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COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

NORTHWEST PRODUCT DESIGN GROUP, LLC, a Washington limited liability corporation; TODD D. ANDERSEN, an individual; MAC CAMERON, an individual; JERRY CHAMBERS, an individual; and ELLIS MASSEY, an individual,

Appellants/Cross-Respondents

v.

HOMAX PRODUCTS, INC., a Delaware corporation; RANDAL W. HANSON and JANE DOE HANSON, husband and wife, and the marital community thereof; ROSS CLAWSON and JANE DOE CLAWSON, husband and wife, and the marital community thereof; LESTER GREER, JR. and Jane Doe Greer, husband and wife, and the marital community thereof; and WILFRED HOFFMANN and Jane Doe Hoffmann, husband and wife, and the marital community thereof,

Respondents/Cross-Appellants.

RESPONDENT'S BRIEF

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I. INTRODUCTION

After a trial spanning over two weeks and wide-ranging testimony of Mr. Robert Cameron spanning over two days, the jury conclusively and properly determined what Appellants (NPDG) should have and likely did know, that Respondent Homax (Homax)¹ did not cause NPDG any damages. This verdict is supported by substantial evidence, such as the clear testimony that NPDG never once attempted to sell a so-called Jaws Clip from the time it was completed in the year 2000 till more than a decade later when the trial was conducted.

NPDG's brief gives the incorrect impression that NPDG was hamstrung at trial. The notion that great limits were placed on NPDG's presentation bears no relation to the wide latitude granted NPDG by the lower Court at trial. No witness called by NPDG was refused, though NPDG never called NPDG's damages expert witness, Mr. Ruble. No lay testimony regarding clip sales or values was refused, and Mr. Robert Cameron was permitted to opine and state alleged damage numbers.

¹ NPDG's brief names Homax in addition to a number of other individual respondents. However, all of the individual defendants were dismissed at trial after the close of NPDG's case. Mr. Greer's Dismissal is in the record. RP February 15, 2011; 4:4-14. Mr. Clawson & spouse and Mr. Hanson & spouse have a dismissal in the record at RP February 15, 2011; 9:4-18. NPDG always dealt with Homax and not individuals. RP Cameron 146:2-147:25.

NPDG's case went to the jury with proper instructions that NPDG blessed at trial², and reached a fully sustainable verdict under the law. NPDG should not be now heard to criticize the jury verdict that was reached using a special verdict form that NPDG did not object to at trial, and which was accompanied by a set of detailed instructions on the law that NPDG also blessed. The instructions and verdict form were also legally correct because, contrary to NPDG's theory on appeal, the jury was free to determine that NPDG had failed to prove actual damages under the Trade Secrets Act.

NPDG was also given every opportunity to discover and properly plead other causes of action. The lower Court correctly determined that a Consumer Protection Act claim was not properly pled, and NPDG never presented a pleading that cured this defect, or the pleading defects related to separate causes of action for fraud and misrepresentation. The jury verdict showed why NPDG remained interested in these or some other causes of action, because NPDG could not prove other pled causes of action or actual damages.

² NPDG has not properly placed the jury instructions before this Court, though part of its appeal alleges an improper special verdict form. "The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue." Olmsted v. Mulder, 72 Wash.App. 169, 183, 863 P.2d 1355, 1362 (1993).

Unfortunately, NPDG remains slow to admit this defect even now after a multi-week jury trial. This is typical of this litigation that was commenced in 2007. For example, NPDG maintained the existence of a Rhino Clip trade secret for over two years of litigation despite possessing evidence eventually discovered from NPDG by Homax showing that NPDG disclosed the Rhino Clip to the world, sold it in substantial quantities, and littered the United States and Canada with boxes of free samples. NPDG was properly sanctioned for belatedly withdrawing the Rhino Clip trade secret cause of action after being explicitly warned that sanctions would be requested if Homax had to proceed with a summary judgment filing. The small sanctions awarded were a fraction of what could have been awarded by the lower Court, and are easily upheld as being with the sound discretion of the lower Court.

II. ASSIGNMENTS OF ERROR

Only those of NPDG's assignments of error that Homax objects to and disagrees with are addressed, consistent with Rule 10.3(b):

Response to Assignment of Error 3

NPDG specifically identifies one ruling in its assignment of error, namely the ruling in limine that NPDG could not present a "lost future

profits” damages theory for the Jaws Clip because “without anything at all we would be asking the fact finder to speculate as to what the profits would be if the plaintiff had decided to market the clip.” RP February 8, 2011; 17:20-22. NPDG’s argument on Assignment of Error 3 criticizes other aspects of the proceedings below, but no specific rulings are identified to permit proper review. Homax objects to consideration of issues outside the scope of Assignment of Error 3.

Response to Assignment of Error 4

NPDG’s statement is incorrect in that it implies that Mr. Robert Cameron was not permitted to offer opinions regarding alleged damages, which will be shown incorrect in the argument below.

Response to Assignment of Error 5

NPDG’s statement is improper because NPDG failed to object to the jury instructions for the Jaws Clip Trade Secret cause of action and because NPDG has failed to present a sufficient record to have this Court review this question because the jury instructions were not designated for the record on appeal. The “record contains no exceptions to the charge of the trial court to the jury, or to the refusal to give requested instructions. The instructions given, therefore, become the law of the case and are not

here for review. This rule is so well established that the assembling of the cases is unnecessary.” Lally v. Graves, 188 Wash. 561, 570, 63 P.2d 361, 365 (1936). Also, where error is assigned to an instruction and that instruction is “not set out in full in appellant’s brief [it] will not be considered upon appeal.” Sons of Norway v. Boomer, 10 Wash.App. 618, 624, 519 P.2d 28, 32 (1974).

III. STATEMENT OF THE CASE

Homax had a prior relationship with another corporate entity associated with some of the NPDG plaintiffs, known as the Cameron Group Acquisition Corporation (CGAC). RP Cameron 62:21-7:5³. This relationship was a “godsend” to CGAC because Homax succeeded in marketing and selling the Crocodile Clip to Lowe’s and Home Depot whereas CGAC and Mr. Cameron had failed to accomplish that goal: “you better believe it was a God send”. RP Cameron 116:24-117:6. When Homax entered the CGAC license agreement it paid CGAC a six figure advance. RP Cameron 19:5-7. During the time that Homax was selling

³ Homax cites to trial testimony. Homax asserts that NPDG’s statement of facts improperly relies exclusively upon pre-trial materials, particularly declarations associated with NPDG’s response to summary judgment (sections A-C of NPDG’s statement of facts) and motions in limine (section D). Pre-trial materials not introduced into evidence are not considered part of the record on appeal. Daggett v. Tiffany, 2 Wash.App. 309, 314, 467 P.2d 629, 632 (1970)(pre-trial deposition “was not introduced into evidence and on this appeal cannot be considered as part of the record.”)

Crocodile Clips pursuant to a license agreement with CGAC, Homax was sued by investors in the CGAC. Partial RP⁴ 147:16-18. To protect itself, Homax set up an escrow account and paid royalties due under a written agreement with CGAC into escrow. Partial RP 147:20-148:23. From Homax's perspective, the ongoing dispute within the CGAC was a risk to Homax's supply chain and Homax eventually lost confidence in CGAC and its principals as a business partner, which led Homax to design its own clip, known as the CinchTite clip. Partial RP 149:2-17. Mr. Cameron told Homax during this period that he was "embarrassed" that the CGAC corporation was invalid and was worried about the potential of losing a relationship with Homax. Ex 14; RP Cameron 116:23.

NPDG owns no rights in the Crocodile clip. RP Cameron 84:5-20; 85:10-13. CGAC's Crocodile clip and Homax's CinchTite clip have sliding closing mechanisms. RP Cameron 84:21-85:5. The Jaws Clip is a rotary clip that is tapered, round, and has a ring on the back so that "when you screw the ring on because that is tapered it closes and clamps the jaws down." Cameron 17:4-12. A Rhino Clip is larger than either a Crocodile or Jaws Clip and unlike the CinchTite clip has a removable screw and nut

⁴ Partial RP refers throughout this brief to the "Partial Verbatim Report of Proceedings February 10th, 14th, 15th, and 16th, 2011".

closing mechanism: “you can take the screw off, pull the nut out, slide this over the grommet, especially if you have a weak area, the grommet is starting to fail, put the bolt through the inside of the grommet and tighten it down.” RP Cameron 78:5-79:20. Homax obtained a patent on the CinchTite clip on March 2, 2004. RP Cameron 107:23-108:5.

NPDG marketed the Rhino Clip to small stores and at trade shows while Homax was selling Crocodile Clips under the CGAC agreement, but lacked funds and professional reps for larger marketing endeavors. RP Cameron 22:2-23:16. NPDG sent out free samples of Rhino Clips – “lots of them”. RP Cameron 27:19-28:6. In the fall of 2002, NPDG was selling tens of thousands of Rhino Clips through a Canadian distributor. RP Cameron 127:22-128:21. NPDG also tried to contact Lowe’s directly about the Rhino Clip, but was overwhelmed with the packet of procedures and “legal language” of “how to do business with Lowe’s”. RP Cameron 24:11-25:13. By 2003, NPDG had a standard form letter that was used to send sample Rhino Clips to potential buyers, and this was sent to many buyers without any concern of confidentiality. RP Cameron 136:22-138:24; 140:7-24. Similar letters had been used in the Spring of 2002 with samples of Rhino Clips and no confidentiality agreement. Cameron 144:6-145:19.

Wanting to get into the big box stores, NPDG then approached Homax. RP Cameron 23:23:4-16. These discussions never reached the stage of a licensing contract. RP Cameron 135: 11-22. Homax witnesses testified about describing Rhino Clip flaws to Mr. Cameron when it was first reviewed in 2001: “It didn't open very much. In other words, you would have to physically pull it open when you unscrewed it. It didn't open up very much. The teeth design were undulating waves which we knew to be faulty. When you tightened it down it collapsed in the middle but it tended to open up at the outer end.” Partial RP 49:24-51:5. Homax also expressed a concern that sales of a second clip would hurt Crocodile Clip sales. RP Cameron 29:8-11. Homax later learned that its customers were being offered the Rhino Clip by principals of its Crocodile Clip license partner CGAC at a lower price than the Crocodile Clip. Partial RP 91:22-92:5. Mr. Cameron's visits to Homax ended around 2003. RP Cameron 49:6-50:10. NPDG was never successful in selling the Rhino Clip to big box stores up to the time of trial in 2011. RP Cameron 123:12-25; 125:4-21.

The parties disagreed at trial on whether NPDG ever showed Homax a Jaws Clip. Partial RP 76:11-77:5; RP Cameron 52:4-18. There is no dispute that NPDG never marketed, patented or sold the Jaws Clip.

RP Cameron 98:4-100:14. This was never done despite investments given NPDG plaintiffs by Mr. Massey in return for a promise to patent and market the Jaws Clip. RP Cameron 154:10-158:17.

IV. ARGUMENT

For the convenience of the Court, NPDG's primary section headings are adopted.

A. ASSIGNMENT OF ERROR NO. 1

1. NPDG Failed to Preserve Issues and Facts for the CPA Claim.

The lower Court decision on March 16, 2007 related to the sufficiency of the first amended complaint, but NPDG improperly refers to some facts that were not pled in or implied in the first amended complaint. Page 9 of NPDG's brief, for example, cites ¶16 of the first amended complaint and states that Homax's business "centers on soliciting and acquiring ideas, trade secrets, and patent rights from individuals and entities." This was not and could not be fairly pled. The corresponding portion of ¶16 actually states: "Homax is a company involved in marketing do-it-yourself and professional home improvement products. Homax is in the business, among other things, of acquiring ideas, trade secrets and patent rights from individuals and entities." CP 1281 ¶16.

This does not support the current allegation on appeal that Homax's business "centers on soliciting and acquiring ideas...".

Similarly, pages 9-10 of the NPDG's brief states that "Homax...executed a confidentiality agreement with respect to the Crocodile Clip". This misstates the content of the paragraphs in a significant manner. Paragraphs 16-20 of the first amended complaint never mention the Crocodile Clip. Paragraphs 16-20 instead concern the Rhino and Jaws Clips (CP 1281 ¶17) and the paragraphs only admit of an inference that a completed confidentiality contract with Homax regarding the Rhino Clip and/or Jaws Clip was never received: "due to the unavailability of Clawson, Mr. Cameron was assured that he would receive a fully executed copy of the agreement with Clawson's signature at a later date. Mr. Cameron had no concern about confidentiality and disclosure as he had previously worked with Homax, particularly with Hanson and Clawson. Sometime after this meeting Mr. Cameron reminded Hanson he had not yet received this confidentiality agreement." CP1281-82 ¶20.

NPDG is now also precluded from alleging the existence of any Rhino or Jaws confidentiality agreement (and would now have to amend any pleading regarding the same) because this matter was conclusively

decided at trial and NPDG has not appealed the finding that there was no confidentiality agreement. Specifically, a directed verdict was entered finding that no confidentiality contract was formed. RP February 15, 2011, P17. Preservation of issues related to a 12(b)(6) motion to dismiss requires acts to preserve issues critical to the position of party seeking review. Paradise, Inc. v. Pierce County, 124 Wash.App. 759, 767, 102 P.3d 173, 177 (2004) (moving party preserved objections related to 12(b)(6) denial with objections to jury instructions). The alleged confidentiality contract was a key part of the alleged deceptive practices in the amended complaint. NPDG has failed to preserve that issue, which is now conclusively and finally decided in favor of Homax and is fatal to NPDG's CPA claim.

2. & 3. Procedural History/Standard of Review

Homax agrees with the statement of procedural history, and that review is *de novo* because dismissal under Rule 12(b)(6) is a legal question. A motion to dismiss a cause of action in a complaint is appropriate when the complaint alleges no facts that would justify recovery. Wright v. Jeckle, 104 Wn. App. 478, 481, 16 P.3d 1268, 1269 (2001). In determining whether to grant a motion to dismiss for failure to

state a claim, the allegations of the plaintiff are accepted for the purposes of determining the motion, along with all reasonable inferences that may be derived from those allegations as true. Dennis v. Heggen, 35 Wn. App. 432, 434, 667 P.2d 131 (1983).

4. NPDG Failed to Plead a Sufficient CPA Claim.

“Where the transaction was essentially a private dispute it may be more difficult to show that the public has an interest in the subject matter”. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wash.2d 778, 790, 719 P.2d 531, 538 (1986) (citing various cases); see also Cashmere Valley Bank v. Brender, 128 Wn. App. 497, 509, 116 P.3d 421 (2005). “Where a private contract is involved, the public interest is impacted if the defendant advertised to the general public and if the parties occupied unequal bargaining positions.” Burbo v. Harley C. Douglass, Inc., 125 Wn. App. 684, 700, 106 P.3d 258 (2005). “[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” Hangman Ridge, 105 Wash.2d at 790, 719 P.2d at 538. The sufficiency of a pleading to meet the public interest factor is determined by considering “(1) whether defendant was acting in

the course of his or her business, (2) whether defendant advertised to the general public, (3) whether defendant actively solicited this plaintiff, and (4) whether the parties were unequal bargainers.” Hangman Ridge, 105 Wash.2d at 794, 719 P.2d at 539–40.

Considering the seminal Hangman Ridge case, the Court below found the complaint to allege “that what Homax does for their business, and that they do, in fact, is go to the public, and they sell things to the public, but we're not talking about something that they did that was deceptive with regards to the public or affects the public interest. I think if there was deception, I think it's purely between two parties and businessmen negotiating amongst themselves...and I think it's not the sort of thing that the Consumer Protection Act envisions.” RP March 16, 2007, P23-24. This analysis of the lower Court is well-supported, and correct within the law showing a lack of public interest.

The Sophistication of the NPDG Plaintiffs

According to the complaint, the various NPDG plaintiffs have formed the “Jaws Partnership” and the Northwest Product Design Group. CP1279 ¶¶ 1-5. Plaintiffs Mac Cameron, Bob Cameron, and Todd Anderson developed two separate products, the Rhino and Jaws Clip. CP1280 ¶ 12. They worked with a Canadian company DragonTex

Industrial Co. Ltd. to develop drawings, molding, and tooling for the product. CP1280 ¶ 13. They filed a Rhino clip patent application in 2001. Id. They also worked with Parallel Precision, a Mt. Vernon, WA business to create drawings and build prototypes for the Jaws Clip. CP1280-81 ¶15. They employ consultants. CP1279 ¶1 & CP 1280 ¶17. They negotiated with Homax, and present their own confidentiality agreements. CP1281 ¶¶ 18-20. They engage in years long corporate litigation from “early 2001 through August 2003.” CP21 ¶21. These allegations don’t admit of a lack of sophistication or business savvy.

Page 14 of NPDG’s brief uses trial testimony to state that Homax had a “multitude of patents” and significant sales and growth. This is outside of the allegations of the amended complaint, and as patents are public documents could have easily been pled by NPDG but was not. This information is used to try to show that “Mr. Cameron was unsophisticated compared to Homax”, again from comments during trial proceedings. NPDG Brief P14. However, if Homax’s patents are considered the mark of a sophisticated business entity, then Mr. Cameron should be considered likewise so as he “has approximately 100 inventions and about 20 patents have been granted to him by the U.S. Patent and Trademark Office.” NPDG Brief P7.

Mr. Cameron is also not an individual plaintiff, so his sophistication or lack of it does not by itself control. The first named plaintiff is NPDG, which is alleged in the complaint to be “a corporation of, and in good standing with, the State of Washington, having its principal place of business in Bellingham, Washington.” CP1278 ¶1. Mr. Graveley, listed as a “consultant” that the corporation acts through in that same paragraph, is a lawyer. RP June 27, 2008 P10. Other named plaintiffs are partners in something called the “Jaws Partnership”. CP1278 ¶¶2-5. Mr. Graveley and Mr. Cameron were also involved in litigation with the Cameron Group Acquisition Corporation. CP1278; NPDG Brief P4. The amended complaint also necessarily implies that NPDG had the sophistication to “seek other licensees or distributors.” CP 1283 ¶25. NPDG, according to the amended complaint, could have pursued “opportunities to pursue business with other companies to license and distribute the Rhino and Jaws clip.” CP 1283 ¶25. An NPDG principal, Mr. Cameron, also was sophisticated enough to present Homax with “a proposed agreement for confidentiality.” CP1281 ¶21. The plaintiffs named in the complaint are collectively sophisticated by any normal measure.

NPDG's brief also describes Mr. Cameron as himself being sophisticated, indeed advocating that he should have been allowed to testify as an expert on markets. NPDG Brief P38. NPDG should not be heard to argue about the lack of sophistication of Mr. Cameron on one hand and his alleged expertise on the other, which included heavy involvement in litigation, multiple corporations, and heavy involvement in "design, packaging, manufacturing and marketing efforts." NPDG Brief P38.

NPDG is a set of plaintiffs who according to the allegations in the complaint are very similar to the Hangman Ridge plaintiffs that "had a history of business experience. They were sole shareholders in a closely held corporation, and they retained an attorney and an accountant on a regular basis. Plaintiffs in this case are not representative of bargainers subject to exploitation and unable to protect themselves." Hangman Ridge, 105 Wash.2d at 794, 719 P.2d at 540.

Advertising & Active Solicitation

There was no advertising alleged in the first amended complaint except for the lone allegation in ¶28 that Homax "advertises to the general public" (CP1283, ¶28) and the connection between the parties was described in the complaint as being based upon a prior relationship: "Mr.

Cameron had no concern about confidentiality and disclosure as he had previously worked with Homax, particularly with Hanson and Clawson”. CP 1281 ¶20. Thus, the previous work with Homax brought Mr. Cameron to Homax, not any advertising. Taken with the other allegations in the complaint, there is no suggestion a pattern of conduct, the potential for repetition, and the likelihood that others will be affected. Burbo, 125 Wn. App. at 700. Instead, the prior relationship brought the parties together, according to the amended complaint.

The Act was Not Intended to Reach Homax’s Actions/Inactions

“[R]easonable business practices [which are] not injurious to the public are not the kind of acts sought to be prohibited” by the CPA. Money Savers Pharmacy, Inc. v. Koffler Stores (Western) Ltd., 37 Wn. App. 602, 611, 682 P.2d 960 (1984). “It is, however, the intent of the legislature that this act shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of business.” Legislature’s Comments to Washington Consumer Protection Act 19.86.920. “The CPA should not be construed to prohibit practices reasonably related to the development and preservation of business, or which are not injurious to the public interest. In determining if an act should be deemed a violation, we must weigh public interest against a

business's right to conduct its trade.” Dwyer v. J.I. Kislak Mortg. Corp.
103 Wn. App. 542, 548, 13 P.3d 240 (2000).

The complaint alleges in paragraph 21 that Homax wanted to “wait until the litigation was settled before entering into license agreements,” referring to litigation being conducted by plaintiffs with “the entity known as Cameron Group Acquisition Corporation” during the period of “early 2001 through August 2003.” CP1282 ¶ 21. After some of the NPDG plaintiffs completed that multi-year litigation, “Homax was in the process of being acquired by a new parent company and that it was necessary to wait until the acquisition was completed.” CP1282, ¶22. These are clearly legitimate business reasons for “failing to finalize and close” the alleged transactions between plaintiffs and Homax. *Id.* at ¶ 22. Such legitimate business considerations are the grist of reasonable negotiations and cannot be the basis for liability under the consumer protection act. The lower Court’s conclusion that the negotiation between NPDG and Homax was “legitimate business, quote/unquote, business practice. That's the language used in the cases, activity between two active businesses, and I think it's not the sort of thing that the Consumer Protection Act envisions,” RP March 16, 2007, PP23-24, is well reasoned and entirely

consistent with the purposes of the act contrary to the position on appeal of NPDG.

NPDG Relies Upon Unpled Allegations and Inapplicable Cases

NPDG improperly attempts to attack the motion to dismiss with information that was not contained in the complaint. Page 10 of the brief discusses a “60-90 day period” with reference to trial testimony. Page 14 alleges a “significant disparity of these entities’ respective size and power” by referring to trial testimony and comments made by the trial court during its ruling on equitable claims. This information outside the amended complaint is irrelevant to considering the motion to dismiss.

NPDG also attempts to rely upon cases that have different circumstances and ruled on different facts than the present complaint. The Stephens case involved two individual representative plaintiffs who had received form collection letters and the court reasoned that “the sending of ‘formal collection notices’ overstating subrogation claims as ‘amounts due’ [to uninsured drivers that were in accidents] is a practice with a real and substantial potential for repetition. Nothing in the record suggests that these two cases are unique or isolated.” Stephens v. Omni Ins. Co. 138 Wash.App. 151, 178, 159 P.3d 10, 24 (2007). Unlike Stephens, the

present complaint alleges a single business negotiation and there is nothing in the complaint to suggest that this case is not unique.

The Dwyer case involved misleading mortgage payoff notices received by plaintiffs and a certified class of other plaintiffs, and the court determined that this type of payoff notice “considered in light of its purpose reveals its capacity to deceive a substantial portion of the public.” Dwyer, 103 Wash.App. at 547, 13 P.3d at 243. In the Eifler case, the plaintiff responded to a storage facility advertised sign and chose to store belongings there because “due to its distinctive name and advertised qualities, ‘sounded safe.’” Eifler v. Shurgard Capital Management Corp. 71 Wash.App. 684, 697, 861 P.2d 1071, 1079 (1993). In Sign-O-Lite Signs, the defendant sign company routinely made “cold calls” to businesses and admitted that it “routinely solicits other businesses” in the same manner, which established a pattern of conduct susceptible to repetition not alleged here. Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wash.App. 553, 563, 825 P.2d 714, 720 (1992). Nothing in the present complaint alleged that the negotiations arose from any patterned notice, advertisement or cold call of Homax, but instead from plaintiffs’ “prior business dealings with Homax as [NPDG’s] representative as well as the former principal of CGAC. NPDG Brief P4.

The amended complaint, in a light most favorable to NPDG, alleged no more than a never consummated relationship between two sophisticated parties. Even if it is assumed that Homax was deceptive, “Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest.” Hangman Ridge, 105 Wash.2d at 790, 719 P.2d at 538. Plaintiffs pled no facts that could be infer a “likelihood that additional plaintiffs have been or will be injured *in exactly the same fashion* that changes a factual pattern from a private dispute to one that affects the public interest.” Hangman Ridge, 105 Wash.2d at 790, 719 P.2d at 538 (emphasis added).

5. NPDG Failed to Plead Fraud and Misrepresentation Claims.

In order to state a claim of fraud, plaintiffs must assert that an “existing fact” was misrepresented by defendant. Havens v. C & D Plastics, Inc., 124 Wash.2d 158, 182, 876 P.2d 435, 448 (1994). “A promise of future performance is not a representation of an existing fact and will not support a fraud claim.” West Coast, Inc. v. Snohomish County, 112 Wn. App. 200, 206, 48 P.3d 997, 1000 (2002).

These claims were properly dismissed by the lower Court because the amended complaint failed to identify any such actual

misrepresentation and only identified an alleged promise of future consideration of a licensing deal. During the hearing on the motion, the lower Court asked NPDG counsel “what specific act or statement by Homax are you alleging led to this loss?,” and the reply was “continuing to talk and to discuss with the Plaintiffs.” RP March 16, 2007 20:2-6. Pressed on the issue, NPDG counsel offered further explanation that “it may not have been a direct representation as such, but it certainly implied their good faith and their intentions to talk with Mr. Cameron on a continuing basis”. RP March 16, 2007 22:5-15. The lower Court found that the complaint therefore did not rise “to the level of specific misrepresentation” and that fraud is not shown by the case where “somebody just doesn't do what they say they're going to do in the future,” which the lower Court felt was a breach of contract issue. RP March 16, 2007; 24:17-25:1.

NPDG’s brief still fails to recognize the difference between failing to live up to an alleged promise (breach of contract) and making a specific misrepresentation of existing fact (fraud/misrepresentation). NPDG tries to avoid this distinction by now asserting that Homax’s “state of mind” was an existing fact, and that “even though it pertained to the future, was a presently existing fact and was accepted by NPDG as a representation of

fact.” NPDG brief P19. This far-fetched theory still does not identify a “fact” that was misrepresented, even if Homax’s “state of mind” could be considered a fact. Nowhere does the amended complaint state that Homax represented its specific state of mind. This Court need not address so esoteric a topic, however, because the law makes clear that NPDG’s “state of mind” theory for the instant allegations is not supported by the law.

As a matter of law, this theory cannot provide a basis for a fraud claim. “[W]ere the rule otherwise, any breach of contract would amount to fraud.” Nyquist v. Foster, 44 Wn.2d 465, 470, 268 P.2d 442,445 (1954). In paragraph 17 of the complaint, plaintiffs allege that they were “discouraged from contacting other distributor licensees/companies.” NPDG also alleged an extended (lasting from 2002-2003), but failed, negotiation between NPDG and Homax in paragraphs 20–22 of the complaint. CP1281-82. In paragraph 22, NPDG alleged that they were unsuccessful in attempting to “contact Hanson and Clawson on several occasions.” CP1282. At best, accepting all inferences due NPDG, this describes an unsuccessful pursuit of Homax by NPDG and that NPDG was told by Homax of reasons for Homax’s lack of interest during the period.

The cases cited by NPDG to support its theory are readily distinguished with these points in mind. Plaintiffs principally rely upon the Beckendorf case, but this unique case had a defendant that admitted lying about his intentions, and the “trial court based its findings and its judgment upon the testimony of Rodney that he intended to defraud his parents.” Beckendorf v. Beckendorf, 76 Wash.2d 457, 458, 457 P.2d 603, 604 (1969). The Beckendorf court resolved the issue by finding no possibility of fraud because of no evidence of reliance, reasoning that the parents had better knowledge of the lack of reliability of the fraudulent promise as persons who were “peculiarly fitted and qualified by knowledge and experience to evaluate the truth or falsity of the representation.” Beckendorf, 76 Wash.2d at 464, 457 P.2d at 608.

A similar question of the reasonableness of reliance would be raised on the present amended complaint, because the amended complaint itself shows that NPDG was aware of its own 2001-2003 year litigation that was a hinderance to further business with Homax and that Homax was in the process of a corporate acquisition. CP1282 ¶21-22. Thus, whether or not Homax failed to notify NPDG before 2004 that it was seeking patents (CP1282 ¶23) or launching its own clip, there could be no reasonable reliance by NPDG because during 2001-2003 NPDG was

specifically told, according to the complaint, that Homax was not interested at that time in “entering into any licensing agreements.” CP1282 ¶21. NPDG has thus failed to plead reliance under Beckendorff because the amended complaint admits that such reliance would not have been reasonable under the pled circumstances.

Similarly, there is no pled admission rising to the level of the admission in Beckendorff upon which the pleading could be found to have pled a misrepresentation of Homax’s state of mind. The state of mind pled in the complaint as being communicated to NPDG from Homax was that Homax was not interested in taking a license because of litigation and corporate acquisition. CP1282, ¶21-22. There is no pleading that Homax told NPDG that it would enter into a licensing agreement, so there is no possible misrepresentation of any “state of mind”.

The Markov case relied upon by NPDG also reinforces that even an explicit promise, lacking in the present amended complaint, must be reasonable to rely upon before the elements for a fraud claim can be present. In Markov, there was an explicit promise by a partnership that it would “renew the lease for a term of 3 years” and “negotiate the amount of rentals in good faith,” and that circumstances made it reasonable to rely upon those explicit promises. Markov v. ABC Transfer & Storage Co., 76

Wash.2d 388, 396, 457 P.2d 535, 539 (1969). Thus, there was an existing property use contract and an explicit promise to renew that relationship. The present pleading, in contrast, does not rise to one of such “times when the law demands of one an honest declaration of future intentions.” Markov, 76 Wash.2d at 388-89, 457 P.2d at 535 (1969).

Finally, NPDG’s reliance on the dissent in Shook is also unavailing. NPDG Brief P19-20. Even the dissent focused on a specific representation, namely that a well was capable of producing 750 gallons per minute of water and that a purchaser of land was entitled to a tenth of 750 gallons, or even a lesser amount sufficient for his purposes. Shook v. Scott, 56 Wash.2d 351, 364, 353 P.2d 431, 439 (1960). There is no comparable, specific representation alleged in the amended complaint, as seen above. In any event, the holding in Shook was that since any alleged statements concerned future performance of an existing contract with a third party that owned the well it was “not a representation on which an action for fraud could be grounded.” Shook, 56 Wash.2d at 357, 353 P.2d at 434. The present amended complaint at best concerns future performance of a contract that NPDG hoped to enter, which is also not an action upon which fraud could be grounded.

B. ASSIGNMENT OF ERROR NO. 2

1. Additional Facts not in Proposed Complaint

Not a single one of the additional “facts” in this section of NPDG’s brief is taken from the proposed second amended complaint that the lower Court considered in evaluating and denying the motion to amend. The proposed second amended complaint is found at CP1205-1215. It is not clear what purpose is intended, but none of the statements and interpretations in this section of the brief on pages 19-20 of NPDG’s brief relate to the alleged sufficiency of the second amended complaint to state a CPA cause of action as the facts were not alleged in the second amended complaint.

2. & 3 Procedural History/Standard of Review

Homax agrees that the standard of review is “abuse of discretion”, and that NPDG therefore faces a significant burden. Homax disagrees that there was any “newly discovered evidence” that was not available to NPDG at the time the original complaint was filed in 2007, as the “new evidence” dates back to the years earlier time frame of the complaint.

5. No Abuse of Discretion is Shown by NPDG

Motions to amend that merely restate previously pled and dismissed claims are properly denied. Pepper v. King County, 61 Wash.App. 339, 343, 810 P.2d 527, 529 - 530 (1991) (denying motion to amend where “the three claims merely restated the plaintiffs' previously pled and dismissed claims.”). Leave to amend should not be granted when it appears to a certainty that the party would not be entitled to any relief under any state of facts. Adams v. Allstate Ins. Co., 58 Wash.2d 659, 672, 364 P.2d 804, 812-13 (1961).

Page 24 accuses the lower Court of applying an incorrect standard by quoting the Court’s comparison of the proposed second amended complaint to the first amended complaint, “there's really nothing significantly new here that changes my perception,” and alleging this to be outside the scope of the standard for a motion to amend. The point that the lower Court was making concerned the “futile” nature of the proposed amendment in that the proposed amendment still failed to properly state a CPA cause of action that had already been once dismissed. As NPDG basically merely restated a previously pled and dismissed claim, the motion was properly denied. Pepper, 61 Wash.App. at 343, 810 P.2d at 529–30.

Specifically, the new complaint alleged that Homax used a website to solicit inventors to share product ideas. CP1208 ¶¶17-20. Judge Snyder observed that “As I understand it I'm not sure even Mr. Cameron claims that he saw this website or was somehow induced by those things that you discovered that say to contact Homax.” RP June 27, 2008 P6. This precludes a finding that the public interest element is met, as no facts are pled that tie the advertising to the contact between NPDG and Homax. The Hangman Ridge court similarly found public interest could not be met in the absence of factors to indicate that a client was led to an escrow agent as the result of any “widespread advertising of loan closings. In fact, defendant was chosen by the lender. Plaintiffs merely followed the directions of their lender.” Hangman Ridge, 105 Wash.2d at 794, 719 P.2d at 540.

The lower Court correctly decided that the advertising alleged in the amended complaint was completely unrelated to the meetings between NPDG and Homax, and that there was therefore no CPA claim properly alleged: “what the Consumer Protection Act anticipates is when an advertisement or a solicitation, however it's formatted, brings someone to the business, and then as a result of that, there is some action taken which is essentially dishonest.” RP June 27, 2008, P12. The defect identified in

NPDG's complaint and motion to amend was that none of the alleged advertising of Homax was alleged to bring NPDG/Mr. Cameron to Homax. Indeed, NPDG's motion admitted that they were not previously aware of the alleged advertising because they had to use expert advice and a web tool that they were not aware of until 2008 to find an archived versions of Homax's web site. CP 1143 (declaration of White). Like the plaintiffs in Hangman Ridge, NPDG was not drawn in by any advertising (as they were admittedly not aware of it).

The lower Court's decision was entirely consistent with Hangman Ridge because in that case the escrow agent was recommended to the plaintiffs by the bank, and the court found that while the escrow agent may have advertised, public interest could not be met because the contact with the particular plaintiffs in that case resulted from the recommendation of the mortgage company. Hangman Ridge, 105 Wash.2d at 794, 719 P.2d at 540.

C. ASSIGNMENT OF ERROR NO. 3

1. & 2. Procedural History & Factual Background

A Single Ruling On Motion in Limine is Identified for Review

NPDG's assignment of error is narrower than the issues raised in the argument and therefore improper, as it fails to follow Rule 10.3(a)(4). There is no "concise statement of each error a party contends was made by the trial court" in that particular alleged erroneous rulings are not identified relating to testimony of Mr. Cameron or Mr. Ruble (who was never even called by NPDG).

The trial Court granted one narrow motion in limine only, excluding lost profits evidence related to the Jaws Clip. RP February 8, 2011 17:16-25. Homax disagrees with NPDG's statement of the procedural history that implies other rulings, as the lower court reserved rulings for trial as to the scope of Mr. Cameron or Mr. Ruble's testimony vis a vis damages. The only motion granted was limited to excluding the lost profits theory on the Jaws Clip because plaintiffs had never attempted to sell or market the Jaws Clip: "we would be asking the fact finder to speculate as to what the profits would be if the plaintiff had decided to market the clip. And that's just, as the court sees it, just too speculative without any evidence at all of marketability or sales. I'm going to grant the motion." RP February 8, 2011 17:22-23. All other rulings on testimony, including other damages relating to the Jaws Clip and all damages relating

to the Rhino Clip were reserved for trial. RP February 8, 2011 25:8-11; 32:3-15; 35:25-36:2.

Failure to Call Mr. Ruble – Failure to Identify Rulings

With respect to both Mr. Cameron and Mr. Ruble, the lower Court gave NPDG the opportunity “to establish, attempt to establish the expertise of both of these gentlemen with regard to their expertise, and I think I need to manage this by just entertaining objections to the questions that are asked to determine whether or not the question falls within the area that the foundation has been laid as to their expertise. I'm not going to micromanage this. I'm going to handle this as an evidentiary issue during the course of the trial.” RP February 8, 2011 40:22-41:6.

Not only was Mr. Ruble not limited at trial, but NPDG waived any right to complain about what Mr. Ruble would have testified about, because NPDG never called Mr. Ruble to the stand. By failing to call Mr. Ruble, NPDG has waived all issues concerning the scope of Mr. Ruble’s testimony as issues not raised below are waived for appeal. Martin v. Municipality of Metro. Seattle, 90 Wash.2d 39, 42, 578 P.2d 525 (1978); King County Water Dist. No. 75 v. Seattle, 89 Wash.2d 890, 905, 577 P.2d 567 (1978).

NPDG states on page 28 of their brief that “Mr. Ruble would have quantified NPDG's loss as an expert in the field of damages calculation.” This is improper because Mr. Ruble was never called as a witness and there was no ruling preventing him from testifying.

3. Standard of Review

Homax agrees that the standard of review for the lower Court’s exclusion of the lost profits theory of damages for the Jaws Clip is abuse of discretion.

4. The Lower Court Did Not Abuse its Discretion in Excluding a Lost Profits Theory for the Jaws Clip that NPDG Never Attempted to Sell or Market.

The Narrow Ruling to Exclude Jaws Clip Lost Profits Theory

Testimony of plaintiff’s witnesses at trial vindicated the Court’s decision to exclude a lost profits theory for the Jaws Clip. Mr. Cameron testified that although Rhino Clips were sold in the years from 2002-2011 and a patent application filed for the Rhino Clip, the Jaws Clip invented in 2000 was never sold, marketed or patented as of 2011 because NPDG “didn’t have the money” and because NPDG was “concentrating on the Rhino”. RP Cameron; 98:4-100:12. Mr. Cameron also testified that over

the 11 year period from 2000-2011, the Jaws Clip was never offered for sale, sold or marketed despite NPDG plaintiffs having accepted investments from Mr. Massey in the year 2000. RP Cameron 160:1-16. The Court was well within its discretion to exclude a lost profits theory on the motion in limine because it was undisputed in response to the motion that NPDG had never attempted, before or after any alleged wrongdoing by Homax, to market, patent or sell a Jaws Clip.

The narrow ruling to exclude a Jaws Clip lost profits theory was well within the law because claim for lost profits is properly excluded if the alleged loss cannot be adequately proved and remains speculative. Golf Landscaping, Inc. v. Century Constr. Co., 39 Wash.App. 895, 903, 696 P.2d 590 (1984). In Golf Landscaping, a lost profits theory was excluded when it was based upon speculative assertions that the defendant prevented it from obtaining business with third parties. Golf Landscaping, 39 Wash. App. at 903; 696 P.2d at 594. When a plaintiff merely contemplates future business without taking any steps or having any accomplishments that would result in the business, evidence of lost profits is speculative and cannot properly support a damages claim. O'Brien v. Larson, 11 Wash.App. 52, 54-55, 521 P.2d 228, 230 (1974). “[T]here was no evidence that O'Brien had even entered into negotiations for the

purchase of a new tavern and absolutely nothing by which to measure the prospective profit or loss which would result from the venture if undertaken,” Larson, 11 Wash.App. at 55, 521 P.2d at 230. Thus, the lower Court properly excluded lost profits theory for the Jaws Clip because in response to the motion in liminie NPDG failed to identify “any evidence at all of marketability or sales. I’m going to grant the motion.” RP February 8, 2011 17:22-23. The Court’s ruling is exactly consistent with Larson, contrary to the allegation on NPDG’s brief at 33.

Other Issues in the Argument About Assignment of Error 3

The entirety of NPDG’s brief at 34 lacks any citation to the record and is filled with issues concerning what Mr. Cameron would have testified to “if allowed to testify” and that “by excluding his testimony on the subject, the trier of fact was deprived of the opportunity to determine the reliability of Mr. Cameron’s evidence.” None of these complaints relate to the motion in liminie excluding Jaws Clip lost profits, because the Court explicitly determined that it would consider Mr. Cameron’s and Mr. Ruble’s testimony “by just entertaining objections to the questions that are asked to determine whether or not the question falls within the area that the foundation has been laid as to their expertise.” RP February 8, 2011 40:22-41:6.

NPDG also mischaracterizes the proceedings below. Mr. Cameron was not nearly as hamstrung as implied by NPDG's brief. Mr. Cameron, for example, was permitted to offer testimony on the alleged lost value and lost sales of the Jaws Clip: "what they did on it since the half-inch hole and the others, and what they did with the Jaws, we should be entitled to 10 percent of their net profits." RP Cameron 73:19-23. Mr. Cameron also was allowed to testify that he could have gained entrance to big box stores because it would have been a "no brainer when you've got a company selling millions of [other clips] you handed them something better even at a better price, it's like I say, I don't think it takes a brain surgeon to figure that out." Mr. Cameron also testified that a 15% interest in the Jaws Clip was sold for \$10,000. RP Cameron 155:14-17. In return, plaintiffs Andersen and Mac Cameron promised to pay for a Jaws patent, but never filed for one because there was "no money to do that". RP Cameron 156:7-157:12. Mr. Cameron also received a used 1996 Cadillac de Ville for another 10% interest in the Jaws Clip. RP Cameron 158:3-22.

Mr. Cameron was also permitted, over Homax's objection, to testify to a dollar value for the Jaws Clip being "Four hundred to five hundred thousand dollars." RP Cameron; 171:7-16. The actual record

demonstrates that NPDG was given wide latitude to introduce a value and damages theory for the Jaws Clip.

D. ASSIGNMENT OF ERROR NO. 4

Homax agrees that the standard of review is abuse of discretion and that only prejudicial errors require a reversal. The procedural history and argument sections 1 and 3 are addressed together. Homax again notes, however, that the entirety of the related section “D” of NPDG’s statement of facts and P38 of NPDG’s brief (citing to CP142) cites to pre-trial materials instead of addressing the foundation attempted at trial. Pre-trial materials that are part of the clerk’s papers are not considered after a trial. Dowell v. Department of Labor and Industries, 51 Wash.2d 428, 430, 319 P.2d 843, 845 (1957).

NPDG’s brief at 35 mischaracterizes the ruling below in stating that “the trial court ruled that Mr. Cameron could not testify as either an expert or lay person regarding lost future profits.” As seen above, Mr. Cameron was permitted to state his lay opinions that he believed that the Jaws Clip would have “to 10 percent of their net profits” and to testify that it had a value of 400 to 500 thousand dollars. RP Cameron 73:19-23; 171:7-16 . NPDG raises a smoke screen by trying to said that more “lay

opinions” should have been permitted when Mr. Cameron was given wide latitude and the lower Court was permissive toward Mr. Cameron’s testimony.

Examination of the record reveals that NPDG offered Mr. Cameron as an expert on markets, and that was where the lower Court properly drew a line. As will be seen, Mr. Cameron also lacked any knowledge about the big box retail stores critical to the market displacement theory that NPDG wished him to testify about.

The narrow ruling of the Court limiting Mr. Cameron’s testimony was related to the scope of his expert qualifications. NPDG tendered Mr. Cameron as “an expert in clip marketing, sales, manufacture and – design”. Partial RP 3:14-21. The Court permitted NPDG to attempt to lay a foundation for Mr. Cameron’s expertise. When asked by NPDG counsel about his experience in marketing, Mr. Cameron instead testified about the efforts of someone he had hired for that purpose: “I set up a lot of marketing for the person I licensed it to in Grainger now which is one of the biggest catalogue stores and he has other stores. He has met with and hired reps and stuff like this. And like I say, we have learned a lot from the trade shows. We learned about the reps that we use. I learned a

hard lesson on reps the hard way of getting the wrong one to go to a trade show.” Partial RP 6:23-7:6.

On *voir dire* cross-exam, Mr. Cameron admitted that he lacked formal education in accounting or marketing. Partial RP 7:18-24. He admitted that he had never personally succeeded in placing a clip in a large retail store, that Homax had taken care of placing the Crocodile Clip in large retail stores, and that he hadn’t understood the procedures of Lowe’s. Partial RP 8:9-20. He had no experience with Lowe’s procedures, had never placed a product in Walmart, and had never maintained a supply chain with Walmart, TruServ or Home Depot. Partial RP 10:15-11:3. He also testified that he had no education regarding dealing with big box retailers. Partial RP 11:4-6. After completion of *voir dire* NPDG counsel tendered Mr. Cameron as a clip design expert and also as an expert as “whether if his company were in the market whether it could displace or take over some of the Homax business... to the tune of about 20 percent a year up to five years when it would have half of the sales within the company. So it's a clip thing, it's not an economic thing.” Partial RP 11:23-12:8.

The lower Court reasonably permitted wide latitude which stopped at the point of opinions on numerical values for market displacement.

Specifically, the Court reasoned he could testify about the advantages and disadvantages of different clips, but regarding “displacing in the marketplace through sales there's no qualification that I have heard from him at all, Mr. Mullins, that qualifies him to testify as to sales displacement in the marketplace. I don't see how he has any qualifications to say that his clips would displace by 20 percent.” Partial RP 12:11-21. NPDG counsel pressed the issue, and the court granted significant leeway up to a clear line “You can go all the way up until you say he is qualified to say how much of a percentage his clip would take over in the marketplace.” Partial RP 13:1-9.

After a lunch break, the Court allowed NPDG counsel the opportunity to further argue about Mr. Cameron’s qualification to talk about market penetration as a “lay witness”. Counsel cited a number of cases, which the Court distinguished from the proffer. Partial RP 15:1-22:3. The lower Court addressed every point raised by NPDG in a lengthy exchange. Partial RP 15:3-29:24. The Court eventually exercised its discretion and agreed to consider specific testimony as it came in to serve the roll of calling “balls and strikes as they come,” and that the ball headed to the plate for a call was “whether you will be allowed to elicit testimony from Mr. Cameron that he, would have captured 25 percent of the market

in 10 years and he is not qualified to testify to that by training, education, and he has no experience in marketing.” Partial RP 30:3-10. The Court permitted NPDG every opportunity to present different evidence and even invited consideration of possible additional briefing promised by NPDG counsel: “I’m always open to reconsideration, Mr. Mullins, if you can convince me that I’m wrong. But right now I’m satisfied that I’m correct in my ruling with what I understand and what I have, but you can always come back.” Partial RP 31:21-25.

The lower Court exercised its discretion judiciously, permitted NPDG wide latitude, and only called “balls and strikes” as the evidence came in. A wide discretion must be granted the trial judge in exercising judgment and common sense in determining limits upon expert testimony Poston v. Clinton, 66 Wash.2d 911, 917, 406 P.2d 623, 627 (1965). The lower Court followed the law because the court painstakingly considered Mr. Cameron’s qualifications and permitted testimony within the scope of those qualifications. The “standard that the trial court must apply in deciding whether to exercise its discretion has three parts: (1) is the witness qualified to testify as an expert, (2) is the expert's theory based on a theory generally accepted in the scientific community, and (3) would the testimony be helpful to the fact finder?” Saldivar v. Momah, 145

Wash.App. 365, 397, 186 P.3d 1117, 1134 (2008). This standard was clearly followed, and the Court's evaluation of Mr. Cameron's expertise should not be disturbed on appeal.

The lower Court also correctly recognized that speculative testimony is not helpful to a trier of fact and a damages theory must be supported by evidence that provides a reasonable basis for estimating the loss and does not amount to mere speculation or conjecture. Shinn v. Thrust IV, Inc., 56 Wash.App. 827, 840, 786 P.2d 285 (1990). Similarly to the small limitations placed on Mr. Cameron, in Wilson v. Brand S Corp., 27 Wash.App. 743, 746-747, 621 P.2d 748, 750 (1980), evidence relating to lost profits for the sale of slate was properly excluded because though the plaintiff "had developed retail connections, and had the basic knowledge to start production" the mere intention to enter the market and some "exploratory" work was "insubstantial and speculative". The lower Court recognized the same defect in the proposed scope of Mr. Cameron's testimony. The few limits placed on Mr. Cameron's testimony were warranted and well within the Court's properly exercised discretion.

E. ASSIGNMENT OF ERROR NO. 5-7, 9

NPDG Has Failed to Properly Present a Question for Review

NPDG's assignments of error here should be refused because NPDG has failed to follow Rule 10.3 and has failed to identify "each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number." NPDG identifies the special verdict form, but NPDG did not object to this form or any instruction at trial. The parties cooperated with the Court in the preparation of instructions at trial, and neither party objected to the instructions. Having failed to object to the special verdict form, or indeed any portion of the jury instructions, NPDG should be deemed to have waived rights to a trial based upon a different verdict form pursuant to Superior Court Civil Rule 49(a).

NPDG has also failed to provide critical portions of the record to permit this Court to determine whether the jury's verdict is supported by substantial evidence and whether the jury was properly instructed. NPDG has failed to designate critical portions of the record, such as the instructions given to the jury. "The party seeking review has the burden of perfecting the record so that this court has before it all of the evidence relevant to the issue." Olmsted v. Mulder, 72 Wash.App. 169, 183, 863

P.2d 1355, 1362 (1993), citing Allemeier v. University of Washington, 42 Wash.App. 465, 472, 712 P.2d 306 (1985) Jury instructions must be considered as a whole, and are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, and, when read as a whole, properly inform the jury of the applicable law. State v. Clausing, 147 Wn.2d 620, 626, 56 P.3d 550 (2002).

The Jury Verdict is Supported by Evidence

In addition, the jury was well within its discretion to follow the Court instructions to find a lack of proximate cause or a lack of actual damages. As seen above, there was significant evidence in the record that NPDG never made any effort to market or sell the Jaws clip, and there was no evidence placed in the record to support damages.

There was also no evidence to establish that Homax ever sold, marketed or otherwise benefitted from the Jaws Clip. The only evidence of Homax clip sales in the record concerned sales of licensed Crocodile Clips and Homax's patented CinchTite Clip. Partial RP 113:1-14. NPDG even admits in its brief that "Homax never sold the Jaws Clip trade secret as its own product." NPDG Brief at 44.

There is therefore no showing that the verdict is "outside the range of substantial evidence in the record, or shocks the conscience of the court,

or appears to have been arrived at as the result of passion or prejudice” after viewing the evidence in the light most favorable to the party for whom the verdict was entered. Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (quoting Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)). This correct standard identified by NPDG in their brief has not been demonstrated on appeal.

NPDG Had the Burden to Prove Actual Damages

NPDG’s theory on appeal, as best understood, seems to be that it was not obligated to prove damages for misappropriation of the Jaws Clip. The Uniform Trade Secrets act “provides that a plaintiff can receive *actual damages* for misappropriation of trade secrets.” Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 46, 738 P.2d 665, 673 (1987 (emphasis added)). Having failed to convince the jury of any such actual damages, NPDG improperly tries to remove their burden of proving damages. RCW 19.108.030(2) only permits exemplary damages if “willful and malicious appropriation exists”, whereas RCW 19.108.030(1) states that a plaintiff “*may* recover damages for the *actual loss* caused by misappropriation” and also “*may* recover for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for

actual loss” (emphasis added). “Actual damages include ‘damages for injury in fact, as distinguished from exemplary, nominal or punitive damages.’” Eagle Group, Inc. v. Pullen, 114 Wash.App. 409, 421, 58 P.3d 292, 299 (2002), citing Ellingson v. Spokane Mortgage Co., 19 Wash.App. 48, 58, 573 P.2d 389 (1978). The jury could properly determine within the law that NPDG had failed to prove any actual damages or unjust enrichment.

The instruction upheld in Eagle Group similarly reflected the burden to prove damages because the jury in that case was given the similar instruction that “if you find that [defendants] misappropriated any of Plaintiff’s trade secrets, you *may* award for the actual damages caused by the misappropriation.” Eagle Group, 114 Wash.App. at 421, 58 P.3d at 299 (emphasis added).

NPDG is really arguing that it is entitled to exemplary damages under RCW 19.108.030(2). However, such an award requires a finding of willful misappropriation and is within the discretion of the trial court, and NPDG does not even argue that the lower Court abused its discretion.

E. ASSIGNMENT OF ERROR NO. 8

CR 11 requires attorneys to date and sign every pleading, motion, and legal memorandum filed with the court, certifying the pleading motion or memoranda is well grounded in fact, is warranted by existing law or a good faith argument, and is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” Biggs v. Vail, 124 Wash.2d 193, 196, 876 P.2d 448 (1994). If a party violates CR 11, the court may impose appropriate sanctions ordering that party to pay reasonable expenses incurred by the other party, including reasonable attorney fees. Just Dirt, Inc. v. Knight Excavating, Inc., 138 Wash.App. 409, 417, 157 P.3d 431, 436 (2007). The fees awarded under CR 11 are limited to “the amounts reasonably expended in responding to the sanctionable filings.” Biggs, 124 Wash.2d at 201, 876 P.2d 448. This Court reviews a trial Court’s imposition of action for an abuse of discretion, Biggs, 124 Wash. 2d at 197, 876 P.2d 448, which occurs only when an order is “is manifestly unreasonable or based on untenable grounds.” West v. State, Washington Ass'n of County Officials, 162 Wash.App. 120, 135, 252 P.3d 406, 413 (2011) citing Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash.2d 299, 339, 858 P.2d 1054 (1993).

NPDG does not even discuss the content of the lower Court's order, and certainly does not meet the high standard of demonstrating that it was "is manifestly unreasonable or based on untenable grounds." As shown in the lower Court's uncontested order, NPDG caused undue time and expense and never "voluntarily" withdrew the Rhino Trade secret cause of action.

The lower Court's order that states: "On February 10, 2009, Defendants' counsel provided timely notice to Plaintiffs' counsel that there was no factual basis for, inter alia, the trade secret claim based upon the Rhino Clip, and that they would seek recovery of attorneys' fees and costs for continued prosecution of the claim, based upon its frivolous nature. In particular, Plaintiffs cited the testimony of Robert Cameron that he had provided samples of the Rhino Clip to dozens of third parties, and that the product's features were disclosed in U.S. Patent Publication No. 2002/0000027 that published on January 3, 2002 ." CP 9 ¶2. Plaintiffs did not withdraw the claim as requested, and Homax proceeded with its summary judgment motion. CP9 ¶3. It was only after Homax's summary judgment motion was prepared and filed that NPDG withdrew the Rhino trade secrets claim. CP9 ¶4. No discovery was required to review NPDG's own documents, and the facts of NPDG's lack of investigation

was uncontested at the time of the motion and remains uncontested on appeal. CP9 ¶5. The lower Court's ruling was based upon "the admitted testimony of Plaintiff Robert Cameron, the other uncontested facts, and Plaintiffs lack of any argument to the contrary." From the conceded history of the case and admissions of the plaintiffs that remain unchallenged on appeal, the lower Court found "that Plaintiffs had no reasonable basis in fact or law to pursue their claim for trade secret misappropriations of the Rhino Clip, and Plaintiffs failed to make a reasonable inquiry into the law or facts prior to commencing this action. This Court finds that Plaintiffs' continued advancement of the Rhino Clip trade secret claim is subject to sanctions under CR 11." CP9 ¶5.

NPDG's complaints about the Homax attorney that signed a declaration submitted with Homax's motion ring hollow given that documents attached to the motion established the facts relied upon by the Court and NPDG did not and could not challenge the authenticity of the documents. The exhibits to the declaration fully support the Court's ruling and their authenticity was not, is still not, and could not be challenged by NPDG.

V. CONCLUSION

Homax requests that NPDG's appeal be denied in whole, and that the jury verdict and decisions of the lower Court be upheld in whole or in such part as deemed appropriate by this Court. Homax requests that it be deemed the prevailing party.

DATED this 26th day of January 2012.

Respectfully Submitted

A handwritten signature in black ink, appearing to read "S. Fallon", is written over a horizontal line.

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COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION I

NORTHWEST PRODUCT DESIGN)
GROUP, LLC, a Washington limited)
liability corporation; TODD D.) Court of Appeal No. 67278-9
ANDERSEN, an individual; MAC) Superior Court No. 07-2-00040-9
CAMERON, an individual; JERRY)
CHAMBERS, an individual; and) PROOF OF SERVICE
ELLIS MASSEY, an individual,)
)
Appellants/Cross-Respondents,)
)
v.)
)
HOMAX PRODUCTS, INC., a)
Delaware corporation; RANDAL W.)
HANSON and JANE DOE)
HANSON, husband and wife, and)
the marital community thereof;)
ROSS CLAWSON and JANE DOE)
CLAWSON, husband and wife, and)
the marital community thereof;)
LESTER GREER, JR. and Jane Doe)
Greer, husband and wife, and the)
marital community thereof; and)
WILFRED HOFFMANN and Jane)
Doe Hoffmann, husband and wife,)
and the marital community thereof,)
)
Respondents/Cross-Appellants.)

I, Steven P. Fallon, attorney for GREER, BURNS & CRAIN Ltd., attorneys for Respondents/Cross-Respondents in the above entitled action, hereby certify that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 26th day of January 2012, I served by sending a true and correct copy in the manner indicated below of the following documents:

1. Respondent's Brief; and
2. Proof of Service.

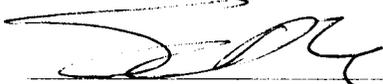
Upon the attorney of record herein, as follows, to wit:

Donald H. Mullins *via email and US mail*
Allyssa J. Hale
Badgley~Mullins Law Group
701 Fifth Avenue, Suite 4750
Seattle, WA 98101
Email: DonMullins@badgleynullins.com; ahale@badgleynullins.com

Upon the clerk of the court the court of record herein, as follows, to wit:

via US mail
Clerk of the Court
Court of Appeals of the State of Washington Division I
600 University St
One Union Square
Seattle, WA 98101-1176

DATED this 26th day of January 2012 in Chicago, IL


Steven P. Fallon, Attorney of Record

January 26, 2012

Mr. Richard D. Johnson
Clerk of the Court
Washington State Court of Appeals
Division I
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Amy C. Ziegler
Patricia L. Prior *

Re: Washington State Court of Appeals, Division I
Appeal No. 67278-9
NORTHWEST PRODUCT DESIGN GROUP, LLC, a Washington
limited liability corporation; TODD D. ANDERSEN, an individual;
MAC CAMERON, an individual; JERRY CHAMBERS, an individual;
and ELLIS MASSEY, an individual,

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Gavin J. O'Keefe
Kevin T. Bastuba
Justin R. Gaudio
Tanja Proehl, Ph.D. **
Danielle M. Beach

Roger D. Greer (1941-2011)

Of Counsel:
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* Admitted in Ohio only
** Admitted in New York only

Appellants/Cross-Respondents

v.

HOMAX PRODUCTS, INC., a Delaware corporation; RANDAL W.
HANSON and JANE DOE HANSON, husband and wife, and the
marital community thereof; ROSS CLAWSON and JANE DOE
CLAWSON, husband and wife, and the marital community thereof;
LESTER GREER, JR. and Jane Doe Greer, husband and wife, and
the marital community thereof; and WILFRED HOFFMANN and Jane
Doe Hoffmann, husband and wife, and the marital community
thereof,

Respondents/Cross-Appellants.

Dear Mr. Johnson:

Enclosed please find an original and one copy of the Respondent's Brief due
in the above captioned case on January 26, 2012 and timely filed with this
mailing. A copy of the Respondent's Brief has been duly served upon the
parties named herein as noted in the enclosed Proof of Service.

Should you have any questions, please contact me.

Respectfully Submitted,

GREER, BURNS & CRAIN, LTD.



By

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SPF:bh
Encl.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
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