans and that they were – that's how they were going to pay the money back, was the sale of their house.***

Q: Do you recall a discussion with Jack and Lynn Junell where you explained to them that you had a concern because you had lent money in the past to someone who had not repaid it and the Junells responded by telling you that they would sell their house and repay the \$225 – out of the house? Do you recall that conversation?

....
A: Yeah, I don't know what timeline, but I'll answer the question. I don't specifically remember the day, time, or exactly what was said, **but basically that's what was said.**

CP 361-62 (dep.37-38/lines 21-17) (emphasis added; objection omitted).

Rick completed the Cascade loan purchase by April 2013. CP 241; CP 363 (dep.43-44/lines 17-2); CP 363 (dep.45/lines 10-14). On May 21, 2013, Jack wrote to Rick:

Lynn and I were wondering if you have come up with an amount we will have to pay you when we sell the house.... We know there is an ongoing monthly cost.

Appendix B - CP 240. Rick replied an hour later:

Jack – The quick answer to your question is \$225,000. + plus legal fees and costs (Guess is \$7,000. – I will supply you with invoice copies) + 5.5% per month in interest on the total, which is a lot less than the 7.25% Opus was charging you on the \$130,000. loan and the 8.25% they were charging you on the \$500,000. loan.

Appendix B - CP 238/240. Later, Rick annotated this email in his own handwriting: “No Interest on the legal fees + costs.” CP 205 ¶19; CP 240; CP 362 (dep.39/lines 3-13). This email is totally consistent with Jack and Lynn's testimony that the “225,000” debt was substituted for the large Cascade debt, and viewed favorably to the Junells/Glasrail, it adds to the disputed issues of fact. Rick agreed at his deposition that the origin of the

5.5% interest figure was that he had told Jack he was willing to charge less than the bank was charging him. CP 362 (dep.40/lines 3-7).

5. Misrepresentations

Rick told Jack that the bank's legal department was backed up, and it was simpler and quicker just to buy the loans than to wait for an agreement to settle the loans for \$225,000. CP 206 ¶21. Based on this, the Junells signed consents to the transaction structured as a loan purchase. CP 206 ¶21; CP 497-500. The Junells had no particular knowledge of, and did not care, what form Rick's transaction with the Bank would take, because they knew they had a verbal deal with Rick to loan them the funds to satisfy the Cascade loans, and from long experience they trusted Rick.

As stated in Jack's sworn declaration:

We signed the consent in reliance on Rick's promise to pay Opus Bank the \$225,000 to satisfy the loans and his agreement to be reimbursed the \$225,000 from the sale of our home.... I completely trusted Rick's representation to Lynn and me concerning our deal.

CP 206 ¶21.

Rick/Westport purchased the Cascade loans from Opus bank with two payments, \$35,000 on 1/23/13, and \$191,250.58 on 4/29/13, for a total of \$226,250.58. CP 241; CP 363 (dep.43-44/lines 17-2); CP 363 (dep.45/lines 10-14). The bank approved the sale on January 29, 2013, CP 247, in an internal document that recognized this as a continuation of the

earlier negotiations under which the bank had agreed to satisfy the loans for the same payment:

This mirrors an earlier approved proposal offered in November 2012, but upon which the Borrower and his investor did not perform. Hathaway has returned with a similar offer, supported by [Glasrail] Principal, Jack Junell and his wife

CP 246. As one of the “pros” in favor of the transaction, the bank noted: “Investor is motivated, *already has a stake in business*”. CP 247 (emphasis added).

Rick also acknowledged his agreement with the Junells/Glasrail in February 2014, in connection with the pending closing of the Junells’ home sale. The first closing on the Junell residence was set for February 27, 2014.⁶ CP 205 ¶19. In anticipation of that, in January 2014, Rick sent Jack the annotated version of their May 2013 emails, accompanied by a detailed amortization table and a detail of fees and expenses for the loan. CP 205 ¶19; CP 239-42. The amortization table is based on the amounts advanced by Rick/Westport to Opus bank for the loans - \$35,000 on 1/23/13, and \$191,250.58 on 4/29/13, for a total of \$226,250.58 – at 5.5% interest. Appendix C - CP 241; CP 363 (dep.43-44/lines 17-2); CP 363 (dep.45/lines 10-14). There is no indication of any other amounts due, other than \$5,597.18 in legal fees and transaction costs, and a \$10,530.41

⁶ This first potential sale failed to close for reasons unrelated to this dispute between the parties. CP 412 ¶8.

reimbursement for an invoice that Rick paid on behalf of Glasrail. Appendix C - CP 241-42; CP 364 (dep.48/lines 17-25). Rick handwrote that the “TOTAL PAYABLE TO WESTPORT” with interest and expenses is \$253,491.52. Appendix C - CP 241-42. Rick admits that this amount is calculated per the May 2013 formula of \$225,000 plus interest and costs/legal fees. CP 365 (dep.51-52/lines 22-8).

The escrow instructions issued by Rick/Westport instruct the closing agent to clear the two deed exceptions and close the transaction “when you have collected funds for the account of Westport Capital Investments LLC in the amount of \$253,491.52.” CP 244. What Rick did not tell Jack was that the reconveyances that he provided to the closing agent were *without satisfaction of the underlying loans*. CP 501-04; CP 370 (dep.71/lines 8-12). After claiming in his deposition that he told Jack that he owed the full amount on the bank loans, Rick was unable to say when or where this conversation occurred, and then he finally admitted he didn’t remember:

Plaintiffs’ Counsel: Do you recall telling Jack that he owed you the full amount?

Rick Hathaway: I don’t recall not telling him that. No, I don’t specifically – I don’t have a specific recollection.

CP 370 (dep.71/lines 8-12).

6. Disputes Arise Between Jack and Rick in June 2014: the Mettry Deal and the Second and Third House Closings

In February 2014, Matt Mettry expressed an interest in purchasing Glasrail or its assets. CP 207 ¶23; CP 249. Jack provided Mr. Mettry with information on the company in hopes of getting a formal offer, but when no offer was forthcoming Rick took control on behalf of Jack/Glasrail with an email he called “Old Guys [*sic.*] Observation and Suggestion”: telling Mettry that because “you started this journey *with us* in February,” now was the time to “submit an offer to Glasrail that includes all of the contingencies that either you, your lawyer or your bank wants met prior to closing and funding the actual asset purchase.” CP 249, 251. This spurred a June 1, 2014 offer in the form of a proposed Asset Purchase Agreement and Consulting Agreement, reciting that “Seller, PIC Sentry Rail, Inc., *owned by Junell and Hathaway . . .*,” would sell the assets for \$300,000, plus a consulting agreement with Jack for \$150,000 over three years. CP 252-269, especially CP 253, 255 ¶1.2, 268; CP 207 ¶23.

Rick met with Jack on June 7, 2014 to discuss the proposed asset purchase, and made it clear that he wanted \$400,000 to be paid to him at closing. CP 207 ¶24. Jack communicated this to Mettry, along with his own willingness to reduce his consulting fee to \$100,000, and Rick

confirmed this in an email directly to Mettry, in which he also asked for a telephone conference “so it is perfectly clear to you what my perspective is on the entire deal.” CP 207 ¶24; CP 271-72.

To this point in the negotiations, the two Glasrail co-owners, Jack and Rick, appear to have been acting in unison. As stated in Jack’s declaration: “throughout Rick’s negotiations to sell Glasrail’s assets to Matt Mettry Rick never once asserted that Glasrail’s assets were encumbered by the Cascade Bank UCC filing securing over \$800,000 in indebtedness.” CP 208 ¶27.

Disputes began to surface a few days later. Rick stopped by Jack’s office to tell him that he wanted Glasrail and Jack to take all of the corporate debt, so that the purchase price to Mettry could be increased, and he suggested that Jack “could just take the corporation into U.S. bankruptcy and flush the debts.” CP 207 ¶24. In a June 19, 2014 email, Jack told Rick that he was seeking bankruptcy advice on credit card and IRS debt. CP 508. Nonetheless, he remained firmly committed to paying Rick/Westport what he owed:

We contacted Kim the RE agent and dropped the price by \$50,000 to try ... [to] bring to the table a buyer so we can at least pay to you back soon what you had bailed us out on from the bank.

CP 508. But Rick exploded with anger, stating in an email that “Susan and I are bitterly disappointed in you” CP 507. Rick continued:

[P]lease consider this transmittal as both my and Westport Capital’s notice to you that ***any and all agreements*** between Hathaway and any of our entities and PIC Sentry Rail/Glasrail and/or Jack and Lynn Junell ***are null and void as of today’s date***. In addition, I have no choice but to begin the process of protecting Hathaway’s financial and legal interests as it relates to this situation.

CP 507 (emphasis added). Jack replied in a short email: “I am not filing bankruptcy, I want to find out about the credit cards and IRS worst case scenario.” CP 507. Rick shot back:

Jack – I believe you meant exactly what you said in your initial email and only decided to spin it’s [sic.] intent when you saw me finally push back. You have played your game of ‘delay delay delay and make excuses excuses excuses’ one too many times with me.

In the past 2 weeks I gave you several opportunities to move forward with a last ditch plan and each time you did your normal thing – which is to do nothing.

That plan is off the table. ***Your conclusion will be I am renegeing on my commitments to you.*** My conclusion is you have been renegeing on your commitments to me for years and I have been a fool for standing by you for all these years with both my time and money.

To make it perfectly clear it is my intend [sic] to to [sic] take whatever actions necessary to recover as much of the money as possible that I have loaned/invested in the company, you and all of the business and personal assets I hold as security, including your personal residence.

As I did in my previous email *you are again apprised any discussions about or agreements you may believe we had regarding anything related to the company, its assets or your house are null and void.*

...

From this point forward I do not plan to communicate with you except through legal counsel. I urge you to retain counsel as well. You and I are done.

CP 509 (emphasis added).

After this Rick was adversarial, delaying reconveyance for so long that the Junells lost a second home sale to Gayle Rogers that was originally scheduled to close on September 25, 2014. CP 108-09 ¶4 (Westport only pledges to “endeavor” to obtain signed reconveyances without satisfaction by October 8); CP 111 (Rogers terminates sale on October 6). As a consequence, the Junells were forced to expend more funds on home upgrades and reduce the purchase price again, as well as to bring this lawsuit to enjoin further interference with closings. CP 209 ¶30-31. On January 5, 2015, one day before the scheduled third closing on the Junells’ home, Rick agreed to disbursement of \$225,000 from closing, and placing what ultimately proved to be \$235,000 in a blocked account, in order to let the sale go through. CP 209 ¶¶31-32; CP 693-98.

C. Procedural Facts

Junells and Glasrail brought suit against Hathaways and Westport on December 4, 2014, asserting claims for breach of contract/specific performance of the oral loan agreement, breach of fiduciary duty and estoppel, injunctive relief, and intentional interference with contract (Gayle Rogers closing). CP 669-685. On January 21, 2015, Hathaways/Westport counterclaimed for (inter alia) breach of the Cascade loan agreements and breach of the guaranties. CP 553-569. On February 11, 2015, Junells and Glasrail pleaded affirmative defenses to the counterclaims, including (inter alia) constructive trust, fraud and misrepresentation, breach of fiduciary duty, and unclean hands/antecedent breach. CP 547-552.

Just nine days after joinder of issues, on February 20, 2015, Hathaways/Westport moved for summary judgment against plaintiffs. CP 518-537. On March 9, 2015, Junells/Glasrail moved for a modest 38-day continuance of the summary judgment hearing to permit plaintiffs to conduct discovery. CP 396-404. At the hearing on summary judgment on March 20, the trial court ruled that it had considered all the pleadings that were presented as bearing both on continuance and on summary judgment. CP 75-76, 692. The trial court denied the Junell/Glasrail motion for continuance, and granted the Hathaway/Westport motion for summary

judgment, dismissing all of plaintiffs' claims, and directing that the \$235,000 from the Junell house closing held in a blocked account be disbursed to Rick/Westport. CP 184-85, 191-93, 692. The trial court entered judgment against plaintiffs on April 17, 2015, CP 70-72, and a supplemental judgment including attorneys' fees on April 24, 2015. CP 769-71. The total amount of the judgment is \$562,761 principal, plus \$38,210 in fees, plus 18% per annum interest. CP 70-72, 769-71. Because the original oral loan plus 5.5% interest and costs was paid out of closing, and summary judgment ordered the blocked funds released, Rick/Westport has already been paid a total of \$460,000. CP 192; 209 ¶32; 693 ¶3. Combined with the judgments, Rick/Westport's total recovery against Junells/Glasrail would be \$1.061 Million, plus interest at 18% on unpaid amounts – all on its \$226,250 investment, far in excess of the oral loan agreement. Considering Rick's fiduciary role as majority shareholder and trusted advisor, that should shock the conscience of the Court.

Junells/Glasrail filed a motion for reconsideration on April 27, 2015. CP 741-44. It was denied by order entered May 4, 2015. CP 716. This timely appeal was first filed on March 24, 2015, CP 187-90, and supplemented by an amended notice of appeal filed on May 14, 2015. CP 699-715.

IV. ARGUMENT

A. Standard of Review

“In reviewing a summary judgment order, an appellate court evaluates the matter de novo, performing the same inquiry as the trial court.” *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). “In a summary judgment motion, the burden is on the moving party –” in this case, Rick/Westport – “to demonstrate that there is no genuine issue as to a material fact and that, as a matter of law, summary judgment is proper.” *Atherton Condominium Apartment-Owners Ass’n Bd. of Dir. v. Blume Development Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). In making this showing, “[t]he moving party is held to a strict standard”:

Any doubt as to the existence of a genuine issue of material fact ***is resolved against the moving party***. In addition, we consider all the facts submitted ***and the reasonable inferences therefrom in the light most favorable to the nonmoving party***.

Id. (emphasis added). In this case, the nonmoving party is Junell/Glasrail.

“[A] motion for summary judgment should be granted only if, from all the evidence, reasonable persons could reach but one conclusion.”

Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

Summary judgment is not a substitute for a trial; it exists as a mechanism to decide whether there exists any truly disputed material facts.

Johnson v. Rothstein, 52 Wn. App. 303, 305, 759 P.2d 471 (Div. 1 1988) (quoting, *Morgan v. American Univ.*, 534 A.2d 323, 327 (D.C.App.1987)).

Taking all the evidence and reasonable inferences in the light most favorable to Junell/Glasrail, it is plain that disputed issues of fact exist as to: (1) Rick's breach of fiduciary duty to Jack and Glasrail; (2) Rick's breach of an oral contract, which is outside the statute of frauds; (3) estoppel; (4) fraud and misrepresentation; (5) tortious interference with the second closing; and (6) constructive trust. The Court should reverse this overly-hasty summary judgment, and remand for discovery and trial.

B. Breach of Fiduciary Duty is a Disputed Question of Material Fact

In the landmark case of *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980), the Washington Supreme Court considered whether sophisticated "borrowers" could assert a usury defense against a "lender" who was in actuality an unsophisticated investor in their house-flipping business, and who had been led in reliance on their advice to invest based on promissory notes with interest rates as high as 36%. *Id.* at 884-85. Mrs. Liebergesell, a school teacher without business experience, relied upon Mr. Kotowski, whose full-time job was in the state auditor's office, which required "a thorough knowledge of accounting and a Bachelor's degree with a major in that subject." *Id.* at 884. The trial court, on

summary judgment, held that Liebergesell could show facts constituting an estoppel, but the Court of Appeals reversed. *Id.* at 886.

The Supreme Court decisively reversed the Court of Appeals, holding that a full factual exploration of the fiduciary duty and estoppel defenses was necessary. According to the Court:

In some circumstances a fiduciary relationship which allows an individual to relax his guard and repose his trust in another may develop. The Restatement of Contracts describes such a fiduciary relationship as one in which one party “occupies such a relation to the other party as to justify the latter in expecting that his interests will be cared for....” Restatement Contracts s 472(1)(c); see also *id.* at Comment C (describing the circumstances under which such a “fiduciary position” may arise). Such a fiduciary relationship creating justifiable reliance could be thought to have developed between plaintiff and defendant Kotowski if plaintiff’s allegations regarding the source and extent of her trust in Mr. Kotowski were confirmed at trial.

Liebergesell v. Evans, supra, 93 Wn.2d at 889-90. Just as in *Liebergesell*, reasonable fact finders could find such a relationship between Jack and Rick if the evidence in this summary judgment record is developed through discovery and trial.

The Supreme Court did not stop there. It held there could be fiduciaries “in law” or “in fact”:

A fiduciary relationship arises as a matter of law between an attorney and his client or a doctor and his patient, for example. But a fiduciary relationship can also arise in fact regardless of the relationship in law between the parties. *Salter v. Heiser*, 36 Wn.2d 536, 550-55, 219 P.2d 574 (1950).

A confidential or fiduciary relationship between two persons may exist either because of the nature of the relationship between the parties historically considered fiduciary in character; e.g., trustee and beneficiary, principal and agent, partner and partner, husband and wife, physician and patient, attorney and client; or the confidential relationship between persons involved may exist in fact.

McCutcheon v. Brownfield, 2 Wn. App. 348, 356-57, 467 P.2d 868, 874 (1970). See also Restatement Contracts §472 Comment C (“A fiduciary position ... includes not only the position of one who is a trustee, executor, administrator, or the like, but that of agent, attorney, **trusted business adviser**, and indeed **any person whose relation with another is such that the latter justifiably expects his welfare to be cared for by the former**”).

Liebergessell v. Evans, supra, 93 Wn.2d at 890-91 (emphasis added).

In the case at bar, material issues of fact exist as to *both* whether Rick was a fiduciary in law, and a fiduciary in fact. Shareholders in closely-held corporations, and majority shareholders, owe other shareholders a fiduciary duty as a matter of law. *Scott v. Trans-System, Inc.*, 148 Wn.2d 701, 711, 64 P.3d 1 (2003); *Interlake Porsche & Audi, Inc. v. Bucholz*, 45 Wn. App. 502, 508-09, 728 P.2d 597 (Div. 1 1987); *Saviano v. Westport Amusements, Inc.*, 144 Wn. App. 72, 80, 180 P.3d 874 (Div. 2 2008); *see, Lang v. Hougan*, 136 Wn. App. 708, 718, 150 P.3d 622 (Div. 2 2007); *Arneman v. Arneman*, 43 Wn.2d 787, 799, 264 P.2d 256 (1953). The evidence here shows that Rick contributed roughly \$1.3

Million to the business over 11 years prior to purchasing the Cascade loans, without documentation, interest, regular payments, promissory notes or security agreements, and that these contributions were documented solely on a corporate balance sheet stating that Rick was an equity investor. Based on his investment in Glasrail, Rick testified that he originally claimed between 75-78% of the company. On summary judgment, taking all the evidence and inferences most favorably to Jack/Glasrail, Rick must be viewed as the Glasrail majority shareholder long before he acquired the Cascade loans, and therefore he owes Jack and Glasrail a fiduciary duty as a matter of law.

In addition, there is substantial evidence in the record that Rick is a fiduciary in fact: (1) Rick has actually participated in management of Glasrail on a regular basis since he became involved in late 2001 or early 2002; (2) because of Rick's major financial stake in the corporation, Rick has held and exercised major control of management direction; (3) Rick has greater business acumen and experience than Jack, and has served as Jack's management advisor and confidante from 2002 to 2014; (4) Rick and Jack developed a close personal friendship and working relationship of trust over those years, prior to their falling out in June 2014; (5) Jack/Glasrail entrusted Rick with full access to their internal communications and sensitive financial information that would only be

given to a business insider; and (6) Rick actually represented Jack and Glasrail in a substantial portion of their negotiations concerning attempted satisfaction of the very Cascade loans that are now in dispute.

“Superior knowledge and assumption of the role of adviser may contribute to the establishment of a fiduciary relationship.” *Liebergesell v. Evans, supra*, 93 Wn.2d at 891. Friendship between the parties is also an important factor. *Id.* Corporate controlling persons can lend their money to the corporation, “[b]ut courts closely scrutinize such transactions, which must be characterized by the utmost good faith.” *Saviano, supra*, 144 Wn. App. at 79. The corporate fiduciary “has a strong influence on how the corporation conducts its affairs, and a correspondingly strong duty not to conduct those affairs to the unfair detriment of others, such as minority shareholders” *Id.* (quoting, *Intertherm, Inc. v. Olympic Homes Sys., Inc.*, 569 S.W.2d 467, 471 (Tenn.App. 1978)). This must be especially true where the party most harmed besides Jack will be the corporation itself, PIC Sentry Rail d/b/a Glasrail, for which the difference between survival and liquidation hinges on whether the Cascade loans are deemed satisfied by the payment the Junells made out of their house closing. CP 246-47. As stated in *Saviano*:

So, when the lender is a director, charged, with others, with the control and management of the affairs of the corporation, representing in this regard the aggregated interest of all the

stockholders, his obligation, if he becomes a party to a contract with the company, to candor and fair dealing, is increased in the precise degree that his representative character has given him power and control derived from the confidence reposed in him by the stockholders who appointed him their agent. If he should be a sole director, ***or one of a smaller number vested with certain powers***, this obligation would be still stronger, and his acts subject to more severe scrutiny, and their validity determined by more rigid principles of morality, and freedom from motives of selfishness.

Saviano, supra, 144 Wn. App. at 80 (*quoting, In re Trimble Co.*, 479 F.2d 103, 113-14 (3d Cir. 1973) (*quoting, Twin-Lick Oil Co. v. Marbury*, 91 U.S. 587, 590, 23 L.Ed. 328 (1875))) (emphasis added); *see also, Wenzel v. Mathies*, 542 N.W.2d 634, 641 (Minn.App. 1996) (directors, officers and shareholders in closely-held corporation have a fiduciary relationship that imposes the highest standard of integrity and good faith).

It was not in the best interests of the minority shareholder or the corporation for Rick/Westport to take over loans that Opus Bank was willing to compromise, and then to enforce them to their fullest extent. ***Instead, it was the epitome of self-dealing.*** Nor was it the utmost good faith or in conformance with morality for Rick to promise at the Mukilteo Café to lend the funds to buy off the bank for \$225,000 plus legal and closing costs at 5.5% interest, payable from the Junells' house closing, and then to later (in his own words) begin "renegeing on his commitments" by demanding payment in excess of \$1 Million.

The Supreme Court in *Liebergesell* held:

Whether such a fiduciary relationship existed in fact in this case depends on the development of factual proof. The facts alleged by the plaintiff in her affidavit in response to the defendants' motion for partial summary judgment, when considered in a light most favorable to the plaintiff, were sufficient to raise a question of fact which prevented summary judgment.

Liebergesell v. Evans, supra, 93 Wn.2d at 891. The same is true in the present case. Reversal and remand for discovery and trial on the issue of breach of fiduciary duty is required.

C. There is a Disputed Issue of Material Fact as to Breach of an Oral Contract to Make a Loan

1. Record Evidence Shows the Existence of an Oral Loan Agreement

The evidence is strong that within a few weeks of December 18, 2012, Jack and Lynn Junell sat down with Rick at the Mukileo Café, and Rick promised to lend them \$225,000 to pay off the Cascade loans, to be repaid at 5.5% interest plus his closing and legal costs, out of their house sale. Appendix A - CP 196-97 ¶¶5-8; CP 204-05 ¶17. In reliance on that promise, the Junells ceased looking for other financing sources, signed the consents to the transaction between Opus and Rick, and prepared their house for the market. CP 200 ¶2; CP 667 ¶¶3.16-.17. Rick confirmed this deal in writing in his May 21, 2013, email response to Jack's question about the amount the Junells would have to pay out of closing: "Jack –

The quick answer to your question is \$225,000. + plus legal fees and costs (Guess is \$7,000. – I will supply you with invoice copies) + 5.5% per month in interest on the total . . .” Appendix B - CP 238, 240. He even confirmed it again in anger in June 2014, by telling Jack, “[y]our conclusion will be I am renegeing on my commitments to you.” CP 509. When confronted with the May 21st email in deposition, Rick was shaken, and had to pause to confer with counsel before proceeding. CP 361 (dep.36). Afterwards, he treaded very close to admitting the loan deal. CP 361-62 (dep.37-38/lines 21-17). This case cries out for a hearing on credibility before a trier of fact.

2. The Oral Loan Agreement Falls Outside the Scope of the Statute of Frauds

It is anticipated that Rick/Westport will attempt to hide behind the Statute of Frauds, RCW 19.36.010.

The courts do not tolerate the use of the statute of frauds to enable one to take advantage of his own wrong. As has been said, that principle of law or legislative enactment would be an anomaly which, while attempting to prevent fraud, would become an instrumentality for the perpetration of fraud.

Miller v. McCamish, 78 Wn.2d 821, 825-26, 479 P.2d 919 (1971) (italics added by Court).

The Statute of Frauds does not apply here on its face, and if it did, this case would fall into the exceptions for memorandum of agreement, and for part performance.

a. The Oral Loan Agreement Could be Performed within One Year

The statute applies to “[e]very agreement that *by its terms* is not to be performed in one year from the making thereof” RCW 19.36.010(1) (emphasis added). There is nothing in the terms of the December 2012 oral loan agreement to prevent it from being performed within one year. The fact that the loan was not paid back within a year is legally immaterial. If there is any possibility that the agreement can be performed within a year, then it is not within the statute of frauds. *Gronvold v. Whaley*, 39 Wn.2d 710, 717 & 720, 237 P.2d 1026 (1951). In that case, plaintiff Gronvold and defendant Whaley struck an oral deal in 1935 to join in a Columbia River transportation company, based on business projections that required use of the locks at the Bonneville dam, which was then under construction. *Id.* at 712-13, 718. The evidence showed “that the temporary locks were not expected to be opened, nor were they opened, until two years after the making of the contract.” *Id.* at 718. Nonetheless, the court found that the fact “[t]hat the contract was not performed within a year, is of no significance; nor does it matter that it was highly improbable that the contract could be performed within one

year.” *Id.* at 717. Indeed, so narrowly is the statute of frauds construed, that the court indulged every presumption against it:

[T]here is no evidence that the temporary locks could not possibly have been completed within one year. For example, the Army engineers in charge of the construction of the locks might have decided, for aught that appears in the record, to expedite the completion of the locks so as to be usable within one year. For the doing of a thing to be impossible it must be physically or legally incapable of being done.

Id. at 718-19; *accord, e.g.*, Restatement (Second) Contracts § 130 comment a; Corbin on Contracts § 444 (One Vol. Ed. West 1952).

In this case, because the oral loan agreement could have been completed within a year – Rick did pay Opus within a year, and the Junells might have sold their house within a year – it does not fall under part .010(1) of the Statute of Frauds.

b. The Oral Loan Agreement was an Original Promise, Supported by Consideration

Rick/Westport may wish to argue that the oral promise falls under RCW 19.36.010(2), “every special promise to answer for the debt, default, or misdoings of another person” That is contrary to case law which draws a sharp distinction between a “collateral” promise to pay the debt of another, which is within the statute of frauds, and an original promise to pay the debt of another, which is not covered by the statute of frauds. *Washington Belt & Drive Systems, Inc. v. Active Erectors*, 54 Wn. App.

612, 617, 774 P.2d 1250 (Div. 1 1989); *Morrison-Knudsen Company, Inc. v. Hite Crane & Rigging, Inc.*, 36 Wn. App. 860, 863, 678 P.2d 346 (Div. 3 1984). “A promise is considered original when the promisor receives some consideration or benefit from the promise.” *Washington Belt & Drive, supra*. A loan made to a closely held corporation benefits the shareholders thereof, especially here where it would induce the creditor (in this case Opus) to forebear from further enforcement of the Cascade loans. *Washington Belt & Drive, supra*, 54 Wn. App. at 618-19; *South Sound Nat’l Bank v. Meek*, 14 Wn. App. 577, 582-84, 544 P.2d 25 (Div. 2 1975).

In addition, the 5.5% interest was a consideration or benefit from the oral loan promise, paid directly to Rick/Westport.

For purposes of summary judgment, viewing all the evidence and reasonable inferences most favorably to Jack/Glasrail, Rick’s promise was clearly an original promise, outside the scope of the statute of frauds.

c. The May 19, 2013 Email is a Sufficient Memorandum of Agreement to Satisfy the Statute of Frauds

The Statute of Frauds is satisfied by “some note or memorandum” of the agreement, “in writing, and signed by the party to be charged . . .” RCW 19.36.010. In this case, we have an email “From: Rick Hathaway” “To: Jack Junell”, sent “Tuesday, May 21, 2013, 8:10 AM”, confirming all the essential terms of the deal (“\$225,000. + plus legal fees and costs . . . +

5.5% per month in interest on the total . . .”), containing at the bottom the name “Rick Hathaway”, his address, telephone number and email address. CP 238. The same May 21st email appears again in the record at CP 376, where it is page 2 of Rick’s deposition exhibit #2. CP 361 (dep.34/lines 8-16); CP 376. Rick admitted that this was his email in deposition:

Plaintiffs’ Counsel: And the email on page 2 that’s written by you, do you recall that?

Rick Hathaway: Yes, I do.

Q: In the email on page 1, Jack is asking you the amount that they would have to pay when they sell their house, to you, right?

A: Yes.

Q: And the email to them on the next page, is that your response to that email?

A: Yes.

CP 361 (dep.34-35/lines 20-4).

“To satisfy the statute [of frauds], written memoranda must disclose the subject matter of the contract, the parties, the promise, the terms and conditions, and (in some but not all jurisdictions) the price or consideration.” *Family Med. Bldg., Inc. v. State, Dep’t of Soc. & Health Servs.*, 104 Wn.2d 105, 108, 702 P.2d 459 (1985); *Bharat Overseas Ltd. v. Dulien Steel Prods., Inc.* 51 Wn.2d 685, 687, 321 P.2d 266 (1958). “A single writing is not essential to satisfy the statute; multiple writings, taken together, will suffice.” *Hunt v. Great Western Sav. Bank*, 54 Wn. App. 571, 573, 774 P.2d 554 (Div. 2 1989). In this case, Rick’s email of May

21, read in conjunction with Jack's email of the same date to which it responds, evidences the agreement to lend \$225,000 to be repaid out of the sale of the Junell's home, which is the subject-matter of the contract. The parties are the Junells and Rick, who were the parties to the oral loan agreement. The promise (partially executed) is the loan of \$225,000, and the agreement to repay the same out of the house closing. The terms and conditions are payment back of \$225,000, plus interest at 5.5%, plus Rick's legal fees and costs, which he estimates at \$7,000 and says he will back up with invoice copies. CP 240. Rick's name at the bottom serves as his signature. *Wright v. Seattle Grocery Co.*, 105 Wash. 383, 387-88, 177 P. 818, 820 (1919) (preprinted name on order form constitutes signature for purposes of statute of frauds). The May 21 email is therefore a sufficient memorandum of terms to take the oral agreement out of the statute of frauds.

d. The Oral Loan Agreement is Enforceable Due to Part Performance

Part performance of an oral agreement may take it outside the statute of frauds. *Powers v. Hastings*, 93 Wn.2d 709, 718-19, 612 P.2d 371 (1980); *Miller v. McCamish*, *supra*, 78 Wn.2d at 824. The Junells have performed their part of this agreement by putting their house on the market and instructing the closing agent to pay Rick his requested

\$253,491.52 at the very first scheduled closing in February 2014, even before any dispute arose or any agreement was put in place to have this amount paid without prejudice. CP 200 ¶2; CP 204-06 ¶¶17-20; CP 677-78 ¶¶3.18-.20.⁷

D. The Junells/Glasrail Raised a Disputed Issue of Fact as to whether Rick/Westport Should be Estopped from Collecting More than the Amount Agreed at the Mukilteo Café

The evidence and reasonable inferences taken most favorably to the Junells show that Rick promised to loan them the funds at 5.5% interest that were needed to take advantage of Opus Bank's offer to write off the Cascade loans for \$225,000, and that Rick also told Jack that the reason he was purchasing the loans instead of simply paying for their cancellation was that the legal department at Opus Bank was backed up. In light of the long history of working together cooperatively based on oral agreements and trust, Junells/Glasrail justifiably relied to their detriment upon the promises made by Rick at the Mukilteo Café, and the representations later made by Rick to Jack, by consenting to the sale to Rick instead of insisting on having the loans discharged at that time, or simply leaving the loans in the hands of a bank that had shown it was willing to compromise.

⁷ Jack also made a tender of interest on the loan in July 2014, but whether that was accepted requires further discovery. CP 381. Rick was asked in deposition, but did not recall. CP 366 (dep.57/lines 8-11).

This case is governed by the principles of estoppel laid down in

Liebergesell v. Evans:

Estoppel requires: (1) an admission, statement, or act inconsistent with the claim afterwards asserted; (2) an action by the other party on the faith of such admission, statement, or act; and (3) an injury to the other party if the claimant is allowed to contradict or repudiate his earlier admission, statement, or act.

Liebergesell v. Evans, supra, 93 Wn.2d at 888-89; *accord, e.g., Arnold v. Melani*, 75 Wn.2d 143, 147, 437 P.2d 908 (1968). The Supreme Court emphasized that reliance is more easily justifiable in the presence of a fiduciary relationship: “[T]he existence of a fiduciary relationship between the parties and the general duty to contract in good faith may make it possible for an individual to rightfully rely on statements made by another with whom he contracts or on the validity of a transaction based on a failure to disclose relevant information concerning the agreement entered into between them.” *Liebergesell, supra*, 93 Wn.2d at 889.

As applied to this case, the Junells and Glasrail had a right to rely on Rick’s promises to loan the funds needed to satisfy the Cascade debt made at the Mukilteo Café, and again when he obtained their consent to transfer instead of immediately cancel the loans without disclosing an intention to enforce them to their full extent. “As in other areas of the law, the general theory underlying estoppel ... is that an individual should not

benefit from his own wrong.” *Id.* at 888. The Junells/Glasrail raised a disputed issue of fact as to whether Rick should be estopped from enforcing the Cascade loans beyond the amount paid from their house closing of \$225,000 plus 5.5% interest and legal fees and costs of the transaction. *Id.* at 895-96.

Promissory estoppel may be used as a sword as well as a shield. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wn.2d 255, 259, 616 P.2d 644 (1980); *McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 117, 992 P.2d 511 (Div. 1 1999).

The Court has described the five elements of a promissory estoppel claim: (1) a promise, (2) that promisor should reasonably expect to cause the promisee to change his position, and (3) actually causes the promisee to change position, (4) justifiably relying on the promise, (5) in such a manner that injustice can be avoided only by enforcement of the promise.

McCormick v. Lake Washington, supra, 99 Wn. App. at 117; *accord, e.g. Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 171-72, 876 P.2d 435 (1994). Here, the evidence viewed most favorably to the Junells/Glasrail shows: (1) a promise to lend the money to take advantage of the payoff deal offered by Opus Bank; (2) that Rick should reasonably expect would cause the Junells to agree to him acquiring the loans; (3) that does have this effect; (4) under circumstances of long common dealings and trust such that their faith in Rick is justifiable; and (5) in which the injustice of

enforcement of the loans well beyond what the parties intended at the Mukilteo Café or what Opus Bank would have done can only be avoided by enforcement of the promise.

It was reversible error to dismiss Junells'/Glasrail's affirmative claim to enforce Rick's promises made at the Mukilteo Café, at the time consent was given, and in his May 2013 email, and to seek damages based on reliance on those promises.

E. Fraud and Misrepresentation

The elements of fraud are:

1) a representation of existing fact, (2) its materiality, (3) its falsity, (4) the speaker's knowledge of its falsity, (5) the speaker's intent that it be acted upon by the person to whom it is made, (6) ignorance of its falsity on the part of the person to whom the representation is addressed, (7) the latter's reliance on the truth of the representation, (8) the right to rely upon it, and (9) consequent damage.

Elcon Const., Inc. v. E. Washington Univ., 174 Wn.2d 157, 166, 273 P.3d 965 (2012). "Washington has adopted the Restatement (Second) of Torts with respect to the elements of negligent misrepresentation." *ESCA Corp. v. KPMG Peat Marwick*, 135 Wn.2d 820, 826, 959 P.2d 651 (1998).

The Restatement (Second) of Torts § 552(1) (1977) describes negligent misrepresentation as:

One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject

to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

ESCA Corp., supra, 135 Wn.2d at 826. In addition to affirmative negligent misrepresentation, liability may be imposed for nondisclosure where a fiduciary duty to disclose exists. *Leibergesell v. Evans, supra*, 93 Wn.2d at 891-92. Washington relies upon the Restatement (Second) of Torts § 551 to define the contours of liability for nondisclosure:

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and ...

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Restatement (Second) Torts § 551; *see, Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 168, 704 P.2d 1032 (1987).

Clearly, the “fact” that Rick intended to collect the whole amount under the loans was something he knew would induce Junells/Glasrail to act differently in the transaction. It was a fact basic to the transaction, which they had a right to hear from their trusted advisor. Had Rick disclosed that fact, the Junells would not have further dealt with him, would not have signed the consents, and might have: (1) convinced Opus not to sell to Rick, because it could potentially realize more from their house sale (which ultimately netted \$235,000 more than the original \$225,000 payment); (2) at the last minute, found another source of funds to pay off the bank at the \$225,000 compromise amount; or (3) simply chosen to let the foreclosure to go forward, and take their chances with a bank that was uninterested in the corporate assets.⁸

Contracts induced by fraud or material misrepresentation may be avoided:

A party’s misrepresentation of a material fact may render a contract voidable. The party seeking to have the contract voided based on misrepresentation has the burden of establishing that the party’s manifestation of assent is induced by an assertion or representation not in accord with the facts;

⁸ Taking reasonable inferences most favorably to Jack/Glasrail, Opus Bank would not have sold to Rick, whom it knew to be a corporate insider, in the absence of consent from Jack, the other corporate principal.

that the assertion is either fraudulent or material; and that the recipient is justified in relying on the assertion.

Brinkerhoff v. Campbell, 99 Wash. App. 692, 697, 994 P.2d 911, 915 (Div. 1 2000).

It is not credible that Junells/Glasrail would have consented to the transfer of the Cascade loans to Rick/Westport if they had been informed that Rick intended to enforce them to their full value, when the record shows that Opus Bank was willing to take far less for them, and had little interest in attempting to execute on the corporate assets. Viewing the evidence and all reasonable inferences most favorably to the Junells/Glasrail, there are disputed issues of material fact as to whether Rick/Westport committed fraud or material negligent misrepresentation in connection with this transaction, such that the transaction is voidable, and sufficient to subject Rick/Westport to liability for damages. It was reversible error to dismiss those claims on summary judgment.

F. It was Error to Dismiss the Constructive Trust Claim

Where for any reason the legal title to property is placed in one person under such circumstances as to make it inequitable for him to enjoy the beneficial interest, a trust will be implied in favor of the persons entitled thereto. This arises by construction of equity, independently of the intention of the parties. Equity will raise a constructive trust and compel restoration where one through actual fraud, abuse of confidence reposed and accepted, or through other questionable means gains something for himself which in equity and good conscience he should not be permitted to hold.

Scymanski v. Dufault, 80 Wn.2d 77, 88-89, 491 P.2d 1050 (1971) (quoting, *Seventh Elect Church v. First Seattle Dexter Horton Nat'l Bank*, 162 Wash. 437, 440, 299 Pac. 359 (1931)); accord, e.g., *Betchard-Clayton, Inc. v. King*, 41 Wn. App. 887, 893, 707 P.2d 1361 (Div. 1 1985) (“The imposition of a constructive trust is the appropriate equitable remedy to prevent an unjust enrichment and to return the funds to their rightful owner.”). “It is a well settled principle of law that, where a fiduciary has misappropriated property belonging to his beneficiary and transfers it to a third person, the latter, unless a bona fide purchaser for value, holds the property as constructive trustee for the beneficiary.” *Viewcrest Co-op. Ass'n, Inc. v. Deer*, 70 Wn.2d 290, 292, 422 P.2d 832 (1967). In this case, a reasonable fact-finder could find that Rick, a fiduciary of Junell/Glasrail, has misappropriated the Cascade loan and transferred it to Westport, when it should in good conscience and fair dealing have been purchased for the benefit of Junell/Glasrail. In addition, Rick/Westport claims amounts far in excess of the rightful payment of \$253,000 for the oral loan agreement, obtained by trickery, deception, and breach of trust. Under these circumstances, imposition of a constructive trust on Rick/Westport in favor of Junell/Glasrail would be appropriate, and therefore it was reversible error to dismiss the constructive trust claim.

G. The Trial Court Abused its Discretion by Denying a 38-Day Continuance of the Summary Judgment Hearing

CR 56(f) states:

Should it appear from the affidavits of a party opposing the motion that for reasons stated, the party cannot present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

The Junells invoked this rule in seeking a 38-day continuance for additional discovery in this case, principally because Opus Bank was unable to comply with the Junells' subpoena for its full records prior to the date noted for the hearing, and this prevented Junells' attorney from being able to complete the deposition of Rick Hathaway by questioning him based on the full record of documents in the possession of Opus Bank. CP 348 ¶2; CP 349 ¶¶4-5; CP 384-85. In addition, counsel wished to depose Dan Frank, who was involved with Glasrail at the beginning of Rick's involvement as an investor, in order to obtain evidence on Rick's investor status, which ties into Rick's fiduciary duty – but Dan Frank had thus far eluded the process server. CP 348-49 ¶3; CP 279-81.

It is significant that Rick/Westport filed this summary judgment *just nine days after the issues were fully joined* by Junell/Glasrail's Answer and Affirmative Defenses to Counterclaims. CP 518, 547.

Plainly, the defense tactic here was to ram through a flawed summary judgment before any substantial discovery or adequate pretrial preparation could be completed. The busy trial court granted what the defendants wanted, and the old adage that “haste makes waste” is likely to apply when this matter has been remanded at great expense to the parties and the court system. Overly hasty summary judgments do not serve the laudable goal of CR 56 by weeding out truly meritless claims; instead, they subvert a rule aimed at efficiency into one of oppression and waste.

“The trial court may deny a [CR 56(f)] motion for a continuance when (1) the requesting party does not have a good reason for the delay in obtaining the evidence, (2) the requesting party does not indicate what evidence would be established by further discovery, or (3) the new evidence would not raise a genuine issue of fact.” *Building Ind. Ass’n v. McCarthy*, 152 Wn. App. 720, 742-43, 218 P.3d 196 (Div. 2 2009). Denial of a CR 56(f) continuance is reviewed for abuse of discretion. *Id.* at 742.

A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997).

The inability to access the full Opus Bank file, and question Rick about it, and the inability to obtain a deposition from Dan Frank, were all good reasons for the requested 38-day continuance. The request was specific as to this required information, and the reasons that it was not yet available. The unavailable information was potentially centrally relevant to the claims and defenses raised by Junell/Glasrail, and would have been helpful in showing disputed issues of material fact on the claims briefed above. It was an abuse of discretion to deny the continuance.

H. Attorneys Fees Below and On Appeal

First, if the underlying grant of summary judgment is reversed, then the award of attorneys' fees to Rick/Westport should be reversed as a matter of course, because it was based on the attorneys' fee provisions of the Cascade loans. CP 3-4.

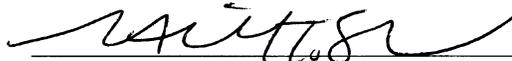
Second, in the event of reversal, then Junells/Glasrail should be awarded their attorneys fees incurred on appeal. It is a well-recognized principle of Washington law that a party who prevails by demonstrating that a contract containing an attorney fee provision is unenforceable or inapplicable is entitled in equity to recover their attorneys fees. *Kaintz v. PLG, Inc.*, 147 Wn. App. 782, 784 ¶1, 787-90, 197 P.3d 710 (Div. 1 2008); *Herzog Aluminum, Inc. v. Gen. Am. Window Corp.*, 39 Wn. App. 188, 195-97, 692 P.2d 867 (Div. 1 1984).

V. CONCLUSION

Junells/Glasrail request a special order reminding the trial court of its duty under RAP 12.8 to immediately order return (with interest) of the \$235,000 removed from the blocked account, and all other collateral executed on during the pendency of this appeal.⁹

For all the foregoing reasons, the order granting summary judgment and the judgment and amended judgment should be REVERSED, all of plaintiffs' claims and defenses should be reinstated, and this matter remanded for further proceedings.

DATED this 30th day of June, 2015.



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Co-counsel for Appellants

⁹ As of the filing of this Brief of Appellant, Rick/Westport has scheduled an execution sale against all corporate assets for June 8, 2015.

APPENDIX A

FILED

Motion for Continuance of Summary Judgment Hearing
March 20, 2015
9:30 a. m

2015 MAR 19 PM 1:06

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL17188474

WASHINGTON STATE SUPERIOR COURT
FOR SNOHOMISH COUNTY

JACK S. JUNELL and LYNN JUNELL, husband)
and wife; and P. L. C. SENTRY RAIL, INC., a)
Washington limited liability company, d/b/a)
GLASRAIL,)

No. 14-2-07614-1

Plaintiffs,)

v.)

PLAINTIFF LYNN JUNELL'S
DECLARATION IN SUPPORT OF
MOTION FOR CONTINUANCE

RICHARD R. HATHAWAY, and SUSAN F.)
HATHAWAY, husband and wife; and)
WESTPORT CAPITAL INVESTMENTS, LLC, a)
Washington limited liability company,)

Defendants.)

Lynn Junell declares under penalty of perjury, under the laws of the State of Washington,
that the following is true and correct:

1. I am a plaintiff in this action and I make this declaration on personal knowledge
concerning matters to which I am competent to testify.

2. I am 63 years old and my husband is 74 years old. My husband started Glassrail in
1997 with a large equipment loan from G. E. Capital. That loan was later taken over by Cascade
Bank, which later became Opus Bank. The two Cascade Bank loans were the Glassrail's only
significant debt.

3. Rick Hathaway has been part of Glassrail since around 2002, almost from the
beginning. Rick regularly provided business advice to Jack.

PLAINTIFF LYNN JUNELL'S DECLARATION
IN SUPPORT OF MOTION FOR CONTINUANCE - 1

ORIGINAL

JOHN W. HATHAWAY, PLLC
ATTORNEYS AT LAW
701 FIFTH AVENUE, SUITE 4600
SEATTLE, WA 98104
206.424.7100/206.424.9292 FAX

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1 4. The Summer and Fall of 2012 was a difficult time for me because I had been
2 diagnosed with tonsil cancer in June 2012 and had two surgeries in August and September 2012. I
3 underwent chemotherapy and radiation treatments from late October until December 18, 2012. I
4 know that during that time, 2012 Jack was working hard trying to reach an agreement with Opus
5 Bank to reduce the balance owed on the two Cascade Bank loans to an amount that we could afford
6 to pay and that Opus Bank finally sent Jack a letter agreeing to accept \$225,000 to completely pay
7 off the two Cascade Bank loans.

8 5. A few weeks after December 18, 2012, when I finished radiation and chemotherapy
9 treatments, Jack and I were asked by Rick Hathaway to meet him at the Mukilteo Café. I do not
10 recall the exact date, but it was some time after I had completed chemotherapy and it was on a
11 Saturday morning for breakfast. It was clear from Rick's statements at the Café that he had not yet
12 paid anything to Opus Bank on the the Cascade Bank debts, so it must have been in late December
13 2012 or early January 2013.

14 6. Jack and I met Rick at the Café at around 10:00 a.m. and ordered breakfast. Rick told
15 me that he wanted me present so that he could tell me personally what he was going to do to clear
16 the Cascade Bank loans. Rick told us that he was going to pay the \$225,000 required by Opus Bank
17 and that we could pay him back with interest from the proceeds obtained from selling our house.
18 Rick told us that we did not have to sell the house right away. He suggested that we wait and see
19 if Glassrail's business picked up enough for Glassrail's revenues to repay Rick the \$225,000 loan.

20 7. Rick told us at the lunch meeting that after his deal with Opus Bank was done,
21 instead of a \$600,000 debt, all we would owe is \$225,000 plus 5 ½ percent interest, which he said was
22 a lot lower interest rate than what Opus Bank had been charging us on the two loans.

23 8. Rick asked for our assurance that we would repay the loan, explaining that he had
24 made a loan to a friend and it had not turned out well and he did not want that to happen to us.
25 Jack and I both assured Rick that we would get our house ready for sale as soon as possible, so that
26 we could repay Rick the loan and interest. We both told Rick that we were grateful to him and Susan

1 for loaning us the money to pay off the Opus Bank debt and assured him that we would repay the
2 loan from proceeds of selling our house. Rick once again suggested that we wait awhile before selling
3 our house to see if the loan could be repaid from Glassrail's revenues.

4 Dated this 18th day of March, 2015 at Mukilteo, Washington.

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7 LYNN JUNELL
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APPENDIX B

Jack Junell

From: Jack Junell [jjunell@glasrail.com]
Sent: ~~Tuesday, June 17, 2014 3:43 PM~~
To: 'Jack Junell'
Subject: FW: OPUS

Jack Junell
Glasrail, President
4215 Suite A Russell Rd. Mukilteo, WA 98275
P.888.349.1550, C.425.330.9111, F.425.348.8476
jjunell@glasrail.com

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

From: Jack Junell [mailto:jjunell@glasrail.com]
Sent: Tuesday, May 21, 2013 8:28 AM
To: 'Lynskitchen@aol.com'
Subject: FW: OPUS

Jack Junell
Glasrail, President
4215 Suite A Russell Rd. Mukilteo, WA 98275
P.888.349.1550, C.425.330.9111, F.425.348.8476
jjunell@glasrail.com

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

From: Rick Hathaway [mailto:rickhathaway@comcast.net]
Sent: Tuesday, May 21, 2013 8:10 AM
To: Jack Junell
Subject: Re: OPUS

Jack - The quick answer to your question is \$225,000. + plus legal fees and costs (Guess is \$7,000. - I will supply you with invoice copies) + 5.5% per month in interest on the total, which is a lot less then the 7.25% Opus was charging you on the \$130,000. loan and the 8.25% they were charging you on the \$500,000. loan.

Plan to be up there Thursday.

Rick Hathaway
11269 NE 37th Place
Bellevue, WA 98004
425-417-8674
rickhathaway@comcast.net

On May 21, 2013, at 7:28 AM, "Jack Junell" <jjunell@glasrail.com> wrote:

Good morning Rick,

Rick Hathaway <rickhathaway@comcast.net>
To: Jack Junell
Re: OPUS

May 21, 2013 8:09 AM

Jack - The quick answer to your question is \$225,000. + ^① plus legal fees and costs (Guess is \$7,000. - I will supply you with invoice copies) + 5.5% per month in interest on the total, which is a lot less than the 7.25% Opus was charging you on the \$130,000. loan and the 8.25% they were charging you on the \$500,000. loan.

Plan to be up there Thursday. ^① *No interest on the legal fees & costs.*

Rick Hathaway
11289 NE 37th Place
Bellevue, WA 98004
425-417-8674
rickhathaway@comcast.net

On May 21, 2013, at 7:28 AM, "Jack Junell" <junell@glasrail.com> wrote:

Good morning Rick,

Lynn and I were wondering if you have come up with an amount we will have to pay you when we sell the house. As you know we are working on the cosmetics and will be getting rid of a lot of furniture we will not need. We are trying to figure out to some degree what we will have left and what we will be able to afford. We know there is an ongoing monthly cost.

Thanks again for all your and Susan's help.

Sincerely,

Jack

Jack Junell
Glasrail, President
4215 Suite A Russell Rd. Mukiteo, WA 98275
P.888.349.1550, C.425.330.9111, F.425.348.8478
junell@glasrail.com

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*I am leaving on Saturday 2/11 returning Sunday 3/2.
Best way to reach me during that time is by
texting to my cellphone.*

APPENDIX C

SPORT CAPITAL INVESTMENTS LLC JACK & LYNN JUREL

Interest rate: 6.50% per annum, compounded monthly
Due date: 02/27/14

Date	Description	Transaction Amount	In Spent	In Acc.	Prn Change	Prn Bal	# Days	Note Rate	In	In Pd	Unpaid In	Less Paid	Total Unpaid	Total Unpaid Less Paid	Prn Service Fee	Total Service Fee	Total Due
02/27/13	Interest	34,000.00			34,000.00	34,000.00	0	6.50%						34,000.00			34,000.00
02/27/13	Interest Compounding		02/27/13	02/27/13	47.47	34,047.47	0	6.50%	47.47	(47.47)	47.47		34,047.47				34,094.94
02/27/13	Interest Compounding		02/27/13	02/27/13	147.87	34,195.34	28	6.50%	147.87	(147.87)	147.87		34,195.34				34,343.21
02/27/13	Interest Compounding		02/27/13	02/27/13	184.41	34,379.74	31	6.50%	184.41	(184.41)	184.41		34,379.74				34,564.14
02/27/13	Interest Compounding		02/27/13	02/27/13	181,230.58	228,610.32	28	6.50%	148.18		148.18		228,758.50				34,712.32
02/27/13	Interest Compounding		02/27/13	02/27/13	217.44	228,827.76	0	6.50%	82.29	(217.44)	217.44		229,045.20				34,859.76
02/27/13	Interest Compounding		02/27/13	02/27/13	1,088.57	229,916.33	31	6.50%	1,088.57	(1,088.57)	1,088.57		230,004.90				35,008.23
02/27/13	Interest Compounding		02/27/13	02/27/13	1,020.18	230,936.51	30	6.50%	1,020.18	(1,020.18)	1,020.18		231,056.69				35,157.61
02/27/13	Interest Compounding		02/27/13	02/27/13	1,089.23	231,985.74	31	6.50%	1,089.23	(1,089.23)	1,089.23		232,075.03				35,306.99
02/27/13	Interest Compounding		02/27/13	02/27/13	1,074.21	232,989.95	30	6.50%	1,074.21	(1,074.21)	1,074.21		233,064.16				35,456.37
02/27/13	Interest Compounding		02/27/13	02/27/13	1,044.52	233,983.67	30	6.50%	1,044.52	(1,044.52)	1,044.52		234,028.19				35,605.75
02/27/13	Interest Compounding		02/27/13	02/27/13	1,044.52	234,988.21	31	6.50%	1,044.52	(1,044.52)	1,044.52		235,032.73				35,755.13
02/27/13	Interest Compounding		02/27/13	02/27/13	1,054.15	235,982.36	30	6.50%	1,054.15	(1,054.15)	1,054.15		236,036.51				35,904.51
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	236,986.57	31	6.50%	1,084.21	(1,084.21)	1,084.21		237,040.78				36,053.89
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	237,980.99	31	6.50%	1,084.21	(1,084.21)	1,084.21		238,045.20				36,203.27
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	238,984.41	31	6.50%	1,084.21	(1,084.21)	1,084.21		239,048.62				36,352.65
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	239,987.83	31	6.50%	1,084.21	(1,084.21)	1,084.21		240,052.04				36,502.03
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	240,991.25	31	6.50%	1,084.21	(1,084.21)	1,084.21		241,055.46				36,651.41
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	241,994.67	31	6.50%	1,084.21	(1,084.21)	1,084.21		242,058.88				36,800.79
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	242,998.09	31	6.50%	1,084.21	(1,084.21)	1,084.21		243,102.30				36,950.17
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	243,991.51	31	6.50%	1,084.21	(1,084.21)	1,084.21		244,045.72				37,100.55
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	244,994.93	31	6.50%	1,084.21	(1,084.21)	1,084.21		245,039.14				37,249.93
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	245,998.35	31	6.50%	1,084.21	(1,084.21)	1,084.21		246,042.56				37,399.31
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	246,991.77	31	6.50%	1,084.21	(1,084.21)	1,084.21		247,045.99				37,548.69
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	247,995.19	31	6.50%	1,084.21	(1,084.21)	1,084.21		248,049.41				37,698.07
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	248,998.61	31	6.50%	1,084.21	(1,084.21)	1,084.21		249,052.83				37,847.45
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	249,992.03	31	6.50%	1,084.21	(1,084.21)	1,084.21		250,056.25				37,996.83
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	250,995.45	31	6.50%	1,084.21	(1,084.21)	1,084.21		251,059.67				38,146.21
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	251,998.87	31	6.50%	1,084.21	(1,084.21)	1,084.21		252,063.09				38,295.59
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	252,992.29	31	6.50%	1,084.21	(1,084.21)	1,084.21		253,066.51				38,444.97
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	253,995.71	31	6.50%	1,084.21	(1,084.21)	1,084.21		254,070.93				38,594.35
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	254,999.13	31	6.50%	1,084.21	(1,084.21)	1,084.21		255,075.35				38,743.73
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	255,992.55	31	6.50%	1,084.21	(1,084.21)	1,084.21		256,079.77				38,893.11
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	256,995.97	31	6.50%	1,084.21	(1,084.21)	1,084.21		257,084.19				39,042.49
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	257,999.39	31	6.50%	1,084.21	(1,084.21)	1,084.21		258,088.61				39,191.87
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	258,992.81	31	6.50%	1,084.21	(1,084.21)	1,084.21		259,093.03				39,341.25
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	259,996.23	31	6.50%	1,084.21	(1,084.21)	1,084.21		260,097.45				39,490.63
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	260,999.65	31	6.50%	1,084.21	(1,084.21)	1,084.21		261,101.87				39,640.01
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	261,993.07	31	6.50%	1,084.21	(1,084.21)	1,084.21		262,106.29				39,789.39
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	262,996.49	31	6.50%	1,084.21	(1,084.21)	1,084.21		263,110.71				39,938.77
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	263,999.91	31	6.50%	1,084.21	(1,084.21)	1,084.21		264,115.13				40,088.15
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	264,993.33	31	6.50%	1,084.21	(1,084.21)	1,084.21		265,119.55				40,237.53
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	265,996.75	31	6.50%	1,084.21	(1,084.21)	1,084.21		266,123.97				40,386.91
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	266,990.17	31	6.50%	1,084.21	(1,084.21)	1,084.21		267,128.39				40,536.29
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	267,993.59	31	6.50%	1,084.21	(1,084.21)	1,084.21		268,132.81				40,685.67
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	268,997.01	31	6.50%	1,084.21	(1,084.21)	1,084.21		269,137.23				40,835.05
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	269,990.43	31	6.50%	1,084.21	(1,084.21)	1,084.21		270,141.65				40,984.43
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	270,993.85	31	6.50%	1,084.21	(1,084.21)	1,084.21		271,146.07				41,133.81
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	271,997.27	31	6.50%	1,084.21	(1,084.21)	1,084.21		272,150.49				41,283.19
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	272,990.69	31	6.50%	1,084.21	(1,084.21)	1,084.21		273,154.91				41,432.57
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	273,994.11	31	6.50%	1,084.21	(1,084.21)	1,084.21		274,159.33				41,581.95
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	274,997.53	31	6.50%	1,084.21	(1,084.21)	1,084.21		275,163.75				41,731.33
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	275,991.95	31	6.50%	1,084.21	(1,084.21)	1,084.21		276,168.17				41,880.71
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	276,995.37	31	6.50%	1,084.21	(1,084.21)	1,084.21		277,172.59				42,030.09
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	277,998.79	31	6.50%	1,084.21	(1,084.21)	1,084.21		278,177.01				42,179.47
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	278,992.21	31	6.50%	1,084.21	(1,084.21)	1,084.21		279,181.43				42,328.85
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	279,995.63	31	6.50%	1,084.21	(1,084.21)	1,084.21		280,185.85				42,478.23
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	280,999.05	31	6.50%	1,084.21	(1,084.21)	1,084.21		281,190.27				42,627.61
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	281,992.47	31	6.50%	1,084.21	(1,084.21)	1,084.21		282,194.69				42,777.00
02/27/13	Interest Compounding		02/27/13	02/27/13	1,084.21	282,995.89	31	6.50%	1,084.21	(1,084.21)							

Opus Junell Loan Register through 02/11/14:

Date	No./Ref.	Name	Account	Memo	Amount C	Balance
01/23/13	3204	Opus Bank	Westport Capital ...		35,000.00	35,000.00
04/01/13	3241	Puget Sound...	Westport Capital ...	Junell/Op... (1)	5,196.00	40,196.00
04/29/13		Lawyers Title	Westport Capital ...		191,250.58	231,446.58
04/29/13		Bank Of Ame...	Westport Capital ...	Wire Tran... (1)	25.00	231,471.58
09/04/13	3219	Hillis Clark ...	Westport Capital ...	(1)	270.18	231,741.76
12/23/13	3244	Hillis Clark ...	Westport Capital ...	(1)	106.00	231,847.76

Reimbursable Expenses (1)

\$ 5,597.18

CERTIFICATE OF SERVICE

I, Jennifer Marroquin, legal assistant for Sullivan Law Firm, hereby certify that on the date set forth below I caused a copy of the within BRIEF OF APPELLANTS to be sent by email and U.S. Mail, first class postage prepaid, to counsel of record for Respondents at the following address:

Hacker & Willig, Inc., P.S.
Arnold M. Willig
520 Pike Street, Suite 2500
Seattle, WA 980101
arnie@hackerwillig.com

DATED at Seattle, King County, WA, this 30th day of June, 2015.



Jennifer Marroquin