

NO. 42158-5-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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JAMES L. BRUMMETT AND AT LEAST 10,000'S OF OTHER  
LOTTERY 2010 RAFFLE PLAYERS SO SITUATED,

Appellants

v.

WASHINGTON'S LOTTERY, WASHINGTON'S LOTTERY  
COMMISSION AND COLE & WEBER UNITED, et al.,

Respondents

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION II  
BY  
IDENTITY

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COURT OF APPEALS  
DIVISION II

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**BRIEF OF RESPONDENT COLE & WEBER UNITED**

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## TABLE OF CONTENTS

I.	PRELIMINARY STATEMENT .....	1
II.	STATEMENT OF THE ISSUES .....	1
III.	STATEMENT OF THE CASE .....	2
	A.    THE 2010 THANKSGIVING RAFFLE .....	3
	B.    THE C&W ADVERTISING .....	6
	C.    THE COMPLAINT.....	9
	D.    THE DECISION BELOW.....	11
IV.	ISSUES AND ANALYSIS .....	11
	A.    STANDARD OF REVIEW .....	11
	B.    SUMMARY OF ARGUMENT .....	13
	C.    THE TRIAL COURT PROPERLY CONSIDERED ALL OF PLAINTIFF’S CLAIMS BEFORE DISMISSING THE COMPLAINT (ASSIGNMENT OF ERROR 1) .....	13
	D.    THE TRIAL COURT PROPERLY HEARD ARGUMENT ON THE ADVERTISEMENTS REFERENCED IN PLAINTIFF’S COMPLAINT (ASSIGNMENT OF ERROR 2) .....	14
	E.    THE TRIAL COURT PROPERLY DISMISSED ALL PLAINTIFF’S DECEPTION-BASED CLAIMS (ASSIGNMENT OF ERROR 1, 4 AND 5) .....	16
	1.    The CPA Claim Is Insufficiently Pled.....	17
	2.    The Common Law Fraud Claim is Insufficiently Pled .....	24
	3.    The Negligent Misrepresentation Claim is Insufficiently Pled .....	26
	F.    THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF’S BREACH OF CONTRACT CLAIM (ASSIGNMENT OF ERROR 3 AND 6) .....	26
V.	CONCLUSION .....	28

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Branch v. Tunnell</i> , 14 F.3d 499 (9th Cir. 1994), <i>cert. denied</i> , 512 U.S. 1219, 114 S. Ct. 2404 (1994) <i>overruled on other grounds</i> .....	15
<i>Galbraith v. County of Santa Clara</i> , 307 F.3d 1119 (9th Cir. 2002) .....	15
<i>In Re Stac. Elecs Sec. Litig.</i> , 89 F.2d 1399 (9th Cir. 1996) .....	15
<i>Tandiama v. Novastar Mortgage, Inc.</i> , 2005 WL 1287996 (W.D.Wash. 2005).....	25, 26

### STATE CASES

<i>Atchison v. Great Western Malting Co.</i> , 161 Wn.2d 372, 166 P.3d 662 (2007).....	11
<i>Brown v. MacPherson's, Inc.</i> , 86 Wn.2d 293, 545 P.2d 13 (1975).....	12, 15
<i>Contreras v. Crown Zellerbach Corp.</i> , 88 Wn.2d 735, 565 P.2d 1173 (1977).....	12
<i>Eli Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).....	15
<i>Ernst Home Center Inc. v. United Food Workers</i> , 77 Wn.App. 33, 888 P.2d 1196 (1995).....	23
<i>Ferre v. Doric</i> , 62 Wn.2d 561, 383 P.2d 900 (1963).....	14
<i>Hiner v. Bridgestone/Firestone, Inc.</i> , 91 Wn. App. 722, 959 P.2d 1158 (1998), <i>reversed on other</i> <i>grounds</i> , 138 Wn.2d 248 (1999).....	18
<i>Gorman v. Garlock, Inc.</i> , 155 Wn.2d 198, 118 P.3d 311 (2005).....	12
<i>Haberman v. WPPSS</i> , 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987) .....	11

<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	17
<i>Howell v. Alaska Airlines, Inc.</i> , 99 Wn. App. 646, 994 P.2d 901, review denied, 141 Wn.2d 1014, 10 P.3d 1071 (2000) .....	12
<i>Lawyers Title Insurance Co. v. Baik</i> , 147 Wn.2d 536, 55 P.3d 619 (2002).....	25, 26
<i>Leingang v. Pierce County Medical Bureau, Inc.</i> , 131 Wn.2d 133, 930 P.2d 288 (1997).....	18
<i>Postlewait Construction Co. v. Great American Insurance Co.</i> , 106 Wn.2d 96, 720 P.2d 805 (1986).....	27
<i>Poulsbo Group LLC v. Talon Development LLC</i> , 155 Wn.App. 339, 229 P.3d 906 (2010).....	24
<i>Puget Sound National Bank v. McMahon</i> , 35 Wn.2d 51, 330 P.2d 559 (1958).....	25, 26
<i>Rutter v. Rutter</i> , 59 Wn.2d 781, 370 P.2d 682 (1962).....	14
<i>Stephens v. Omni Insurance Co.</i> , 138 Wn. App. 151, 159 P.3d 10 (2007).....	18
<i>Williams v. Joslin</i> , 65 Wn.2d 696, 399 P.2d 308 (1965).....	26
<b>STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS</b>	
Consumer Protection Act, RCW 19.86 .....	17
RCW 67.70.040(1) .....	13
Rule 12(b)(6) .....	passim

**OTHER AUTHORITIES**

May 20, 2011, Verbatim Report of Proceedings, p. 22, l. 8-14 I .....	14, 15
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## I. PRELIMINARY STATEMENT

Respondent Cole & Weber United (“C&W”) submits this Respondent’s Brief in opposition to the Appellant’s Brief, filed August 4, 2011, and in support of the order of Judge Carol Murphy, Judge of the Superior Court of Thurston County, dated May 20, 2011, which granted respondent C&W’s Rule 12(b)(6) motion to dismiss the appellant’s *pro se* complaint as meritless. The *pro se* complaint, fashioned as a “class action,” charged respondent C&W with a Consumer Protection Act violation, common law fraud, negligent misrepresentation, and breach of contract arising out of certain advertising C&W created for the Washington State Lottery Commission in connection with the Lottery’s 2010 Thanksgiving Day Raffle. In dismissing the complaint in its entirety, the Trial Court found that the *pro se* pleading failed to sufficiently plead the elements of any of the alleged claims.

## II. STATEMENT OF THE ISSUES

Did the District Court err in granting C&W’s Rule 12(b)(6) motion when the Complaint and documents it relied upon established (1) that plaintiff knew that the challenged advertising for the 2010 Thanksgiving Raffle—“Get your tickets now, they’re going fast”<sup>1</sup>—did not reflect the

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<sup>1</sup> The subject print ads said that the chances for \$50,000 were “going fast” (CP-246). The radio ads said that tickets were “selling fast, so go, go, go” (CP-248). The ads are interchangeably referred to herein as either the “going fast” ads or the “selling fast” ads.

pace of actual ticket sales; and (2) that the advertisements themselves did not address how or when the thirty Early Bird prizes were being awarded.

### III. STATEMENT OF THE CASE

This *pro se* appeal by self-styled lottery “watchdog” and avocational litigant James P. Brummett turns upon Mr. Brummett’s erroneous beliefs about the basis on which thirty \$500 “Early Bird” promotional prizes were to be awarded during the 39 day Thanksgiving Raffle run by the Washington State Lottery in 2010 (Appellant’s Brief at 26). Having purchased twelve (12) losing tickets at various times throughout the 39 day raffle offering, Mr. Brummett’s sole claim against C&W, as limited by his appellate brief, relates to only the first two tickets which he purchased on October 20, 2010. According to Mr. Brummett’s complaint and appellate allegations, he seeks damages from C&W because he interrupted a hunting trip to Eastern Washington and “unnecessarily traveled 70 miles” on October 20 to purchase the two \$10 lottery tickets on an erroneous belief that all of the \$500 Early Bird Prizes would be awarded during the first week of ticket sales, and that they would be unavailable to him if he waited until the following week to purchase raffle tickets (Complaint at ¶5.2; CP-306, 313-314).

Mr. Brummett’s complaint charges that C&W’s “going fast” advertising was responsible for his unnecessary 70 mile trip (App. Br. at pp. 11-12). He admits that C&W had nothing to do with structuring the award

of Early Bird prizes (CP- 306, 308-9), but, erroneously believing that Early Bird prizes would be awarded within the first 50,000 tickets (CP-232, 306, 313-14), he claims the print and radio ads affected his ticket purchase timing (App. Br. at p. 12). For that reason, he alleges that C&W's "selling fast" ads were "unfair, misleading, and deceptive," and seeks damages for fraud, breach of contract, negligence misrepresentation, and violation of the Consumer Protection Act (CP21-23).

As set forth hereinafter, however, admissions contained in plaintiff's own papers undermine his claims. They establish that his 70 mile ticket hunting trip on October 20, 2010 was entirely the result of his own erroneous assumptions. He admittedly knew the "selling fast" ads did not reflect the pace of actual ticket sales (CP-16). Moreover, C&W's challenged advertising in fact said nothing about the awarding of Early Bird Prizes which would support any of the claims in his complaint. The Trial Court's Rule 12(b)(6) dismissal of the complaint should therefore be affirmed.<sup>2</sup>

#### **A. THE 2010 THANKSGIVING RAFFLE**

On August 19, 2010, the Washington State Lottery Commission unanimously approved a raffle, denominated the Thanksgiving Raffle (CP-13). The Commission authorized the sale of 250,000 \$10 raffle tickets to be sold over 39 days culminating in the award of 2,720 prizes by raffle drawing

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<sup>2</sup> C&W joins in the arguments advanced in the Attorney General's opposition brief to the extent applicable.

to be held on Thanksgiving Day, November 25, 2010 (*Id.*). The guaranteed prizes included 20 \$50,000 prizes, 200 \$250 prizes, and 25,000 \$50 prizes (*Id.*). The Commission also authorized 30 \$500 interim promotional prizes, denominated Early Bird prizes. In all, 2,750 prizes awarding \$1,090,000 were guaranteed to be awarded by the Lottery Commission (*Id.*). If all 250,000 tickets sold, the odds of winning a raffle prize were better 1 in 92 (CP-201, 246).

Significantly, the Lottery Commission did not initially disclose the methodology or timing for the awarding of the thirty Early Bird prizes. All that was disclosed was that they were instant prizes that would be awarded at the time of ticket purchase. The 2,720 cash raffle prizes would all be awarded by drawing on November 25. All the Early Bird prizes would therefore be awarded *before* the drawing prizes.

According to Mr. Brummett's complaint, when raffle sales began on October 17, 2010, neither he nor any of the other ticket purchasers had any way of knowing how the Early Bird prizes would be awarded (*see* Complaint at ¶ 4.12, 4.13; CP-16). The Lottery simply did not disclose that information. As a self-appointed lottery watchdog, however, Mr. Brummett followed the sales pattern established by his own ticket purchases to determine the pattern of ticket sales against the number of Early Bird prizes

awarded.<sup>3</sup> When he learned on or about November 15, 2010, at the time he purchased his ninth ticket, No. 156575, that eleven (11) of the thirty (30) Early Bird prizes had yet to be awarded, he called the Lottery's in house counsel, Jana Jones, and told her that the tickets were not "selling fast," and that because of the slow ticket sales, he believed that all of the eleven remaining Early Bird prizes might not be awarded (CP-15). In response to his call, the Lottery advised Mr. Brummett that they were changing the programmed issuance of Early Bird prizes from "every 8,000<sup>th</sup>" ticket to "every 1,000<sup>th</sup>" ticket to ensure that all Early Bird prizes were awarded by the drawing date (CP-15).

As the complaint acknowledges, all the prizes were in fact awarded. 2,720 prizes worth \$1,075,000 were awarded by a drawing on November 25, and the 30 \$500 Early Bird prizes were all awarded by the issuance of the 179,000<sup>th</sup> ticket on or about the 34<sup>th</sup> day of the raffle period (CP-295). As a total of 211,755 tickets were sold, the last 32,775 tickets purchased were therefore "too late" to win an Early Bird prize (Compare CP-16 and CP-295). And because all 250,000 tickets did not sell out, the odds of winning a prize turned out to be considerably better than the 1 in 92 originally projected. Based on actual lower sales, the odds of winning were 1 in 78 ( $211,755 \div 2720$ ).

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<sup>3</sup> The tickets were numbered sequentially and sold at 4,000 points of sale throughout the state. By the numbers in his own periodically purchased tickets, plaintiff could judge the pace of ticket sales.

Notably, Mr. Brummett continued to purchase raffle tickets after learning from the Lottery that their methodology for awarding Early Bird prizes was being changed to every 1000<sup>th</sup> ticket (Complaint at ¶ 4.8-4.10). While he had no knowledge of the award program when he purchased his first nine tickets, he knew when he purchased his last three tickets that Early Bird prizes were being awarded to every 1000<sup>th</sup> ticket sold (*Id.* at 14-15). Indeed, appellant was the only raffle player that had the information (CP-15-16). Despite that knowledge, Mr. Brummett's final two ticket purchases, Nos. 181,314 and 191,258, were purchased *after* the 179,000<sup>th</sup> ticket sold. Accordingly, he was "*too late*" for an Early Bird prize when he purchased those last two tickets.

#### **B. THE C&W ADVERTISING**

By written contract dated October 10, 2008, respondent C&W was the provider of advertising service for the Washington State Lottery (CP-12; CP-99-108). In that role, C&W provided the Lottery with the print and radio ads which were referenced in the Brummett complaint (*see* CP-93; CP-109; CP-228; CP-246), and which Mr. Brummett allegedly relied upon in traveling 70 miles on October 20, 2010 to purchase two \$10 raffle tickets in hopes of winning an Early Bird prize (CP-231-233; 306; 313-314). According to Mr. Brummett's opposition papers below, those ads, which he denominates the "Going and selling fast" ads (CP-228), were seen and heard by him "a week or so before" the October 17 start of ticket sales (CP-231-232; 233; 305-306).

On its face, the printed placard Mr. Brummett claims to have seen a week before tickets went on sale actually reads: “The easiest way to \$50,000 is going fast! Sales start October 17. Only 250,000 tickets.” (CP-246). The placard then lists the 2750 prizes available and the 1 in 92 odds of winning (*Id.*). The ad offered no information about the timing or awarding of Early Bird prizes.

The two radio ads which Mr. Brummett claims to have heard during the week before his October 14 hunting trip, and which he allegedly relied upon in traveling 70 miles to purchase two raffle tickets on October 20, 2010, were also unrelated to the timing or methodology for awarding Early Bird prizes. They were transcribed by Mr. Brummett as follows:

RADIO ANNOUNCER: This just in: raffle mania. With a limited number of prizes including twenty \$50,000 top prizes, tickets for Washington’s Lottery Raffle are going fast. So drop what you’re doing and buy a raffle ticket now, unless you’re an air traffic controller, a school bus driver, a Seahawks player about to score, or a surgeon in the middle of open-heart bypass surgery. For the rest of you, there are no excuses. Washington’s Lottery Raffle tickets are going fast, so go, go, go.

DISCLAIMER ANNOUNCER: Overall odds are one in ninety-two. Must be 18 to purchase. Be a smart player. Know your limits. Problem gambling helpline: 1-800-547-6133. Visit [wa.lottery.com/raffle](http://wa.lottery.com/raffle) for details.

(End first commercial; begin second commercial.)

RADIO ANNOUNCER: This just in: raffle mania. With a limited number of prizes including twenty \$50,000 top prizes, tickets for Washington's Lottery Raffle are going fast. So drop what you're doing and buy a raffle ticket now, unless you're an air traffic controller, someone negotiating world peace, a school bus driver, a mother removing a splinter, a Seahawks player about to score, or a surgeon in the middle of open-heart bypass surgery. For the rest of you, there are no excuses. Washington's Lottery Raffle tickets are going fast, so go, go, go.

Why are hundreds of people camping in front of a convenience store? Tom Wallace from (inaudible) is on the scene.

MR. WALLACE: Sir, what brings you here today?

MAN #1: I'm here to get a ticket for Washington's Lottery Raffle before they sell out. They're going really fast.

MR. WALLACE: And you, ma'am?

WOMAN: It's all those amazing prizes.

MR. WALLACE: And you, sir?

MAN #2: I just like camping.

MR. WALLACE: And there you have it. People want those tickets for Washington's Lottery Raffle, and they're going fast. Better get yours today.

DISCLAIMER ANNOUNCER: Overall odds are one in ninety-two. Must be 18 to purchase. Be a smart player. Know your limits. Problem gambling helpline: 1-800-547-6133. Visit [wa.lottery.com/raffle](http://wa.lottery.com/raffle) for details.

(End second commercial.)(CP-248)

**C. THE COMPLAINT**

On its face, plaintiff's complaint offers little insight into the theory of plaintiff's claim against C&W. The complaint does not deny that all of the raffle prizes were actually awarded in the amounts projected. And though the number and amounts of the drawing prizes were not affected by the total ticket sales, plaintiff's complaint focuses on the fact that only 211,755 of the 250,000 tickets were sold; and argues that the pace of ticket sales was not as reported, and did not require the ticket purchasers to "hurry" out to buy them (Complaint at ¶5.2; CP-22). In short, plaintiff's complaint alleges that the radio advertising which said "buy your tickets now for they're going fast" and "tickets are selling fast"—ads which were admittedly aired a week before ticket sales even began—were either intentionally fraudulent or negligent misrepresentations (CP-14-15), and were "unfair, misleading and deceptive" (CP-22), since actual sales records show the sales to have been slower than expected (CP-14-15).

Refining the allegations of the complaint, Mr. Brummett's appellate brief admits that this case is not about the 2720 top tier prizes, but is "only about the 30 \$500 EARLY BIRD prizes and Lottery and Cole & Weber United raffle advertisements" (App. Br. at 15). Moreover, in opposing C&W's motion to dismiss below, Mr. Brummett repeatedly admitted that C&W had nothing to do with the structuring of the Early Bird prizes (CP-306, 307), and was not liable for any "odds" differentiation which may have

resulted from the Lottery's changing of the Early Bird prize program from an award "every 8000<sup>th</sup>" ticket to one "every 1000<sup>th</sup>" ticket (*Id.*).<sup>4</sup> Yet, while the C&W advertising cited in the complaint says absolutely nothing about how or when the Early Bird prizes would be awarded, Brummett now asks this Court to reverse the Trial Court's Rule 12(b)(6) dismissal and to reinstate his complaint, arguing that C&W ads were false and misleading about the pace of ticket sales early during the week of October 17. He claims that the "selling fast" ads caused him to unnecessarily travel 70 miles from his hunting camp on October 20 in pursuit of an Early Bird prize when he could have waited until the next week to buy tickets without competitive disadvantage (App. Br. at 26; CP-306, 313-314).<sup>5</sup>

While the complaint itself is devoid of any explanation as to how C&W's challenged advertising caused plaintiff any damage whatsoever, Mr. Brummett attempts on appeal to shore up the defective pleading by arguing that the "selling fast" ads caused him to drive 70 miles to buy two \$10 lottery tickets on October 20 because he believed that the Early Bird prizes would be "front loaded" into the first 50,000 tickets (App. Br. at 26; CP-306, 313-314), and because he believed that 50,000 of 250,000 were likely to be sold out during the first week given the reported "fast pace of ticket

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<sup>4</sup> His claims about these issues are directed only at the State Lottery Commission and its employees.

<sup>5</sup> Notably, plaintiff's own submissions below show the pace of ticket sales on October 17 and October 18, just before he made his October 20 purchases, was in fact "fast" by his own analysis (CP-295). Mr. Brummett reports 10,986 tickets were sold on October 17 (the first day of ticket sales)—and 7209 were sold on October 18<sup>th</sup> (the second day). He himself labels sales on both days "Fast!" (*Id.*).

sales” (*Id.*) But nothing in the challenged C&W ads suggests that Early Bird prizes would be “front loaded” or otherwise describes how and when they would be awarded. Mr. Brummett’s imagination is solely responsible for those erroneous assumptions.

#### **D. THE DECISION BELOW**

After briefing and oral argument addressing all of the defendants’ claims, including C&W’s challenges to the sufficiency of plaintiff’s fraud, CPA, breach of contract and negligent misrepresentation allegations (CP-49-73; May 20, 2011 Hearing Transcript at p. 6, 22), Judge Carol Murphy, of the Thurston County Superior Court, dismissed all of plaintiff’s claims against C&W with prejudice (CP-605). After hearing all sides, Judge Murphy, applying the pleading standards of Rule 12(b)(6), held that Mr. Brummett’s complaint failed to adequately allege the elements required to prove his alleged claims (Hearing Transcript at p. 26). The Court then dismissed all of his claims on the strength of the moving papers (CP-604-605).

### **IV. ISSUES AND ANALYSIS**

#### **A. STANDARD OF REVIEW**

The standard of review for a trial court order granting a motion to dismiss pursuant to CR 12(b)(6) is *de novo*. *Atchison v. Great Western Malting Co.*, 161 Wn.2d 372, 376, 166 P.3d 662 (2007).

A trial court may grant dismissal for failure to state a claim under CR 12(b)(6) only if “it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.” *Haberman v. WPPSS*, 109 Wn.2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987). The relevant inquiry on a motion to dismiss for failure to state a claim under CR 12(b)(6) is whether it can be said there is not a state of facts which plaintiff can prove that would entitle him to relief under his claim. *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977). The question of whether a pleading states a claim for relief is basically a legal one, and the facts are considered only as a conceptual background for the legal determination. *Id.*; *Brown v. MacPherson’s, Inc.*, 86 Wn.2d 293, 298, 545 P.2d 13 (1975). For purposes of a motion to dismiss under CR 12(b)(6), the court “accept[s] as true the allegations in the complaint and all reasonable inferences that may be drawn therefrom.” *Howell v. Alaska Airlines, Inc.*, 99 Wn. App. 646, 648, 994 P.2d 901, *review denied*, 141 Wn.2d 1014, 10 P.3d 1071 (2000). While the court must consider any hypothetical facts when considering a motion to dismiss, the gravamen of the court’s inquiry is whether the plaintiff’s claim is legally sufficient; if the claim remains legally insufficient even under the plaintiff’s proffered hypothetical facts, dismissal is appropriate. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 118 P.3d 311 (2005).

**B. SUMMARY OF ARGUMENT**

Read most favorably to plaintiff, and accepting his factual allegations as true for the purpose of the motion, the complaint was properly dismissed by the Trial Court for failing to state a claim upon which relief could be granted. Plaintiff's CPA, common law fraud and negligent misrepresentation claims failed, as a matter of law, because: (1) plaintiff's complaint admits that C&W's "selling fast" ads were published and seen by plaintiff a week before ticket sales began—depriving plaintiff of any claim that he believed the "selling fast" promotion had any thing to do with the actual pace of ticket sales, which did not begin until October 17<sup>th</sup>; and (2) the ads, on their face, offered no information whatsoever as to the timing or methodology of awarding Early Bird prizes. Finally, plaintiff's claim that C&W breached contractual obligations imposed by RCW 67.70.040(1) failed as a matter of law because that statute imposes no performance standard upon C&W; and because plaintiff, as a non-party to the C&W contract with the Lottery, has no standing to challenge C&W's contractual performance.

**C. THE TRIAL COURT PROPERLY CONSIDERED ALL OF PLAINTIFF'S CLAIMS BEFORE DISMISSING THE COMPLAINT (ASSIGNMENT OF ERROR 1)**

As his first assigned error, Mr. Brummett claims that Judge Murphy failed to consider the "multiple reasons" his brief offered for denying C&W's motion to dismiss, and instead "only completely ruled on one issues

that I could not prove fraud... The fraud issue is the only one Cole & Weber United verbally argued” (App. Br. at 16). Mr. Brummett is wrong. A simple review of the hearing transcript shows that C&W orally argued at the hearing the insufficiency of Mr. Brummett’s CPA claim, as well as the insufficiency of his fraud claim (*see* Hearing Transcript at 6, 22). And while C&W did not orally argue the insufficiency of his breach of contract and negligent misrepresentation claims at the hearings, those claims were addressed by C&W’s moving papers and fall for the same reasons—failure to demonstrate any deceptive advertising by C&W, and lack of reliance by Plaintiff.

Moreover, the fact that each of the various legal theories alleged in plaintiff’s complaint was not explicitly discussed during oral argument of the motion to dismiss is irrelevant. *Ferre v. Doric*, 62 Wn.2d 561, 566-67, 383 P.2d 900 (1963)(Trial judge’s oral decision has no final or binding affect); *Rutter v. Rutter*, 59 Wn.2d 781, 784, 370 P.2d 682 (1962)(Court’s oral statements cannot be used to impeach findings or judgment). It is sufficient that the arguments were before the Court in written moving papers when the order issued.

**D. THE TRIAL COURT PROPERLY HEARD  
ARGUMENT ON THE ADVERTISEMENTS  
REFERENCED IN PLAINTIFF’S COMPLAINT  
(ASSIGNMENT OF ERROR 2)**

Without explaining how he was allegedly prejudiced, Mr. Brummett’s next argues that the Trial Court erred in not treating C&W’s

motion to dismiss as a motion for summary judgment (App. Br. at 20-21).

The basis for the claimed error is that:

Attorney Pro Hac Vice Paul Corcoran from New York City, New York, read into their motion to dismiss hearing on May 20, 2011, Verbatim Report of Proceedings, page 22, line 8-14 I quote “It’s something to the effect of drop what you’re doing, unless you’re an air traffic controller, a school bus driver, a Seahawk player about to score, or a surgeon in the middle of open bypass surgery, but the rest of you have no excuses, the Washington Lottery Raffle tickets are going fast, so go, go, go.” (*Id.* at p. 20).

Mr. Brummett’s brief admits that the quoted passage is from his own Exhibit 3 to his Declaration in Opposition to C&W’s Motion to Dismiss, which was a transcript of the two radio ads Mr. Brummett referenced in, but did not attach to, his complaint.<sup>6</sup> Citing *Brown v. MacPherson’s Inc.*, 86 Wn.2d 298, 545 P.2d 13 (1975), Mr. Brummett argues that on a motion under Rule 12(b)(6), “No matter outside the pleading may be considered” (App. Br. at 21). Mr. Brummett is wrong. He simply misunderstands the law.

A Rule 12(b)(6) motion to dismiss addresses the facial sufficiency of the allegations of the complaint, and the Washington State Courts generally will not consider facts outside the complaint. *Brown v. MacPherson’s supra*. However, as in federal court, on a Rule 12(b)(6) motion, the Courts

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<sup>6</sup> The transcript of the radio ads (CP-248) were attached as Exhibit 3 to Mr. Brummett’s Declaration in Opposition to Cole & Weber’s Motion to Dismiss (CP-226-299), as the radio ads which ran the week before the October 17, 2011 date for start of ticket sales (CP-228, 232). (*See* Complaint at ¶5.2 (CP-22)).

of this State may properly consider documents whose contents are alleged in the complaint, but which are not physically attached to it (*see In Re Stac. Elecs Sec. Litig.*, 89 F.2d 1399, 1405, n. 4 (9th Cir. 1996); *Branch v. Tunnell*, 14 F.3d 499, 453-454 (9th Cir. 1994), *cert. denied*, 512 U.S. 1219, 114 S. Ct. 2404 (1994) *overruled on other grounds*, *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002); *Eli Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 189 P.3d 168 (2008). Under this well established exception to the *MacPherson* rule, C&W's counsel properly read to the Court portions of the radio ads referenced in plaintiff's complaint, which were before the Court in any event, through plaintiff's own papers (CP 248). Such reading was perfectly proper and did not require the Court to treat C&W's dismissal motion as one for summary judgment.

**E. THE TRIAL COURT PROPERLY DISMISSED ALL  
PLAINTIFF'S DECEPTION-BASED CLAIMS  
(ASSIGNMENT OF ERROR 1, 4 AND 5)**

To the extent that the single claim in Mr. Brummett's *pro se* complaint can be read to allege a Consumer Protection Act violation, common law fraud, or negligent misrepresentation claims against C&W (*see* CP-20-23), the claims were properly dismissed by the Trial Court. All such claims defectively rest on the notion that Mr. Brummett was deceived by the C&W ads. As refined and limited by his Appellate Brief, Mr. Brummett's fundamental allegation is that he was deceived by the C&W ads into believing that the fast pace of ticket sales required him to "hurry" from his hunting camp on October 20, 2010 and drive 70 miles in order to buy two

raffle tickets, to avoid losing the opportunity to win one of the Early Bird prizes (App. Br. at 26; CP-306, 313-314). On the strength of the “selling fast” ads, Mr. Brummett now claims that he believed that 50,000 of the raffle tickets would be sold during the first week (App. Br. at 26), and that the Early Bird prizes would be unavailable to him if he waited until after his hunting trip to purchase his tickets (*Id.*). Mr. Brummett’s deception-based claims were all undermined by other admissions in his complaint.

### **1. The CPA Claim Is Insufficiently Pled**

Alleging a violation of the Consumer Protection Act, RCW 19.86, for the ads created by C&W for the 2010 Thanksgiving Raffle, appellant claims the Trial Court erred in dismissing the claims which charged that the ads falsely reported the raffle tickets were “selling fast” when they were not. Unable to demonstrate the materiality of the “selling fast” ads to a decision to buy or not buy a \$10 raffle ticket which admittedly awarded 2750 prizes in the amount of \$1,090,000, appellant contends that ads were “unfair and deceptive” in that they “caused Mr. Brummett to drive 70 miles to purchase early tickets to the Early Bird prizes, because at the time he thought the first 40-50,000 [of the 250,000 available] 2010 Raffle Tickets would be gone before he returned from his hunting trip in Eastern Washington.” (App. Br. at p. 26).

The Trial Court properly dismissed his CPA claim as meritless. To state a claim under Washington’s Consumer Protection Act (CPA), RCW

19.86.00, a plaintiff must allege five elements: (1) an unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) impacting the public interest; (4) injury to plaintiff's business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Whether a particular act is deceptive so as to give rise to a violation of the CPA is reviewable as a question of law. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). Implicit in the term "deceptive" is "the understanding that the actor *misrepresented something of material importance.*" *Stephens v. Omni Insurance Co.*, 138 Wn. App. 151, 166, 159 P.3d 10 (2007), quoting from *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *reversed on other grounds*, 138 Wn.2d 248 (1999)(emphasis added). Here, plaintiff has failed to allege facts supporting a violation of the CPA.

On the facts alleged in appellant's complaint, as supplemented by his arguments on the dismissal motion, and on this appeal, Mr. Brummett can demonstrate no set of facts on which he is entitled to relief under the CPA. Instead, the factual admissions made in his Complaint and in his papers before the Trial Court, undermine the CPA claim he advances on this appeal. Admitting that he is a perennial lottery loser, appellant does not claim that C&W's "going fast" ads misled him as to the number of prizes, the amount of prize money, or the odds of winning a raffle prize for the \$10 ticket price. Rather, appellant claims that he was deceived by the ads'

reports on the fast pace of ticket sales, and that, as a result, he was damaged because they caused him to drive 70 miles from his hunting camp in Eastern Washington State to buy two raffle tickets on October 20, 2010, when he allegedly could have waited until after his hunting trip ended to purchase the tickets without competitive disadvantage (App. Br. at 26). Appellant's CPA claim was properly dismissed as facially insufficient.

**a) Absence of Materiality**

First, there was no material misrepresentation in the C&W ads that could support the "deception" element of a CPA claim. On their face, the "selling fast" ads were no more than promotional puffing. Published more than a week before ticket sales even began, the ads did not purport to report the pace of actual ticket sales which had not yet begun. And they contained nothing material to a ticket purchaser's decision to buy one of the 250,000 \$10 raffle tickets. All the raffle prizes were guaranteed by the Lottery and nothing in the ads suggested that the amount of the prize money or chances of winning would be adversely impacted by how many tickets sold or how fast they sold. That the tickets would be "selling fast" should have made no material difference to the decision to buy or not buy a \$10 raffle ticket that gave at least a 1 in 92 chance of winning one of 2,750 prizes worth \$1,090,000. The pace of ticket sales was simply irrelevant to a purchase decision.

Moreover, even if the “selling fast” ads could be read as a factual report on the pace of actual ticket sales, they would not have been deceptive at the time Mr. Brummett made his 70 mile trek to buy two tickets in pursuit of an Early Bird prize (CP 306, 313-314). As the complaint alleges, Mr. Brummett made his allegedly “unnecessary” trip on October 20, 2010—the fourth day of the 39 day raffle sale. By Mr. Brummett’s own account the Thanksgiving raffle tickets were in fact “selling fast” at that time. As Mr. Brummett’s opposition papers below reported, 10, 986 tickets were sold on October 17, 2010; and 7,209 raffle tickets were sold October 18, 2010 (CP-295).<sup>7</sup> Mr. Brummett himself labeled those sale days as “fast” days (*Id.*). To the extent that he relied on C&W ads in deciding to drive 70 miles to purchase two tickets On October 20, the “selling fast” ads were not deceptive—by his own calculation.

Finally, the materiality element of the CPA claim is negated by Mr. Brummett’s admission that he saw and heard the C&W “selling fast” ads the week before raffle tickets went on sale (CP-231-32, 233, 305-306). As Mr. Brummett himself argues below, no one could know the pace of ticket sales before they began (Hearing Tr. at 17-18). And his own version of the facts on appeal establishes that it was not the fast pace of ticket sales that drove Mr. Brummett to make his “unnecessary 70-mile trip” on October 20,

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<sup>7</sup> Notably, while the C&W ads said nothing about the awarding of Early Bird prizes, under the undisclosed 8000<sup>th</sup> ticket program then in effect, 3 of the 30 Early Bird prizes were awarded to the purchasers of tickets 8,000, 16,000, and 24,000 before Mr. Brummett made his first ticket purchases of ticket nos. 25,572 and 25,716 on October 20<sup>th</sup> (see Complaint at ¶¶ 4.8 and 4.14). Mr. Brummett was too late to win those first three prizes.

2010. Instead, it was his belief that all the Early Bird prizes would sell out within the first 50,000 tickets (CP-306, 313-314). That belief was not founded on anything in the C&W ads. As Mr. Brummett's admits, prior to November 15, 2010, neither he nor any other raffle players had any way of knowing how the Lottery Commission was awarding the Early Bird prizes (Complaint at ¶ 4.12, 4.13). His trip-motivating belief—that the Early Bird prizes were “front loaded” in the first 50,000 tickets (CP-306, 313-314)—was not derived from anything in the C&W ads.<sup>8</sup> It was pure surmise on his part. He was wrong.

**b) Absence of Injury to Business or Property**

Failing on the fourth element as well, Mr. Brummett's CPA claim was properly dismissed because he cannot demonstrate that the C&W ads resulted in any injury to his business or property. As the Attorney General's brief on appeal points out, all that Mr. Brummett purchased by spending \$10 for a raffle ticket was a “chance” to win a raffle prize and an Early Bird prize. Erroneously believing that all Early Bird prizes would be awarded during the first week of ticket sales (CP-306, 313-14), Mr. Brummett made his 70-mile trip (from Waconda to Curlew to Republic and back) in order to purchase two \$10 raffle tickets on October 20 so that he would have a chance of winning an Early Bird prize (App. Br. at 12; CP-232, 306, 313-

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<sup>8</sup> Mr. Brummett's baseless belief that Early Bird prizes would be let out within the first 50,000 tickets would have motivated his trip whether the tickets were selling fast or slow. As Mr. Brummett himself establishes, 44,000 tickets were sold in the first week of sales, October 17-24 (CP-295). Based on plaintiff's erroneous beliefs, failure to purchase Early Bird tickets during his hunting trip might have left him without a chance at an Early Bird prize whether tickets were selling fast or slow.

314). He received exactly what he paid for. Tickets 25,572 and 25,716, which Mr. Brummett purchased on October 20, 2010, were both in the running for Early Bird prizes. Unknown to the public, the Lottery Commission's program at that time awarded Early Bird prizes every 8000<sup>th</sup> ticket purchaser. An Early Bird prize was in fact awarded on October 20 to the purchaser of ticket 24,000 (*see* Complaint at ¶ 4.14; CP-295). Had Mr. Brummett gone directly to Republic that morning, rather than driving to Curlew first, he might have been the purchaser of ticket 24,000. He wasn't. An earlier bird got that worm.

As his own papers demonstrate, Mr. Brummett's chances of winning an Early Bird prize were far greater than he himself believed. Erroneously assuming that all Early Bird prizes had been awarded within the first 50,000 tickets sold (CP-306, 313-314), Mr. Brummett admittedly purchased seven additional raffle tickets after that first week—tickets nos. 034,389, 045,113, 051,305, 078,717, 107,839, 130,692, and 156,575—presumably without expecting any chance to win an Early Bird prize (*see* Complaint at ¶4.8; App. Br. at 26). As his complaint alleges, it was only on November 15, 2010, after he purchased ticket no.156,575, that he learned by Lottery publication that eleven (11) Early Bird prizes remained (CP-15). He claims he was surprised by the discovery (*Id.*). He thereafter bought three more raffle tickets with full knowledge that Early Bird prizes remained (ticket nos. 171,769, 181,314 and 191,258)(CP-14). As a result, ten of Mr. Brummett's twelve tickets were actually in the running for Early Bird

prizes, notwithstanding his early erroneous belief about “front loading.” The last two tickets he purchased, however, tickets 181,314 and 191,258, were not, because he purchased them after the final Early Bird prize had been awarded to ticket no. 179,000 (Complaint at ¶¶ 4.8, 4.14). He simply purchased those tickets “too late.” Plainly, none of Mr. Brummett’s allegations support a claim that he was injured in his business or property by the challenged C&W ads.

**c) Absence of Causation**

For the very same reasons, Mr. Brummett’s complaint fails to satisfy the “causation” element of a CPA claim. Even if the subject C&W ads could be read as misrepresenting the pace of actual ticket sales—and they cannot be—Mr. Brummett admits that he was not misled by them. He admittedly saw and heard the “selling fast” ads the week before ticket sales began (Complaint at ¶4.7; CP-14, 228-29, 231, 233). As Mr. Brummett recognizes, no one could know the rate of ticket sales before they began (Hearing Tr. at 17). For that reason alone, his CPA claim fails. Mr. Brummett cannot demonstrate that he relied upon the contents of the C&W ads, or that they “caused” him to drive 70 miles on October 20 in pursuit of an Early Bird prize (App. Br. at 26; CP-306, 313-314).

**d) Exemption from CPA Coverage**

Finally, Mr. Brummett’s CPA claim fails because C&W, as agent for the Washington State Lottery, is not subject to the CPA. *See Ernst*

*Home Center Inc. v. United Food Workers*, 77 Wn.App. 33, 46-48, 888 P.2d 1196 (1995). Mr. Brummett admits that he cannot bring a CPA claim directly against the Washington State Lottery (CP-21). Nor can he bring such a claim against C&W based upon its work for the exempt Lottery Commission. In *Ernst*, the Court held that a CPA claim could not be brought against a labor union's law firm precisely because labor unions are statutorily exempt from CPA coverage. The Washington State Lottery is similarly exempt. On the same grounds that the labor union's law firm was exempt from CPA coverage in *Ernst*, C&W should be exempt here. The dismissal of Mr. Brummett's CPA claim should be affirmed on this ground as well.

## **2. The Common Law Fraud Claim is Insufficiently Pled**

Mr. Brummett's common law fraud claim was also properly dismissed by the Trial Court. It suffers from the same pleading deficiency as his CPA claim, and more. To properly plead a common law fraud claim, the plaintiff must sufficiently allege nine elements: (1) representation of existing fact; (2) materiality of the representation; (3) falsity; (4) the speaker's knowledge of its falsity; (5) the intent of the speaker that it be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely on the representation; and (9) resulting damages. *Poulsbo Group LLC*

v. *Talon Development LLC*, 155 Wn.App. 339, 345-46, 229 P.3d 906 (2010). Mr. Brummett's pleading failed to satisfy any of those elements.

As discussed above in regard to the CPA claim, the subject C&W advertising contained no material misrepresentation about either the awarding of Early Bird prizes or the actual pace of ticket sales. Clearly, then, nothing contained in those ads caused Mr. Brummett any damage to his business or property.

But the defect of Mr. Brummett's fraud claim is even more pronounced. It is an essential element of a fraud claim that the plaintiff reasonably rely upon the alleged misrepresentation. *Puget Sound National Bank v. McMahon*, 35 Wn.2d 51, 330 P.2d 559 (1958); *Lawyers Title Insurance Co. v. Baik*, 147 Wn.2d 536, 55 P.3d 619 (2002); *Tandiama v. Novastar Mortgage, Inc.*, 2005 WL 1287996 (W.D.Wash. 2005). When the plaintiff reasonably should have known that the statement was unreliable, there is no actionable fraud claim (*McMahon, supra*).

Here Mr. Brummett's complaint, and his factual submissions in support of this fraud claim, establish, as a matter of law, that the requisite reliance element was absent. In his papers in opposition to C&W's motion to dismiss, and in his appellate brief, Mr. Brummett admits that he saw and heard the "going fast" and "selling fast" ads a week *before* ticket sales even began (CP-228-229, 231, 308). Indeed, he argues in support of his fraud claims that no one could have known the pace of ticket sales before the sale

began (*see* Hearing Tr. at pp. 17-18). Mr. Brummett therefore admittedly knew that the “selling fast” ads published a week before the raffle start date did not reflect the pace of actual ticket sales. He cannot therefore claim he reasonably relies on those promotional ads to support of a fraud claim. *See McMahon; Lawyers Title; Tandiana.*

### **3. The Negligent Misrepresentation Claim is Insufficiently Pled**

Mr. Brummett’s negligent misrepresentation claim was also properly dismissed by the Trial Court. Under Washington law, negligent misrepresentation, like fraud, requires, as an essential element, reasonable reliance by plaintiff on the alleged misrepresentation. *Tandiana, supra, citing Williams v. Joslin, 65 Wn.2d 696, 399 P.2d 308, 309 (1965); Lawyers Title, 55 P.3d 626-627 (2002); McMahon, 55 Wn.2d 51.* As discussed above, Mr. Brummett’s own papers establish facts that preclude any reasonable reliance claim by him. He admittedly saw and heard the subject promotional ads the week before ticket sales began (CP 228-29, 231, 308). As such, he had no reasonable basis to believe they were intended to reflect the pace of actual ticket sales that had not yet begun. His negligent misrepresentation claim is therefore defective.

#### **F. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFF’S BREACH OF CONTRACT CLAIM (ASSIGNMENT OF ERROR 3 AND 6)**

At paragraph 5.3 of his complaint, Mr. Brummett charges that C&W violated its contract with the Washington Lottery, which was “thus a

violation of all public residents of Washington State.” Citing provisions of the Advertising Services Contract between C&W and the Lottery that require C&W to comply with the law, Mr. Brummett alleges that C&W’s performance of the contract—presumably a reference to his claim that the ads falsely represented the pace of ticket sales—failed to comply with RCW 67.70.040(1) which authorizes the Washington State Lottery Commission to establish the Lottery “consonant with the dignity of the State and the general welfare of the People” (RCW 67.70.040(1)). According to Mr. Brummett, that statutory provision mandates that all aspects of the lottery must be “excellent and honorable” (App.Br. at pp. 26-27). He charges that C&W’s promotional ads fail to meet that “excellent and honorable” standard (Complaint at ¶ 5.3).

The Trial Court properly rejected Mr. Brummett’s statutory claim. RCW 67.70.040 does not provide any legal basis for Mr. Brummett’s claim for several reasons. First, the statute does no more than establish the powers and duties of the State Lottery Commission. It has no application to Cole & Weber and does not even purport to establish any required standard of performance (RCW 67.70.040). Second, there is no “violation” of the statute alleged. The statute is not even capable of being violated, since it does not purport to establish any required contract standard. Third, the statute does not define any protected class, or create any private right of action by which Mr. Brummett could bring this claim.

Moreover, Mr. Brummett's breach of contract claim, which is based on RCW 67.70.040(1), is defective because he lacks standing to bring it. Mr. Brummett is not a party to the Advertising Services Contract at issue. Nor is he a third party beneficiary. He therefore lacks standing to bring a breach of contract claim relating to C&W's performance of its agreement with the Washington State Lottery. *See Postlewait Construction Co. v. Great American Insurance Co.*, 106 Wn.2d 96, 99, 720 P.2d 805 (1986).

## V. CONCLUSION

For all the reasons set forth herein, the Trial Court properly granted C&W's Rule 12(b)(6) motion, dismissing plaintiff's complaint with prejudice. Based upon plaintiff's own pleadings and admissions, and upon C&W's ads themselves, the Trial Court could properly conclude that nothing in C&W's advertising misrepresented the pace of actual ticket sales or published any information upon which plaintiff could have reasonably relied about the timing or availability of Early Bird prizes. Nor did plaintiff's complaint sufficiently plead that C&W caused any damage to plaintiff which could support a claim for relief.

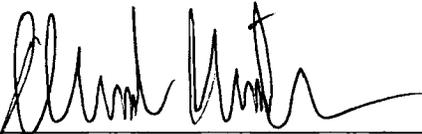
Cole & Weber United respectfully asks that the order of Thurston County Superior Judge Carol Murphy granting its Rule 12(b)(6) motion dismissing plaintiff's complaint be affirmed.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of October, 2011.

MERRICK, HOFSTEDT & LINDSEY, P.S.

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COURT OF APPEALS, DIVISION II  
OF THE STATE WASHINGTON

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LOTTERY 2010 RAFFLE	)	No. 42158-5-II
PLAYERS SO SITUATED,	)	
	)	DECLARATION OF
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WEBER UNITED, et al.,	)	
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Respondents.	)	
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THE UNDERSIGNED hereby certifies that on October 6, 2011,  
she caused to be deposited in the United States mail, first-class postage  
prepaid, copies of **(1) Brief of Respondent Cole & Weber; and (2)**  
**Declaration of Service**, to the persons whose names and addresses are set  
forth below:

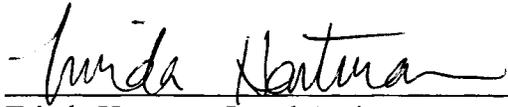
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED this 6<sup>th</sup> day of October, 2011, at Seattle, Washington.

  
\_\_\_\_\_  
Trinda Hartman, Legal Assistant

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