693492-2-I

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No. 693492-2-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

ALASKA STRUCTURES, INC.,

Appellant,

v.

CHARLES J. HEDLUND,

Respondent.

REPLY BRIEF OF APPELLANT ALASKA STRUCTURES, INC.

O. Yale Lewis, Jr.
WSBA No. 1367
Stacia N. Lay
WSBA No. 30594
Attorneys for Appellant

Hendricks & Lewis PLLC
901 Fifth Avenue, Suite 4100
Seattle, Washington 98164
(206) 624-1933

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I. INTRODUCTION.

Rather than substantively address the discrete issues on appeal, Respondent Charles Hedlund maligns Appellant Alaska Structures, Inc., making irrelevant and unsupported accusations of "abusive interview tactics," an "abusive work place environment," "mistreatment of employees," "[f]raud and misrepresentation," and "illegal" and "socially reprehensible treatment of subordinate individuals." (Corrected Brief of Respondent ("Resp. Br.") at 4, 25-26.) But Hedlund's personal vendetta[1] against Alaska Structures is not something Washington's Anti-SLAPP statute was intended to address. Therefore, the grant of his motion to strike Alaska Structures' breach of confidentiality agreement claim upset the balance the statute seeks to strike "between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern." Laws of 2010, ch. 118, § 1(2)(a).

II. ARGUMENT.

A. Hedlund Misstates Alaska Structures' Position Regarding the Applicable Standard of Review.

Hedlund asserts that Alaska Structures "contends this Court should review the grant of an Anti-SLAPP Motion under an abuse of discretion

[1] His vendetta is apparent from his starkly skewed, argumentative "Counter Statement of the Case," which contains numerous irrelevant allegations, unsupported by accurate record citations, that fails to comply with RAP 10.3. His improper allegations are too numerous to comprehensively debunk but Alaska Structures refers the Court to its Statement of the Case, which provides an accurate, objective statement of the relevant facts and procedure.

standard." (Resp. Br. at 21.) But Alaska Structures unambiguously stated in its opening brief that "a **de novo** standard of review presumptively applies" to the grant of his motion under RCW 4.24.525. (Brief of Appellant ("Appellant's Br.") at 13 (emphasis added).) *See also Eugster v. City of Spokane*, 139 Wn. App. 21, 31, 33, 156 P.3d 912 (2007) (de novo review applies to application of statute to particular facts and interpretation and application of other anti-SLAPP statute, RCW 4.24.510).

B. Hedlund's Reliance on the Same Fatally Flawed Arguments Cannot Satisfy His Burden of Establishing That His Disclosure of Non-Public Details About Alaska Structures' Security System Involved an Issue of Public Concern.

Hedlund repeats the arguments he made in the trial court but ignores Alaska Structures' refutation of those arguments in its opening brief. Thus, he again (1) improperly conflates the separate "public forum" and "issue of public concern" components of the two-step inquiry; and (2) improperly relies upon generalized and amorphous "issues of public concern" that he fails to demonstrate have any connection to his August 12th disclosure about Alaska Structures' security system or to an ongoing public controversy about that system.

1. Hedlund Incorrectly Describes His Initial Burden.

Hedlund begins his discussion of the "issue of public concern" requirement by misstating the threshold burden of proof he bears. Specifically, he states that he need "only" establish by a preponderance of

the evidence "that his written statement was submitted in a place open to the public or a public forum in connection with an issue of public concern, or that the claims related to lawful conduct in furtherance of the exercise of the constitutional right of free speech." (Resp. Br. at 21.)

But under the unambiguous language of the statute, Hedlund had to establish that his August 12th Posting was made "in a place open to the public or a public forum in connection with an issue of public concern," RCW 4.24.525(2)(d), or that it was "in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern," RCW 4.24.525(2)(e). Hedlund notably omits the required "issue of public concern" element of subsection (2)(e), and thereby suggests that there is no dispute that his August 12th Posting was "in furtherance of the exercise of the constitutional right of free speech," a question that is most clearly disputed. (Resp. Br. at 21.)

2. Hedlund Improperly Suggests That the Existence of a Public Forum Demonstrates an Issue of Public Concern.

Hedlund appears to suggest that the mere existence of a public forum makes any statement made in that forum an "issue of public concern." For example, he states that "Indeed.com is an open forum and can be accessed by anyone" and "is a jobs forum for use by applicants to inform their decisions about which jobs to take, where to interview, and what jobs and interviews to pass by. Just like in **Avvo**, the exchanges

between posters is [sic] on a matter of public concern." (Resp. Br. at 27.)

But Hedlund offers no authority for such an overbroad proposition and adopting it would effectively read the "issue of public concern" limitation out of the statute, a result contrary to well-established rules of statutory construction. *See Robertson v. Wash. State Parks & Recreation Comm'n*, 135 Wn. App. 1, 5, 145 P.3d 379 (2005). His contention is also contrary to the cases that treat the "public forum" and "issue of public concern" questions as separate requirements. *See, e.g., Ampex Corp. v. Cargle*, 128 Cal. App. 4th 1569, 1576, 27 Cal. Rptr. 3d 863 (2005) (finding that public forum existed but then asking "were [the] postings made in connection with a matter of public interest?"); *see also Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 898, 17 Cal. Rptr. 3d 497 (2004) (noting that "not all statements made in a public forum" fall under the statute).

3. Hedlund's Proposed Standard for Determining the Existence of an "Issue of Public Concern" is Contrary to the Weight of Authority.

Hedlund claims that an "issue of public concern" can be "any issue in which the public is interested," citing a single California appellate court decision, *Nygard, Inc. v. Uusi-Kerttula*, 159 Cal. App. 4th 1027, 72 Cal. Rptr. 3d 210 (2008). (Resp. Br. at 22 (emphasis and internal quotation marks omitted).) But Hedlund ignores the numerous California decisions that have further articulated the types of "issues of public interest"

contemplated under California's Anti-SLAPP statute by a thorough examination of case law applying the statute, which Alaska Structures explicitly discussed in its opening brief. (*See* Appellant's Br. at 20-21.)

The following are perhaps the most cited "guiding principles" for determining the existence of an "issue of public interest:"

> [T]he statute requires that there be some attributes of the issue which make it one of public, rather than merely private, interest. A few guiding principles may be derived from decisional authorities. First, "public interest" does not equate with mere curiosity. . . . Second, a matter of public interest should be something of concern to a substantial number of people. . . . Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. . . . Third, there should be some degree of closeness between the challenged statements and the asserted public interest[;] the assertion of a broad and amorphous public interest is not sufficient. . . . Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of [private] controversy. . . . Finally, those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure. . . . A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Weinberg v. Feisel, 110 Cal. App. 4th 1122, 1132-33, 2 Cal. Rptr. 3d 385 (2003) (internal quotation marks omitted); *see also Price v. Operating Eng'rs Local Union No. 3*, 195 Cal. App. 4th 962, 971-72, 125 Cal. Rptr. 3d 220 (2011); *All One God Faith, Inc. v. Organic & Sustainable Indus. Standards, Inc.*, 183 Cal. App. 4th 1186, 1201-02, 107 Cal. Rptr. 3d 861 (2010); *Hailstone v. Martinez*, 169 Cal. App. 4th 728, 736, 87 Cal. Rptr. 3d

347 (2008); *Olaes v. Nationwide Mut. Ins. Co.*, 135 Cal. App. 4th 1501, 1510-11, 38 Cal. Rptr. 3d 467 (2006). Other cases have articulated similar general categories of "issues of public interest." *See, e.g.*, *Wilbanks*, 121 Cal. App. 4th at 898; *Commonwealth Energy Corp. v. Investor Data Exch., Inc.*, 110 Cal. App. 4th 26, 33-34, 1 Cal. Rptr. 3d 390 (2003); *Rivero v. Am. Fed'n of State, Cnty. & Mun. Emps.*, 105 Cal. App. 4th 913, 924, 130 Cal. Rptr. 2d 81 (2003).

In addition to being outside the mainstream of California law on this issue, *Nygard* is readily distinguishable on the facts. In *Nygard*, a company owned by a public figure sued a former employee and a magazine that published an unflattering interview with the former employee about the company's owner. The trial court found and the appellate court affirmed on the basis that there was:

> "extensive interest" in Nygard—a "prominent businessman and celebrity of Finnish extraction"—among the Finnish public. Further, defendants' evidence suggests that there is particular interest among the magazine's readership in "information having to do with Mr. Nygard's famous Bahamas residence which has been the subject of much publicity in Finland." The June 2005 article was intended to satisfy that interest.

Nygard, 159 Cal. App. 4th at 1042.

In this case, there has not been a finding that the owner of Alaska Structures is a person in the public eye or that there is extensive public interest in either the company or its owner. Moreover, even a searching

review of the material proffered by Hedlund (CP 751-91), reveals, at most, insignificant support for the proposition that Alaska Structures' owner is in the public eye or a subject of extensive public interest. Haiti relief and Sean Penn might be, but Alaska Structures and its owner are not.

Implicitly recognizing that Alaska Structures' owner is not a public figure, Hedlund claims "[t]his would not be a relevant basis for distinguishing the two cases (*Nygard* dealt with whether or not discussions of workplace conditions generally were a matter of public interest)." (Resp. Br. at 29.) But his description of *Nygard* is simply incorrect. (Compare Hedlund's description of *Nygard* with the relevant portion of *Nygard*, quoted above, which does not even refer to "workplace conditions.")

Similarly, the record evidence of "public" interest in the Alaska Structures Forum at the time of Hedlund's post, which Hedlund represents is the complete compilation in the period August 12-17, 2011 (CP 795-96, 808-32), Hedlund identifies, at most, nine individuals and he claims that three of them are Alaska Structures' employees (CP 516, 794-95). Similarly, one of the alleged Alaska Structures employees claims that two of the other posters were actually Hedlund's aliases. (CP 829.) If both claims are accurate, there were, *at most*, three posts from people other than Hedlund who are not company employees. Obviously, these numbers do not remotely equate to "extensive public interest."

The operative language of RCW 4.24.525 also precludes porting the *Nygard* test into Washington law. First, the California Legislature found that "it is in the public interest to encourage continued participation in matters of *public significance*[.]" CAL. CODE OF CIV. PROC. § 425.16(a) (emphasis added). In contrast, the Washington Legislature directed that RCW 4.24.525 "[s]hall be applied and construed liberally to effectuate its general purpose of protecting participants in *public controversies*." (Emphasis added). These differing rules of construction are then applied to determine what is meant by issues of public *interest* (California) and issues of public *concern* which is a well developed concept in Washington First Amendment law. *See, e.g., White v. State*, 131 Wn.2d 1, 10-11, 929 P.2d 396 (1997). Accordingly, as a matter of statutory construction, the California act, as construed by *Nygard*, has a very different scope than RCW 4.24.525, which focuses on *public controversies about* issues of *public concern.*

Another major difference is that an explicit purpose of RCW 4.24.525(2)(a) is to "strike a balance between the rights of persons to file lawsuits and to trial by jury and the rights of persons to participate in matters of public concern." No California cases address this purposeful balancing that is required by RCW 4.24.525. But it is incontrovertible that the California statute protects only against claims that *lack minimal merit*.

Navellier v. Sletten, 29 Cal. 4th 82, 93, 124 Cal. Rptr. 2d 530 (2002). RCW 4.24.525(4)(b), however, provides that the responding party must establish by clear and convincing evidence a probability of prevailing on its claim. Obviously, this is consequential:

> One of the most crucial distinctions between the two statutes is that Washington's Anti-SLAPP law requires a responding party to demonstrate a likelihood of prevailing on his or her claims by *clear and convincing evidence.* RCW 4.24.525(4)(b). The significance of this heightened evidentiary burden cannot be overstated. Whereas the California statute—which incorporates a mere "probability" standard—essentially creates an early opportunity for summary judgment, the Washington statute radically alters a plaintiff's burden of proof. Accordingly, courts evaluating a special motion to strike pursuant to RCW 4.24.525 must carefully consider whether the moving party's conduct falls within the "heartland" of *First Amendment* activities that the Washington Legislature envisioned when it enacted the anti-SLAPP statute.

Jones v. City of Yakima Police Dep't, Case No. 12-CV-3005-TOR, 2012 U.S. Dist. LEXIS 72837, *8-9 (E.D. Wash. May 24, 2012).

The implicit basis for *Jones* was that, where the moving party's conduct falls within the heartland of First Amendment activities, the opposing party will already be required to satisfy a higher burden of proof that protects First Amendment activities. But when the moving party cannot establish that his or her speech or conduct was within the heartland of First Amendment activities, a plaintiff whose claims can otherwise survive summary judgment will be allowed to proceed to a trial on the

merits, including a jury trial, which will also achieve the purposeful balance that RCW 4.25.525(2)(a) mandates.

4. The Specific Matter of Public Concern Allegedly at Issue Remains Largely a Mystery.

Because Hedlund essentially regurgitates his trial court arguments, his contentions on appeal regarding his threshold burden of establishing the existence of an "issue of public concern" suffer from all of the fatal infirmities discussed in Alaska Structures' opening brief. (*See* Appellant's Br. at 17-32.) Specifically, he asks the Court to ignore the statement on which Alaska Structures' contract claim is based—his August 12th Posting about the company's security system—and instead focus on statements made by other people, on other topics, often at other times far removed from the date of his posting. Based on those unrelated posts, he then asks the Court to adopt one or more of his generalized "issues of public concern" without connecting those generic issues to either the substance of his August 12th Posting about Alaska Structures' security system or any ongoing controversy regarding that system. In short, Hedlund offers nothing to undermine Alaska Structures' showing that he failed to satisfy his threshold burden of establishing an "issue of public concern."

Hedlund claims that the "few sentences [Alaska Structures] now

focuses on"[2] in his August 12th Posting "cannot lawfully be separated" from the "context" in which they appear. (Resp. Br. at 26.) He then describes that "context" extraordinarily broadly to include essentially every post on Indeed.com about Alaska Structures regardless of when the posts were made, who made them, or their subject matter. For example, Hedlund offered three sets of alleged posts from Indeed.com relating to Alaska Structures. (*See* CP 129-56, 289-305, 808-32.)[3] But he has not shown that those posts—which largely address interviewing with Alaska Structures—have any connection to his August 12th disclosure, which reveals details about the company's security system. Only two posts—apparently created some 2-3 months before Hedlund's post—reference seeing cameras, with no detail or discussion about the company's security system. (CP 148 (user "Milgram"), 149 (user "mermaid").) And Hedlund claimed to be responding not to those posts but to a post by a user he alleged was an Alaska Structures' employee masquerading as an applicant who merely commented that "[i]f you work in military contracting proper security is a must, and usually a contractual requirement." (CP 808; *see also* CP 812.) Moreover, many of the posts appear to have been made months and even

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[2] Notwithstanding Hedlund's suggestion to the contrary, Alaska Structures' contract claim has always focused on his August 12th disclosure about the security system. (*See, e.g.*, CP 2, 268, 270, 586-87; *see also* Appellant's Br. at 28.)

[3] CP 289-305 appears to be duplicates of the posts at CP 140-156 and should be disregarded. And CP 810-814, 820-824, 827-831 are other posts by Hedlund, including the August 12th Posting on which Alaska Structures' contract claim is based.

years before Hedlund's August 12, 2011 posting. (*See, e.g.*, CP 129-39 (printout dated 10/26/2011 and posts dated from "51 months ago" to "54 months ago"), 140-56 (printout dated 9/16/2011 and posts dated from "2 months ago" to "46 months ago").)

Hedlund offers no authority for such a broad definition of the "context" surrounding his August 12th Posting to include posts made years before on topics that have nothing to do with the specific statement upon which Alaska Structures' breach of confidentiality agreement claim is based and of which he does not even claim to have been aware at the time of his August 12th disclosure. In the absence of any offer of authority by Hedlund to support his limitless definition of the relevant "context," the Court should presume that no such authority exists.[4] *See Oregon Mut. Ins. Co. v. Barton*, 109 Wn. App. 405, 418, 36 P.3d 1065 (2001) ("If no authority is cited, we may presume that counsel, after diligent search, has found none.") (internal quotation marks omitted).

Hedlund's contention that the Court should essentially ignore his August 12th disclosure about Alaska Structures' security system and instead

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[4] If Hedlund is asserting that he cannot be sued for actionable statements if his other posts were not actionable (Resp. Br. at 20), that claim is also incorrect. A person who commits fraud is not immunized by his non-fraudulent activity. An article or book containing defamatory material is not immunized by the inclusion of non-defamatory material. Misappropriation of a particular trade secret is not immunized by a decision to eschew the theft of a different but equally available trade secret. If Hedlund's assertion on this point were accurate, then all kinds of unlawful conduct could be immunized by a cloak of lawful conduct, which obviously is not the law.

focus on the extraordinarily broad "context" he describes (e.g., all other posts about Alaska Structures) is also contrary to the cases that repeatedly emphasize that the "key [is to examine] the *specific nature of the speech*" at issue. *Commonwealth Energy*, 110 Cal. App. 4th at 34; *see also World Fin. Group, Inc. v. HBW Ins. & Fin. Servs., Inc.*, 172 Cal. App. 4th 1561, 1569, 92 Cal. Rptr. 3d 227 (2009), *modified*, 2009 Cal. App. LEXIS 702 (May 7, 2009); *Consumer Justice Ctr. v. Trimedica Int'l, Inc.*, 107 Cal. App. 4th 595, 601, 132 Cal. Rptr. 2d 191 (2003).

Nonetheless, Hedlund continues to proffer the vague, generalized "issues of public concern" he claims are reflected in the other Indeed.com posts about Alaska Structures, including: "[f]raud and misrepresentation by an employer to attract applicants and employees;" "abusive tactics and practices [that] reveal[] a likely illegal as well as socially reprehensible treatment of subordinate individuals;" "management improprieties;" issues about Alaska Structures' "management;" and "conditions of the workplace and the management." (Resp. Br. at 26, 28.) But again, even assuming that these vague alleged "issues of public concern" can be gleaned from the other posts, Hedlund never demonstrated the necessary connection between those amorphous issues and his August 12th disclosure of non-public details about Alaska Structures' security system, which is the only speech at issue.[5]

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[5] *See Hailstone*, 169 Cal. App. 4th at 736 (an "issue of public interest" requires "a degree of closeness between the challenged statements and the asserted public interest"); *Dyer v.*

Rather, Hedlund appears to argue that if "issues of public concern" exist with respect to other posts, by other people, on other topics related to Alaska Structures, then **any** posts about the company in that forum necessarily involves an "issue of public concern" regardless of the content of the posts. But such a proposition is again contrary to the rule that the focus is on the **specific** speech or conduct at issue and the cases stating that the possible presence of collateral protected activity does not subject a claim to the anti-SLAPP statute. *See Fielder v. Sterling Park Homeowners Ass'n*, Case No. C11-1688RSM, 2012 U.S. Dist. LEXIS 174750, *27-28 (W.D. Wash. Dec. 10, 2012); *Martinez v. Metabolife Int'l, Inc.*, 113 Cal. App. 4th 181, 188, 6 Cal. Rptr. 3d 494 (2003).

Nor has Hedlund proven his belated suggestion that Alaska Structures' "cameras/security system" involved an "issue of public concern." (Resp. Br. at 28.) In fact, he never explains the purported "issue" but merely states that "the sentences related to cameras and security clearly relate to the same issue of public concern as the remainder of the posts." (Resp. Br. at 26.) He also did not demonstrate that anyone other than himself had any interest in the details of the company's "cameras/security system"[6] or that there was an "ongoing" controversy regarding it. *See*

Childress, 147 Cal. App. 4th 1273, 1280, 55 Cal. Rptr. 3d 544 (2007) (although movie might address broad topics of widespread interest, defendants were "unable to draw any connection between those topics" and plaintiff's claims).

[6] Blogs and websites that criticize, warn about or provide comparative information about

World Fin. Group, 172 Cal. App. 4th at 1572-73 (where allegedly protected speech is of interest to a limited but definable portion of the public, speech must relate to "an ongoing controversy, dispute or discussion") (internal quotation marks omitted); *Weinberg*, 110 Cal. App. 4th at 1132 (an "issue of public interest" should be of concern to a substantial number of people).

Hedlund's attempt to rely on the burglary of Alaska Structures to establish an "issue of public concern" is similarly unavailing. Alaska Structures debunked that theory in its opening brief (*see* Appellant's Br. at 31-32), and Hedlund offers nothing to undermine that showing. He also now claims that alleged "[i]nadequate security" is a "public concern" because there was an "investment of public resources to investigate, solve and prosecute the criminals, as well as to police against future robberies[.]" (Resp. Br. at 27.) But he offers no support for the proposition that the burglaries were the result of "[i]nadequate security;" rather, as Alaska Structures demonstrated, the police records and news reports highlighted the use of "Knox boxes" to gain access to the businesses. (*See* Appellant's Br. at 31-32.) Moreover, under Hedlund's theory, every burglary—commercial or residential—would necessarily involve an "issue of public

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consumer products or services have—depending on the particular facts at issue—been found to address matters of public concern, but details of a private company's security system have never been determined to be inherently matters of public concern. Moreover, if confidential details of a private company's security measures, which could include security codes and protective software systems, locking mechanisms, monitored alarm systems, and photographic identification equipment, could be disclosed with impunity on the theory that the details of any such security measures are inherently a matter of "public concern," the costs to our society and economy would be immeasurable.

concern," regardless of the actual content of the speech at issue, because of the public resources invested in investigating and prosecuting the crimes. But again, his theory runs afoul of the rule that the Court must examine the specific speech at issue rather than "society's general interest in the subject matter of the dispute[.]" *World Fin. Group*, 172 Cal. App. 4th at 1570, 1572; *see also Rivero*, 105 Cal. App. 4th at 924-25 (rejecting theory that "issue of public interest" existed because the allegedly protected speech occurred at a publicly-financed institution). In short, Hedlund has made no showing—supported by law and fact—that his August 12th Posting of non-public details about weaknesses of Alaska Structures' security system involved any "issues of public concern."

C. Hedlund Failed to Refute Alaska Structures' Showing That It Is Likely to Prevail on its Breach of Contract Claim.

Hedlund alleges—without citation to the record—that Alaska Structures argued that he had signed a "secrecy for life" confidentiality agreement preventing him from ever disclosing anything about the company, including events occurring after his employment ended. (Resp. Br. at 30.) But Alaska Structures has never made such a claim. Rather, its claim has always been limited to Hedlund's disclosure of non-public details about the company's security system, which he learned of during his employment, matters covered by the Confidentiality Agreement he signed at the start of his employment. Hedlund's other contentions with respect to

the substance of Alaska Structures' breach of confidentiality agreement claim are similarly frivolous.

1. Hedlund's Alleged Faulty Memory Does Not Invalidate His Signature on the Confidentiality Agreement.

Despite his signature on both the Employment Agreement and the Confidentiality Agreement (CP 599 (¶ 3), 604-13), Hedlund makes the remarkable claim that Alaska Structures cannot demonstrate a valid contract because he "has no memory of signing a 'confidentiality agreement.'" (Resp. Br. at 2, 39.) But Hedlund has never disputed that it is his signature on the agreements and his inability to remember signing them cannot trump the objective manifestation of his signature. *See Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20 (1973).

Hedlund's contention that Alaska Structures did not demonstrate consideration for the Confidentiality Agreement is also frivolous. (*See* Appellant's Br. at 39.) He cites no authority or evidence for his assertion that Alaska Structures "cannot show a valid contract" (Resp. Br. at 39), and therefore the Court should not consider it. *See McKee v. Am. Home Prods. Corp.*, 113 Wn.2d 701, 705, 782 P.2d 1045 (1989); *Northlake Marine Works, Inc. v. City of Seattle,* 70 Wn. App. 491, 513, 857 P.2d 283 (1993).

2. Hedlund Failed to Refute Alaska Structures' Showing That He Disclosed Confidential Information in Breach of His Confidentiality Agreement.

Hedlund's contentions regarding Alaska Structures' breach of

confidentiality agreement claim essentially are that (1) Alaska Structures "cannot get into his head" and disprove his self-serving allegations that the facts disclosed in his August 12th Posting were learned after his employment ended; (2) "[n]o one knows what 'consumer-grade' or 'off-the-shelf' means" and therefore those statements were merely his "opinions" not facts covered by his Confidentiality Agreement; and (3) contradicting the previous contention, the "facts" he disclosed in his August 12th Posting were not confidential information because they were purportedly public knowledge. (Resp. Br. at 30, 34-36.) None of these contentions refute Alaska Structures' showing that it is likely to prevail on its claim that Hedlund breached his Confidentiality Agreement.[7]

As to Hedlund's assertion that Alaska Structures "cannot get into his head" and disprove the allegations in his declaration, that is a question of credibility for the trier of fact and therefore is not properly resolved on an early Anti-SLAPP motion to strike. *See Dyer v. Childress*, 147 Cal. App. 4th 1273, 1279, 55 Cal. Rptr. 3d 544 (2007). And while it is true that Alaska Structures "cannot get into [Hedlund's] head," it did demonstrate that his claim that the facts he disclosed in his August 12th Posting related to another security system installed after his employment ended was not

[7] Although he contends that the details he disclosed were not confidential, he never contests Alaska Structures' position that "confidential business and technical information" includes confidential details about the company's security system. His failure to do so should be deemed a concession that Alaska Structures' position on this point is correct.

credible given the starkly differing system described in his post and the professionally installed monitored system installed after the first burglary. (*See* Appellant's Br. at 43-44.) Hedlund offers no response to that showing.

Similarly, Hedlund's contention that his statement that "the security measures at [Alaska Structures] are all consumer-grade off the shelf fare installed by the former CIO, who had no prior security experience," (CP 615), was simply his "opinion" because "[n]o one knows what 'consumer-grade' or 'off-the-shelf' means" (Resp. Br. at 34), is not persuasive. First, the specific statement at issue—"the security measures . . . are all consumer-grade off the shelf fare installed by the former CIO, who had no prior security experience"—is, on its face, a factual statement not an expression of opinion.[8] Second, in addition to being unsupported by any meaningful analysis, Hedlund's assertion that "[n]o one knows what 'consumer-grade' or 'off-the-shelf' means" is belied by the fact "off-the-shelf" has a dictionary definition. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY at 862 (11th ed. 2003) ("off-the-shelf" means "available as a stock item: not specially designed or custom-made"). Third, even if Hedlund's contention that the meaning of "consumer-grade" or "off-the-shelf" is a mystery was given some credence, the "fact vs. opinion" question is appropriately left to the ultimate trier of fact.

[8] Indeed, the factual nature of the statement is what led Alaska Structures to believe that the August 12th Posting was made by an employee, a belief that turned out to be correct.

Hedlund also failed to substantiate his contention that the facts he disclosed were not confidential information protected by his Confidentiality Agreement because the facts were disclosed in public records and news reports or were observable by non-employees. First, his contention that the Court should look to the Indeed.com posts made by other people on other topics in deciding whether his statement about Alaska Structures' security system disclosed confidential information (*see* Resp. Br. at 36-37), is nonsensical as those posts demonstrate nothing about the specific facts he disclosed. The two posts making fleeting reference to the presence of cameras (CP 148-49), do not alter the irrelevance of the Indeed.com posts because those two posts disclosed nothing besides the existence of cameras, a fact Alaska Structures has never asserted is confidential.

Second, Alaska Structures debunked Hedlund's contention that the facts he disclosed about the weaknesses of its security system appear in police records and news reports. (*See* Appellant's Br. at 43-44.) Hedlund offers no meaningful response to that showing and instead repeatedly makes inaccurate factual allegations supported only occasionally by overbroad citations to the record that are of no assistance to the Court in identifying purported record support for his allegations.[9] (*See, e.g.*, Resp. Br. at 32-33 (citing to CP 334-47, 350-434, nearly 100 pages of police records on

[9] Additionally, the police records were obtained by Hedlund's counsel for the motion to strike and therefore could not have been the source of the facts he disclosed. (CP 334.)

burglaries of Alaska Structures and other businesses).) For example, Hedlund claims that police records revealed "intricate details" about Alaska Structures' security system but cites to no specific evidence in support of that assertion. (*See* Resp. Br. at 32.) He then makes several pages of allegations with no citations to the record. (Resp. Br. at 33-36.) In short, Hedlund's rambling, unsupported and largely inaccurate allegations that the information he disclosed about weaknesses in Alaska Structures' security system was not confidential information does not refute Alaska Structures' properly supported showing to the contrary. (*See* Appellant's Br. at 41-44.)

Hedlund's criticism of Alaska Structures' current security system is inaccurate and irrelevant. (*See* Resp. Br. at 26-29.) There is no reason to believe that the monitored security alarm system installed by Allied Fire & Security after the first burglary is inadequate; and in fact, as Hedlund acknowledges, a hidden camera secretly installed in the Alaska Structures server room after the first burglary did, in fact, capture images of the second burglary. These images are reported as being of "'good quality' by police and were used to identify the burglars." (Resp. Br. at 33.) Furthermore, the reason for the additional security shifts in August and September 2011 was to provide extra security for office personnel. That increase was a direct response to Hedlund's disclosures (Appellant's Br. at 6-7; CP 598-602), not a perceived weakness in the monitored security alarm system. For all of

these reasons, Hedlund's current criticism of Alaska Structures' security system is meritless.

And Hedlund's repetitive references to Alaska Structures' claims against other former employees or independent contractors (of which there have only been two) (CP 602) necessarily involve different issues and different agreements and are irrelevant to the issue of whether Alaska Structures' claim against him should have been dismissed.

Finally, Hedlund's contention that Alaska Structures cannot establish damages from the breach of his Confidentiality Agreement is unsupported by any argument or authority and therefore should be summarily rejected. *See McKee*, 113 Wn.2d at 705. He also offers no factual support for his allegation that "[Alaska Structures] admits it had Hedlund's [August 12th Posting] removed by Indeed.com within hours of its posting." (Resp. Br. at 41.) Remarkably, Hedlund's only support for that claimed admission by Alaska Structures is **his** declaration (Resp. Br. at 41 (citing CP 792, 800)); as a result, his claim of an admission by Alaska Structures is effectively unsupported and should be disregarded. *See Northlake Marine*, 70 Wn. App. at 513. Thus, Hedlund offers no argument, supported by authority, that the damages Alaska Structures described in its opening brief (*see* Appellant's Br. at 45-47) are either factually or legally non-cognizable. To the contrary, he admits that Alaska Structures increased

its security shifts as a result of his August 12th Posting (*see* Resp. Br. at 41), which is one form of damages Alaska Structures established (*see* Appellant's Br. at 46). Hedlund's exceedingly cursory discussion of the question of damages, therefore, cannot overcome Alaska Structures' showing—supported by facts and law—that it suffered damages as a result of Hedlund's breach of his Confidentiality Agreement.

D. Hedlund Fails to Demonstrate an Entitlement to Attorneys' Fees and Costs for the Georgia Proceeding.

While acknowledging both that his father was the Cox Communications' subscriber who Alaska Structures successfully sought to identify in the Georgia proceeding and that RCW 4.24.525(6)(a)(i) contains a "prevailing party" requirement, Hedlund pronounces that he was "the real party in interest" and simply ignores that Alaska Structures prevailed in that proceeding. (Resp. Br. at 42.)

Alaska Structures demonstrated both (1) that Hedlund's father, the Cox Communications' subscriber identified in the Georgia proceeding, was the "John Doe" party;[10] and (2) that Alaska Structures prevailed in that proceeding when the court granted the petition to enforce the subpoena, the only matter at issue. (Appellant's Br. at 48-49; *see also* CP 78, 96-97, 101,

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[10] Hedlund's assertion that "[his] willingness to call out his former employer's agents for masquerading as applicants to draw unwitting applicants in should be rewarded, not punished" (Resp. Br. at 26) might have resonated if (a) that had been the content for which he was sued; and (b) he had not made his posts anonymously on his father's computer.

276, 307, 331, 674-97.) Hedlund fails to offer any argument and authority in response to that showing. *See* RAP 10.3(a)(6) (argument must be supported by legal authority); *State v. Mills*, 80 Wn. App. 231, 234, 907 P.2d 316 (1995) ("We will not consider contentions unsupported by argument or citation to authority[.]"). Thus, Alaska Structures' showing that it was error to award Hedlund attorneys' fees and costs in connection with the Georgia proceeding remains unrefuted.

E. Hedlund Offers No Support For an Award of CR 11 Sanctions.

Hedlund asks the Court to "award CR 11 sanctions against [Alaska Structures] for **its pursuit of the case** and appeal." (Resp. Br. at 1 (emphasis added).) To the extent he seeks affirmative relief, his request must be denied because he failed to cross appeal under RAP 5.1(d). *Wolstein v. Yorkshire Ins. Co.*, 97 Wn. App. 201, 206, 985 P.2d 400 (1999) (a cross appeal is essential if respondent seeks affirmative relief); *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 700 n.3, 915 P.2d 1146 (1996) (parties' failure to cross appeal precluded grant of prevailing party attorneys' fee award). If he seeks CR 11 sanctions for the appeal, that request fails because he did not support his request with argument supported by authority (*see* Resp. Br. at 44-45).[11] *See* RAP 10.3(a)(6). Under CR 11—the authority on which Hedlund bases his request—he has the burden of

[11] RAP 18.9, not CR 11, is the authority for attorneys' fees on appeal. *Right-Price Recreation, L.L.C. v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 384, 46 P.3d 789 (2002) (describing RAP 18.9 as the "appellate equivalent of CR 11").

establishing that sanctions are appropriate, a burden he made no attempt to satisfy. *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994).

III. CONCLUSION.

The only thing Hedlund has demonstrated is that he has a personal vendetta against Alaska Structures. But a vendetta is not something that Washington's Anti-SLAPP statute was intended to carve out from civil liability in order to foster the public's ability to participate in ongoing public controversies about issues of public concern. And even if Hedlund's personal dislike of Alaska Structures could somehow be transformed into an "issue of public concern," Alaska Structures demonstrated that it has a legitimate contract claim that it is entitled to have determined on the merits. As a result, Alaska Structures respectfully requests that the Court reverse the trial court's grant of Hedlund's motion to strike and the corresponding monetary awards to Hedlund.

DATED this 26th day of April, 2013.

Respectfully Submitted,

HENDRICKS & LEWIS PLLC

By: 

O. Yale Lewis, Jr., WSBA No. 1367
Stacia N. Lay, WSBA No. 30594
Attorneys for Appellant