IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

K & S DEVELOPMENTS, LLC, a Washington limited liability company, Plaintiff, v. CITY OF SEATAC, et al, Defendants.	Consolidated Under Case No. 12-2-40564-6 KNT **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**
CITY OF SEATAC, Plaintiff, v. GERALD and KATHRYN KINGEN, Defendants.	Date: September 11, 2015 With Oral Argument

I. INTRODUCTION

K&S purchased the real property, commonly known as the SeaTac Center, located at 15247 International Boulevard in the City of SeaTac in 2003 (the "Property"). K&S used the Property as security to purchase and develop the Property, including infusing millions of dollars in remodeling the existing commercial building.

LANDERHOLM
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

As part of its development plans, K&S began meeting with the City of SeaTac ("City") in 2004 to develop a 1,200 stall "park-and-fly" parking facility. In February 2006, the City Planning Department tried to stop K&S in its tracks by having the City Council surreptitiously adopt an emergency moratorium. When the City Council later learned the facts, it directed its staff to negotiate a development agreement that would allow K&S to proceed with its proposed 1,200 stall park-and-fly. The council members also directed its Staff to enter into an agreement with K&S on July 11, 2006 that it would support the terms of a particular Development Agreement that was attached to that letter agreement.

Through its conduct, the City Council led K&S to believe that it would approve the proposed park-and-fly in return for K&S not challenging the City's zoning actions.

But 15 months later, and after many delays caused, at least in part, by the City Staff, the City did a complete reversal and rejected the proposed park-and-fly. The City's change in course was seemingly due to the (1) City Staff's failure to comply with its July 11, 2006 contractual obligations to "fully support" the development agreement, (2) City's secret desire to acquire K&S's property for economic development purposes—the City did not believe K&S was the right entity to own the property, (3) the City's desire to protect its pecuniary interest in constructing its own competing parking garage closer to the SeaTac Airport, and (4) the self-serving and discriminating views of at least one council member personally affected by the proposed park-and-fly.

After three years of being led down a primrose path, and spending substantial sums of time and money on the project, K&S had no financial option but to abandon the proposed park-and-fly and pursue a multi-family development. But the City was still not satisfied. Still improperly believing that K&S was the wrong property owner or developer to accomplish the City's specific economic vision for the property, the City

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805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

continued its scheme of using its regulatory powers to hamper K&S's planned development and reduce the value of the property. Instead of working with K&S in good faith as required under the Development Agreement, the City was lying in wait to acquire the property as the "phantom" buyer. And instead of cooperating in K&S's efforts to implement the Development Agreement, the City was attempting to frustrate K&S's development efforts. Unfortunately, K&S only learned the true reasons for the City's actions after the City acquired its property.

The City's actions and delays caused K&S to incur additional debt, fees, and financing costs related to the Property. After delays, bad faith negotiations, and other misconduct, the City eventually reneged on its promise to provide a development agreement for the proposed park-and-fly. The City then secretly hired Colliers to represent it as an undisclosed principal to acquire the Property in order to take advantage of the financial strain that its actions had placed on K&S. But instead of approaching K&S about acquiring the property, which the City had done with other similarly situated property owners, Colliers and the City took the unprecedented action of contacting K&S's lenders to try and force a foreclosure of the property, even though K&S had negotiated a forbearance agreement.

The City, acting through Colliers, offered to purchase the promissory notes secured against the Property from K&S's lenders, provided K&S would first sign agreements to provide a deed in lieu of foreclosure (the "DIL Agreements") (the Deed in Lieu is abbreviated as "DIL"). And despite Colliers repeated representations to the contrary, the only way the City could have accomplished the transaction under the Washington State Constitution[1] was for K&S to agree to sign a DIL. In other words,

[1] Art. 8, § 5 and Art. 8, § 7 prohibit cities from lending its credit to private enterprises, such as K&S.

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K&S had to be part of the transaction between Colliers, representing the anonymous City, and the lenders or the entire transaction would fail.

K&S had no choice but to sign the DIL Agreements on December 24, 2009 (the "DIL Transaction") as the City's misconduct prevented it from developing the Property. Due to all of the Defendants' concealment, misconduct, and misrepresentations, K&S did not know at that time that Colliers represented the City, that the City was to be the beneficiary of the DIL Agreements, or that the City was acting to acquire the Property.

The City, acting through Colliers, purchased the promissory notes secured against the Property on or about December 31, 2009. The lenders assigned the DIL Agreements to the City. By purchasing the promissory notes, the City acquired the Property for millions of dollars less than the fair market value. And then, at risk of further legal jeopardy, K&S signed the required Deed on December 31, 2009. But K&S's execution of the Deed was a ministerial act because it had previously signed away its rights to the property on December 24, 2009 through the Deed in Lieu of Foreclosure.

Once it learned the truth from its public records request, K&S filed its lawsuit against the City, various City officials, and Colliers. K&S has continued to discover additional facts through discovery (third party subpoenas) that further show the City's misconduct.

After losing its efforts to have K&S's lawsuit dismissed, the City retaliated against the principals of K&S (Gerald and Kathryn Kingen and Scott and Cheri Switzer) and their consultant (Paul Krakow) by alleging five causes of action. In the process, the City violated the automatic stay of the United States Bankruptcy Code when it sued the Switzers. After being sanctioned by the Bankruptcy Court, and attempting to re-work its allegations, the City eventually capitulated and dismissed the

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T: 360-696-3312 • F: 360-696-2122

Switzers. The City also dismissed Mr. Krakow and his spouse. The City then consolidated the two lawsuits.

In a twist of irony, the City's claims against the Kingens boil down to the fact that it believes the Kingens interfered with its acquisition of the Property and that it failed to disclose certain terms as part of the DIL. The City claims the Kingens violated promises and representations they made in the DIL by having K&S sue the City. The City is essentially trying, by filing this second lawsuit and then consolidating the two cases, to pierce K&S's corporate veil and impose personal liability on the Kingens. Similar to its threats to go after the Kingens on their personal guarantees under the loans, the City is using this lawsuit to intimidate the Kingens against challenging the City's actions.

The court should dismiss the City's lawsuit against the Kingens because it hinges upon a total misunderstanding of K&S's lawsuit against the City and it completely ignores corporate formalities without any valid or lawful reason. K&S does not seek to rescind the DIL. After all, why would anyone in K&S's shoes ever want to own property within a jurisdiction that it cannot trust and has acted in this manner?

K&S seeks damages for the taking of their property (the City paid millions of dollars less than the property's fair market value). K&S also seeks economic damages for the City's misconduct of (1) stalling K&S's parking garage, (2) improperly rejecting K&S's proposed park-and-fly, (3) delaying and frustrating K&S's overall development of the property for improper purposes, and (4) failing to disclose its interest in acquiring the property at a time when it was legally and contractually obligated to work with K&S on the development. K&S does not seek to rescind the transaction; it wants damages for what the City did.

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The City's lawsuit against the Kingens fails because the Kingens did not owe any individual duties to the City. The Kingens were part owners of K&S, but never had any privity of contract with the City. The Kingens therefore owed no duties to the City and the Kingens did not personally make any representations, misrepresentations, or omissions to the City.

Assuming the City can prove that there *was* misrepresentations made, there is no evidence that, at the time the agreements were signed, the Kingens knew or had reason to know that the representations were untrue—the fact that K&S discovered facts after the City acquired the property does not mean the documents were false when they were signed.

And finally, the City claims the Kingens have interfered with the City's business expectancy. What business expectancy? The City owns the property and neither K&S nor the Kingens have done anything to interfere with the City's ownership.

II. SUMMARY OF FACTS[2]

A. City's Delays Caused K&S Significant Financial Harm

During the City's delays in negotiating the Development Agreement, K&S incurred additional costs associated with managing and maintaining the Property.[3] K&S was forced to borrow additional funds to cover those costs.[4] K&S eventually had four loans secured against the Property.[5] The first position loan was from Avatar Income Fund I, LLC ("Avatar") for $6.5 million;[6] the second position loan was from Centrum Financial Services, Inc. ("Centrum") for $4.5 million;[7] the third position loan was from

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[2] The facts are set forth extensively in K&S's prior Motion for Partial Summary Judgment. K&S only incorporates the prior Motion and Memorandum and only re-states those sections relevant to its current Motion.
[3] Kingen Dec., ¶11.
[4] Richard Dec., ¶12, Ex. 10 (Kingen Dep., 114:23-115:8).
[5] Kingen Dec., ¶11.
[6] Kingen Dec., ¶11, Ex. F.
[7] Kingen Dec., ¶11, Ex. G.

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Velocity Capital Partners, LLC, ("Velocity") for $560,000;[8] and the fourth position loan was from Dan Kirby for $560,000.[9] The first three loans—Avatar, Centrum, and Velocity—were personally guaranteed by K&S's principals, Gerald Kingen and Scott Switzer.[10]

K&S originally intended to refinance all of its debt based on the financial strength of the park-and-fly project.[11] However, as a result of the City's decision to eliminate the park-and-fly at the eleventh hour, MasterPark was no longer interested in financing the development project and K&S was unable to refinance its debt.[12]

In 2009, K&S found itself in a difficult financial position and fell behind on its loan payments.[13] Centrum, the second position lender, initiated a foreclosure action against K&S on May 5, 2009, and moved for summary judgment in August 2009.[14] By this time, Centrum had reached agreement with Avatar that it would keep Avatar current. Centrum had taken over the negotiations with K&S as any deal that it reached with K&S would also impact Avatar. K&S had made significant progress towards developing the Property and still intended to benefit from the Property so it negotiated a forbearance agreement with Centrum, which included Avatar (the "Forbearance Agreement").[15] Accordingly, Centrum struck its summary judgment motion on October 16, 2009,[16] and K&S made three monthly payments of $38,000 each in furtherance of the Forbearance Agreement.[17] K&S was also in the process of working out similar

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[8] Kingen Dec., ¶11, Ex. H. Velocity alleged that it made an additional loan to K&S for another $560,000 but it was not secured against the Property.
[9] Kingen Dec., ¶11.
[10] Kingen Dec., ¶11. Mr. Kingen is currently the only member and manager of K&S; Mr. Switzer is no longer involved.
[11] Kingen Dec., ¶12.
[12] Kingen Dec., ¶12
[13] Richard Dec., ¶12, Ex. 10 (Kingen Dep., 23:23-24:1), Kingen Dec., ¶12.
[14] Kingen Dec., ¶13.
[15] Kingen Dec., ¶13, Ex. I.
[16] Richard Dec., ¶13, Ex. 11.
[17] Kingen Dec., ¶13, Ex. J.

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Vancouver, WA 98666
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arrangements with its other lenders. None of the other lenders had initiated any type of foreclosure as they were working with K&S.

B. <u>The Deed-in-Lieu of Foreclosure Transaction</u>

1. After learning that K&S was in foreclosure, the City decided to buy the notes from K&S's lenders to force the transfer of the Property.

Unbeknownst to K&S, the City engaged commercial broker Arvin VanderVeen from Colliers International WA, LLC ("Colliers") in early to mid-2009 to find a way to anonymously acquire K&S's Property.[18] The City and Colliers saw the Centrum foreclosure action and K&S's vulnerability as a way for the City to obtain K&S's Property for a significantly reduced value.[19] Jeffrey Robinson, the City's Economic Development Manager, and Todd Cutts, who was then the Assistant City Manager, decided they wanted to find a way to acquire the Property for less than $12 million.[20] Colliers and the City decided that, rather than approach K&S on the open market or use the City's traditional condemnation powers to acquire the Property for fair market value, the City would negotiate deals directly with K&S's lenders to acquire K&S's debt.[21] The City could then use those agreements as leverage to anonymously put pressure on K&S by threatening foreclosure and deficiency judgments to convince K&S to transfer the Property via deed in lieu of foreclosure.[22] This was an unprecedented plan of attack.[23] To keep the City's interest and actions a secret, the City acted as a "phantom buyer" and refused to disclose its involvement to K&S.[24]

In order to put the plan into action, Colliers and the City engaged commercial

[18] Richard Dec., ¶18, Ex. 16 (Deposition of Arvin VanderVeen, 58:14-25).
[19] Richard Dec., ¶37, Ex. 35 (Special Meeting Transcript, 7:20-22).
[20] Richard Dec., ¶16, Ex. 14.
[21] Richard Dec., ¶37, Ex. 35 (Special Meeting Transcript, 8:3-10).
[22] Kingen Dec., ¶¶16-17.
[23] Richard Dec., ¶18, Ex. 16 (Deposition of Arvin VanderVeen, 53:12-15).
[24] Richard Dec., ¶17, Ex. 15.

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loan broker Thomas R. Hazelrigg, III, now serving a sentence of 4.5 years in federal prison for tax evasion—who Colliers described as the "king pin between all of these lending entities"[25]—to "use his mussel [sic]" to convince K&S's lenders to sell their notes and release their interests in the Property. [26] By November 2009, Colliers and the City had successfully reached agreements with all four of K&S's lenders.[27] On November 24, 2009, VanderVeen, as a nominee for an undisclosed principal, executed loan purchase agreements with Avatar for $7.15 million and Centrum for $4 million (the "Avatar Loan Purchase Agreement"[28] and the "Centrum Loan Purchase Agreement"[29] respectively), and agreed to pay $100,000 to Velocity and $100,000 to Kirby to release their deeds of trust.[30] The City refused to purchase the Velocity and Kirby loans.[31]

2. The City and Colliers used improper threats and misrepresentations to force K&S to relinquish the Property for a reduced value.

With the loan purchase agreements in place with the lenders, the City needed K&S to agree to transfer the Property to the phantom buyer via a deed-in-lieu of foreclosure. The City used Colliers to put enormous pressure on K&S. First, they attempted to exert pressure on K&S through K&S's lenders. For example, on December 2, 2009, Robinson directed VanderVeen to tell "Centrum to put the pedal to the metal and tell [K&S] to sign the doc today or there is a high probability the 'buyer' will walk and they can meet in court!"[32]

K&S did not want to transfer the Property as it believed the Property "had great

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[25] Richard Dec., ¶19, Ex. 17.
[26] Richard Dec., ¶17, Ex. 15.
[27] Richard Dec., ¶¶19-21, Exs. 17-19.
[28] Richard Dec., ¶20, Ex. 18.
[29] Richard Dec., ¶21, Ex. 19.
[30] Richard Dec., ¶22, Ex. 20.
[31] Richard Dec., ¶25, Ex. 23.
[32] Richard Dec., ¶23, Ex. 21.

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value…value far greater than what this entity, who we had know [sic] idea who it was, was proposing to pay for our property"[33], was negotiating DA amendments with the City[34], and was working with consultants to finalize the development plans.[35] K&S believed it had found a workable solution to profitably develop the Property, and it had already worked out loan extensions with its lenders. Additionally, the phantom buyer was refusing to assume the Velocity debt as part of the proposed transaction and K&S was not interested in a deal that did not at the very least extinguish all of the debt and guarantees.[36]

Given K&S's unwillingness to transfer the Property, VanderVeen initiated a new round of threats that included direct intimidation from the anonymous buyer. On December 8, 2009, VanderVeen wrote to K&S:

> Talked to my guy and he was ready to kill the entire deal until we talked awhile, he is going to think about this overnight. He may just buy the first and second, go after the personal guarantees which we are told at full tilt could be up to $12 million and $10 million not counting Velocity, get the judgments and then foreclose himself out on the second and take the property also. A lot of hassle but very do able and would be very costly to Gerry [Kingen]. I think you would be wise to rethink your Velocity request. Will let you know in the morning.[37]

Presumably, this threat was cooked up with the assistance of the now convicted felon, Hazelrigg. Not only did the City and Colliers continue to mislead K&S and hide the City's involvement by referring to the buyer as "my guy" and "he," but now Colliers was threatening K&S with direct action from this unknown person and taking aim at Mr. Kingen personally.[38] The possibility that an anonymous "guy" that K&S and Mr.

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[33] Richard Dec., ¶12, Ex. 10 (Kingen Dep., 38:9-38:11).
[34] Kingen Dec., ¶14.
[35] Kingen Dec., ¶15.
[36] Richard Dec., ¶25, Ex. 23.
[37] Richard Dec., ¶26, Ex. 24 (emphasis added).
[38] Richard Dec., ¶26, Ex. 24 (emphasis added).

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Kingen knew nothing about, who was going to great lengths to protect his identity, and was going to buy the notes and come after K&S and its principals personally was a daunting and intimidating prospect.[39] Moreover, K&S's Forbearance Agreement with Centrum included a clause which provided that the Forbearance Agreement would terminate if Centrum were to sell the loan.[40] If Colliers' secret principal were to buy the Centrum loan, K&S would lose the protection of the Forbearance Agreement and be subject to foreclosure and a potential deficiency judgment.[41] The City knew it lacked the ability to buy the notes and foreclose the loans, yet it had Colliers represent otherwise to K&S.

Third, the City and Colliers came up with yet another means to improperly pressure K&S. The City and Colliers used Hazelrigg to get Avatar[42]—the first position lender—to send a letter to K&S stating that the balance of the Avatar loan was $10,181,970.25 and that Avatar would revoke its $7.15 million payoff amount if K&S did not agree to transfer the Property to the anonymous entity by December 14, 2009.[43] Both the City and Colliers knew Avatar's representations were false because the Avatar Loan Purchase Agreement specifically stated that the Avatar loan was only $7,434,837.30 and Avatar had no intention of revoking the payoff amount.[44] As stated by VanderVeen:

> [Hazelrigg] had his son issue a letter from Avatar that said the debt on the first is about $10,500,000 (I will send it to you) and that he understands they are dragging their feet and if the DIL isn't executed and in escrow by the 14th he is pulling his payoff of $7,150,000 off of the table. **Now we know better but they don't as it really got their**

[39] Kingen Dec., ¶¶16-19.
[40] Kingen Dec., ¶13, Ex. I (Forbearance Agreement § 10).
[41] Kingen Dec., ¶13, Ex. I (Forbearance Agreement § 10).
[42] Avatar is run by Hazelrigg's son, Thomas R. Hazelrigg, IV.
[43] Richard Dec., ¶27, Ex. 25.
[44] Richard Dec., ¶20, Ex. 18.

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attention.[45]

Fourth, the City was in a unique position because it was able to use its ongoing negotiations with K&S regarding the Development Agreement to increase the pressure on K&S. K&S wanted to develop mid-rise towers in order to take advantage of the needs of the housing market and cheaper construction costs. K&S's architect had an initial meeting with the City in November 2009 to discuss the idea, which was favorably received by the City. K&S then scheduled a meeting with the City for December 20, 2009 to discuss modifying the DA.[46] However, the City refused to meet with K&S and, on December 18, 2009, the City cancelled the meeting.[47] K&S would later learn that Robinson directed the City attorney to cancel the meeting and to wait until after the New Year, because by "then hopefully it will be moot," as the City intended to acquire the Property on or before December 31, 2009.[48]

The City's unwillingness to meet to discuss the Development Agreement put enormous pressure on K&S to accept the deal being forced upon it by Colliers' secret principal.[49] K&S was faced with the possibility that the City would engage in the same dilatory tactics it used throughout the four year negotiation of the Development Agreement, unreasonably refuse to amend the Starbucks clause before February 28, 2010, and take the position that the Development Agreement was terminated.[50] At the time, K&S was unaware that all of the sources of pressure were being applied by the

[45] Richard Dec., ¶28, Ex. 26.
[46] Kingen Dec., ¶15.
[47] Kingen Dec., ¶15.
[48] Richard Dec., ¶29, Ex. 27.
[49] Kingen Dec., ¶15.
[50] Kingen Dec., ¶15.

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805 Broadway Street, Suite 1000
PO Box 1086
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T: 360-696-3312 • F: 360-696-2122

same entity.[51]

3. The City was successful in forcing the transfer of the Property for reduced value.

All of the pressure and threats eventually became too much for K&S.[52] On December 24, 2009, still unaware that the note buyer was the City,[53] K&S executed the DIL Agreement with Centrum, in which K&S promised to provide a deed-in-lieu of foreclosure to the anonymous buyer that purchased Centrum's loan.[54] K&S had no other choice—the City was refusing to meet to finalize the amendment to the Development Agreement and the phantom buyer was threatening to buy K&S's debt, nullify the Forbearance Agreement, foreclose, and exercise the personal guarantees of K&S's members.[55]

On the evening of December 29, 2009—after K&S had executed the DIL Agreement—the City finally revealed itself to K&S as the purchaser of the notes and acquirer of the Property.[56] When K&S learned the City was the beneficiary of the DIL Agreement, it was in a state of shock and disbelief.[57] Given the City's conduct, K&S believed the City to be capable of anything and did what it could to preserve its rights and potential claims for relief against the City.[58]

4. City Officials used the low acquisition cost as the main selling point

The City Council did not publicly approve the acquisition of the Property until after the Loan Purchase Agreements and the DIL Agreement were fully executed.[59] The decision to acquire K&S's Property in the manner in which it did had already been

[51] Kingen Dec., ¶16-17.
[52] Kingen Dec., ¶17.
[53] Kingen Dec., ¶17.
[54] Richard Dec., ¶31, Ex. 29.
[55] Kingen Dec., ¶¶15-17.
[56] Richard Dec., ¶32, Ex. 30.
[57] Kingen Dec., ¶18.
[58] Kingen Dec., ¶¶18-19.
[59] Richard Dec., ¶3, Ex. 1.

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805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
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made by the City officials and approved by the Council, in secret, in or before September 2009. The December 29, 2009 public meeting was merely to formalize what had already been approved and acted upon in private.[60] During the meeting, the City officials provided a summary of some of what they had been doing for the past few months, highlighted the economics and great value the City would be receiving, and asked the Council members to provide final approval:

> It's currently listed by a brokerage for $20,804,000, which equates to $112.43 a square foot. The King County assessed valuation of all three parcels is just a bit over $19,189,000, almost nineteen million one ninety.[61]
>
> In June of 2009, the property was appraised at $16,500,000 by CB Richard Ellis Valuation & Advisory Services. The acquisition price for the notes that we are acquiring…is $11,350,000, which equates to $61.40 a square foot. And the anticipated all-in acquisition costs, which includes due diligence, outside legal counsel, our commission, is $12,400,000, or about $69 a square foot. [62]
>
> Negotiations with the current lenders were undertaken through the City's commercial broker on behalf of us as a City, who were identified as an undisclosed buyer. Discounted note acquisition amounts were agreed upon, and the documents to effect the transfer of the property were drafted and distributed for signature. [63]

The City officials further gloated about the value of the property to the Council, stating:

> So we feel strongly that, at such a time as the market is ripe for development, that this property will certainly sell for what we think the appraised value indicates, which is 16.5 million, and with the

[60] A copy of the full transcript from that special meeting is attached as Exhibit 35 to the Declaration of Michael Richard.
[61] Richard Dec., ¶37, Ex. 35 (Special Meeting Transcript, 5:22-25, 6:1-2).
[62] Richard Dec., ¶37, Ex. 35 (Special Meeting Transcript, 6:3-11).
[63] Richard Dec., ¶37, Ex. 35 (Special Meeting Transcript, 8:11-17).

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> improvements that we're planning to make as a City, probably closer to what the assessed value is, which is almost 20 million.[64]

The transaction closed on December 31, 2009.[65] The City took assignment of the Avatar and Centrum notes,[66] and then exchanged those notes for the Property via a DIL.[67] The City spent $12,283,978.29 to acquire a Property it acknowledged was worth at least $16.5 million.[68] Indeed, included within the acquisition price was the purchase of a policy of title insurance in the amount of $16.5 million.[69]

The City chose an unprecedented path to buy debt to acquire property in order to avoid paying fair market value. K&S initiated its action to recover just compensation and other associated damages and fees. The City sued the Kingens alleging the following claims: (1) negligent or intentional misrepresentation; (2) civil conspiracy; (3) tortious interference with business expectancy; and, (4) unjust enrichment. K&S moves for summary judgment on these claims.

III. ARGUMENT

Summary judgment is appropriate when there are no genuine issues of fact and the moving party is entitled to a judgment as a matter of law.[70] The moving party is entitled to summary judgment if the pleadings and affidavits on file show there is no genuine issue of material fact.[71] The purpose of a motion for summary judgment is to examine the sufficiency of the evidence supporting the plaintiff's formal allegations so that unnecessary trials may be avoided where no genuine issue of material fact exists.[72]

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[64] Richard Dec., ¶37, Ex. 35 (Special Meeting Transcript, 31:23-25, 32:1-4).
[65] Richard Dec., ¶¶4-7, Exs. 2-5.
[66] Richard Dec. ¶¶4-5, Ex. 2, 3.
[67] Richard Dec. ¶6, Ex. 4.
[68] Richard Dec. ¶7, Ex. 5.
[69] Richard Dec. ¶8, Ex. 6.
[70] CR 56(c); *Brown v. Snohomish County Physicians Corp*., 120 Wn.2d 747, 752, 845 P.2d 334 (1993); and *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990)
[71] *Suarez v. Newquist*, 70 Wn. App. 827, 831, 855 P.2d 1200 (1993)
[72] *Island Air v. La Bar*, 18 Wn. App. 129, 137, 566 P.2d 972 (1977)

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805 Broadway Street, Suite 1000
PO Box 1086
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The moving party bears the initial burden of showing the absence of an issue of material fact.[73] The non-moving party then has the burden of submitting competent evidence showing specific disputes as to material facts.[74] A nonmoving party may not rely on speculation or argumentative assertions where unresolved factual issues remain, nor may it have its affidavits considered at face value.[75] Rather, the nonmoving party must set forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists.[76]

A. City's Claim for Civil Conspiracy Fails as a Matter of Law

The City alleges the Kingens, Switzers, and Krakows, acting in concert, undertook actions or omissions intended to accomplish an illegal end by legal means, a legal end by illegal means, or an illegal end by illegal means, causing the City damage. The City cannot put forth any admissible evidence to prove its claim. "A plaintiff in a civil conspiracy has the burden of proving the case by a preponderance of the evidence, and must establish the existence of the conspiracy by clear, cogent and convincing evidence."[77] "An action for civil conspiracy lies when there is an agreement by two or more persons to accomplish some purpose, not in itself unlawful, by unlawful means."[78]

The City must prove the Kingens, Switzers, and Krakows "entered into an agreement to accomplish the object of the conspiracy."[79] The City's evidence must prove "that the circumstances [of the conspiracy] must be inconsistent with a lawful or honest purpose and reasonably consistent *only* with the existence of the conspiracy."[80]

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[73] *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975)
[74] *Ames v. City of Fircrest*, 71 Wn. App. 284, 290, 857 P.2d 1083 (1993)
[75] *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986)
[76] *Dwinnell's Cent. Neon v. Cosmopolitan Chinook Hotel*, 21 Wn. App. 929, 936, 587 P.2d 191 (1978)
[77] *Sterling v. Thorpe*, 82 Wn. App. 446, 450, 918 P.2d 531 (1996).
[78] *Id*. at 451.
[79] *Corbit v. J.I. Case Co.*, 70 Wn.2d 522, 528, 424 P.2d 290 (1967).
[80] *Id*.

LANDERHOLM
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

The City's Amended Complaint is short on facts alleging the existence of an agreement to accomplish the as yet undefined conspiracy. The City alleges K&S, Kingen, Switzer, and Krakow acted in concert to cause the City to spend over $12 million in public money to deliver benefits to them. The City also alleges K&S, Kingen, Switzer, and Krakow acted in concert to hide material facts, including that they were engaging in the DIL under duress, and that they did not intend to be bound by all of the documents they signed.

The City's claim that Kingen, Switzer, and Krakow acted in concert to cause the City to spend over $12 million in public money to purchase their Property defies logic. First, neither Kingen, Switzer, nor Krakow *knew* the City was the buyer until late December 2009. There was no agreement to cause the City to spend this money—the City was acting on its own volition without any input from K&S, Kingens, Switzer, and Krakow. Second, as the City publicly stated, the Property was worth substantially more than $12 million when the City acquired it—upwards of $19 million dollars according to the City. The City has not been financially harmed. Finally, the City was applying the pressure to K&S to close—including having false threats made against it (overstating the loan balance and threatening to buy the notes, foreclose, and pursue Kingen for the deficiency). Kingen, Switzer, and Krakow were under the duress applied by the City and Colliers.

K&S cannot conspire with its own officers while the officers are acting in their official capacity. The rational is that since the acts of a corporate agent are the acts of the corporation, a conspiracy among the agents of the corporations, or among an agent of the corporation, is in effect a conspiracy with only one actor—the corporation. Further, Kingens, Switzer, and Krakow are protected under the Intracorporate Conspiracy Doctrine as the interests of the company and the agents are clearly aligned.

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805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

Thus, the City's claim for civil conspiracy against Kingens, Switzer, and Krakow is entirely invalid as there was no conspiracy to begin with, and, also, individuals who are members and managers of a LLC are shielded from any lability for civil conspiracy as their conduct does not fall within the "scope of employment" or "scope of agency" exception. Kingens, Switzer, and Krakow have no personal agendas or reason to pursue illegal conduct, but they act as agents of the company in pursuit of bettering the business. The claim for civil conspiracy against Kingens, Switzer, and Krakow is legally unfounded and should be dismissed as a matter of law.

The City and Colliers forced K&S to sign the DIL Agreements in order to avoid personal exposure on the loans, a fact that everyone now knows was false. But, in order to prevail on its civil conspiracy claim, the City must identify an *agreement* that Kingen, Switzer, and Krakow entered into. The City cannot establish such agreement by clear, convincing, and cogent evidence because one does not exist. In reality, the City knows the only potential claims are against K&S, the property owner, and not the individuals. In order to circumvent the privity of contract and standing issue, the City has concocted a theory of civil conspiracy.

B. The City's Claim for Intentional or Negligent Misrepresentation Fails as a Matter of Law.

K&S executed the DIL as the borrower and grantor conveying the Property to the City. K&S, as Property owner, was the only entity that made, or failed to make, representations regarding the Property. The City seeks to unartfully and improperly pierce the corporate veil and allege claims that it may have, but has not asserted, against K&S against the members of K&S in an effort to put pressure on them similar to what it did in 2009. The City's claims are without merit.

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805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

The nine elements of intentional misrepresentation (fraud) are: (1) representation of an existing fact, (2) materiality, (3) falsity, (4) the speaker's knowledge of its falsity, (5) intent of the speaker that it should be acted upon by the plaintiff, (6) plaintiff's ignorance of its falsity, (7) plaintiff's reliance on the truth of the representation, (8) plaintiff's right to rely upon the representation, and, (9) damages suffered by the plaintiff.[81] All nine elements of fraud must be established by "clear, cogent and convincing evidence."[82]

The City cannot prove the Kingens misrepresented existing facts or that they knew those facts, if made, were false. Further, the City has no right to rely upon the representations if made, and that the City suffered damage. The City contracted with K&S, any representations made were made by K&S, not the Kingens. The Kingens did not make any statements to the City, thus this claim fails.

Similarly, the claim for negligent misrepresentation fails as a matter of law. In order to prove a claim for negligent misrepresentation, the City must prove the following by clear, cogent, and convincing evidence: (1) a false statement; (2) made to induce a business transaction; (3) upon which the other party justifiably relies.[83] The proof of these elements must be clear, cogent, and convincing.[84]

The City must prove the Kingens supplied false information made to induce the City to enter a business transaction with K&S, and the City justifiably relied upon that information. At the outset, the City must prove false statements were made. What false statements is the City relying upon?

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[81] *W. Coast, Inc. v. Snohomish County*, 112 Wn. App. 200, 206, 48 P.3d 997 (2002).
[82] *Stieneke v. Russi*, 145 Wn. App. 544, 10 P.3d 60 (2006).
[83] *Ross v. Ticor Title Ins. Co*., 135 Wn. App. 182, 143 P.3d 885 (2006), *aff'd in part, disapproved in part on other grounds*, 162 Wn.2d 493, 172 P.3d 701 (2007).
[84] *Van Dinter v. Orr*, 157 Wn.2d 329, 138 P.3d 608 (2006).

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PO Box 1086
Vancouver, WA 98666
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The next key point is that K&S, and not the Kingens, were involved in the business transaction. The City's Amended Complaint alleges false information was provided about the Property, and the City relied upon that information. But the City must look to K&S, not the Kingens, as the statements, if any, came from K&S and not the Kingens. In other words, the City seeks to pierce the corporate veil, without a lawful basis, to hold the Kingens liable for K&S's alleged wrongful statements. Finally, the City has not shown that its claims would survive the economic loss rule as it bars claims for intentional misrepresentation and negligent misrepresentation if there is a contract between the parties.

"The economic loss rule serves to limit parties to their contract remedies when a loss potentially implicates both tort and contract relief. The rule prohibits plaintiff from recovering in tort economic losses to which their entitlement flows only from a contract because tort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement."[85]

The City has included a claim for breach of contract, apparently alleging the Kingens were a party to a contract. The City cannot have it both ways: the Kingens were either a party to a contract that was breached and these claims are barred, or there was no contract and the breach of contract claim fails as a matter of law. Assuming *arguendo* that the City can survive this initial burden, it cannot satisfy the elements of intentional or negligent misrepresentation and these claims should be dismissed.

C. The City's Claim for Tortious Interference with a Business Expectancy Fails as a Matter of Law.

The City's third cause of action alleges Kingen, Switzer, and Krakow intentionally interfered with the City's business expectation by improper means and for

[85] *Alejandre v. Bull*, 159 Wn.2d 674, 681, 153 P.3d 864 (2007).

LANDERHOLM
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

an improper purpose. The City does not allege any facts in its Amended Complaint to support this claim.

To prove tortious interference with a business expectancy, a plaintiff must show (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that the defendant interfered for an improper purpose or used improper means; and, (5) resulting damages.[86] "Interference is for an improper purpose if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession."[87]

The City cannot satisfy any of the elements. For example, the City omits reference of any valid contractual relationship or business expectancy in its Amended Complaint. As such, Kingen, Switzer, and Krakow could not interfere with a non-existent contract or expectancy. Moreover, the Kingens were not part of the DIL transaction. The Property was K&S, and it was K&S that conveyed the Property to the City. The Kingens did not interfere with a contractual relationship or business expectancy with the City. The City chose not to sue K&S. It instead wants to assert any claims it may have against K&S (there are none as it didn't allege any counterclaims) directly against the Kingens through an ostensible and unwarranted piercing of the corporate veil in a direct attempt to continue its threats against the Kingens personally.

Further, the City does not allege that it had suffered any damages such as a third party breaching an agreement or lost income. The City appears to believe that K&S is seeking return of the Property, and then it would suffer damages. This is not the case,

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[86] *Newton Ins. Agency & Brokerage v. Caledonian Ins. Group*, 114 Wn. App. 151, 157-58, 52 P.3d 30 (2002).
[87] *Id*. at 158.

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805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

and even if true, the Kingens are only members of K&S and are not liable directly to the City. The City must do more than allege it lost "business benefits." Accordingly, this claim fails as a matter of law.

D. City's Unjust Enrichment Claim Fails as a Matter of Law

Three elements must be satisfied to sustain a claim based on unjust enrichment: (1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value.[88]

The City argues it conferred a benefit on Kingen and Switzer by relieving them of the obligations on their personal guarantees (for the Avatar and Centrum loans only), and this relief far exceeded the $12 million paid by the City. As stated above, this is not true as the City concedes the Property was worth more than $19 million in 2009. Thus, K&S was deprived of equity in the Property. The Kingens did not have a benefit conferred upon them when the City took this equity from K&S. Moreover, K&S is not seeking to undo the DIL and get the Property back. Thus, there is no inequitable retention of benefits by the Kingens.

The City alleges the Kingens now owe it money to repay the unjust enrichment. The City is wrong. The City stated that it obtained the Property for significantly less than its value—close to a $7 million savings if it had been required to pay the assessed value ($19 million). In reality, the City did not confer any benefit on Kingen or Switzer as K&S was left without the Property and any ability to develop the Property, plus they also had the remaining liabilities the City refused to include in the DIL Transaction.

[88] *Young v. Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).

LANDERHOLM
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

IV. CONCLUSION

The Court should dismiss these claims because they are based upon a misunderstanding of K&S's lawsuit against the City. K&S is not seeking to rescind the DIL. K&S's damages are related to the City's misconduct of stalling K&S, improperly rejecting its park-n-fly, delaying and frustrating K&S's development of the Property, and failing to disclose its interest in acquiring the Property while it was legally and contractually obligated to work with K&S. The City's lawsuit is based upon retaliation against the members of K&S in an unlawful and unwarranted attempt to pierce the corporate veil. Because the City cannot prove the required elements of its claims, the claims should be dismissed with prejudice.

DATED this 14th day of August, 2015.

LANDERHOLM, P.S.

/s/ Phillip J. Haberthur
BRADLEY W. ANDERSEN, WSBA #20640
PHILLIP J. HABERTHUR, WSBA #38038
Of Attorneys for Plaintiff

LANDERHOLM
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

1. My name is HEATHER A. DUMONT. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Washington, and am not a party of this action.

2. On the 14th day of August, 2015, a true and correct copy of the foregoing **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** was delivered via email and first class United States Mail, postage prepaid, to the following:

Michael B. Tierney
Tierney & Blakney
2955 80th Avenue SE, Suite 102
Mercer Island, WA 98040
E-mail: tierney@tierneylaw.com
ellen@tierneylaw.com

Paul R. Taylor
Joshua B. Selig
Byrnes Keller Cromwell, LLP
1000 2nd Avenue, Suite 3800
Seattle, WA 98104
E-mail: ptaylor@byrneskeller.com
jselig@byrneskeller.com
ccoleman@byrneskeller.com
lyoshinaga@byrneskeller.com

Mark S. Johnsen
Mary E. Mirante Bartolo
City of SeaTac Legal Depart.
4800 S. 188th Street
SeaTac, WA 98188
E-mail: mjohnsen@ci.seatac.wa.us
mmbartolo@ci.seatac.wa.us

Richard Stephens
Stephens & Klinge
10900 NE 8th St., Ste. 1325
Bellevue, WA 98004-4405
E-mail: stephens@sklegal.pro
lhall@gsklegal.pro
jills@sklegal.pro

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED: August 14, 2015

At: Vancouver, Washington

/s/ Heather Dumont
HEATHER A. DUMONT

LANDERHOLM
805 Broadway Street, Suite 1000
PO Box 1086
Vancouver, WA 98666
T: 360-696-3312 • F: 360-696-2122