

No. 29411-1-III

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

P.E. Systems, LLC, a Delaware Limited Liability Company,
Plaintiff/Appellant

v.

CPI Corp., a Missouri Corporation,
Defendant/Respondent.

Appeal from the Superior Court for Spokane County
Cause No. 10-2-02351-2

RESPONDENT CPI CORPORATION'S BRIEF

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TABLE OF CONTENTS

	Page
I. <u>INTRODUCTION</u>	1
II. <u>COUNTER STATEMENT OF ISSUES PRESENTED</u>	1
III. <u>STATEMENT OF THE CASE</u>	2
A. <u>Factual Background</u>	2
B. <u>Procedural History</u>	4
IV. <u>APPLICABLE LEGAL STANDARDS</u>	6
A. <u>CR 12(c) Motion for Judgment on the Pleadings</u>	6
B. <u>CR 15(a) Motion to Amend</u>	7
V. <u>ARGUMENT</u>	8
A. <u>PES Clearly Referenced and Incorporated the Contract into Its Complaint and Admitted the Writing Attached to CPI’s Answer Was the Contract at Issue.</u>	9
B. <u>A Declaration Submitted by PES’s Counsel Does Not Automatically Convert a CR 12(c) Motion Into One for Summary Judgment.</u>	10
1. <u>Appellant’s Attorney Did Not – and Cannot – Properly Authenticate the PowerPoint Presentation.</u>	13
2. <u>The PowerPoint Slide Attachment Was Riddled with Inadmissible Hearsay.</u>	13
3. <u>The PowerPoint Slide Attachment was Immaterial to the Matter Before the Trial Court.</u>	14
C. <u>The Purported “Contract” Between CPI and PES Represents, at Most, an “Agreement to Agree” and Is Unenforceable Under Washington Law Despite Appellant’s Contradictory Attempts to Confuse the Issues.</u>	15

1.	<u>This Court Should Reject Appellant’s Contradictory, Self-Serving, and Unsubstantiated Argument that “Historic Cost” Was Simply a “Math Calculation” that Did Not Require Agreement by the Parties.</u>	20
2.	<u>The Court Should Reject Plaintiff’s Claim that “Extrinsic Evidence” Will Establish that the Parties Entered Into an Agreement.</u>	21
3.	<u>The Material Term of Price Was Not Agreed Upon and the Contract is Not One on Open Terms.</u>	23
D.	<u>Appellant’s Claim For Breach of the Covenant of Good Faith and Fair Dealing Fails Because this Covenant Is Contingent on the Existence of an Enforceable Agreement – an Agreement that Simply Does Not Exist in this Case as Evidenced by the Pleadings.</u>	25
E.	<u>Appellant Did Not Adequately Seek a Continuance Under CR 56(f).</u>	26
F.	<u>Justice Did Not Require That Appellant’s Motion to Amend Be Granted.</u>	27
VI.	<u>RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS</u>	30
VII.	<u>CONCLUSION</u>	31
	<u>APPENDIX A</u>	A-1

TABLE OF AUTHORITIES

	Page
 FEDERAL CASES	
<i>Branch v. Tunnell</i> , 14 F.3d 449 (9th Cir. 1994)	9
<i>Burnett v. Twentieth Century Fox Film Corp.</i> , 491 F. Supp. 2d 962 (C.D. Cal, 2007)	9
<i>Daly v. Viacom, Inc.</i> , 238 F. Supp.2d 1118 (N.D. Cal., 2002)	9
<i>Fudge v. Penthouse Intern. Ltd.</i> , 840 F.2d 1012 (1st Cir. 1988).....	10
<i>Romani v. Shearson Lehman Hutton</i> , 929 F.2d 875 (1st Cir. 1991).....	10
<i>Stone v. Travelers Corp.</i> , 58 F.3d 434 (9th Cir. 1995)	27
 WASHINGTON STATE CASES	
<i>16th Street Investors, LLC v. Morrison</i> , 153 Wn. App. 44, 223 P.3d 513 (2009).....	15
<i>Badgett v. Security State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991).....	25, 26
<i>Bank of American NT & SA v. David W. Hubert, P.C.</i> , 153 Wn. 2d 102, 101 P.3d 409 (2004).....	7
<i>Bort v. Parker</i> , 110 Wn. App. 561, 42 P.3d 980 (2002).....	22
<i>Browning v. Howerton</i> , 92 Wn. App. 644, 966 P.2d 367 (1998).....	24
<i>Burmeister v. State Farm Ins. Co.</i> , 92 Wn. App. 359, 966 P.2d 921 (1998).....	13
<i>Chandler v. Washington Toll Bridge Authority</i> , 17 Wn.2d 591, 137 P.2d 97 (1943).....	29
<i>City of Moses Lake, v. Grant County</i> , 39 Wn. App. 256, 693 P.2d 140 (1984).....	passim
<i>Deschamps v. Mason County Sheriff's Office</i> , 123 Wn. App. 551, 96 P.3d 413 (2004).....	27

<i>Gasper v. Peshastin Hi-Up Growers</i> , 131 Wn. App. 630, 128 P.3d 627 (2006).....	6
<i>Groman v. Garlock, Inc.</i> , 155 Wn. 2d 198, 118 P.3d 311 (2005).....	8
<i>Haberman v. Wash. Pub. Power Supply Sys.</i> , 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987).....	20
<i>Hansen v. Bank of California, Nat. Ass'n</i> , 189 Wash. 454, 66 P.2d 303 (1937)	27
<i>Hollis v. Garwall, Inc.</i> , 137 Wn. 2d 683, 974 P.2d 836 (1999).....	22
<i>Johnson v. Whitman</i> , 1 Wn. App. 540, 463 P.2d 207 (1969).....	29
<i>Keystone Land & Dev. v. Xerox Corp.</i> , 152 Wn. 2d 171, 94 P.3d 945 (2004).....	passim
<i>King County Fire Protection Districts No. 16, No. 36 and No. 40 v. Housing Authority of King County</i> , 123 Wn.2d 819 P.2d 516 (1994).....	13
<i>Labriola v. Pollard Group, Inc.</i> , 152 Wn. 2d 828, 100 P.3d 791 (2004).....	30
<i>McCurry v. Chevy Chase Bank</i> , 169 Wn.2d 96, 233 P.2d 861 (2010).....	18, 19
<i>Metropolitan Park Dist. of Tacoma v. Griffith</i> , 106 Wn. 2d 425, 723 P.2d 1093 (1986).....	15
<i>Mossman v. Rowley</i> , 154 Wn. App. 735, 229 P.3d 812 (2009).....	26
<i>Northwest Animal Rights Network v. State</i> , 158 Wn. App. 237, 242 P.3d 891 (2010).....	27, 28
<i>Ortblad v. State</i> , 85 Wn. 2d 109, 530 P.2d 635 (1975).....	7
<i>Pac. Cascade Corp. v. Nimmer</i> , 25 Wn. App. 552, 608 P.2d 266 (1980).....	17
<i>Rodriguez v. Loudeye Corp.</i> , 144 Wn. App. 709, 189 P.3d 168 (2008).....	20
<i>Seaborn Pile Driving Co., Inc. v. Glew</i> , 132 Wn. App. 261, 131 P.3d 910 (2006).....	22
<i>Sea-Van Investments Assoc. v. Hamilton</i> , 125 Wn.2d 120, 881 P.2d 1035 (1994).....	24

<i>Setterlund v. Firestone</i> , 104 Wn.2d 24, 700 P.2d 745 (1985).....	16
<i>Spectrum Glass Co., Inc. v. Public Utility Dist. No. 1 of Snohomish County</i> , 129 Wn. App. 303, 119 P.3d 854 (2005).....	22, 23
<i>Swanson v. Holmquist</i> , 13 Wn. App. 939, 539 P.2d 104 (1975).....	24
<i>Tellevik v. 31641 West Rutherford Street</i> , 120 Wn. 2d 68, 838 P.2d 111 (1992).....	26
<i>Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.</i> , 134 Wn.2d 692, 952 P.2d 590 (1998).....	16
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999).....	7, 27
<i>Yakima County Fire Prot. Dist. No. 12 v. City of Yakima</i> , 122 Wn.2d 371, 858 P.2d 245 (1993).....	16

WASHINGTON STATE CIVIL RULES

Civil Rule 12	20, 22
Civil Rule 12(b)(6).....	18
Civil Rule 12(c).....	passim
Civil Rule 15(a).....	7, 27, 28
Civil Rule 56	7
Civil Rule 56(f).....	8, 26, 27

WASHINGTON STATE STATUTES

RCW 19.36.010	8
RCW 4.84	30
RCW 4.84.330	30

I. INTRODUCTION

This is the type of case that Civil Rule 12(c) is meant for. The rule allows for judgment on the pleadings when the plaintiff can prove no set of facts consistent with its complaint that would entitle it to relief. Here, Appellant P.E. Systems, LLC (“PES”) brought contract claims against Respondent CPI Corp. (“CPI”). PES brought those claims pursuant to a writing it admitted was the “contract” in dispute. However, that “contract,” by its terms, requires further agreement on the price of the services to be performed – an agreement that PES admits never happened. Thus, the writing is at most an agreement to agree and not enforceable under Washington law. The Trial Court took the matters within the pleadings into consideration, excluded matters outside the pleadings, and properly entered judgment for CPI.

II. COUNTER STATEMENT OF ISSUES PRESENTED

1. Can a purported contract repeatedly referenced in and adopted by a Complaint, attached to the Answer, and later admitted by the Plaintiff as authentic, be considered in a CR 12(c) motion as a “matter” within the pleadings for purposes of legal questions regarding the contract’s validity?
2. Can a defendant automatically defeat a CR 12(c) motion on a legal issue through the submission of an immaterial, inadmissible, and unauthenticated attorney declaration?
3. Is a writing that is not fully executed, is missing price terms, provides that it is not to be performed within one year of the making thereof, and which contains only evidence of a future contractual intent, unenforceable in Washington?

4. Will a denial of a Motion to Amend by a Trial Court be upheld on an abuse of discretion standard when justice does not require the amendment and the moving party will not be prejudiced because it is able to re-file any claims that are not inconsistent with its original complaint?

III. STATEMENT OF THE CASE

A. Factual Background.

Respondent CPI Corp. (“CPI”) operates portrait studios throughout retail stores in North America. CP 13 ¶ 2.¹ Appellant P.E. Systems, LLC (“PES”) markets services to merchants to help reduce credit card processing fees those merchants pay to credit card companies such as Visa and MasterCard. CP 13 ¶ 1. On June 8, 2010, PES filed the present suit claiming that CPI breached a written agreement that the parties entered into “[o]n or about July 10, 2009.” CP 4 ¶ 3. PES’s Complaint makes numerous references to this supposed written agreement. CP 4 ¶ 6 (“[o]n July 10, 2009 Defendant CPI executed the agreement for services”); ¶ 7 (“[t]he agreement for services provided that...”); ¶ 8 (“[a]fter the agreement was executed...”); *see also* CP 5 ¶ 15, 16; CP 6 ¶ 19, 20. Yet, PES did not attach a copy of this “contract” to the Complaint. The supposed agreement is two pages in length and contains an “Agreement

¹ Citations to the Clerk’s Papers will be made by the designation “CP” followed by the particular page and line or paragraph number, as appropriate (CP page:line). Citations to the Report of Proceedings will be made by the designation “RP” followed by the particular page and line or paragraph number, as appropriate (RP page:line).

for Services” page and an “Addendum A” page. CP 20-21 (Exhibit A to CPI’s Answer – the purported contract is also attached hereto as Appendix A for ease of reference).

According to the terms of this claimed agreement (and PES’s allegations), PES was to “analyze Client’s (including all subsidiaries and merchant locations) payment for Merchant Processing Services costs and provide Client with its proprietary analysis to facilitate reductions in fees and chargebacks, capture refunds and the associated cost structure applicable to Client’s Merchant Processing Services.” CP 20 ¶ 1; CP 4 ¶ 7. These services were referred to as the PES “Consulting Services.” *Id.* The “agreement” indicates that in order for PES to provide these “Consulting Services” to CPI, the parties had to agree on the “historic costs” that CPI had paid to these third parties for credit card processing. In fact, the writing explicitly provides that “Client’s Historic Cost will be set forth and mutually agreed to by the parties in Addendum A.” Addendum A was never filled out by the parties and was never signed. Appendix A, CP 20 ¶ 3 (emphasis supplied).

Further, the supposed agreement indicates that PES would receive a “consulting fee” for providing the “Consulting Services” only if CPI actually saved money by implementing the PES “Cost Savings Program.” Appendix A, CP 20 ¶ 4. PES’s consulting fee would be “50% of all

Program Cost Savings realized by Client.” *Id.* The “Program Cost Savings” was to be calculated “by taking the difference between Client’s Historic Cost (baseline) and Client’s new merchant services costs obtained by Client.” *Id.* Because there was no agreement between the parties on CPI’s “historic cost,” there was no agreement.

B. Procedural History.

PES filed a complaint against CPI for breach of contract and breach of good faith and fair dealing on June 8, 2010. CP 3-7. CPI answered and asserted its affirmative defenses on August 13, 2010. CP 13-21. CPI specifically alleged in its Answer that no contract existed and that the agreement was at most an “agreement to agree.” CP 15 ¶ 1. Attached to that pleading was also a copy of the purported “contract” at issue. CP 20-21 (Exhibit A to CPI’s Answer – and Appendix A hereto for ease of reference). PES admitted that the writing attached to the Answer was the contract in dispute. CP 37.²

CPI properly moved the Trial Court for judgment on the pleadings under CR 12(c) on August 27, 2010. RP 20:3-4; RP 31:25-32:1. In response, on September 3, 2010, PES attempted to transform the motion into one for summary judgment by filing a declaration of its counsel and

² PES did not object to this admission at any time below. *See* RP 20-21, RP 31-33.

asking the Trial Court to consider matters outside the pleadings. CPI filed a timely motion to strike PES's counsel's declaration on September 7, 2010, four days after the declaration was filed and prior to a reply on the Rule 12(c) motion.

On September 10, 2010, the Trial Court heard oral argument on CPI's Motion for Judgment on the Pleadings and granted the motion:

[T]his was filed under CR 12(c), and it says basically that the Court examines the pleadings to determine whether the plaintiff can prove any set of facts consistent with their Complaint that would entitle the plaintiff to relief. Even though [it] wasn't filed with the Complaint, the contract or the agreement that you referred to, it has been stipulated in this that this is the contract or agreement, which is a one-page contract with the attachment A or Addendum A, which was never filled out and agreed to. ... How the Court reads it is with Addendum A never being filled out and not being signed, there wasn't a full meeting of the minds. ... I don't believe that this was an agreement that's enforceable because they're missing some material parts of what would be a breach of contract. ... Negotiations need to be finalized, and the Court can't fill in material terms.

RP 20-21 (Judge Plese's September 10, 2010 Oral Ruling) (emphasis supplied). The Trial Court clarified its ruling further at the September 28, 2010 presentment hearing:

[CPI's Motion] was a judgment on the pleadings, and that's what I ruled on. ... I only considered the pleadings and the issue for their motion on judgment on the pleadings and not the exhibits [to Mr. Kovarik's Declaration] at that time. ... In other words, that's all I was considering was the CR 12 motion and what's in the file for that, not for the issues of the Summary Judgment, which would be the exhibit that

you added in all of that. I guess I should have been very clear that I struck that at that time. ... It was very clear at the hearing that they [CPI] were not asking for a Summary Judgment motion. They were asking for a Judgment on the pleadings.

RP 31:25-32, 33.

After the CR 12(c) motion was granted, PES moved to amend its Complaint. RP 22:8-16. PES's statement of the Trial Court's ruling in that regard is incorrect. The Trial Court denied the motion insofar as an amendment would necessitate PES alleging facts inconsistent with its original Complaint, but was clear that PES could bring other claims that would have been barred by the economic loss rule as new causes of action.

RP 24:7-25. PES has not filed a new cause of action at this time.

IV. APPLICABLE LEGAL STANDARDS

A. CR 12(c) Motion for Judgment on the Pleadings.

This Court's review on the CR 12(c) ruling is *de novo*. *Gasper v. Peshastin Hi-Up Growers*, 131 Wn. App. 630, 634-35, 128 P.3d 627 (2006). On appeal from a CR 12(c) motion, the appellate court will "examine the pleadings and determine whether the [appealing party] can prove any set of facts, consistent with the complaint, which would entitle them to relief." *City of Moses Lake, v. Grant County*, 39 Wn. App. 256, 258, 693 P.2d 140, 142 (1984) (citations omitted). Factual allegations of the complaint are to be accepted as true for purposes of the appeal. *Id.* It

is true that, if matters outside the pleadings are presented to and not excluded by the court, then a CR 12(c) motion is converted to a CR 56 summary judgment motion. *Id.* However, even if the trial court considered material beyond the pleadings:

[I]f the basic operative facts are undisputed and the core issue is one of law, no purpose would exist for treating the motion for judgment on the pleadings as one for summary judgment and granting an opportunity to present factual evidence pertinent under CR 56 if whatever might be proven would be immaterial.

Id. at 259 (citing *Ortblad v. State*, 85 Wn. 2d 109, 530 P.2d 635 (1975)).

The sole issue before the Court is whether the contract at issue is an unenforceable “agreement to agree” under Washington law – a question of law.

B. CR 15(a) Motion to Amend.

This Court’s review on PES’s motion to amend is an abuse of discretion standard. *Bank of American NT & SA v. David W. Hubert, P.C.*, 153 Wn. 2d 102, 122, 101 P.3d 409 (2004). The Trial Court’s decision “will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Wilson v. Horsley*, 137 Wn. 2d 500, 505, 974 P.2d 316, 318 (1999) (emphasis supplied).

V. ARGUMENT

PES is boxed-in on its contract claims and the Court should affirm for five reasons. First, the writing³ in dispute was a matter within the pleadings for purposes of CR 12(c). Second, CPI's CR 12(c) Motion was not automatically transformed into a motion for summary judgment simply because PES submitted a declaration from its counsel. Third, the written agreement on which PES bases its claims is unenforceable by law because it is an "agreement to agree," missing the material term of price, and is not cured by inadmissible and clandestine extrinsic evidence. Fourth, even if PES were entitled to further discovery, it did not make a proper motion under CR 56(f). Finally, the Trial Court's decision to deny PES's Motion to Amend was well within its discretion.

PES can prove no facts which would entitle it to relief. Even if the Court takes all of PES's alleged facts as true, PES's claim is legally insufficient and the Trial Court's judgment was appropriate. *See, e.g., Groman v. Garlock, Inc.*, 155 Wn. 2d 198, 118 P.3d 311 (2005).

³ It is undisputed that any contract on which PES bases its claims must be in writing under Washington's Statute of Frauds. *See* RCW 19.36.010; CP 20 ¶ 4, 21 (providing for a term of at least 24 months).

A. PES Clearly Referenced and Incorporated the Contract into Its Complaint and Admitted the Writing Attached to CPI's Answer Was the Contract at Issue.

The Trial Court properly looked to the language of the contract in dispute when ruling on the CR 12(c) motion. Here, the purported “contract” was (i) repeatedly referenced and adopted in CPI’s Complaint (CP 4:1, 12-13, 21; 5:17, 21; CP 6:5,9), (ii) admitted by CPI to be the contract in dispute (CP 37); and (iii) attached to CPI’s Answer (CP 14, 20-21).⁴ It is well-established that the Trial Court may take into consideration documents referenced in the pleadings, especially where as here, the document was attached to the pleadings and admitted by PES to be the contract in dispute. Such consideration will not turn the CR 12(c) motion into one for summary judgment. *See Daly v. Viacom, Inc.*, 238 F. Supp.2d 1118, 1121-22 (N.D. Cal., 2002) (“documents specifically referred to in a complaint, though not physically attached to the pleading, may be considered where authenticity is unquestioned.”); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 966 (C.D. Cal, 2007); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading, may be

⁴ The purported contract is also attached hereto as Appendix A, for ease of reference.

considered in a motion to dismiss and such consideration does not convert the motion into a motion for summary judgment) (separate holding overruled on other grounds); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 (1st Cir. 1991) (“Although plaintiff did not attach a copy of the [documents in dispute] to his complaint, defendants submitted the documents with their motions to dismiss. This step was proper and did not convert the motion to dismiss into a motion for summary judgment.”) (superseded by statute on other grounds); *Fudge v. Penthouse Intern. Ltd.*, 840 F.2d 1012, 1015 (1st Cir. 1988) (when plaintiff fails to introduce a pertinent document as part of his pleading, defendant may introduce the exhibit as part of his motion attacking the pleading. Plaintiff suffers no prejudice from lack of opportunity to submit additional evidentiary materials when nothing he could have introduced could have affected the disposition of the purely legal questions that the motion to dismiss raised regarding the documents). PES cannot argue that it may escape CR 12(c) simply because it chose not to attach the contract to its Complaint.

B. A Declaration Submitted by PES’s Counsel Does Not Automatically Convert a CR 12(c) Motion Into One for Summary Judgment.

PES argues that the Trial Court was required to treat CPI’s motion as a motion for summary judgment because PES submitted a declaration from its counsel. PES’s Brief, p. 12. PES would have the Court adopt a

rule contrary to the plain language of CR 12(c) that requires denial of a CR 12(c) motion *any time* a party submits a declaration in its defense. This is not the rule and such a rule would leave CR 12(c) wholly ineffective in every case. CR 12(c) states that “[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment....” Here, PES submitted an identical copy of the contract as provided by CPI and a copy of a PowerPoint presentation through its counsel, Mr. Kovarik, in the hopes of circumventing CR 12(c) and drawing this matter out past the pleading stage. *See* CP 45-75. Yet, the Trial Court made clear that it did not consider matters outside the pleadings, and in fact excluded such matters. RP 33:1-7. The purported contract was already part of the pleadings, as discussed above, and the Trial Court deemed the remainder of the declaration as immaterial to its ruling on the CR 12(c) motion. Thus, no “matters outside the pleadings” were considered by the Trial Court and a judgment under CR 12 was proper.

Further, even the case that PES cites for its own purposes states that there is no reason to treat CPI’s 12(c) motion as one for summary judgment. *See Moses Lake*, 39 Wn. App. at 258-59. In that case, the appealing party raised the same argument that PES raises – that the trial

court should have allowed additional evidence and converted the CR 12(c) motion into one for summary judgment. The appellate court did not agree and stated that:

[I]f the basic operative facts are undisputed and the core issue is one of law, no purpose would exist for treating the motion for judgment on the pleadings as one for summary judgment and granting an opportunity to present factual evidence pertinent under CR 56 if whatever might be proven would be immaterial.

Id. at 259. Here, the core issue is not one of fact but one of law – whether the contract at issue is enforceable under Washington law. PES admits that this issue is a matter of law. PES’s Brief, p. 18. The basic operative facts are undisputed. PES admits that the contract as attached to CPI’s Answer is the writing in dispute. CP 37. The issue for the Trial Court was whether the writing was an enforceable contract. Any additional material provided by PES was immaterial to that legal issue. Thus, under the case law cited by PES, it was proper for the Trial Court to enter judgment under CR 12(c) and not consider matters immaterial to the issue of law before it. PES has not challenged the Motion to Strike that was filed by CPI against the immaterial matters contained in Mr. Kovarik’s declaration below, but in any event the declaration was properly excluded by the Trial Court for three independent reasons.⁵

⁵ The standard of review on an order from a motion to strike is abuse of

1. Appellant's Attorney Did Not -- and Cannot -- Properly Authenticate the PowerPoint Presentation.

In order for documentary evidence to be considered, the evidence must be “authenticated” by declaration testimony and an attorney’s declaration is insufficient. ER 901; *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365-366, 966 P.2d 921, 924 (1998) (an attorney’s declaration is insufficient to authenticate a document if he or she cannot testify as to the authenticity of its contents based on personal knowledge). The Kovarik Declaration gives no information regarding: (i) who prepared the PowerPoint slides; (ii) when the slides prepared; (iii) what those slides were used for; (iv) to whom the slides were presented; or (v) Mr. Kovarik’s personal knowledge regarding the slides. CP 45-46. Instead, the slides were simply attached to the declaration of PES’s counsel with the statement that they are true and correct copies of PES’s presentation. This is woefully insufficient under ER 901.

2. The PowerPoint Slide Attachment Was Riddled with Inadmissible Hearsay.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c) The PowerPoint slides in

discretion. *King County Fire Protection Districts No. 16, No. 36 and No. 40 v. Housing Authority of King County*, 123 Wn.2d 819, 826, 872 P.2d 516, 519 (1994).

Exhibit B to Mr. Kovarik's declaration contain written statements, made by an individual other than Mr. Kovarik, and were offered by PES to prove a fee calculation laid out in the slides. The slides do not fall under an exception to the hearsay rule. ER 801(c). For this reason as well, the slides were properly stricken.

3. The PowerPoint Slide Attachment was Immaterial to the Matter Before the Trial Court.

ER 402 provides that "evidence which is not relevant is not admissible." Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ER 401. Here, Exhibit B to the Kovarik Declaration was a copy of a PowerPoint slideshow "sales pitch" from PES to CPI. This document was not at all relevant to the CR 12(c) motion before the Trial Court. The sole issue before the Trial Court was whether the supposed written "agreement," upon which PES's Complaint was based, was executed and enforceable. The PowerPoint slides did not speak to the issue of whether a contract was properly formed as an executed writing, as would be necessary in this case under the Statute of Frauds and the plain writing of the contract in dispute.

For all these reasons, the Trial Court properly excluded matters outside the pleadings under CR 12(c) and the standard in *Moses Lake*. 39 Wn. App. at 259 (“[I]f the basic operative facts are undisputed and the core issue is one of law, no purpose would exist for treating the motion for judgment on the pleadings as one for summary judgment ... if whatever might be proven would be immaterial.”).

C. **The Purported “Contract” Between CPI and PES Represents, at Most, an “Agreement to Agree” and Is Unenforceable Under Washington Law Despite Appellant’s Contradictory Attempts to Confuse the Issues.**

The “contract” at issue in this case is, at most, an agreement to agree and is unenforceable by law, despite PES’s internally inconsistent and contradictory arguments regarding extrinsic evidence and open terms. An agreement to agree is “an agreement to do something which requires a further meeting of the minds of the parties and without which it would not be complete. Agreements to agree are unenforceable in Washington.” *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn. 2d 171, 175-76, 94 P.3d 945 (2004) (citing *Sandeman v. Sayres*, 50 Wn. 2d 539, 541-42, 314 P.2d 428 (1957)); see also *16th Street Investors, LLC v. Morrison*, 153 Wn. App. 44, 54, 223 P.3d 513 (2009); *Metropolitan Park Dist. of Tacoma v. Griffith*, 106 Wn. 2d 425, 434, 723 P.2d 1093, 1099 (1986).

Washington follows the “objective manifestation test” for contracts. *Wilson Court Ltd. P’ship v. Tony Maroni’s, Inc.*, 134 Wn.2d 692, 699, 952 P.2d 590 (1998). Accordingly, for a contract to form, the parties must objectively manifest their mutual assent to all necessary terms. *See Yakima County Fire Prot. Dist. No. 12 v. City of Yakima*, 122 Wn.2d 371, 388, 858 P.2d 245 (1993); *Setterlund v. Firestone*, 104 Wn.2d 24, 25, 700 P.2d 745 (1985) (noting an agreement must be “definite enough on material terms to allow enforcement without the court supplying those terms”). A contract that does not contain all of the necessary and material terms is unenforceable.

For example, in *Keystone*, the Court held the parties had simply entered into an unenforceable “agreement to agree.” There, *Keystone* submitted a letter of intent to purchase a facility Xerox owned. *Keystone*, 152 Wn.2d at 174. The letter contained a net purchase price and several other key deal points. Xerox then requested a “final and best offer” and *Keystone* responded by letter, amending the purchase price. Xerox replied stating, “Xerox is prepared to negotiate a Purchase and Sale Agreement with *Keystone Development* subject to two modifications to your Proposal.” *Id.* at 175. *Keystone* accepted the modifications and contended that all of the key terms necessary to form a contract were present in its agreements with Xerox. *Id.* The *Keystone* Court rejected this contention,

finding that Xerox merely manifested an intention to negotiate with Keystone and “an intention to do something ‘is evidence of a future contractual intent, not the present contractual intent essential to an operative offer.’” *Id.* at 179 (quoting *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 556, 608 P.2d 266 (1980)).

Here, as in *Keystone*, as the purported contract indicates, CPI and PES simply agreed to pursue a potential business relationship – a relationship that would require a further meeting of the minds and an agreement on the key “Historic Cost” term. The “Historic Cost” term was not some insignificant or trivial component of the alleged agreement that this Court or a finder of fact is simply at liberty to determine. Quite the contrary, the agreement itself specifically states that “Client’s Historic Cost **will be set forth and mutually agreed to by the parties in Addendum A.**” CP 20 ¶ 3 (emphasis supplied).⁶ Addendum A is unsigned and there is nothing in that document showing that the parties remotely agreed on the “Historic Cost” figure. Not only does the express contractual language require an agreement on “Historic Cost,” but the “Historic Cost” term is a vital and necessary component to PES’s claim

⁶ The “contract” contains other language indicative of future intent as well. *See, e.g.*, Appendix A (CP 20) ¶ 4 (“Client retains the right not to implement a program or cost savings proposed by PES for Client’s good faith business reasons.”); *Id.* (“Should client decide to go forward ...”); *Id.* at ¶ 5 (“Should client elect to implement ...”).

for damages. As PES alleges in its Complaint, “[t]he agreement specifically stated that PES shall receive a consulting fee at a rate of 50% of all program cost savings realized by the client.” CP 4 ¶ 7. But, as PES’s claim for relief completely and conveniently ignores, the “cost savings realized” is calculated “by taking the difference between Client’s Historic Cost (baseline) and Client’s new merchant services costs obtained by Client.” CP 20 (Appendix A hereto) ¶ 4. Because there was no written agreement on CPI’s “Historic Cost” (as specifically required by the purported agreement), there is no basis upon which to award PES any consulting fee whatsoever. Thus, because there was no meeting of the minds on the “Historic Cost” term, the purported “agreement” is nothing more than “evidence of a future contractual intent” and not the present contractual intent essential to an operative agreement.

PES’s reliance on the *McCurry* case does not help its cause. *McCurry v. Chevy Chase Bank* dealt with the legal issue of whether certain state laws “are preempted by federal regulation of federal savings associations.” 169 Wn.2d 96, 99, 233 P.2d 861, 862 (2010). That issue had been decided by the trial court in that case under CR 12(b)(6). On appeal, the bank asked the court to consider the standard for dismissal under CR 12(b)(6) under the less-stringent federal rule rather than the state law standard. *Id.* at 101. The court declined and stated that CR 12(b)(6)

“weeds out complaints where, even if what the plaintiff alleges is true, the law does not provide a remedy” and “a plaintiff states a claim upon which relief can be granted if it is possible that facts could be established to support the allegations in the complaint.” *Id.* This is the exact standard used by the Trial Court in this case. Judge Plese stated in her oral ruling that:

[T]his was filed under CR 12(c), and it says basically that the Court examines the pleadings to determine whether the plaintiff can prove any set of facts consistent with their Complaint that would entitle the plaintiff to relief.

RP 20 (emphasis supplied).⁷ The Trial Court did not use a federal standard, as PES implies. Furthermore, the *McCurry* case was decided based solely on a legal issue – preemption. 169 Wn. 2d at 109. The court specifically stated that “no factual record has yet been developed in the trial court” on alternative grounds for dismissal. *Id.* PES’s argument that *McCurry* somehow stands for the proposition that immaterial facts in this case should have been considered on a legal issue is baseless.

PES also proposes an inaccurate standard to the Court based on a wholly unsupported argument. PES states that, because it alleged in its Complaint that a valid contract exists (a legal conclusion), the Trial Court

⁷ Further, the Trial Court’s written order on the CR 12(c) motion specifically stated that “The Court considered only matters within the pleadings, pursuant to CR 12(c).” CP 117:21-22.

should have accepted that allegation as true and denied the CR 12 motion. PES's Brief, p. 17. This is patently false and PES cites no authority for this argument. Instead, under CR 12, the Trial Court presumes all *facts* alleged in the plaintiff's complaint are true, *not* the complaint's legal conclusions. *Rodriguez v. Loudeye Corp.*, 144 Wn. App. 709, 718, 189 P.3d 168, 172 (2008) (citing *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn. 2d 107, 120, 744 P.2d 1032, 750 P.2d 254 (1987), appeal dismissed, 488 U.S. 805, 109 S.Ct. 35, 102 L.Ed.2d 15 (1988)).

PES also sets forth arguments that the failure to execute the agreement was merely a consequence of an unimportant formality surrounding a way to check math (PES's Brief, p. 22), that inadmissible and unknown extrinsic evidence will save its case (*Id.*), and that an open term of the price for the services is somehow not fatal to the contract (PES's Brief, pp. 20, 22, 23). These arguments are disposed of in turn.

1. This Court Should Reject Appellant's Contradictory, Self-Serving, and Unsubstantiated Argument that "Historic Cost" Was Simply a "Math Calculation" that Did Not Require Agreement by the Parties.

For at least two reasons, this Court should reject PES's argument regarding Historic Cost. *See* PES's Brief, p. 22. First, PES's claim that Addendum A's "sole purpose" was to "provide a mechanism for the client to verify PES's mathematical calculations" is directly contradicted by the

contract itself. The contract explicitly states that the parties were required to agree to the Historic Cost in writing. *See* Appendix A (CP 20) ¶ 3 (“Historic Cost will be set forth and mutually agreed to by the parties in Addendum ‘A’ which is incorporated by reference herein.”). Thus, PES’s characterization of this requirement as a trivial aspect of the agreement should be rejected.

Second, PES has presented no credible evidence that Historic Cost was simply an “opportunity to verify PES’s calculations.” PES’s Brief, p. 22. PES presented no affidavit testimony or other evidence from anyone at PES that would support this claim. Instead, PES relies on unsubstantiated lawyer argument to support its (internally-inconsistent) position. For this reason as well, the Court should reject PES’s claim.

2. The Court Should Reject Plaintiff’s Claim that “Extrinsic Evidence” Will Establish that the Parties Entered Into an Agreement.

PES asserts that some unidentified piece of “extrinsic evidence” will show the parties entered into an enforceable agreement because Addendum A was simply a means to “verify PES’s calculations.” PES’s Brief, p. 22. The Court should reject this claim as well.

First, PES has not presented anything specific. Second, despite Washington’s “context rule,” a court cannot admit and consider an unexpressed intention of one of the parties regarding the agreement.

Seaborn Pile Driving Co., Inc. v. Glew, 132 Wn. App. 261, 270, 131 P.3d 910 (2006). The general rule of not admitting parol evidence to show intent independent of what is included in the agreement is still in effect in Washington. *Spectrum Glass Co., Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 129 Wn. App. 303, 311, 119 P.3d 854 (2005). If existing written terms are at issue, as they are here, extrinsic evidence is not admissible to contradict or supplement an integrated, unambiguous instrument. *Id.*; see also *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 697, 974 P.2d 836 (1999) (Under the *Berg* rule, extrinsic evidence is not admissible to redraft or add to the language of a written agreement); *Bort v. Parker*, 110 Wn. App. 561, 574, 42 P.3d 980 (2002) (use of extrinsic evidence does not convert a written contract into a partly oral, partly written contract and parol evidence does not alter the terms contained in the contract).

Here, PES seeks to have its own, contradictory meaning of Addendum A supplant the clear written terms in the writing itself, simply as a way to confuse the issues and draw this matter out. The context rule is not meant to be used in that way, and PES will not be able to introduce facts that are contradictory to the writing and its own Complaint. CPI moved for dismissal for that reason, and the reason behind CR 12 itself – PES cannot prove the claims made in its Complaint due to the inadequate

written agreement. The Trial Court agreed. The words in the contract must be given their ordinary meaning and courts are not to admit evidence of a party's unilateral or subjective intent, evidence that would show an intention independent of the instrument, or evidence that would vary, contradict, or modify the written word. *Spectrum Glass*, 129 Wn App. 303.

3. The Material Term of Price Was Not Agreed Upon and the Contract is Not One on Open Terms.

Any extrinsic evidence showing that the parties agreed that “historic cost” was merely to “verify” PES’s calculation or arguments that the contract should be read as one on open terms would be expressly contradicted by the integration clause, Addendum A, and other clear provisions in the agreement. The integration clause states:

This Agreement (**together with Addendum A hereto**) represents the entire agreement between the parties and shall supersede any prior proposals, offers, negotiations, revisions, unincorporated written communications or oral discussions, statements, representations or agreements. This Agreement may not be altered, amended or extended except by a writing signed by an authorized representative of each party.

CP 20 ¶ 8. (emphasis supplied).

Other terms in the “contract” also contradict PES’s assertions. The price for the services, a material term, was clearly never agreed upon as required by the proposed contract. The contract does state that

“[s]hould Client elect to implement any portion of PES’ Cost Savings Program ...” the consulting fee will be 50% of the cost savings. CP 20 ¶ 4. However, PES was obligated to provide an actual number to CPI and by the terms of the agreement, that number must be “mutually agreed to by the parties in Addendum A[.]” *Id.*, ¶ 3. CPI did not elect to implement PES’s Cost Savings Program, and the price was never mutually agreed upon by the parties in Addendum A.

Despite the missing price, PES repeatedly states that all material terms were agreed upon. PES’s Brief, pp. 18, 20, 23. However, price is a material term. *See, e.g., Browning v. Howerton*, 92 Wn. App. 644, 650, 966 P.2d 367, 371 (1998); *Sea-Van Investments Assoc. v. Hamilton*, 125 Wn.2d 120, 129, 881 P.2d 1035, 1040 (1994); *Swanson v. Holmquist*, 13 Wn. App. 939, 943, 539 P.2d 104, 107 (1975) (“The document signed by the parties did not reflect a common understanding of the essential terms of a contract and therefore, no contract existed between them”). Here, no price was agreed upon by the parties, even though the proposed contract specifically required that the price be mutually agreed upon and set out in Addendum A.

Instead, PES again asserts the confusing argument that completely contradicts the terms of the writing. PES states that “[t]he sole purpose of Addendum A is to provide a mechanism for the client to verify PES’s

mathematical calculations. It did not provide for a future ‘agreement’ or negotiation.” PES’s Brief, p. 22. However, this is not what the purported contract says. It clearly requires that all terms be integrated and specifically states that Addendum A must be filled out and agreed upon by the parties. CP 20 ¶¶ 3, 8. No reasonable party would agree to such a “blank check” by not including any price for services to be performed. If PES has evidence that the parties separately agreed to the price of the contract, in writing, it would have presented it in response to the motion before the Trial Court. PES has not pointed, and cannot point, to any writing signed by an authorized representative that cures these defects in its claim for breach of contract.

D. Appellant’s Claim For Breach of the Covenant of Good Faith and Fair Dealing Fails Because this Covenant Is Contingent on the Existence of an Enforceable Agreement – an Agreement that Simply Does Not Exist in this Case as Evidenced by the Pleadings.

PES’s second cause of action, for alleged breach of good faith and fair dealing, fails for the same reasons as the first cause of action. The Court held in *Keystone* that “[a]lthough there is a duty of good faith and fair dealing implied in all existing contracts, we have consistently held there is no ‘free-floating’ duty of good faith and fair dealing that is unattached to an existing contract.” 152 Wn.2d at 177 (quoting *Badgett v. Security State Bank*, 116 Wn.2d 563, 569-70, 807 P.2d 356 (1991)). The

duty exists only “in relation to performance of a specific contract term.”
Id. Here, because PES’s pleading has failed to establish the existence of an enforceable contract, PES’s claim for breach of the duty of good faith and fair dealing likewise fails.

E. Appellant Did Not Adequately Seek a Continuance Under CR 56(f).

This case was decided on CR 12(c). Nevertheless, PES argues that, in the alternative, it should be allowed to conduct discovery pursuant to CR 56(f). PES’s Brief, p. 14. However, CR 56(f) states that, for the Court to issue a continuance, a party’s affidavits must show that it cannot, for the reasons stated, present by affidavit facts essential to justify its position. Here, PES has not submitted any affidavit stating that it cannot present essential facts and the reasons why. The Kovarik Declaration does not speak at all to any reason for a need for a continuance.

A court may deny a motion under CR 56(f) when:

(1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; (2) the requesting party does not state what evidence would be established through the additional discovery; or (3) the desired evidence will not raise a genuine issue of material fact.

Mossman v. Rowley, 154 Wn. App. 735, 742, 229 P.3d 812, 817 (2009);
Tellevik v. 31641 West Rutherford Street, 120 Wn. 2d 68, 90, 838 P.2d 111, 122 (1992). Here, PES fails all factors. It did not offer a good reason for delay in obtaining evidence establishing its position. It did not state

what evidence would be established through the requested discovery. It also did not state that the desired evidence will raise a genuine issue of material fact. PES was not entitled to a continuance under CR 56(f).

F. Justice Did Not Require That Appellant's Motion to Amend Be Granted.

As stated above, the standard of review on a Motion to Amend is abuse of discretion and the Trial Court's decision "will not be disturbed on review except on a *clear showing* of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Wilson*, 137 Wn.2d at 505 (emphasis supplied). A Motion to Amend will be allowed if justice requires, absent prejudice to the non-moving party. CR 15(a). It is proper for a trial court to dismiss a claim and not allow leave to amend when the deficiencies in the complaint cannot be cured by amendment without alleging facts inconsistent with the original complaint. *See Stone v. Travelers Corp.*, 58 F.3d 434, 437 n. 1 (9th Cir. 1995); *Hansen v. Bank of California, Nat. Ass'n*, 189 Wash. 454, 455, 66 P.2d 303, 303 (1937); *Northwest Animal Rights Network v. State*, 158 Wn. App. 237, 247-248, 242 P.3d 891, 897 (2010). Further, leave to amend should not be granted where the complaint is futile – i.e., the amendment would not affect the result. *Deschamps v. Mason County Sheriff's Office*, 123 Wn. App. 551, 563, 96 P.3d 413, 419 (2004).

First, an amendment to a complaint will not cure legal deficiencies and it is within the Trial Court's discretion to deny a motion to amend in such a case. *Northwest Animal Rights Network*, 158 Wn. App. at 247-248 (affirming both judgment on the pleadings per CR 12(c) and denial of motion to amend under CR 15(a)). Here, it was the legal issue of the invalidity of the contract at issue under *Keystone* that led to the judgment on the pleadings, and no amendment on that issue would cure the legal deficiency. To the extent PES argues it should have been allowed to amend its complaint to pursue breach of contract claims, such arguments are not well taken.

Second, PES has not made a clear showing necessary to override the broad discretion granted to the Trial Court. PES has made no allegation or showing regarding the initial requirement for a Motion to Amend under CR 15(a) – that justice requires it be allowed to amend its Complaint. *See* CR 15(a). Here, justice did not require amendment because the Trial Court's ruling did not prejudice any viable claims by PES and, therefore, the Trial Court acted well within its discretion. The Trial Court was clear that PES could bring any other viable claims as new actions:

They [PES] can file if they want a new cause of action. It's up to them whether they file a new cause of action, but it's separate from what I ruled on today. I'm not going to

allow them to amend it. This was a breach of contract case. It's been dismissed today. They're going to have to file their new claims as a new cause of action. So I'm not going to allow them to do it in this file.

RP 25:4-11

I would agree, though, that the plaintiff couldn't have filed [their trade secret claims] under the economic loss rule. They couldn't have because they were alleging breach of contract. At this point, I have granted [CPI's] dismissal. I am going to allow [PES] to do it as a new cause of action and not amend the Complaint because they are opposite.

RP 26:7-13.

PES argues that its position that a valid contract exists precludes its ability to bring claims for quantum meruit/unjust enrichment in a complaint. PES's Brief, p. 25. This is not true. Such claims may be pled in the complaint as alternative forms of relief, only PES would not be able to recover on both. The cases PES cites do not stand for the proposition asserted by PES. *See Chandler v. Washington Toll Bridge Authority*, 17 Wn.2d 591, 604, 137 P.2d 97 (1943) (affirming dismissal with prejudice and stating that "[a] party to a valid express contract is bound by the provisions of that contract, and may not disregard the same and bring an action on an implied contract relating to the same matter, in contravention of the express contract."); *Johnson v. Whitman*, 1 Wn. App. 540, 546, 463 P.2d 207 (1969) (affirming award by trial court where court discussed quantum meruit but concluded as a matter of law that the agreement

between the parties was enforceable and “[s]ince these two theories are inconsistent, we must accept the court’s conclusion of law as controlling ... Even if the trial court based the award on quantum meruit, we would still affirm.”) There is no bar to pleading quantum meruit or unjust enrichment claims as alternate forms of recovery and PES should have done so. In any event, the Trial Court allowed PES to re-file any viable claims that were not inconsistent with PES’s Complaint and/or were tort claims barred by the economic loss rule.

Further, PES was not facing any statute of limitations, and it would have pursued this appeal regardless of the decision on the Motion to Amend, and therefore no delay to PES resulted from the Trial Court’s order. The Trial Court acted well within its discretion when it denied PES’s oral motion to amend its Complaint.

VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS

Based on RAP 18.1 and RCW 4.84, CPI respectfully requests an award of reasonable attorney fees and costs incurred below and on Appeal. RCW 4.84.330 authorizes the recovery of attorney fees by a prevailing party in an action on a contract that contains an attorney fee provision, even if the contract is invalidated in whole or in part on appeal. *Labriola v. Pollard Group, Inc.*, 152 Wn. 2d 828, 839, 100 P.3d 791 (2004).

VII. CONCLUSION

For the foregoing reasons, CPI respectfully requests the Court affirm the Trial Court's order dismissing PES's claims with prejudice and denying its Motion to Amend.

DATED this 30th day of March, 2011.

Respectfully submitted,

K&L GATES LLP

By Whitney J. Baran
J. Michael Keyes, WSBA # 29215
Whitney J. Baran, WSBA # 41303
Attorneys for Appellant
CPI Corporation

APPENDIX A
(CP 20-21)

P.E. Systems, LLC - Agreement for Services

Picture in portrait stub

This Agreement is made by and between CPI Corp, 1706 Washington Ave., St. Louis, MO 63103, ("Client"), and P.E. Systems, LLC, located at 245 West Main Avenue, Suite 400, Spokane, Washington 99201-0111 ("PES").

(1) PES is engaged in the business of providing proprietary analysis of Merchant Processing Services costs. Client and PES agree that during the term of this Agreement, PES will analyze Client's (including all subsidiaries and merchant locations) payments for Merchant Processing Services costs and provide Client with its proprietary analysis to facilitate reductions in fees and chargebacks, capture refunds and the associated cost structure applicable to Client's Merchant Processing Services ("Consulting Services"). For purposes of this Agreement, Merchant Processing Services includes debit and credit card processing and their associated equipment expenses.

(2) To facilitate PES performance of Consulting Services and calculation of Client's Historic Cost, within 14 days of execution of this Agreement, Client will provide PES with (a) A current copy of their Merchant Processing Agreement(s) and any documentation or applicable agreements that may affect their Merchant Processing Services Costs; and (b) Copies of Client's last 12 months of Merchant Processing Services Statements for all merchant accounts. Within 20 days of the close of Client's monthly Merchant Processing Services billing cycle, Client will provide monthly Merchant Processing Services billing statements to PES. Prior to PES calculating Client's Historic Cost and developing its proprietary "Cost Savings Program" for Client, Client warrants that it will give PES all information necessary for PES to perform its analysis and calculations.

(3) Client's Historic Cost will be determined, based upon the data provided by Client, by taking Client's total Visa and MasterCard credit and debit card costs divided by Client's total Visa and MasterCard credit and debit card revenue which reflects Client's accurate Historic Cost. Once Historic Cost is calculated PES will analyze the specific Merchant Processing services cost and create a proprietary Cost Savings Program. Client's Historic Cost will be set forth and mutually agreed to by the parties in Addendum "A" which is incorporated by reference herein. Historic Cost will be automatically increased or decreased from time to time to reflect any changes in the Visa or MasterCard fee structure. Client retains the right not to implement a program or cost savings proposed by PES for Client's good faith business reasons. Should Client decide to go forward and implement any part of PES Cost Savings Program, either by itself, by a third party or by using PES services, this Historic Cost becomes the baseline which the parties will use to measure "Program Cost Savings".

(4) Should Client elect to implement any portion of PES' Cost Savings Program, or Cost Savings solutions provided during the agreement term, either by itself, by a third party or by using PES services, Client will pay PES a consulting fee at a rate of 50% of all Program Cost Savings realized by Client. Program Cost Savings are determined by taking the difference between Client's Historic Cost (baseline) and Client's new merchant services costs obtained by Client. In the case of refunds, Program Cost Savings are determined by the total amount of the refund received by Client. Client will pay the Consulting Fee for a period of 24 months following the first invoice. Payment by Client shall be due upon receipt of invoice. Unpaid balances will accrue interest at the monthly rate of 1.5%. PES does not guarantee that savings will be realized by Client in any given month or at all. However, if no savings are realized, no payment will be due and owing to PES by Client. In no case will PES owe client for any work performed.

(5) In the event Client decides not to implement PES' proprietary Cost Savings Program, Client will so notify PES in writing. Client will provide PES with monthly Merchant Processing Services billing statements for a period of 24 months following the date of such notice. If during that 24-month period, Client realizes any Program Cost Savings, Client will pay PES its Consulting Fee on those Savings. In the event PES determines that there are no Program Cost Savings, PES will notify client in writing that client is not required to send its Merchant Processing Services billing statements for the 24 month period.

(6) In performing their respective duties under this Agreement, each party will disclose to the other, certain confidential, proprietary and trade secret information. For purposes of this Agreement, "Confidential Information" means any and all information created by PES not otherwise in the public domain prior to the execution of this Agreement, as well as information that was derived from the public domain but was subsequently collected into a list or other document of any kind, or has been fashioned, manipulated, sorted, organized, categorized, and/or filtered by PES. This shall specifically include but not be limited to PES' Cost Savings Program given to Client. The parties agree that each will hold all Confidential Information exchanged in strictest confidence and that such Confidential Information will not be used by either party nor revealed to any third party, including any subsidiaries or affiliates, for any purpose other than to facilitate the performance of the parties' respective obligations under this Agreement. This clause shall survive the termination of this Agreement.

(7) For any controversy, dispute, or claim arising out of or relating to this Agreement, jurisdiction and venue shall be in Spokane County Superior Court, Spokane, Washington. The laws of the State of Washington will control. The prevailing party shall be entitled to attorney fees and costs.

(8) The undersigned hereby warrants that he/she has the authority to enter into this Agreement on behalf of Client. This Agreement (together with Addendum A hereto) represents the entire agreement between the parties and shall supersede any prior proposals, offers, negotiations, revisions, unincorporated written communications or oral discussions, statements, representations or agreements. This Agreement may not be altered, amended or extended except by a writing signed by an authorized representative of each party. Should any provision of this agreement be held to be void, invalid, unenforceable or illegal by a court of competent jurisdiction, the validity and enforceability of the other provisions will not be affected. Failure by PES to enforce any provision of this agreement will not constitute or be construed as a waiver of such provision of the right to enforce such provision.

By: P.E. Systems, LLC
Print Name: ROBERT S. SKATTUM
Signature: [Signature]
Its (title): VP OPERATIONS
Date: 07-08-09

By: CPI Corp
Print Name: Philip J. DeLuca
Authorized Signature: [Signature]
Its (title): DIRECTOR - TREASURY SERVICES
Date: 7/10/09

Addendum A

Client and PES hereby agree that Client's Historic Cost Percentage as referenced in the Agreement for Services executed on _____ is _____%. As outlined in the Agreement, Client will pay the consulting fee for a period of 24 months following the first invoice.

By: P.E. Systems, LLC.
Print Name: _____
Signature: _____
Its (title): _____
Date: _____

By: CPI Corp
"Client"
Print Name: _____
Authorized Signature: _____
Its (title): _____
Date: _____

— Downgrades —

(1) OVER THE LAST 12 MONTHS WE HAVE REPLACED EVERY CREDIT CARD MACHINE WITH A NEW ONE (HAD PROBLEMS CLOSING ALL TRANSACTIONS TIMELY)

(2) WE DO NOT USE PIN-PADS FOR DEBIT (PLAN IS TO DETERMINE IF THERE WOULD BE ECONOMIC PAYBACK TO DO THIS)

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2011, I caused to be served a true and correct copy of the foregoing **CPI CORPORATION'S RESPONSE BRIEF** to the parties below and in the manner indicated:

Mr. Nicholas D. Kovarik
Mr. Kevin W. Roberts
Dunn & Black
111 North Post, #300
Spokane, WA 99201 *Via Hand Delivery*

DATED this 30th day of March, 2011.

K&L GATES LLP

By Whitney J. Baran
J. Michael Keyes, WSBA # 29215
Whitney J. Baran, WSBA # 41303
Attorneys for Appellant
CPI Corporation