

The Honorable John C. Coughenour

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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ADAMS FINANCIAL PARTNERS, L.P.,  
a Washington limited partnership, and  
ADAMS FINANCIAL CONCEPTS, LLC,  
a Washington limited liability company,

Plaintiffs,

v.

PATKE & ASSOCIATES LTD., an Illinois  
company,

Defendant.

Case No. 2:16-cv-00392-JCC

ADAMS’ OPPOSITION TO PATKE’S  
MOTION FOR SUMMARY JUDGMENT

**NOTED ON MOTION CALENDAR:  
APRIL 28, 2017**

**ORAL ARGUMENT REQUESTED**

**I. OVERVIEW OF OPPOSITION**

In December 2009, Defendant Patke and Associates, Ltd. induced the plaintiffs to use Patke’s services by promising – in the parties’ Initial Contract that Patke conveniently omits from its motion – that Patke’s “extensive experience in the fund industry as well as our competitive fee structure makes us the ideal choice for funds like yours.” Adams Decl., Ex. 11. Patke breached its contracts with Adams Financial Partners, LP (“AFP” or “Hedge Fund”), negligently misrepresented its abilities and intentions, and breached its duties to both AFP and Adams Financial Concepts, LLC (“AFC”), by repeatedly promising but then failing to deliver simple audit opinions on the financial affairs of the Hedge Fund. AFC was the general partner of the Hedge

1 Fund, an investor in the Fund, and also separately managed other individual accounts for the  
 2 Hedge Fund's other investors. Patke's failure, for over four years, to deliver those promised audits  
 3 caused both the Hedge Fund and AFC (collectively "Adams") to lose a principal investor and  
 4 client, destroyed the ability of the Hedge Fund to recruit new investors and ultimately caused  
 5 Washington State's Department of Financial Institutions (DFI) to threaten AFC with loss of its  
 6 license. To mitigate the damage done by Patke's repeated failures, Adams agreed with DFI to  
 7 wind down the Hedge Fund so that AFC at least could continue to operate, which agreement is  
 8 reflected in the 2014 Consent Order.

9 Patke's motion spends most of its time smearing Adams with contested findings  
 10 from that Consent Order, while ignoring the actual facts regarding Patke's own derelictions.  
 11 Patke's failure to inform the Court about the terms of the parties' Initial Contract is reason enough  
 12 to deny the motion. But as explained further below, there are other significant facts in dispute, and  
 13 Adams believes that further discovery will present even more reasons to deny the motion (or even  
 14 grant summary judgment in plaintiffs' favor on many issues). To the extent needed, Adams  
 15 requests relief pursuant to Fed. R. Civ. P. 56(d). Esler Decl. ¶¶ 33-37. However, there are enough  
 16 facts in legitimate dispute on the current incomplete record to deny the motion entirely, which is  
 17 what the Court should do now.

## 18 **II. FACTS**

### 19 **A. AFC FORMED A HEDGE FUND IN 2005.**

20 A. Michael Adams ("Mike Adams") is a Washington Registered Investment  
 21 Advisor, the founder of the two named plaintiffs (AFC and AFP), and has been in the financial  
 22 services industry for more than a quarter of a century. Adams Decl., ¶ 2. In late 2005, AFC put  
 23 together a hedge fund (plaintiff AFP) to provide steady returns with a lesser risk of volatility for  
 24 AFC's larger customers, which fund commenced operations on January 1, 2006. Adams Decl.,  
 25 ¶ 2. AFC is the general partner that manages AFP. Four of AFC's clients ultimately invested a  
 26 total of about \$2 million in AFP, and became the limited partners in the Hedge Fund. AFC

1 charged AFP both a management fee (2%) and a performance fee (20%) for managing the Hedge  
 2 Fund. Adams Decl., ¶ 3. Thus, any harm to the Hedge Fund would also harm AFC by reducing or  
 3 eliminating its performance and management fees. AFC was also a partner in the Hedge Fund and  
 4 had its own equity stake, so would suffer its own losses if the Hedge Fund was damaged. Adams  
 5 Decl., ¶ 4.

6 **B. THE HEDGE FUND RECEIVED CLEAN AUDIT OPINIONS FROM ITS**  
 7 **INCEPTION.**

8 AFP was required to have its financial statements audited and produce the results of  
 9 that audit to its limited partners.<sup>1</sup> AFP also generally issued unaudited quarterly reports to its  
 10 investors to let them know how the Fund was doing. *E.g.*, Adams Decl., Exs. 1, 2.

11 Hedge fund investors are especially anxious to receive the audit opinion, as the  
 12 audit opinion will confirm for the investors that the financials are true and accurate. Adams Decl.,  
 13 ¶ 6. As explained by defendant Patke itself on its webpage:

14 Due diligence procedures should be a primary concern any time you make an  
 15 investment. The importance of these procedures are magnified when looking at  
 16 private investment vehicles or any type of alternative investment [i.e., hedge funds].  
 17 As an audit and tax firm specializing in the investment partnership industry, we  
 18 understand the investors need to obtain complete and accurate information upon  
 19 which to base their decisions. More importantly, we understand our role in helping  
 20 them obtain that info. ***When the auditor is hired by the fund manager, they work  
 21 to serve the needs of all the users of the financial statements. This includes both  
 22 existing and prospective investors.***

23 Esler Decl., Ex. 1 (emphasis added). A hedge fund that cannot produce regular audit opinions on  
 24 its financial statements for its investors is a hedge fund that will be forced to close, which Patke  
 25 knew all too well. Adams Decl., ¶ 6.

26 AFP initially hired Moss Adams, LLP to perform the audit for its first full year of  
 operation (i.e., 2006). On June 26, 2008, Moss Adams expressed its opinion:

In our opinion, the financial statements . . . present fairly, in all material respects,  
 the financial position of Adams Financial Partners, L.P. as of December 31, 2006,  
 and the results of its operations, changes in its net assets and its cash flows for the

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<sup>1</sup> *E.g.*, WAC 460-24A-107.

1 year then ended, in conformity with the accounting principles generally accepted in  
2 the United States of America.

3 Adams Decl., Ex. 3. Moss Adams specifically noted that the financial statements “include a loan,  
4 valued at \$200,000, whose value has been calculated by the General Partner [i.e., AFC] in the  
5 absence of readily ascertainable market values.” Adams Decl., Ex. 3. That 2006 Audit also  
6 disclosed, at Note 8, that AFP had “loaned additional funds to entities affiliated with the General  
7 Partner [i.e., AFC].” Adams Decl., Ex. 3, at 11. AFC sent that 2006 Audit to all the Fund’s  
8 investors on November 5, 2008, but expressed to them AFC’s unhappiness with how long it took  
9 Moss Adams to finish that 2006 Audit, and told them that AFC planned to switch auditors. Adams  
10 Decl., Ex. 4.

11 AFP changed auditors and hired Hanlin Moss P.S. to handle its next audit. Hanlin  
12 Moss only took about six months to complete its work, and on July 1, 2009, it also issued the  
13 Hedge Fund a clean audit opinion:

14 In our opinion, the consolidated financial statements referred to above present  
15 fairly, in all material respects, the financial position of Adams Financial Partners,  
16 L.P. as of December 31, 2008 and the results of their operations and their cash  
17 flows for the year then ended, in conformity with accounting principles generally  
18 accepted in the United States of America.

19 Adams Decl., Ex. 5. That audit opinion also disclosed, at Note 4, that the Fund had engaged in  
20 significant related-party transactions. Adams Decl., Ex. 5, at 3. AFP sent that 2008 audit to its  
21 investors on August 31, 2009. Adams Decl., Ex. 6.

22 **C. AFP CHOSE PATKE AS ITS NEW AUDITOR BECAUSE OF PATKE’S  
23 ALLEGED EXPERTISE IN AUDITING HEDGE FUNDS, AND ITS PROMISE TO  
24 DELIVER TIMELY AUDITS.**

25 In October of 2009, the Washington State Department of Financial Institutions  
26 (“DFI”) conducted a routine investment adviser examination of AFC. Adams Decl., Ex. 7. As a  
result of that 2009 examination, DFI required AFC to find an auditor other than Hanlin Moss to  
audit the Hedge Fund’s financial statements. Adams Decl., Ex. 7, at 5.

1 As a result, Mike Adams thereafter did a nationwide search for a new auditor for  
2 the Hedge Fund, and ultimately interviewed six different auditing firms for the job. Adams Decl.,  
3 Ex. ¶ 12. One of those firms was defendant Patke and Associates.

4 1. Patke represented that the 2009 Audit would be completed during 2010.

5 On December 1, 2009, Mike Adams emailed Ron Niemaszyk at Patke to request a  
6 quote for auditing services. Adams Decl., Ex. 8. Mr. Adams explained:

7 Now that I have a decent track record, I do intend to begin to market the fund and  
8 would hope to grow it significantly.

9 Adams Decl., Ex. 8. That initial email also disclosed that the Fund had “direct real estate  
10 investments structured as loans.” Adams Decl., Ex. 8

11 The next day (December 2), Mr. Adams and Mr. Niemaszyk spoke on the phone.  
12 Adams Decl., ¶ 14. Mr. Niemaszyk claimed Patke was a specialist in providing hedge fund audits,  
13 and told Mr. Adams that Patke already provided audit services to over 50 hedge funds such as  
14 AFP. Adams Decl., ¶ 14. Mr. Adams explained more about the structure of the Fund, and recalls  
15 discussing in particular the nature of the notes that the Fund held as investments and why it held  
16 those notes (as a hedge against swings in the securities market). Adams Decl., ¶ 14. Mr. Adams  
17 also emphasized that he was looking for an auditor for the fund for the long term, as he was hoping  
18 to grow the fund by adding new investors. Adams Decl., ¶ 14. Mike Adams was impressed with  
19 Mr. Niemaszyk’s immediate understanding of, and seeming familiarity with, the Hedge Fund’s  
20 investment philosophy and operations, and its need for growth. Adams Decl., ¶ 14. Mr. Adams  
21 asked Mr. Niemaszyk for a quote to prepare the 2009 audit opinion. Adams Decl., ¶ 14,

22 After the phone call, Mr. Niemaszyk requested further documents, including the  
23 previous audits, all of which Mr. Adams immediately sent. Adams Decl., Ex. 9. After reviewing  
24 those documents, Mr. Niemaszyk requested another phone call. Esler Decl., Ex. 2.

25 On Friday, December 4, 2009, Mr. Adams and Mr. Niemaszyk had another phone  
26 call. Mr. Adams specifically discussed with Mr. Niemaszyk whether Patke could complete the

1 2009 audit by the end of April 2010. Adams Decl., ¶ 16. Mr. Niemaszyk told Mr. Adams that  
 2 Patke was entering its busy season, that it would not be possible to complete the initial audit that  
 3 quickly, but that the 2009 audit would certainly be completed by the end of 2010, and that after  
 4 that, Patke should be able to complete any subsequent audit by the end of April for each year.<sup>2</sup>  
 5 Adams Decl., ¶ 16. Having timely completed audits was required, and was also important to allow  
 6 AFC to grow the Hedge Fund by adding investors in the future, a goal that Mr. Adams made clear  
 7 to Patke repeatedly. Adams Decl., ¶ 16.

8 Mr. Niemaszyk said that Patke could do the audit for a fixed fee – \$10,000 total,  
 9 with \$5,000 due up front, and \$5,000 upon completion. Adams Decl., ¶ 17. Mr. Niemaszyk said  
 10 that Patke could also take care of filing the Hedge Fund’s 2009 federal tax returns and provide its  
 11 partners with their Schedule K-1s (which reports to the partners their share of the partnership’s  
 12 income, deductions, and credits for tax purposes). Adams Decl., ¶ 17. Mr. Niemaszyk represented  
 13 that all of those services would be included in the fixed \$10,000 price.<sup>3</sup> Adams Decl., ¶ 17. There  
 14 was never any discussion that Patke might not deliver any audit opinion. Mr. Adams was sold.

15 Later that day, Mr. Niemaszyk sent Mr. Adams a proposed contract. Adams Decl.,  
 16 Ex. 10. On Wednesday, December 9, 2009, Mr. Adams emailed back a signed copy of that  
 17 contract. Adams Decl., Ex. 11 (hereafter the “Initial Contract”).

18 2. The Initial Contract that Patke omits states that Patke will deliver AFP an audit for  
 19 fiscal year 2009.

20 Patke’s motion, and Mr. Niemaszyk’s declaration (Dkt. No. 33), conveniently omit  
 21 any mention of this Initial Contract. But this Initial Contract (along with the discussions leading up  
 22 to it) formed the basis on which Adams hired Patke, and informs all of the communications and  
 23 subsequent agreements. As far as Adams was concerned, this was *the* contract, governed the

24 \_\_\_\_\_  
 25 <sup>2</sup> See WAC 460-24A-107.

26 <sup>3</sup> Patke’s internal documents show that Patke allocated \$8,500 for the audit, and \$1,500 for the tax work. Esler  
 Decl., Ex. 28.

1 relationship going forward, and set forth what Adams expected, and what Patke promised to  
2 deliver:

3 We are pleased to submit this proposal which sets for the services that Patke and  
4 Associates, Ltd. will provide regarding audit and tax services.

5 1. For the period ended December 31, 2009, we will perform an audit of the  
6 financial statements of the fund. Our audit will include inspection of the statements  
of financial condition, statement of income, statement of changes in net assets, and  
a schedule of investments.

7 2. We will prepare the 2009 federal form 1065 as well as the associated K-1's and  
8 any necessary state tax returns for the fund.

9 **The fees for these services will be billed at our standard rates and will not  
exceed \$10,000.**

10 Adams Decl., Ex. 11 (emphasis in original). Patke further promised that Patke's "extensive  
11 experience in the fund industry as well as our competitive fee structure makes us the ideal choice  
12 for funds like yours." Adams Decl., Ex. 11.

13 Upon receiving this signed Initial Contract, Patke immediately set to work by  
14 assigning James Lensing as audit manager, and Courtney Viamille as tax manager. They requested  
15 a further phone call with Mike Adams to "kick off our audit and tax work." Adams Decl., Ex. 12 .  
16 Mike Adams had a further phone call with those Patke employees on about Friday, December 18,  
17 2009 to do just that. Adams Decl., ¶ 19.

18 3. The subsequent 2009 Engagement Letter must be interpreted in light of the Initial  
19 Contract, and the parties' discussions.

20 On December 22, 2009, James Lensing sent Mike Adams an email that contained a  
21 number of detailed forms for Adams to fill out regarding the Hedge Fund. Adams Decl., Ex. 13.  
22 Included among the many documents Lensing asked Adams to fill out and return was the 2009  
23 Engagement Letter (Niemaszyk Decl., Ex. A, Dkt. No. 32-1). As explained above, Adams had  
24 already signed a contract with Patke three weeks before, and considered the subsequent  
25 December 21, 2009 Engagement Letter to be just one more form that Patke required.  
26

1 Mr. Adams signed the 2009 Engagement Letter on December 29, 2009 as  
2 requested. In it, Patke made a number of promises, including:

- 3 • “We will audit the statement of assets and liabilities of Adams Financial  
4 Partners, L.P. . . .”
- 5 • “We will also prepare the company’s federal and state income tax returns for  
6 the year ended December 31, 2009.”
- 7 • “Our audit will be conducted in accordance with auditing standards generally  
8 accepted in the United States of America . . . .”
- 9 • “If significant additional time is required, we will keep you informed of any  
10 problems we encounter . . . .”

11 Niemaszyk Decl., Ex. A. Patke breached those promises.

12 In its Motion, Patke isolates one provision of the 2009 Engagement Letter (“ . . . we  
13 may decline to express an opinion or issue a report . . . .”) and argues it allowed Patke to charge  
14 AFP and deliver nothing.<sup>4</sup> Motion, at 10-13. But in the context of the parties’ discussions, the  
15 Initial Contract, the 2009 Engagement Letter as a whole, Patke’s professional duties and the duty  
16 of good faith and fair dealing, it allows no such thing. Patke’s form Engagement Letter  
17 undermines that alleged discretion to deliver nothing by expressly stating Patke’s engagement will  
18 continue until a report issues: “Our audit engagement ends *on delivery of our audit report*, our tax  
19 engagement ends on delivery of the tax return.” 2009 Engagement Letter, at 4 (emphasis added).

20 Pursuant to the parties’ 2009 Engagement Letter, the only basis upon which Patke  
21 could fail to deliver was non-payment, which was never an issue here: “If we elect to terminate  
22 our services for nonpayment, our engagement will be deemed to have been completed upon written  
23 notice of termination, even if we have not completed our report.” 2009 Engagement Letter, at 4.  
24 No other basis for termination was expressed in that document. As explained by Adams’ expert  
25 Paul Regan, Patke breached auditing standards repeatedly to Adams’ detriment.

26 <sup>4</sup> *But see In Re American Continental Corporation*, 794 F.Supp. 1424, 1443 (D. Ariz. 1992) (auditor cannot charge for an audit and then refuse to issue the audit opinion to protect itself).



1           4.     Adams performed, Patke dithered, made excuses and breached.

2           AFP paid Patke its initial \$5,000 payment by the end of 2009. Adams Decl., ¶ 22.  
3 By December 31, 2009, Patke had evidently created a “Planning Memorandum” that outlined  
4 generally the steps to complete the 2009 audit. Esler Decl., Ex. 3. That memo specifically  
5 identified the related-party real estate note investments as a risk, and recognized that Patke had to  
6 test those investments. Esler Decl., Ex. 3.

7           As Patke’s own records confirm, Adams informed Patke by January 4, 2010 that  
8 Adams had received a deficiency letter from the DFI that required a response later that month, and  
9 told Patke about the related-party transactions. Esler Decl., Ex. 4. James Lensing followed up by  
10 asking for further documents and information from Adams on January 20, 2010, which Adams  
11 provided. Adams Decl., Ex. 14. But despite knowing then of the DFI deficiency letter and related-  
12 party transactions, Patke did not request any further information from Adams about those issues  
13 then.

14           After that initial January request for documents, Patke largely went dark. Despite  
15 introducing James Lensing as the principal auditor in charge, Patke assigned the audit  
16 responsibilities to a junior employee (Kevin Hengtgen). Esler Decl., Ex. 5. Although Hengtgen  
17 set up some sort of internal meeting at Patke with his superiors in April 2010 to discuss the audit  
18 (Esler Decl., Ex. 5), he appears to have done little else until about July 2010, when he requested a  
19 call with Mike Adams to discuss some questions. Esler Decl., Ex. 6. By that point – seven months  
20 after being hired – Patke had not even contacted the Fund’s accountants. Esler Decl., Ex. 6.

21           By mid-September, Patke reported that it was “nearing the end of [its] audit  
22 procedures.” Esler Decl., Ex. 7. Patke again went silent for a month.

23           In mid-November 2010, Patke again contacted Adams to request a phone call, and  
24 this time emailed Adams a list of further documents and information needed “to complete the  
25 audit.” Esler Decl., Ex. 8. Mike Adams had a lengthy phone call with Mr. Hengtgen on  
26 November 17, 2010 to give Patke more information, and provided all documents and information

1 Patke requested at that time. Adams Decl., ¶ 23, Exs. 15-23. Notably, other than asking for a copy  
2 of one of the promissory notes (which Adams provided), Patke said nothing further about those  
3 notes and asked for no further information. Adams Decl., ¶ 23. By early December, Adams had  
4 emailed to Patke everything it had requested, and expected that (as promised a year earlier), AFP  
5 would receive its audit opinion before year's end. Adams Decl., ¶ 23.

6 Patke again went silent, except to bill AFP on December 20, 2010 another \$5,000,  
7 which was the agreed second payment due once the 2009 audit was complete. Adams Decl.,  
8 Ex. 24. By December 29, 2010 – having provided everything Patke asked for to “complete the  
9 audit” and having received the final invoice but no report – Adams emailed Patke's Kevin Hengtgen  
10 with a simple request: “Would you update me on the status of the audit?” Adams Decl., Ex. 25.

11 Rather than responding, that email was forwarded to Hengtgen's superior James  
12 Lensing. Esler Decl., Ex. 9. Lensing also did not respond immediately, but instead forwarded the  
13 email to Ron Niemaszyk. Esler Decl., Ex. 9. On January 4, 2011, Lensing finally responded:

14 I apologize that we have not yet responded to you, Kevin [Hengtgen] is no longer  
15 with the firm, and I was going through his emails this evening and just noticed your  
16 message. I also noticed that you sent some additional information on December 7  
and December 8 that I was not aware we had received, so will go through this and  
get back to you as soon as possible.

17 Adams Decl., Ex. 26. Patke did not say anything about not being able to complete the audit.

18 On January 11, 2011, Lensing emailed Niemaszyk asking “[d]id you ever call Mike  
19 Adams?” Esler Decl., Ex. 10. Niemaszyk responded “No. Did not know I was supposed to call.”  
20 Esler Decl., Ex. 10. Ultimately, Lensing emailed Mike Adams later that day, stating that he “had a  
21 chance to look through the information [Mike Adams] sent to Kevin [Hengtgen], could we set up a  
22 time to go through a couple of things?” Adams Decl., Ex. 26.

23 On Friday, January 14, 2011, Mike Adams had phone call with Patke's James  
24 Lensing and Ron Niemaszyk to discuss the status of the promised 2009 audit opinion. Adams  
25 Decl., ¶ 26. Ron Niemaszyk did most of the talking. Mr. Niemaszyk confirmed that Hengtgen had  
26 left, and that the 2009 audit was not done. Not only that, but Niemaszyk said Patke would have to

1 start all over again from scratch, and that Patke would not be able to finish that 2009 audit during  
2 the first quarter of 2011 because Patke got a “late start” and it was Patke’s busy season. Adams  
3 Decl., ¶ 26. But Mr. Niemaszyk offered that Patke could get going on the 2010 audit at the same  
4 time, and would be able to deliver both the 2009 opinion and the 2010 opinion before the end of  
5 the year. Adams Decl., ¶ 26.

6 Mike Adams responded that Patke had already promised to complete the 2009 audit  
7 during 2010, and had not kept its word. Adams Decl., ¶ 26. Mr. Niemaszyk did not deny making  
8 that promise, and apologized profusely for the inexcusable delay. Adams Decl., ¶ 26. Mike Adams  
9 told Mr. Niemaszyk that AFP was already out of compliance because of the failure to deliver a  
10 2009 audit opinion to investors, that AFP would now be out of compliance again because Patke  
11 was saying that it could not deliver the 2010 audit opinion by the April 30 deadline, and that DFI  
12 could take enforcement action for failure to deliver those audits to investors. Adams Decl., ¶ 26.  
13 Mr. Niemaszyk – a self-proclaimed hedge fund expert – offered that Patke could provide DFI with  
14 a comfort letter explaining that the delay was Patke’s fault (not the fault of Adams) so as to  
15 assuage any concerns that the regulators might have about the missing audits. Adams Decl., ¶ 27;  
16 *see also* Esler Decl., Ex. 11.

17 But he also explained that the opinions Patke would issue might have to be  
18 qualified opinions because of the unsecured promissory notes held by the Hedge Fund. Adams  
19 Decl., ¶ 27. Mike Adams told Mr. Lensing and Mr. Niemaszyk that he would prefer clean  
20 opinions (as had been issued by the previous auditors, who looked at virtually the same  
21 information), but that receiving audit opinions (qualified or unqualified) to give to investors that  
22 year was the most important thing. Mr. Niemaszyk said he understood completely, would work  
23 with Adams to try to get clean opinions, but would make sure that opinions for the 2009 and 2010  
24 fiscal years got issued that year, even if they had to be qualified opinions. Adams Decl., ¶ 26.  
25 Neither Mr. Lensing nor Mr. Niemaszyk explained to Mr. Adams at that time what Adams would  
26 have to provide regarding the promissory notes to get a clean opinion. Adams Decl., ¶ 26.

1 By failing to perform as promised, Patke had put Adams between a rock and a hard  
2 place. Mike Adams knew, from his previous search for auditors, that he would never be able to  
3 find a new auditor that could complete the 2009 and 2010 audits by the April 30, 2011 deadline.  
4 Adams Decl., ¶ 28. Patke already had all of AFP's books and records for 2009, Lensing had  
5 presumably been overseeing Hengtgen's work so was familiar with those records, and not much  
6 about the Hedge Fund, its investments or its operations had changed in 2010. Adams Decl., ¶ 29.  
7 Patke had proclaimed itself a hedge fund specialist, and Mike Adams thought Patke would be able  
8 to deliver timely audit opinions going forward. Mr. Adams reluctantly agreed to proceed as  
9 proposed by Patke, with the understanding that no matter what, the Hedge Fund would receive the  
10 promised opinions that year. Adams Decl., ¶ 29. The parties ended the call on a lighter note, with  
11 a discussion of (and bet on) the Seahawks-Bears football game taking place that weekend. Adams  
12 Decl., ¶ 28.

13 The following Monday (January 17), Mike Adams asked Patke also to "prepare a  
14 letter that I can give to prospects who may be doing due diligence on the hedge fund" while Patke  
15 completed the 2009 audit. Adams Decl., ¶ 30. Lensing and Niemaszyk engaged in a snarky  
16 internal email exchange regarding that requested letter. Esler Decl., ¶ 11. Mike Adams, being a  
17 man of his word, also sent Patke a box of Washington apples as the payoff for losing his bet with  
18 Patke about the outcome of the Seahawks-Bears game. Adams Decl., ¶ 30.

19 5. Patke's 2011 Engagement Letter confirmed that the Hedge Fund would receive at  
20 least a qualified audit opinion.

21 Thereafter, Patke went silent again. On June 2, 2011, Lensing emailed Adams for  
22 the first time in almost six months to "thank [him] for the apples" and asked to set up a "brief call  
23 . . . to discuss moving forward with the audit." Esler Decl., Ex. 12. Adams responded immediately  
24 with proposed dates. Adams Decl., ¶ 31. By that time, Patke's own billing software no longer  
25 recognized the AFP audit as an ongoing project, presumably as all other 2009 engagements had  
26 already been closed out. Esler Decl., Ex. 13.

1 Mr. Lensing and Mr. Adams had a phone call on June 7, 2011, in which Lensing  
2 explained that Patke had assigned a new associate to the file, Lensing expected the long overdue  
3 audit would soon be done, and asked AFP to pay \$5,000 right away for the work on the expected  
4 audit opinions. Adams Decl., ¶ 32. AFP paid that invoice as requested. Esler Decl., Ex. 15.

5 On June 21, 2011, Mike Adams had to be in Chicago for a conference, and Ron  
6 Niemaszyk asked to meet Mr. Adams for breakfast. Adams Decl., ¶ 33; Esler Decl., Ex. 17. At  
7 that breakfast meeting, Mr. Niemaszyk assured Mike Adams that Patke was working diligently on  
8 the 2009 and 2010 audits, that they should not take that long to finish, and that they would  
9 certainly be done that year. Adams Decl., ¶ 33. Mike Adams was relieved, and discussed with  
10 Mr. Niemaszyk that the Hedge Fund was doing well and that he hoped to take on new investors for  
11 the Fund, but that potential investors needed to see Patke's issued audit opinions before investing.  
12 Adams Decl., ¶ 33. Mr. Niemaszyk apologized again for how long it had taken already, but  
13 assured Mr. Adams that having Patke continue as the Hedge Fund's auditor – given Patke's  
14 experience as a hedge fund auditor and its reputation with potential hedge fund investors – would  
15 help Mr. Adams attract new investors to the Fund. Adams Decl., ¶ 33. Mr. Adams left reassured  
16 that things were back on track, that he would soon have completed audit opinions to provide to  
17 current and prospective investors, and that he had made the right decision to stick with Patke.  
18 Adams Decl., ¶ 33.

19 6. Patke promised Adams that AFP would receive at least “qualified” audit opinions.

20 Having churned AFP's files for over a year and a half, and having met in person  
21 with Mike Adams to assure him everything was going to go smoothly, Patke now wanted to “rope  
22 in what [it] had already billed” on the AFP file by changing the fee schedule from a fixed fee to a  
23 straight hourly basis. Esler Decl., Ex. 18. As confirmed by Patke's own records, by July 15, 2011,  
24 Patke had “already agreed with Mike [Adams] to do an audit of 2009 and 2010. . . .” Esler Decl.,  
25 Ex. 18. The purpose of the 2011 Engagement Letter later signed was to assure Adams that the  
26

1 Hedge Fund would receive at least a qualified opinion, while getting the Hedge Fund to pay again  
2 for the 2009 audit work that should have already been completed.

3 Hence, on July 18, 2011, James Lensing prepared new language for a new  
4 engagement letter to be sent to Adams:

5 ***We anticipate issuing a qualified opinion related to the balance of notes***  
6 ***receivable.*** If our opinion is other than qualified related to the notes, we will  
discuss the reasons with you in advance.

7 Our fees will be billed at our standard hourly rates. If significant additional time is  
8 necessary, we will keep you informed of any problems we encounter. In  
9 accordance with our firm policies, work may be suspended if your account becomes  
thirty days or more overdue and will not be resumed until your account is paid in  
10 full. If we elect to terminate our services for nonpayment, our engagement will be  
deemed to have completed upon written notification of termination, even if we have  
11 not completed our report. You will be obligated to compensate us for all time  
expended and to reimburse us for all out-of-pocket expenditures through the date of  
termination.

12 Esler Decl., Ex. 19 (emphasis added).

13 After Ron Niemaszyk blessed the new language as being congruent with all his  
14 earlier discussions with Adams regarding providing *at least* qualified audit opinions for 2009 and  
15 2010, Sarah Williams sent a new 2011 Engagement Letter to Adams on July 18, 2011, along with a  
16 long list of other forms to fill out and information to provide. Adams Decl., ¶ 34, Ex. 28. Adams  
17 responded with all the information requested, as well as a signed copy of the 2011 Engagement  
18 Letter, on July 28, 2011. Adams Decl., Ex. 28. The following day, James Lensing and Ron  
19 Niemaszyk had a phone call with Mike Adams and assured him again that this year, Adams' file  
20 would get their full attention to ensure that Patke issued the promised audit opinions that year.  
21 Adams Decl., ¶ 35; Esler Decl., Ex. 20.

22 In addition to (1) representing that the Hedge Fund would receive at least qualified  
23 audit opinions for 2009 and 2010 and (2) switching the engagement from a fixed fee to an hourly  
24 basis, the 2011 Engagement Letter contained many of the same promises as the 2009 Engagement  
25 Letter, to wit, (3) that Patke would perform its services according to generally accepted auditing  
26 standards, (4) that Patke would timely inform Adams of any problems, (5) that Patke's engagement

1 would not end until it delivered its promised audit reports and (6) that Patke could only terminate  
2 its service for non-payment. Niemaszyk Decl., Ex. B.

3 But now in addition to those terms, Patke also added an additional four pages of  
4 new “Terms and Conditions.” Niemaszyk Decl., Ex. B. Most important among those conditions  
5 was that Patke confirmed that it would “use all reasonable efforts to perform the Services in  
6 accordance with any agreed upon timeframe.” Niemaszyk Decl., Ex. B, at 9. Patke had already  
7 agreed with Adams (numerous times) to provide at least qualified audits by the end of 2011.

8 Patke again ended up breaching every promise that it made to Adams, in that and  
9 previous contracts.

10 **D. PATKE’S FAILURE TO EVER PROVIDE THE PROMISED AUDITS FOR FOUR**  
11 **YEARS CAUSED DFI TO THREATEN ENFORCEMENT ACTIONS, AND THE**  
12 **HEDGE FUND TO LOSE INVESTORS AND EVENTUALLY SHUT DOWN.**

13 Patke continued to dither on what should have been a simple audit. After receiving  
14 all requested information from Adams in July, Patke again went silent until October 2011. Esler  
15 Decl., Ex. 21. In late November 2011, Adams emailed Patke for an update on the status of the  
16 audits, and Patke responded that it was still waiting for answers to the earlier overlooked October  
17 email. Adams Decl., ¶ 36. Adams set up a conference call with Patke on December 13, 2011, and  
18 provided answers to all those questions. Adams Decl., ¶ 35, Esler Decl., Ex. 22. Almost a month  
19 later, Patke asked for and got a conference call with the Hedge Fund’s accountant (Bill Hanlin) to  
20 go over further questions, and provided all requested information by January 18, 2012. Adams  
21 Decl., ¶ 36. Still Patke produced nothing.

22 Patke’s failure to deliver the promised audit opinions (qualified or unqualified) by  
23 the end of 2011 proved disastrous for both AFC and AFP. Adams Decl., ¶ 37. The Hedge Fund  
24 had only four investors, all of whom were also clients of AFC. During the first quarter of 2012,  
25 one of AFC’s oldest and biggest clients, who was also one of the investors in the Hedge Fund, got  
26 tired of waiting for the long overdue audits. Adams Decl., ¶ 37. With hedge fund scandals in the  
news, and no audit reports for over two years, that investor contacted Mr. Adams in about April,

1 2012 and demanded to withdraw his investment in the Hedge Fund. Adams Decl., ¶ 37. With no  
 2 audits in hand to provide reassurances, Mr. Adams had no choice but to comply. Adams Decl.,  
 3 ¶ 37. When Patke still failed to deliver promised audits the following year, the same investor  
 4 withdrew all funds in his accounts with AFC. Adams Decl., ¶ 37.

5           Around the same time, one of AFC's other prospects (P.W.) expressed interest in  
 6 investing in the Hedge Fund. P.W. Decl., ¶ 4.<sup>5</sup> He had several discussions with Mr. Adams, but  
 7 was dissuaded from investing due to the lack of audited financials. P.W. Decl., ¶ 4. Another AFC  
 8 client, R.S., also expressed interest in investing in the Hedge Fund, but was similarly dissuaded by  
 9 the lack of audits. R.S. Decl., ¶ 5; Adams Decl., ¶ 38.

10           Instead of just issuing a qualified opinion, or telling Adams exactly what was  
 11 needed to get an opinion issued, Patke spent the rest of 2012 and 2013 asking Adams to send more  
 12 material and information (which often was material and information that AFP had provided  
 13 previously) and assuring Adams that the long-overdue audit opinions were almost done. Adams  
 14 Decl., ¶ 39; Regan Decl., *passim*. With two full years of audited financials missing, AFP could  
 15 neither attract new investors, nor find new auditors to perform the missing audits, as any auditor  
 16 would now refuse the engagement given how long Patke had been working on the files. Adams  
 17 Decl., ¶ 39.

18           Contrary to Mr. Niemaszyk's sworn testimony, Mr. Adams did complain, and did  
 19 so well before December 31, 2013. Just by way of example, Mr. Adams sent Patke a detailed  
 20 email on September 27, 2012 noting his unhappiness, and ended by saying: "I am deeply  
 21 disappointed in the time and cost this audit has taken." Esler Decl. 30.

22           To compound the damage, 2013 was the year that AFC was scheduled for its  
 23 routine DFI examination, which generally occurred every four years.<sup>6</sup> Adams Decl., ¶¶ 40-42. In

24 \_\_\_\_\_  
 25 <sup>5</sup> Adams seeks to seal both of the declarations from potential investors to protect their privacy, and refers to them  
 only by their initials here.

26 <sup>6</sup> Recall that AFP engaged Patke initially in 2009 because DFI's previous routine investigation had required that  
 AFP find a new auditor.



1 late March, 2013, Ron Niemaszyk confirmed to DFI's Gina DeCamp that the audits were ready to  
2 go:

3 As I stated in our call, we have completed all of the substantive work related to our  
4 audits of the financial statements for the years ended December 31, 2009 and 2010 .  
5 . . . At this point, we expect to finalize paperwork related to the audit, including  
6 financial statements and necessary disclosures, after our busy season. At that point,  
7 we will also start procedures on the 2011 and 2012 financial statements.

8 Esler Decl., Ex. 23. On about April 17, 2013, DFI's Janet So appears to have had another phone  
9 call with Patke, and her notes indicate that Mr. Niemaszyk assured her that the audits opinions  
10 would issue in a couple of weeks. Esler Decl., Ex. 24. But when no audits then issued, DFI issued  
11 a deficiency letter to AFC and referred the matter to enforcement. Adams Decl., ¶ 42; Esler Decl.,  
12 Ex. 25.

13 As 2013 dragged on without Patke showing any progress on completing the audit,  
14 Adams got increasingly desperate. The lack of even a qualified audit was a red-flag for DFI. Bley  
15 Decl., ¶ 5. Had the audits issued, any of DFI's other minor concerns would have probably gone  
16 away or been resolved. Adams Decl., ¶ 42.

17 By October 2013, DFI's enforcement arm was threatening to pull AFC's license  
18 because of the missing audits, which would have shut down AFC and the Hedge Fund. Adams  
19 Decl., ¶ 44; Bley Decl., ¶ 4. In late November, Adams told Patke that DFI's top priority was to  
20 receive the completed audits. Adams Decl., ¶ 44; Esler Decl., Ex. 26. DFI was expecting the audit  
21 opinions by the end of the year. Bley Decl., ¶ 5.

22 In December of 2013, Patke had a qualified audit opinion prepared to go (Esler  
23 Decl., Ex. 27) but said if Adams could provide an independent third-party valuation of the  
24 promissory notes, Patke could issue clean audit opinions that year. Adams Decl., ¶ 44. Adams  
25 hired a valuation expert – Neil Beaton – to provide those valuations. Beaton Decl., ¶ 4. Beaton  
26 provided Patke with those valuations, which largely supported what the Hedge Fund had been  
showing as the value of the notes. Beaton Decl., ¶ 4; Adams Decl., ¶ 44. But Patke still failed to  
complete the audit opinions.

1 With no audits delivered as promised by the end of the year, DFI had enough, and  
 2 threatened to yank AFC's license, and put it out of business. Adams Decl., ¶ 45. To protect  
 3 AFC's ability to continue operating, Adam's lawyer John Bley talked with DFI's Janet So on  
 4 January 7, 2014 and offered that AFC would voluntarily wind down the Hedge Fund, agree not to  
 5 form any others and agree to a consent order without admitting any guilt, so long as DFI allowed  
 6 AFC to keep its license and waived the audit requirements for the Fund. Bley Decl., ¶ 7.<sup>7</sup>

7 The next day (January 8), Mike Adams called Ron Niemaszyk, told him about the  
 8 proposal and told him to suspend all activity until Adams could find out whether or not DFI would  
 9 still require the audits to be completed. Adams Decl., ¶ 46. Instead, and in direct violation of its  
 10 contractual agreement that its engagement would not end until the audit report was delivered, Patke  
 11 sent Adams an email stating that Patke was disengaging as AFP's auditor. Adams Decl., Ex. 30.

12 **E. PATKE VIOLATED ITS PROFESSIONAL DUTIES TO THE HEDGE FUND AND**  
 13 **AFC.**

14 Patke had a duty to perform its audit services in conformity with generally-accepted  
 15 auditing practices. As confirmed by Patke's own website (and its motion), those duties are owed  
 16 not only to the Hedge Fund, but also to its manager and investor AFC. Esler Decl., Ex. 1. As  
 17 explained in much greater detail in the Declaration of Paul Regan, CPA/CFF, Patke breached those  
 18 duties here. To summarize:

19 Patke failed to conduct its audit services in a sufficiently prompt manner and with  
 20 sufficient due care: Patke failed to identify and investigate known risks early and failed to assign  
 21 sufficiently skilled personnel and resources. The biggest publicly-traded hedge funds get their  
 22 audits completed on average in less than 90 days. As stated by Mr. Regan: "Patke did not  
 23

24 \_\_\_\_\_  
 25 <sup>7</sup> That proposal ultimately led to the Consent Order entered signed on February 21, 2014. As stated on the first page  
 26 of that Consent Order, Adams neither admitted nor denied the findings and conclusions therein. As part of the  
 agreement with DFI, Adams submitted a separate sworn statement, in which he explained how he actually did timely  
 disclose the alleged conflicts of interest to investors, and disputed many of the other finding. Adams Decl., Ex. 31.

1 complete its AFP audits within an approximate four-year period. In my experience, ***I have never***  
 2 ***seen an audit take that length of time.***” Regan Decl., ¶ 46 (emphasis added).

3 Patke failed to protect Adams from the risks of regulatory non-compliance and DFI  
 4 enforcement action. Although Patke was aware of the DFI deficiency letter from the beginning, it  
 5 appears not to have considered DFI enforcement issues at all until 2013. Regan Decl., ¶ 57. Patke  
 6 knew of DFI’s requirement to deliver annual audits on a timely basis, and had a duty to use  
 7 reasonable efforts to deliver those audits to protect Adams.

8 Patke failed to properly supervise its personnel: Patke’s supervisory personnel  
 9 billed less than one hour to the AFP file through January 2011. Regan Decl., ¶ 64. The absence of  
 10 any significant involvement by Mr. Patke and others shows a breach of the standard of care.

11 Patke failed to maintain appropriate integrity in its communications with Adams:  
 12 Over a four year period, Patke repeatedly assured Adams that the audits were almost complete but  
 13 did not complete them. Patke’s “recurring communications regarding the seemingly near  
 14 completion of Patke’s AFP audits were inconsistent with [professional auditing standards] to be  
 15 honest and candid regarding the audit status.” Ragen Decl., ¶ 69.

### 16 **III. ARGUMENT**

#### 17 **A. PATKE BREACHED ITS CONTRACTS.**

18 In deciding a breach of contract action, the Court’s goal in interpreting the  
 19 contract(s) is to ascertain the intent of the parties at the time they executed the contracts. *Int’l*  
 20 *Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 282, 313 P.3d 395 (2013). In  
 21 determining that intent, the Court may consider extrinsic evidence. *Int’l Marine*, 179 Wn.2d at  
 22 282. Such extrinsic evidence is especially important when considering ambiguous or contradictory  
 23 contract provisions. *Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 713, 334 P.3d  
 24 116 (2014). When contract language is ambiguous, the Court construes the ambiguities against the  
 25 drafter to “adopt the interpretation that is most reasonable and just.” *Viking Bank*, 183 Wn. App. at  
 26

1 713. Such contract interpretation normally presents a question of fact. *Donatelli v. D.R. Strong*  
2 *Consulting Engineers, Inc.*, 179 Wn.2d 84, 92, 312 P.3d 620 (2013).

3 Every contract contains an implied duty of good faith and fair dealing. *Badgett v.*  
4 *Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991). A party can fulfill all the express  
5 terms of a contract, yet still breach its duty of good faith and fair dealing by acting so as to deny  
6 the other party reasonably expected performance. *Rekhter v. Dep't of Soc. & Health Servs.*,  
7 180 Wn.2d 102, 111, 323 P.3d 1036 (2014). That duty is especially applicable here, where one  
8 party has discretion over how to provide performance, and how long it takes. *Goodyear Tire &*  
9 *Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 739, 935 P.2d 628 (1997).

10 Where the contract has no explicit deadline, performance must be completed within  
11 a reasonable time under all the circumstances. *Burke & Farrar v. Campbell*, 128 Wash. 646, 651,  
12 224 Pac. 9 (1924). A reasonable time is to be determined by the nature of the contract, the  
13 positions of the parties, their intent, and the circumstances surrounding performance. *Pepper &*  
14 *Tanner, Inc. v. Kedo, Inc.*, 13 Wn. App. 433, 435, 535 P.2d. 857, *rev. denied*, 86 Wn.2d 1003  
15 (1975). “Normally, a determination of what constitutes a reasonable time is a question for the trier  
16 of fact.” *Jarstad v. Tacoma Outdoor Recreation, Inc.*, 10 Wn. App. 551, 558, 519 P.2d 278, *rev.*  
17 *denied*, 83 Wn.2d 1014 (1974). Where – as here – a defendant misrepresents its abilities and  
18 intentions to induce plaintiff to enter into a contract, the plaintiff may recover against the defendant  
19 for such negligent misrepresentations. *Donatelli*, 179 Wn.2d at 95-96.

20 Patke entered into three different (but related) written contracts with AFP, all of  
21 which are informed by, and must be interpreted consistently with, Patke’s repeated representations  
22 that (1) the audit opinions would issue in a timely manner, (2) the audits were almost complete and  
23 (3) at worst, Patke would issue qualified opinions. Patke promised to perform its auditing services  
24 in conformance with generally-accepted auditing standards, which standards were not met  
25 (according to Mr. Regan). Patke told Adams that the 2009 and 2010 audits would certainly be  
26 done by the end of 2011 before it had Adams sign the 2011 Engagement Letter, and then failed to

1 “perform the Services in accordance with [that] agreed upon timeframe.” 2011 Engagement  
 2 Letter, Terms and Conditions. Under any reasonable interpretation of the parties’ contracts, Patke  
 3 breached (or there are at least significant disputed issues of fact regarding whether Patke breached).

4 **B. PATKE’S FAILURE TO PERFORM WAS NOT EXCUSED OR WAIVED.**

5 Tacitly admitting it breached its contracts, Patke argues that its breach was  
 6 “excused” by Adams’ alleged failure to perform. First, as explained above, Adams did perform –  
 7 it is undisputed that Adams paid Patke in full, and Adams’ (and its experts’) testimony is that  
 8 Adams got Patke everything it reasonably needed to produce an audit opinion, and any delay is due  
 9 solely to Patke’s breach of its professional duties. Tellingly, Patke’s examples of Adams’ alleged  
 10 non-performance only begin in December 2012 – three full years after Adams hired Patke. Patke  
 11 MSJ, pp. 6-8. Had Patke exercised the proper due care and diligence, it would have gotten all of  
 12 the requested information in the first few months, completed the 2009 audit by the end of 2010 as  
 13 initially promised, and then continued timely issuing audit opinions. AFP would have then kept its  
 14 investors and gotten new ones, and AFC would have kept managing the fund and avoided DFI’s  
 15 threat to yank AFC’s license. But for Patke’s failures, AFP would still be in business, and bigger  
 16 than ever, and AFC would be reaping the rewards of that growth.

17 Patke argues that, pursuant to the 2011 Engagement Letter’s Terms and Conditions,  
 18 if AFP failed to perform any of its obligations, Patke “shall not be responsible for any delay or  
 19 other consequences due to such failure,” and therefore Patke’s breaches are excused. Patke MSJ,  
 20 at 14. First, it is a disputed issue of fact as to whether AFP actually failed to perform any of its  
 21 obligations.<sup>8</sup> But as importantly, Patke’s own Terms and Conditions go on to state (on the very  
 22 next page) that Patke will only be excused from liability for delay “due to causes beyond its  
 23 reasonable control.” Dkt. No. 32-1, at 11.

24  
 25 \_\_\_\_\_  
 26 <sup>8</sup> Other auditors had completed audits with the same information, and Bill Hamlin states Patke could have issued a  
 clean opinion. Hamlin Decl.

1 Adams did not consent to or encourage Patke's violations. Patke's own motion  
2 suggests that Patke did not even ask AFP for the things Patke now claims were not timely provided  
3 until three years after Patke was hired. Patke had contractual and professional duties to prepare  
4 for, plan and staff the audit, and then diligently and timely pursue its completion – Patke's  
5 admission that it did not even ask for the right things until three years into the audit is sufficient  
6 evidence alone to create an issue of fact as to whether Patke's failure to complete the audit was due  
7 to causes beyond its reasonable control.

8 Further, under Washington law, Patke had an independent duty to avoid its repeated  
9 misrepresentations regarding how long the audit would take, and how close it was to being  
10 finished, which arises independently of the contract and gives rise to a claim. *Donatelli*,  
11 179 Wn.2d at 96.

12 **C. PATKE'S ACTIONS CAUSED THE HEDGE FUND TO LOSE INVESTORS AND**  
13 **ULTIMATELY CLOSE.**

14 Patke's argument that Adams has no evidence that Patke's derelictions caused  
15 Adams damage is, to be mild, disingenuous. The issues of causation, as well as the damages  
16 caused by Patke's failures, are fact issues to be decided at trial. *Micro Enhancement Intern., Inc. v.*  
17 *Coopers & Lybrand, LLP*, 110 Wn. App. 412, 433, 40 P.3d 1206 (2002). Both from its  
18 communications with Adams, and as a self-proclaimed hedge fund specialist, Patke was fully  
19 aware of the requirement to issue annual audits to the Hedge Fund's investors, knew of the  
20 importance of those audits to existing and potential investors, and knew that the failure to issue  
21 audits would lead to existing investors pulling out and potential investors not coming in, and  
22 eventually to a DFI enforcement action.

23 As further outlined above and in the attached declarations, Adams has more than  
24 enough evidence (expert and otherwise) to create at least an issue of fact on causation and damages.  
25  
26

1 **D. THE “IN PARI DELICTO” DEFENSE IS INAPPLICABLE HERE.**

2 As admitted by Patke, Washington courts have never adopted the *in pari delicto*  
 3 defense in this situation. When Washington courts have applied the doctrine, it has largely been to  
 4 prevent enforcement of illegal contracts, which is not the case here. *Goldberg v. Sanglier*,  
 5 96 Wn.2d 874, 888, 639 P.2d 1437 (1982)(refusing to apply *in pari* doctrine even though contract  
 6 may have been illegal).

7 Washington has largely abrogated such absolute defenses in favor of comparative  
 8 fault. RCW 4.22.005; *see also ESCA Corp. v. KPMG Peat Martwick*, 135 Wn.2d 820, 830-31,  
 9 859 P.2d 651 (1998) (applying comparative fault principles to accountant malpractice); *Lawyers*  
 10 *Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 550-51, 55 P.3d 619 (2002) (holding that client’s action  
 11 against professional could not be barred by “plaintiff’s culpability in causing his or her own  
 12 damages”).<sup>9</sup> The plaintiffs (perhaps naively) relied on Patke’s various (mis)representations that the  
 13 audit would be soon completed to their detriment. The damage to Adams from Patke’s failure to  
 14 diligently complete its work was reasonably foreseeable, and at best Adams’ own acts or omissions  
 15 can only be considered to reduce the amount of damages ultimately awarded, not to eliminate  
 16 Patke’s liability altogether. *E.g.*, WPI 15.02 (Proximate Cause – Substantial Factor Test).<sup>10</sup> But  
 17 even if this doctrine applied, it would present a disputed issue of material fact as to who is more  
 18 guilty.<sup>11</sup>

19 \_\_\_\_\_  
 20 <sup>9</sup> As observed by another court, allowing auditors such a defense would be like attributing “the negligent provision  
 21 of medical services in the emergency room to the accident victim by asserting it was the plaintiff’s own negligence  
 22 that caused the accident in the first place.” *Stroud v. Arthur Anderson*, 37 P.3d 783, 789 n.22 (Okla. 2001).

23 <sup>10</sup> Patke’s Amended Answer (Dkt. No. 27) does not appear to plead with particularity the non-occurrence of any  
 24 contractual condition precedent to excuse its performance. Fed. R. Civ. P. 9(a)(d). But even had Patke so pleaded,  
 such conditions precedent are not favored by the courts as they create the risk of forfeiture (e.g., a plaintiff paying a  
 defendant and getting nothing), so any ambiguity will be construed against the drafter (i.e., Patke) and found to be  
 merely a promise, the breach of which does not excuse the other’s performance. *Jones Associates v. Eastside*  
*Properties*, 41 Wn. App. 462, 704 P.2d 681 (1985).

25 <sup>11</sup> Adams disputed then, and disputes now, the findings in the Consent Order, in particular the DFI’s contention that  
 26 AFC did not disclose potential conflict of interest transactions to AFP’s investors. Adams Decl., ¶ 47, Ex. 31.  
 However, AFC could not dispute the failure to provide audits, which failure was caused by Patke, and thus had to  
 agree to a Consent Order in order keep its license.

1 **E. DISCOVERY IS ONGOING, AND WILL STRENGTHEN ADAMS' CASE.**

2 As explained further in the accompanying Esler Declaration ¶¶ 32-37, discovery is  
3 ongoing and outstanding, the expert opinions are not yet final, and no depositions have occurred.  
4 To the extent necessary, Adams requests further relief pursuant to Fed. R. Civ. P. 56(d).

5 **IV. CONCLUSION**

6 Patke's motion fails to tell the whole story, and seems designed more as a discovery  
7 tool than a serious attempt to winnow the issues. There are significant disputed issues of material  
8 fact that preclude summary judgment (at least in Patke's favor), and Patke's motion should be  
9 denied.

10 DATED this 24<sup>th</sup> day of April, 2017.

11  
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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing ADAMS’ OPPOSITION TO  
PATKE’S MOTION FOR SUMMARY JUDGMENT on:

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by the following indicated method or methods on the date set forth below:

- CM/ECF system transmission.**
- E-mail.**

DATED this 24<sup>th</sup> day of April, 2017.

s/ Gillian Fadaie  
Gillian Fadaie, Legal Assistant

4850-5772-9094.7  
561370-0001