

**FILED**  
MAY 19 2011  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 297667

COURT OF APPEALS, DIVISION III OF THE STATE OF WASHINGTON

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EVERGREEN MONEYSOURCE MORTGAGE COMPANY d/b/a EVERGREEN HOME  
LOANS, a Washington corporation,

APPELLANT,

v.

LARRY SHANNON AND JANE DOE SHANNON, husband and wife; and GUILD  
MORTGAGE COMPANY, a California corporation,

RESPONDENTS.

---

APPELLANT'S BRIEF

---

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 **ORIGINAL**

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## **APPENDIX**

1. Appendix 1: Order Granting Shannon's Motion for Summary Judgment dated February 8, 2011.
2. Appendix 2: Judgment dated March 4, 2011.
3. Appendix 3: Order Denying Motion for Reconsideration dated February 25, 2011.
4. Appendix 4: Order Denying Motion for Leave to Amend Complaint dated January 10, 2011.

## **I. INTRODUCTION**

This appeal arises from the trial court's erroneous decision to dismiss Plaintiff/Appellant Evergreen Moneysource Mortgage Company's (hereinafter "Evergreen") lawsuit against Defendants/Respondants Larry Shannon and Jane Doe Shannon (hereinafter "Shannon") and Defendant/Respondant Guild Mortgage Company (hereinafter "Guild"). Simultaneously, the trial court also erred by denying Evergreen's Motion for Partial Summary Judgment. Lastly, in a hearing before the summary judgment motions were heard, the trial court erroneously denied Evergreen's Motion for Leave to Amend the Complaint to add a cause of action for violation of the Washington Trade Secrets Act against Shannon and Guild.

Generally speaking, the dispute arose when Evergreen's former branch manager and employee, Larry Shannon and the other employees at the Moses Lake Branch decided to move to Guild. Guild is a competitor of Evergreen in the mortgage business. The problem was not so much that Evergreen lost a productive branch, but the manner in which Shannon and Guild approached and effectuated the move.

In short, Shannon did not just leave Evergreen, but in the process usurped Evergreen customers, proprietary information and employees

from Evergreen. Guild, for its part, asked for and received Evergreen's confidential and proprietary information that it used to lure over Shannon and the rest of the Moses Lake Branch employees. Significantly, Evergreen's customers also ended up closing loans with Guild. All of these actions create liability for Shannon and Guild.

The trial court erred by overlooking three sets of undisputed material facts which support partial summary judgment as to liability against Shannon and Guild or, at the very least, present genuine issues of material fact that would preclude Shannon's and Guild's Motion for Summary Judgment. There is no genuine issue of material fact that Shannon shared Evergreen's proprietary business information with Guild in violation of his employment agreement with Evergreen. Indeed, Shannon disclosed Evergreen's profit and loss statement, rates and loan originator agreements to Guild. The information contained Evergreen's proprietary information, especially the profit and loss statement. Shannon also improperly transferred Evergreen customer files and documents to Guild.

Moreover, there is no genuine issue of material fact that Guild, through its employee Charles Nay, requested the confidential information from Shannon. Nay used the information to unlawfully solicit

Evergreen's employees with Shannon's help. The solicitation breached Shannon's contractual promise to Evergreen and breached his duty of loyalty. Also, Guild and Shannon worked in tandem to usurp employees from Evergreen, resulting in the loss of an entire branch office.

Furthermore, there is no genuine issue of material fact that Shannon and Guild closed loans for Evergreen's customers. Shannon's solicitation of Evergreen's customers was prohibited by his employment agreement and violated his duty of loyalty owed to Evergreen. Given that they were Evergreen customers, Evergreen had an expectation that it would close the loans. Both Shannon and Guild intentionally interfered with Evergreen's ability to close the loans.

Additionally, there is no genuine issue of material fact that Evergreen properly pled its claim that Shannon and Guild are liable for the unlawful disclosure and use of Evergreen's confidential and proprietary information. The claim was disclosed and discussed all throughout discovery. Also, Evergreen's claim for the improper closing of Evergreen's customers' loans by Guild implicitly pled a general claim for the unlawful transfer for Evergreen's proprietary information to Guild, which included a request for the return of the customer files. All parties had sufficient notice of the claim.

Finally, the trial court also erred when it denied Evergreen's Motion for Leave to Amend Complaint. There was no trial date set and no prejudice or finding of prejudice by the trial court. The factual basis for the new cause of action had been investigated by the parties throughout discovery, before the motion was brought. In short, Evergreen's right to have its claims judged on their merits was improperly dismissed.

## **II. ASSIGNMENT OF ERRORS**

1. The trial court erred by denying Evergreen's Motion for Partial Summary Judgment as to liability against Shannon and Guild.<sup>1</sup> *See* Appendices 1 & 2; *see also* CP 1146-1152 & CP 1325-1328.

2. The trial court erred by granting Shannon's Motion for Summary Judgment. *See* Appendices 1 & 2.

3. The trial court erred by determining that Evergreen had not properly pled or disclosed its claim that Shannon and Guild unlawfully disclosed and used Evergreen's confidential and proprietary business information. *See* Appendices 1 & 2.

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<sup>1</sup> An Order was not issued denying Evergreen's Motion for Partial Summary Judgment. However, other decisions imply that the Motion was denied. The trial court dismissed all of the claims in the lawsuit against Guild and Shannon, granted their Motion for Summary Judgment and noted that the Motion had been denied in the Judgment. CP 1146-1152 & CP 1325-1328.

4. The trial court erred by ordering that all claims against Shannon and Guild be dismissed with prejudice. *See* Appendices 1 & 2.

5. The trial court erred by determining that Shannon was the prevailing party in the lawsuit and awarding judgment against Evergreen for his reasonable attorneys' fees, costs and expenses incurred in defending the lawsuit. *See* Appendices 1 & 2.

6. The trial court erred by entering Judgment against Evergreen in the amount of \$97,755.33. *See* Appendix 2.

7. The trial court erred by denying Evergreen's Motion for Reconsideration and finding "no merit in said motion." *See* Appendix 3; *see also* CP 1293.

8. The trial court erred by denying Evergreen's Motion for Leave to Amend the Complaint to add a cause of action for violation of the Washington Trade Secrets Act. *See* Appendix 4; *see also* CP 885-888.

### **III. ISSUES PERTAINING TO ASSIGNMENT OF ERRORS**

#### **A. Issues Pertaining To Assignment Of Errors (1) & (7):**

1. Whether Shannon should be held liable for breach of contract when he disclosed Evergreen's confidential and proprietary business information, solicited its employees to move to Guild and closed

Evergreen's customers' loans with Guild.

2. Whether Shannon and Guild should be held liable for tortious interference with contractual and business expectancies when Guild improperly used Evergreen's confidential and proprietary information received from Shannon to lure Evergreen employees and customers to Guild.

**B. Issues Pertaining To Assignment Of Errors (2), (3), (4), (5) & (6):**

1. Whether the trial court erred by dismissing Evergreen's cause of action for breach of contract when customers appear on both Evergreen's and Guild's pipeline reports and Shannon agreed that he would not originate or close loans for Evergreen's customers with any company but Evergreen.

2. Whether the trial court erred by dismissing Evergreen's cause of action for breach of contract when Shannon solicited all personnel at the Moses Lake Branch to join him at Guild.

3. Whether the trial court erred by dismissing Evergreen's cause of action for breach of the duty of loyalty against Shannon considering that Shannon did not ever provide any argument for dismissal of the claim in its Motion for Summary Judgment and he usurped proprietary information, customers and employees from Evergreen.

4. Whether the trial court erred by dismissing Evergreen's tortious interference with contractual relations and business expectations causes of action given Shannon and Guild interfered with Evergreen's customers and employees, knowing that Evergreen had a business or contractual expectation as to the customers and employees, and Evergreen lost its customers and its employees at the Moses Lake Branch as a result of their interference.

5. Whether the trial court erred by dismissing Evergreen's claim that its confidential and proprietary information was unlawfully disclosed and used by Shannon and Guild given that the claim was disclosed and investigated throughout the discovery process and implicitly pled in the Complaint.

6. Whether the trial court erred by dismissing Evergreen's cause of action for violation of the Washington Consumer Protection Act given Shannon's and Guild's misappropriation of Evergreen's customers, employees and confidential business information could be replicated with another lender.

7. Whether the judgment entered against Evergreen as to Shannon's attorneys' fees and costs should be reversed if the decision of the trial court to grant Shannon's Motion for Summary Judgment and

dismiss Evergreen's claims with prejudice is reversed and Shannon is no longer the prevailing party for purposes of the award.

**C. Issues Pertaining To Assignment Of Error (8):**

Whether the trial court abused its discretion by denying Evergreen's Motion for Leave to Amend Complaint to add a cause of action for violation of the Washington Trade Secrets Act when there was no prejudice to Guild and Shannon, a trial date had not been set, the parties had known about and investigated the underlying facts that supported the new cause of action during discovery and the trial court failed to make any findings in support of the denial.

**IV. STATEMENT OF THE CASE**

**A. Shannon Begins Employment with Evergreen.**

From approximately March of 2007 to April of 2009, Shannon was the branch manager of Evergreen's Moses Lake Branch. CP 513 (Shannon Dep. 17:4-8, Sept. 14, 2010) & CP 515 (Shannon Dep. 22:19-20). On or about August 9, 2007, Shannon signed a Branch Manager Agreement (hereinafter "Agreement") with Evergreen, which set forth the terms and conditions of his position and employment with Evergreen. CP 512 (Shannon Dep. 10:13-25) & CP 549-563.

The Agreement included a confidentiality clause. CP 554. Shannon agreed to keep confidential Evergreen's proprietary business information both during and after his employment with Evergreen. CP 550 & 554. Shannon also acknowledged that Evergreen's customers belonged to and would remain with Evergreen should his employment end. CP 554. Paragraph 6 of the Agreement states:

Agent hereby acknowledges that Evergreen has a proprietary interest of substantial monetary value in certain confidential information and materials (oral or written) including, but not limited to the following: lender lists, customer leads, trade name, methods of marketing, unique contracts in the real estate and mortgage businesses and accounting information; and Agent agrees that it will not reveal to any other outside source or otherwise publish or divulge the contents or particulars of any such proprietary property of Evergreen both during and after the termination of this Agreement...

Non-independently developed contacts, clients or customers shall remain the property of Evergreen... [a]gent acknowledges and agrees that the business opportunities and relationships reflected in all documents are Evergreen's sole and exclusive property. Once processing on any customer or borrower's application has commenced by Evergreen, Agent shall not remove any file or any documents from such file...

CP 554.

Pursuant to the Agreement, Shannon also agreed that he would not solicit Evergreen's employees. CP 555. Paragraph 7 of the Agreement states:

After Agent leaves Evergreen's employment, Agent shall not, on his/her own behalf or on behalf of any third party, directly or indirectly, solicit or aid anyone in the solicitation of any employees of Evergreen...

CP 555.

**B. Shannon Begins Talking To Guild About Becoming A Guild Branch Office.**

In or around February of 2009, Shannon began talking to Guild about employment. CP 514 (Shannon Dep. 18:4-7). Shannon wanted to talk to Guild because of temporary difficulties in the funding of loans at the Moses Lake Branch. CP 511 (Shannon Dep. 8:22-9:3) & CP 543 (Rita Nicholas Dep. 20:20-21:25, Sept. 15, 2010).<sup>2</sup>

During the course of discussions, Shannon disclosed Evergreen's profit and loss statement, loan originator agreement and rate sheet to Charles Nay (hereinafter "Nay"), the Guild representative who participated in the transaction with Shannon. CP 515 (Shannon Dep. 24:14-25), CP 519 (Shannon Dep. 42:13-43:11), 520 (Shannon Dep. 51:1-52:25) & CP 564-616. Interestingly, Nay asked Shannon for the information. CP 517 (Shannon Dep. 31:8-12), CP 519 (Shannon Dep. 42:23-43:2) & CP 520 (Shannon Dep. 51:20-21).

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<sup>2</sup> Significantly, the issue of funding was widespread throughout the industry as a result of the illiquidity of the warehouse lending market. CP 669-674.

Apparently, Nay created two pro forma reports from Evergreen's profit and loss statement information. CP 537 (Charles Nay Dep. 51:6-8, Sept. 21, 2010), CP 516 (Shannon Dep. 26:1-29:24), CP 572-573 & CP 658-662. Indeed, Nay's pro forma reports show that Shannon's branch at Guild would make approximately 3.1 to 3.33 million dollars in the first month with Guild. CP 572-574 & CP 658-662. The volume would obviously be difficult to accomplish without immediately or previously moving Evergreen's customers to Guild. CP 670. Indeed, it takes at least 30 to 45 days to process a customer loan from start to finish. CP 670.

Moreover, Nay used Evergreen's loan originator agreements to sculpt a compensation plan to lure Evergreen's loan originators to Guild. During his deposition, Nay testified as follows:

- Q: So you were asking for the compensation plans for the loan officers.
- A: LO comp plans, according to this. I don't recall that specifically.
- Q: And you did that to be able to lure the loan officers from Evergreen to Guild; right?...
- A: No.
- Q: (By Mr. Hecker) Well, you wanted to make sure, when they came over, they were compensated in a similar fashion or at least not harmed by coming over to Guild; right?
- A: I wanted to verify that a transition would be comparable to them.
- Q: So that they would come to work for Guild; right?
- A: So that they'd be able to come to work for Guild.

CP 534 (Nay Dep. 28:14-28:19 & 28:20-29:4).

In essence, the objective was to lure all personnel to Guild. CP 518 (Shannon Dep. 38:14-39:2). Shannon and Nay discussed that all members of Evergreen's branch would make the move to Guild. CP 518 (Shannon Dep. 38:14-39:2).

After speaking with Guild, Shannon brought the idea up with all members of Evergreen's Moses Lake Branch. CP 544 (Rita Nicholas Dep. 22:21-24. Sept. 15, 2010). Shannon was the primary, if not sole, conduit of information from Guild to the other employees. CP 543-544 (Nicholas Dep. 21:9-22:20) & CP 545 (Nicholas Dep. 26:13-17). Indeed, the employees did not search for other employment apart from Shannon's urging to join Guild. CP 543-544 (Nicholas Dep. 21:9-22:20), CP 545 (Nicholas Dep. 26:13-17) & CP 546 (Nicholas Dep. 35:6-14). In essence, Shannon wanted to move to Guild and solicited the other employees to cut ties with Evergreen and move to Guild with him. Indeed, some employees conveyed to Pat Dias of Evergreen that they did not want to leave Evergreen. CP 675-676. Apparently, the employees felt pressured to follow Shannon to Guild.

In or about April 1, 2009, Evergreen was advised by the Washington Department of Finance that its Moses Lake Branch had applied to be licensed under Guild. CP 669-674 & CP 620. Evergreen's

President, Keith Frachiseur (hereinafter "Frachiseur"), called and spoke to Shannon about the request to be licensed with Guild. CP 669-674. During the discussion, Shannon told Frachiseur that the branch was considering a move to Guild. CP 669-674. Frachiseur wanted to keep the branch, so he offered to travel to Moses Lake to talk to all branch employees. CP 669-674. Frachiseur wanted to address any problems the employees were facing head on which primarily dealt with temporary funding issues. CP 669-674.

Needless to say, Frachiseur's efforts were unsuccessful. Shortly after Frachiseur's meeting at the branch, Shannon informed Frachiseur that the branch was moving to Guild. CP 669-674. The parties agreed that the branch would move to Guild on May 1, 2009, but until the branch moved to Guild, all customers coming in the door would belong to Evergreen. CP 669-674. Shannon and his office would also close as many loans as possible in Evergreen's pipeline before the branch moved to Guild. CP 669-674. Any remaining unclosed loans would be closed by other personnel at Evergreen. CP 669-674.

Despite Shannon's promise, he worked with Guild to divert loans from Evergreen to Guild, prior to officially working as a Guild branch. CP 618. In an e-mail to several Guild employees on April 22, 2009,

Shannon stated:

Currently, we have about 50 or 60 files that we need to get into the system. We need to close between 25 and 30 of these files in May. We are starting to have issues with borrowers and realtors and need to move forward as soon as we can.

CP 618.

**C. Evergreen Finds Out About Shannon's And Guild's Transgressions.**

After Shannon and the other employees moved to Guild, Evergreen discovered that Shannon had been moving Evergreen customers to Guild. CP 669-674. Indeed, on one particular loan, Shannon outright told his loan processors, Sarah Bullinger and Rita Nicholas, to lie to Evergreen about closing a loan with Guild with one of Evergreen's customers. CP 665 & 669-674.

It is also noteworthy that at the time of filing this lawsuit, Evergreen was not aware of the extent of Guild's involvement. Evergreen had evidence that Shannon and Guild had unlawfully transferred customers from Evergreen to Guild. CP 1-11. The claims made at that time arose primarily from the improper transfer of customers. CP 1-11. However, during the discovery process, it was revealed that Guild's involvement and the disclosure and use of Evergreen's confidential and proprietary information was more extensive than originally known.

It was also revealed during discovery through Guild's pipeline reports that at least 17 of Evergreen's customers ended up closing loans with Guild. CP 621-655. Thus, the plan to move customers from Evergreen to Guild, as shown in the April 22, 2009, e-mail and pro forma reports, was realized just shortly after the Moses Lake Branch left for Guild.

## V. ARGUMENT

### A. **The Trial Court Erred By Denying Evergreen's Motion For Partial Summary Judgment And Granting Shannon's and Guild's Motion for Summary Judgment.**

#### 1. Introduction.

Motions for summary judgment are reviewed de novo. *See Frisino v. Seattle School Dist. No. 1*, 2011 WL 989416 at \*4 (citation omitted). The appellate court engages in the same analysis as the trial court. *See Tanner Electric Cooperative v. Puget Sound Power & Light Co.*, 128 Wn.2d 656, 668, 911 P.2d 1301 (1996)(citing *Scott Galvanizing, Inc. v. Northwest EnviroServices, Inc.*, 120 Wn.2d 573, 580 844 P.2d 428 (1993)). A trial court grants summary judgment if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Id.*

If a Motion for Reconsideration is brought based on the trial court's decision on summary judgment, then the court may consider the evidence submitted with the Motion for Reconsideration as part of its summary judgment review. *See Tanner*, 128 Wn.2d at 675 (*citing Scott Galvanizing, Inc.*, 120 Wn.2d at 580).

Again, as a matter of law, Evergreen is entitled to partial summary judgment as to liability against Shannon and Guild. Shannon disclosed Evergreen's confidential and proprietary information to Guild in violation of the Agreement. Shannon and Guild solicited all personnel at the Moses Lake Branch to Guild from Evergreen. Shannon contacted Guild and actively solicited Evergreen employees to follow him to Guild.

For its part, Guild used Evergreen's confidential and proprietary information that it unlawfully requested and obtained from Shannon to put together a comparable, attractive package to lure the entire Moses Lake Branch to Guild. Shannon's actions violated the Agreement while Guild tortiously interfered with Evergreen's contractual and business expectations. Again, the entire Moses Lake Branch ended up moving to Guild.

Moreover, Shannon and Guild improperly closed Evergreen's customers' loans with Guild. Shannon's transgression violated an express

term of the Agreement. Guild's active interference with Evergreen's business expectations in its customers creates liability in tort. The undisputed facts create liability for both defendants/respondants as a matter of law.

It is also noteworthy that the apparent lynchpin of the trial court's dismissal of the lawsuit was Evergreen's failure to plead its claim for the improper disclosure and use of its proprietary business information. The trial court's decision overlooks the parties' investigation of the claim during discovery.

Also, the Complaint implicitly includes a claim for the improper disclosure and use of Evergreen's proprietary information. The claim for the improper closing of Evergreen's borrowers' loans by Guild implicitly pled a general claim for the unlawful transfer for Evergreen's proprietary information to Guild. Indeed, Evergreen pled that Shannon agreed that all customers and loan files were Evergreen's property and asked for the return of such information from Guild. CP 4, 6, 9 & 10. Evergreen filed a Motion for Reconsideration on this issue; the arguments are included as part of the evidence in support of reversal of the trial court's decisions on Summary Judgment. *See Tanner*, 128 Wn.2d at 675.

2. There Is No Genuine Issue Of Material Fact That Shannon Violated The Agreement.
  - a. SHANNON IMPROPERLY DISCLOSED TO GUILD EVERGREEN'S CONFIDENTIAL AND PROPRIETARY BUSINESS INFORMATION.

Again, the Agreement prohibited Shannon from disclosing Evergreen's proprietary information, which includes but is not limited to, "lender lists, customer leads, trade name, methods of marketing, unique contracts in the real estate and mortgage businesses and accounting information" either during or after his employment with Evergreen. CP 554. There can be no dispute that Shannon breached his obligation to Evergreen by disclosing Evergreen's profit and loss statement, rate sheet and loan originator agreement to Charles Nay of Guild. CP 515 (Shannon Dep. 24:14-25), CP 519 (Shannon Dep. 42:13-43:11), CP 520 (Shannon Dep. 51:1-52:25) & CP 1141-1145. As noted, Shannon also transferred customer files to Guild or at the very least, shared Evergreen's customer information with Guild as evidenced by the April 22, 2009, e-mail and Guild's pipeline reports. CP 618 & CP 621-655.

The information divulged by Shannon was confidential and protected by Evergreen. CP 554. Indeed, in his deposition, Shannon testified that the profit and loss statement reflects the income of the branch. CP 521-522 (Shannon Dep. 57:10-58:3). Accordingly, the

information constitutes “accounting information” that Shannon was not to divulge. An “accounting” is defined as “the system of recording and summarizing business and financial transactions and analyzing, verifying, and reporting the results.” CP 657. It is absurd to think of the profit and loss statement as anything but an “accounting” of branch profits.

Moreover, “unique contracts in mortgage business” includes loan originator compensation agreements. CP 669-674. Indeed, the compensation plans for loan originators are important for recruiting sales people. CP 669-674. Evergreen drafted its own loan originator agreements with competitive salaries for loan originators in mind. CP 669-674.

Likewise, rates allow Evergreen to stay competitive against other mortgage lenders in a given market. CP 669-674. Loan rates affect your ability to bring in customers. CP 669-674. Naturally, customers seek the lowest rates for their loans. CP 669-674. Evergreen tries to secure the best rate and markets its rates to borrowers. CP 669-674. While the rates are not changed often, Evergreen does adjust them from time-to-time to increase its market share in a particular market. CP 669-674. The rates are part of Evergreen’s marketing plans or “methods of marketing” as it is defined in the Agreement. CP 669-674.

Additionally, Shannon divulged Evergreen's proprietary "customer leads" or customer information contained in its documents by transferring files to Guild and closing Evergreen's customers' loans with Guild. Evergreen has requested that "customer leads" be kept confidential in its employment agreements to prevent losing customers to former employees and their new employers. CP 669-674. Keeping customer information from outside sources, such as competitors like Guild, is of paramount importance to Evergreen's ability to close loans and generate profits. CP 669-674.

b. SHANNON IMPROPERLY SOLICITED EVERGREEN'S EMPLOYEES IN VIOLATION OF THE AGREEMENT.

As noted above, Shannon solicited the Moses Lake Branch employees to come with him to Guild in violation of Paragraph 7 of the Agreement. CP 555. Again, Shannon made the initial contact with Guild and brought the option to the other employees at the Moses Lake Branch. CP 544 (Nicholas Dep. 22:1-24) & CP 544-545 (Nicholas Dep. 25:1-26:17). Shannon stated that he wanted the employees to come along with him to Guild. CP 546 (Nicholas Dep. 35:6-14). Indeed, Rita Nicholas, a loan processor, testified that Shannon asked the branch employees to move with him to Guild. CP 546 (Nicholas Dep. 35:6-14). Shannon also testified that he and Nay discussed that the entire branch, including all

personnel would make the move to Guild. CP 518 (Shannon Dep. 38:14-39:2).

Furthermore, Shannon lured the other employees to Guild stating that it would be a solution for Evergreen's alleged temporary funding issues because Guild had different programs. CP 543 (Nicholas Dep. 21:9-14). Also, Shannon specifically negotiated on the employees' behalf with Guild as to benefits. CP 546 (Nicholas Dep. 37:11-25). In short, Shannon was the primary, if not sole, conduit and facilitator of the move of the entire branch to Guild. Indeed, Nicholas testified as follows:

Q: You had no independent contact with Guild, other than through Larry, during the process of deciding to move to Guild; is that correct?

A: Correct.

CP 544 (Nicholas Dep. 22:17-20).

c. SHANNON IMPROPERLY SOLICITED EVERGREEN'S CUSTOMERS IN VIOLATION OF THE AGREEMENT.

Shannon violated the Agreement by closing Evergreen's customers' loans with Guild. CP 549-563. The pipeline reports for both companies reveal that 17 known Evergreen customers closed loans at Guild. CP 621-655. Once a customer file reaches Evergreen's pipeline report, they are considered an Evergreen customer. CP 547 (Nicholas Dep. 47:18-23) & CP 548 (Nicholas Dep. 48:18-24).

Significantly, according to Rita Nicholas, the presence of borrowers on the pipeline reports for both companies signaled that Evergreen customers closed loans with Guild. CP 547-548 (Nicholas Dep. 49:6-50:7). When asked about the presence of duplicate borrowers on the pipeline reports for both companies, she stated as follows:

Q: So there might be loans that – for customers who were Evergreen customers that closed at Guild.

Mr. Daley: Object to the form.

A: Is it possible?

Q: (By Mr. Hecker) Well, it looks like it's probable. It looks like it happened; right?

A: Correct.

CP 548 (Nicholas Dep. 50:1-7).

Moreover, all of the disputed 17 loans involved customers that first had contact with Shannon or the other employees at the Moses Lake Branch while they were employed with Evergreen. CP 523-529 (Shannon Dep. 102:2-129:23) & CP 334-341. In most cases, credit reports were pulled for the relevant customers, good faith estimates were drafted and they filled out loan applications. CP 529 (Shannon Dep. 129:1-25).

For instance, borrower "G.L." had a loan funded with Guild. CP 647.<sup>3</sup> Shannon testified that G.L. appears in the pipeline reports for both

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<sup>3</sup> The borrowers found in Evergreen's and Guild's pipeline reports are listed with their last name first. To comply with the Stipulated Protective Order, Evergreen is using the initials of the borrowers' names as they appear in the reports.

Evergreen and Guild. CP 529 (Shannon Dep. 127:11-128:11). Shannon also testified that G.L. contacted Shannon while he was employed at Evergreen for a loan. CP 529 (Shannon Dep. 128:1-3).

While at Evergreen, Shannon pulled a credit score for G.L. and drafted a good faith estimate. CP 529 (Shannon Dep. 128:1-20). G.L. also filled out a loan application. CP 529 (Shannon Dep. 128:1-20).

Likewise, borrower "D.T." had a loan funded with Guild. CP 634. Shannon testified that D.T. contacted him while he was still employed by Evergreen. CP 528 (Shannon Dep. 122:17-23). While at Evergreen, Shannon pulled a credit score for D.T. CP 529 (Shannon Dep. 129:9-11). Shannon also testified that D.T. appears in the pipeline reports for both Evergreen and Guild. CP 528 (Shannon Dep. 122:15-23).

Similarly, borrower "T.C." had a loan funded with Guild. CP 640. Shannon testified that T.C. appears in the pipeline reports for both Evergreen and Guild. CP 527 (Shannon Dep. 119:6-21). Shannon also testified that the file was started with Evergreen. CP 527 (Shannon Dep. 119:10).

Again, it cannot be emphasized enough that Shannon and Guild worked together to transfer customer files from Evergreen to Guild, before Shannon left Evergreen. As noted, in an April 22, 2009, e-mail, Shannon

clearly indicated that he was trying to upload files into Guild's system. CP 618. Conveniently, 17 of Evergreen's customers ended up on Guild's pipeline reports. CP 621-655.

3. There Is A Dispute Of Material Fact Regarding Shannon's Breach Of His Duty Of Loyalty To Evergreen.

Evergreen did not seek summary judgment for its duty of loyalty cause of action against Shannon. Shannon also did not argue affirmatively for the dismissal of that cause of action but just dropped it into the proposed order. CP 1146-1152. However, the trial court dismissed the cause of action because it dismissed all of Evergreen's claims. CP 1146-1152 & CP 1325-1328. In short, the trial court's decision was in error.

An employee has a duty to refrain from soliciting customers for rival business or "to act in direct competition with his or her employer's business." *See Kieburz & Assoc., Inc. v. Rehn*, 68 Wn.App. 260, 265-266, 842 P.2d 985 (1992)(citing *Restatement (Second) of Agency § 393 comment e (1958)*). Indeed, the duty of loyalty is breached if the employee uses resources gained through one's employment to benefit another separate endeavor. *See Organon, Inc. v. Helper*, 23 Wn.App. 432, 436, 595 P.2d 1314 (1979).

Here, there is a genuine issue of material fact that Shannon breached his duty of loyalty to Evergreen. Again, Shannon disclosed

Evergreen's proprietary business and customer information to Guild. Shannon also solicited the other employees at the Moses Lake Branch to follow him to Guild. Shannon benefitted from his improper actions because he ensured that his Guild branch generated income immediately and was fully staffed with seasoned personnel. In short, Shannon used all of the proprietary information and resources obtained from Evergreen to benefit his own interests.

4. Shannon And Guild Are Liable For Interfering With Evergreen's Contractual And Business Expectancy.
  - a. SHANNON AND GUILD TORTIOUSLY INTERFERED WITH EVERGREEN'S RELATIONSHIP WITH ITS EMPLOYEES.

A defendant is liable for tortious interference with contract or business expectancy when:

- a) There exists a valid contractual relationship or business expectancy;
- b) Defendant had knowledge of the same;
- c) Defendant's intentional interference induced or caused a breach or termination of the relationship or expectancy;
- d) Defendant's interference was for an improper purpose or by improper means; and
- e) Plaintiff suffered damage as a result.

*See Calbom v. Knudtson*, 65 Wn.2d 157, 162-163, 396 P.2d 148 (1964); *see also Pleas v. Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

Here, Evergreen had a valid contractual relationship or business expectancy with the employees at its Moses Lake Branch. A sufficient

expectancy or relationship may arise through an employment relationship, even if terminable at will. *See Calbom*, 65 Wn.2d at 164.

There can be no dispute that Guild had knowledge of the employment relationship between Evergreen and its employees at the Moses Lake Branch. Indeed, Nay met with Shannon and gave him a sales pitch to convince him to move to Guild. CP 538-539 (Nay Dep. 89:4-90:19). Certainly, the purpose of Nay's sales pitch was to take the branch from Evergreen. Again, it was a "package deal." CP 536 (Nay Dep. 35:21-36:2).

Furthermore, Guild's interference with Evergreen's employees was intended to induce them to move to Guild. Nay and Shannon worked together to lure all personnel from Evergreen's Moses Lake Branch to Guild. CP 518 (Shannon Dep. 38:14-39:2). Again, Shannon's part cannot be understated; he acted as the "cheerleader" for Guild to persuade the other employees to go with him. CP 543 (Nicholas Dep. 21:8-14), CP 544 (Nicholas Dep. 22:10-16), CP 545 (Nicholas Dep. 26:10-17) & CP 546 (Nicholas Dep. 35:6-14).

Moreover, Guild used Evergreen's confidential and proprietary business information to improperly induce the Moses Lake Branch to move to Guild. Again, Nay testified that he used Evergreen's loan

originator agreement to ensure that the loan originators would be comparably compensated at Guild. CP 537 (Nay Dep. 28:14-29:4) & CP 1146-1152.

Additionally, as noted, Nay used Evergreen's profit and loss statement information to create two pro forma reports for the branch. CP 537 (Nay Dep. 51:6-8). In February 18, 2009, and February 19, 2009, e-mails between Nay and Shannon, Shannon provided the profit and loss statement to Nay and Nay sent back pro forma reports. CP 564-599 & CP 658-662.

In those e-mails Shannon is passing on Evergreen's profit and loss statement to Nay; Nay specifically responds to that information with a pro forma report for the branch. CP 564-599 (pro forma is on pages CP 572-574). Likewise, Shannon responds to the pro forma report with modified numbers based on production at Evergreen and Nay again follows up with another pro forma report. CP 658-662. Based on those communications, only one conclusion can be drawn; that Nay created pro forma reports from Evergreen's profit and loss statements and used them to show Shannon that the branch income would be comparable at Guild.

Simply put, Guild's use of Evergreen's information was improper. Nay knew or should have known that the disclosure of the confidential

information was improper. Evergreen is a competitor of Guild. The loan originator agreement Shannon provided to Nay (upon Nay's request) has a confidentiality clause that prohibits the disclosure of Evergreen's proprietary information. CP 517 (Shannon Dep. 31:8-12) & CP 600-610.

Nay would be hard-pressed to argue that he did not notice the confidentiality paragraph. Nay testified that he used the loan originator agreement to compare the income computation between Evergreen and Guild. CP 534 (Nay Dep. 28:14-29:4). Accordingly, one can safely assume he reviewed the compensation paragraphs in Evergreen's loan originator agreement. The paragraph regarding confidentiality is located on the same page as the compensation terms.<sup>4</sup> CP 602-603.

Notably, Guild's own policies also contain provisions regarding the confidentiality of its business information. CP 666-668. Specifically, Guild's policy provides that "[a]ll communications sent must comply with this and other company policies and may not disclose any confidential or proprietary information to an unauthorized third party." CP 668.

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<sup>4</sup> Note that the compensation terms begin on another page but conclude on the same page that contains the confidentiality paragraph. CP 602-603.

b. SHANNON AND GUILD TORTIOUSLY INTERFERED WITH EVERGREEN'S RELATIONSHIP WITH ITS CUSTOMERS.

Evergreen had a valid business expectation that its customers' loans would be originated with Evergreen. Again, the customers appeared in Evergreen's pipeline reports as "borrowers." Shannon and the other loan originators agreed to work exclusively for Evergreen. CP 550 & CP 601. Practically speaking, it would be absurd that a business would not expect to profit from its customers, especially those that appear on the company paperwork as "borrowers." CP 622-631. Again, as gleaned from Shannon's testimony, to be a "borrower" in Evergreen's pipeline there had to have been some preapproval or similar work performed for that particular file. CP 523-529 (Shannon Dep. 102:2-129:23) & CP 336-341.

Guild interfered with Evergreen's expectation by assisting Shannon in diverting Evergreen's customers' loans to Guild. Guild helped Shannon divert loans from Evergreen to Guild, prior to the branch officially working for Guild.<sup>5</sup> CP 618. Again, in an e-mail dated April 22, 2009, Shannon stated to several Guild employees:

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<sup>5</sup> Recall that Shannon and the other Moses Lake Branch employees started working for Guild on May 1, 2009.

Currently, we have about 50 or 60 files that we need to get into the system. We need to close between 25 and 30 of these files in May. We are starting to have issues with borrowers and realtors and need to move forward as soon as we can.

CP 618.

Also, Evergreen's customers appeared in Guild's pipeline reports as "borrowers." CP 621-655. Considering the timing and language of the e-mail and the appearance of Evergreen's borrowers on Guild's pipeline reports, only one conclusion can be drawn; that Shannon asked Guild to upload Evergreen's customers' files into Guild's system and closed the loans with Guild. Indeed, Shannon was still working exclusively for Evergreen at the time the e-mail was sent.

Again, Guild was also planning on taking over Evergreen's customers. When viewing the projected income on Guild's pro forma reports for the first month, it is apparent that Guild was planning on Shannon transferring Evergreen's customers' loans to Guild. CP 564-599 & CP 658-662. It is unlikely that Shannon's Guild branch could make the planned 3.1 to 3.33 million dollars in the first month of operation without moving loans from Evergreen to Guild. CP 670.

In short, Evergreen expected that its customers would close their loans with Evergreen, and Shannon and Guild knew about Evergreen's

expectation. Instead of allowing Evergreen to keep its customers, Guild and Shannon worked together to transfer and divert Evergreen's customers to Guild.

5. Evergreen's Claim For The Unlawful Disclosure And Use Of Its Confidential Business Information Was Sufficiently Pled Through Discovery.
  - a. THE CLAIM WAS DISCLOSED AND DISCUSSED DURING THE DEPOSITIONS OF NAY AND SHANNON.

At Summary Judgment, the decision to dismiss Evergreen's claim for the unlawful disclosure and use of Evergreen's proprietary and confidential business information was based on the premise that the claim had not been properly pled by Evergreen.<sup>6</sup> CP 1194-1207. However fundamentally, the trial court misapplied the requirements of notice pleading to Evergreen's claim.

"It is well established that pleadings are to be liberally construed; their purpose is to facilitate proper decision on the merits, not to erect formal and burdensome impediments to the litigation process." *See State of Washington v. Adams*, 107 Wn.2d 611, 619-621, 732 P.2d 149 (1987)(quoting *Caruso v. Local 690, Int'l Brotherhood of Teamsters*, 100 Wn.2d 343, 349 (1983)). If a theory is unclear in the initial pleadings but

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<sup>6</sup> Evergreen brought the issue to the trial court's attention again on a Motion for Reconsideration after the decision on summary judgment. CP 1194-1207.

clarified through the course of summary judgment, it is still properly pled. *Id.*; see also *Schoening v. Grays Harbor Comm. Hosp.*, 40 Wn.App. 331, 337, 698 P.2d 593 (1985) review denied by 104 Wash.2d 1008, 1985 WL 320780 (1985).

The disclosure of Evergreen's confidential profit and loss statement, rate sheet and loan originator agreement was discussed at length in the depositions of Nay and Shannon. Indeed, there are at least 60 pages of testimony dealing with or related to the confidentiality issue in Shannon's Deposition.<sup>7</sup>

By way of example, Shannon was specifically asked about the confidentiality provision in the Agreement and the application of the provision to Evergreen's confidential profit and loss statement:

- Q: Evergreen has included a pretty lengthy paragraph in your employment agreement about what needs to be kept confidential; right?
- A: Yeah...
- Q: So that's why I'm asking. Is anything confidential?...
- Q: So borrower names, you believe that to be confidential?
- A: Yeah, borrowers.
- Q: Is there anything else in the business information that you worked with that you would consider to be confidential?

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<sup>7</sup> See CP 515 (Shannon Dep. 24:14-25), CP 516 (Shannon Dep. 26:1-29:24), CP 517 (Shannon Dep. 31:8-12), CP 519 (Shannon Dep. 42:13-43:11), CP 520 (Shannon Dep. 51:1-52:25), CP 521-522 (Shannon Dep. 57:10-58:3), CP 523-529 (Shannon Dep. 102:2-129:23), CP 1214-1217 (Shannon Dep. 24:10-37:25), CP 1218 (Shannon Dep. 39:10-40:8), CP 1219 (Shannon Dep. 42:13-44:8), CP 1220-1223 (Shannon Dep. 49:11-59:14), CP 1224 (Shannon Dep. 130:5-19), CP 564-616, CP 658-662, CP 1251-1257 & CP 1271.

- A: No...
- Q: If you could please turn back to Exhibit 2. It's the closest one, so I thought it would be the easiest. You testified earlier that the attachment there is a profit and loss statement for the Moses Lake branch; is the correct?
- A: Yes.
- Q: Is it accounting information?
- A: I really don't know.
- Q: What would you call it then?
- A: It's a profit and loss statement.
- Q: What does a profit and loss statement do?
- A: It tells me if we've made money at the branch.
- Q: So does it provide an accounting for the branch numbers?
- A: It gives the branch numbers.

CP 1222-1223 (Shannon Dep. 55:25-56:3, 56:11, 56:13-56:19 & 57:15-58:3) & CP 564-599.

Likewise, in Nay's Deposition, a significant portion of the deposition was devoted to discussing the confidentiality issue as pertaining to Evergreen's proprietary information.<sup>8</sup> By way of example, Nay was questioned directly about the confidentiality and use of Evergreen's information in his possession:

- Q: Is it fair to say that the confidentiality or propriety of any information you were getting from Evergreen was not a concern of yours?
- A: I wasn't intending on using it for any competitive advantage. So I'd have to say that I received it. I didn't demand any information.

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<sup>8</sup> See CP 533 (Nay Dep. 23:1-12 & 24:20-25:15), CP 534 (Nay Dep. 28:14-29:4), CP 535 (Nay Dep. 32:5-10), CP 537 (Nay Dep. 51:6-8), CP 1228-1232 (Nay Dep. 16:20-33:1), CP 1232 (Nay Dep. 33:24-25), CP 1233-1237 (Nay Dep. 36:20-50:5), CP 1237-1238 (Nay Dep. 51:6-56:1), CP 1239 (Nay Dep. 66:19-22), CP 1239 (Nay Dep. 67:11-68:6), CP 1240 (Nay Dep. 70:8-71:5), CP 1240 (Nay Dep. 71:22-23 & 72:2-5), CP 564-616, CP 658-662, CP 667-668 & CP 1142-1145.

Mr. Hecker: Could you show him Exhibit 11. Michelle, we are going to look at Exhibit No. 11, as previously identified.

Mr. Daley: It's a March 19 E-mail?

Q: (By Mr. Hecker) Yes, it's a March 19 E-mail from Larry Shannon to Charles Nay on the top. Then it looks like there was an original message from Charles Nay to Larry Shannon, dated March 19<sup>th</sup>, and in it, it says: "Can you send me their current plans?" Do you know what you were requesting at that time from Larry Shannon?

A: Judging from this, we might have been discussing what our loan officer plans were and if we could – and if we had the ability to match their plans. So then I would have requested what their plan looks like so I could make sure that employees wouldn't suffer, that they would have comparable compensation.

Q: So you were asking for the compensation plans for the loan officers?

A: LO comp plans, according to this. I don't recall specifically.

Q: And you did that to be able to lure the loan officers from Evergreen to Guild; right?...

A: No.

Q: (By Mr. Hecker) Well, you wanted to make sure, when they came over, they were compensated in a similar fashion or at least not harmed by coming over to Guild; right?

A: I wanted to verify that a transition would be comparable to them.

Q: So that they would come to work for Guild; right?

A: So that they'd be able to come to work for Guild.

CP 1231 (Nay Dep. 27:16-28:19 & 28:21-29:4), CP 600-610 & CP 1142-1145.

Nay was also questioned about the use of the information from Evergreen's confidential profit and loss statement to create pro forma reports for Guild:

Q: What are these models typically used for?  
A: A pro forma?  
Q: Yes.  
A: To evaluate the business. To evaluate the business on a profit and loss statement – I mean on a profitability measure.  
Q: Do you remember did you take the numbers that Evergreen had provided and plug them into your formula for the profitability that you thought would happen with the branch from Guild’s perspective if it was a Guild operation?..  
A: No.  
Q: (By Mr. Hecker) So you never utilized any information you received from Larry Shannon with respect to his productivity and his loan officer productivity to determine the profit – how that would translate into profitability at Guild?..  
A: Ask the question again, please.  
Mr. Hecker: Would you restate it.  
(Questions on Page 39, Lines 17 through 21, read by the reporter)  
A: Larry Shannon would have provided me information to complete the sample pro formas.  
Q: And the information Larry Shannon would have provided would have been Evergreen business information; right?..  
A: I viewed it as Larry Shannon information.  
Q: (By Mr. Hecker) Was Larry Shannon running a separately incorporated company from Evergreen?  
A: Actually, when – the way I looked at it from Larry Shannon was he was an independent person because he owned all equipment and owned the lease.  
Q: Did –  
A: So –  
Q: -- Larry Shannon operate a separate company separately incorporated from Evergreen?  
A: I’m not sure.

CP 1234 (Nay Dep. 39:4-39:14, 39:16-39:21, 39:23-40:6 & 40:8-40:18).

- b. THE CLAIM WAS DISCLOSED AND DISCUSSED IN THE DEPOSITION OF KEITH FRACHISEUR AND IN A LETTER FROM EVERGREEN'S COUNSEL.

Not only was the claim discussed at length in the depositions of Shannon and Nay, it was also disclosed and discussed in the deposition of Evergreen's President, Keith Frachiseur. In Frachiseur's deposition, Frachiseur identified Evergreen's claim regarding the unlawful disclosure of its proprietary information as follows:

- Q: Do you contend that any actions that took place in the transfer of Larry Shannon's office from Evergreen Home Loans to Guild were improper?  
A: Were improper?  
Q: Yes.  
A: Yes.  
Q: And what?  
A: In what way?  
Q: What was improper?  
A: **That Larry Shannon transferred Evergreen proprietary information and loan files to Guild without our express consent.**

CP 1246 (Frachiseur Dep. 123:25-124:11) (emphasis added).

Frachiseur also testified:

- Q: Okay. And there are no damages being sought relating to the 34 that were listed as – improperly listed as fictitious; correct?  
A: Not in that category. I think that falls into the other category.  
Q: And which category is that?  
A: **Tortious interference and – I don't think that Larry had the right to take our proprietary data, database, clientele with him without release.**

CP 1247 (Frachiseur Dep. 172:7-15) (emphasis added).

Furthermore, Shannon certainly had an appreciation of the claim regarding the unlawful transfer of Evergreen's profit and loss statement and loan originator agreement given the type of questions posed by Shannon's counsel at Frachiseur's Deposition. Indeed, Mr. Sonn questioned Frachiseur at length on the disclosure of income statements and loan originator agreements during the transfer of the Moses Lake Branch from Home 123 Mortgage to Evergreen. CP 1244 (Frachiseur Dep. 115:18-25) & CP 1245 (Frachiseur Dep. 118:6-119:13). In short, Mr. Sonn was apparently attempting to investigate whether he could discredit Evergreen's confidential information claim through Frachiseur's prior acts with respect to transitioning the branch from Home 123 Mortgage to Evergreen. In other words, Evergreen cannot complain about Shannon and Guild's behavior if Evergreen engages in the same wrongful conduct.

However, it is apparent from the testimony of Frachiseur that Evergreen did not engage in the same conduct. Indeed, Evergreen properly acquired the Moses Lake Branch from Home 123 Mortgage, which had gone out of business. Evergreen had a right to acquire the branch because New Century, the parent company, and the bankruptcy court approved the deal. CP 1245 (Frachiseur Dep. 121:21-22) & CP

1246 (123:20-24). Also, Frachiseur's testimony shows that Evergreen does not use or encourage the use of proprietary information from its competitors when recruiting personnel. CP 1245 (Frachiseur Dep. 119:11-13).

Lastly, as noted, Evergreen's counsel also disclosed Evergreen's claim in an August 20, 2010, letter to counsel:

While I will not detail every mistake of Guild... I believe one of the biggest problems involved Guild's direct knowledge of Shannon's Employment Agreement as well as receiving confidential trade secrets of Evergreen.

CP 1248-1250.

6. The Claim Was Pled In The Complaint As A Component Of The Claim For The Unlawful Transfer Of Evergreen's Customers To Guild.

The claim for the unlawful disclosure of Evergreen's confidential and proprietary business information was revealed through Evergreen's claim that its customers' loans were unlawfully closed by Guild. Again, the closing of Evergreen's borrowers' loans with Guild resulted in the unlawful disclosure of Evergreen's proprietary information for its customers.

As noted, Shannon promised that he would not disclose Evergreen's business information, which includes but is not limited to, "lender lists, customer leads, trade name, methods of marketing, unique

contracts in the real estate and mortgage businesses and accounting information” either during or after his employment with Evergreen. CP 554. Shannon also agreed that Evergreen’s customers belonged to Evergreen. CP 554.

There is no dispute that Evergreen sufficiently pled its claim that Shannon and Guild unlawfully closed Evergreen’s customers’ loans with Guild. In making that claim in the Complaint, Evergreen alleged that the customers and customer information belonged to Evergreen pursuant to the Agreement and asked for the return of any customer files. CP 1-11. The trial court overlooked that the claim for the improper closing of Evergreen’s customers’ loans by Guild implicitly pled a general claim for the unlawful transfer for Evergreen’s proprietary information to Guild.

More specifically, Evergreen claimed:

The Agreement provided that all contracts, clients or customers developed during Shannon’s employment with Evergreen belonged to Evergreen...

Pursuant to the Agreement, Shannon promised, amongst other things, to use his best and exclusive efforts to originate loans for Evergreen, acknowledged that all clients and files for loans originated during his employment belonged to Evergreen, and agreed not to solicit Evergreen employees and input false information into Evergreen’s files...

Shannon failed to honor his obligations under the Agreement.

CP 4 & 6.

In its Prayer for Relief, Evergreen also asked “[f]or an Order that Shannon and Guild return all client files to Evergreen, which were originated during Shannon’s employment at Evergreen.” CP 9-10. Certainly, at the very least, the claims brought to light that Evergreen viewed the closing of its customers’ loans with Guild as an improper transfer of proprietary information to Guild. Indeed, it asked for the return of its customer information. Ultimately, the claim regarding the unlawful disclosure and use of Evergreen’s proprietary and confidential information was sufficiently pled. In short, the notice pleading requirements do not require more than what Evergreen claimed and disclosed in the instant situation. *See Adams*, 107 Wn.2d at 619-620; *see also Schoening*, 40 Wn.App. at 337.

7. There Is A Genuine Issue Of Material Fact Regarding Evergreen’s Consumer Protection Act Cause Of Action.

A defendant violates the CPA when its (a) unfair or deceptive act; (b) occurred in commerce; (c) affected the public interest; and (d) caused damage to plaintiff. *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Here, there is a dispute of material fact that Shannon’s conduct impacts the public interest. All of Shannon’s “bad acts” are capable of repetition and stand

to affect the public interest. *See Hangman Ridge*, 105 Wn. at 790. Shannon has been in the mortgage lending business for nearly 33 years. CP 174. During those years, he has worked for different mortgage lenders. CP 174. Accordingly, Shannon could replicate the misappropriation of customers, employees and proprietary business information with another lender.

Additionally, there is a genuine issue of material fact whether Guild's conduct impacts the public interest. Guild's anti-competitive behavior strikes at the core purpose of promulgating the CPA. Guild engaged in anti-competitive behavior when it spearheaded the solicitation of Evergreen's Moses Lake Branch for Guild and in doing so misappropriated the customers and confidential business information of Evergreen. The conduct is capable of being repeated because Nay's duties for Guild include recruiting personnel. CP 922 (Nay Dep. 8:10-22 & 50:4-12).

8. The Decision To Award Attorney Fees And Costs To Shannon Should Be Reversed.

Although Evergreen is not asking for review of the amount of attorney fees and costs awarded to Shannon, it notes that if the trial court's decision is reversed as to the granting of Shannon's Motion for Summary Judgment, the decision granting attorney fees and costs should also be

reversed. The award of the fees and costs stems from Shannon's status as a prevailing party because Evergreen's lawsuit was dismissed; if the trial court's decision is reversed, then Shannon would no longer be the prevailing party for purposes of the award.

**B. The Court Erred In Denying Evergreen's Request To Amend Its Complaint And Add A Cause Of Action For Violation Of The Washington Trade Secrets Act.**

1. Introduction.

In the instant situation, the Court should reverse the trial court's decision because it abused its discretion by denying Evergreen's Motion for Leave to Amend the Complaint. *See Walla v. Johnson*, 50 Wn.App. 879, 883, 751 P.2d 334 (1988)(citing *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 573 P.2d 1216 (1978)). "Outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely an abuse of discretion..." *See Walla*, 50 Wn.App. at 885 (quoting *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230, 9 L.Ed.2d 222 (1962)).

Here, the trial court abused its discretion because it failed to follow the law. Indeed, the facts that supported the "new" cause of action had been investigated in discovery, a trial date had not been set, Guild and Shannon would not have been prejudiced and the trial court failed to enter

any findings in support of the denial. In short, there was no surprise or prejudice that would have resulted had the Motion been granted.

2. Shannon And Guild Were Not Surprised By Evergreen's Request To Add A Cause Of Action For Violation Of The Washington Trade Secrets Act.

In the case of a request to amend the complaint, “‘leave to amend shall be freely given when justice so requires’; this mandate is to be heeded.” *See Tagliani v. Colwell*, 10 Wn.App. 227, 233, 571 P.2d 207 (1973); *see also* CR 15(a).

If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason...such as undue delay, bad faith or dilatory motive on the part of the movant...undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment...the leave sought should, as the rules require, be ‘freely given.’

*Id* (quoting *Foman*, 371 U.S. 178, 182, 83 S.Ct. 227 (1962)).

“In determining whether prejudice would result, a court can consider potential delay, unfair surprise, or the introduction of remote issues.” *See Kirkham v. Smith*, 106 Wn.App. 177, 182, 23 P.3d 10 (2001) (citing *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 165-166, 736 P.2d 249 (1987)).

Here, no surprise or remote issues would have been introduced if the Complaint had been amended. The facts that supported the cause of action for violation of the Washington Trade Secrets Act were investigated by the parties during discovery. In other words, Shannon and Guild had notice of a possible claim for the misappropriation of Evergreen's trade secrets vis-à-vis the exploration of the improper disclosure of Evergreen's confidential and proprietary business information. *See Caruso v. Local 690*, 100 Wn.2d 343, 350, 670 P.2d 240 (1983).

More specifically, the "new" cause of action arose from the same set of facts that supported the causes of action in the Complaint. Again, the information disclosed in discovery showed that Shannon disclosed and Nay requested and received the loan originator agreement, rates and income information for Evergreen. CP 517 (Shannon Dep. 31:8-12), CP 519 (Shannon Dep. 42:13-43:11), 520 (Shannon Dep. 52:-52:25), CP 564-616 & CP 1142-1145. The discovery also revealed that Guild helped Shannon transfer Evergreen's customer files to Guild and that Guild closed Evergreen's customers' loans. CP 600-610 & CP 621-655.

Significantly, through the depositions which were conducted September through October of 2010, the extent of and timing of Guild's involvement in the improper use of the confidential information was

revealed. For example, Nay used Evergreen's proprietary business information for an improper purpose; to lure Evergreen employees to Guild. CP 534 (Nay Dep. 28:14-29:4). Indeed, Nay testified that he used the loan originator information, contained in Evergreen's loan originator agreement, to ensure the compensation would be comparable. CP 534 (Nay Dep. 28:14-29:4). In other words, Nay used the information to show Evergreen's loan originators that they would make comparable salaries with Guild. During this time the branch was still with Evergreen. CP 549-620, CP 670 & CP 1142-1145.

Again, it was also revealed at Nay's deposition that he had created pro forma reports for the branch that were based off of Evergreen's profit and loss statement. When viewing the projected income on Guild's pro forma reports for the first month, it is apparent that Guild was planning on Shannon transferring Evergreen's customers' loans to Guild. CP 670, CP 564-599 & CP 658-662. It is unlikely that Shannon's Guild branch could make the planned 3.1 to 3.33 million dollars in the first month of operation without moving loans from Evergreen to Guild. CP 670. In short, the identity and timing of the improper disclosure and Guild's use of Evergreen's proprietary information became fully realized through the depositions.

3. A Trial Date Had Not Been Set At The Time Of The Motion.

Assuming Shannon and Guild would have required more time to conduct discovery, the trial court still erred in its decision. A trial date had not been set and more discovery could have been easily accomplished. Indeed, undue delay in and of itself does not amount to prejudice; cries of prejudice without “specific facts to support a finding of prejudice” are insufficient. *See Walla*, 50 Wn.App. at 884-885; *see also Caruso*, 100 Wn.2d at 349.

Moreover, in instances where additional time was needed to prepare the case for trial as a result of the “new” cause of action, a continuance was deemed the proper remedy for any resulting prejudice. *See Walla*, 50 Wn. App. at 885; *see also Quakenbush v. State*, 72 Wn.2d 670, 672, 434 P.2d 736 (1967) & *Caruso*, 100 Wn.2d at 351. Here again, no trial date had been set at the time of the Motion. However, it is important to note that any delay that would have been experienced in setting the trial date would not have resulted in prejudice. The courts prefer to hear claims on their merits, especially when the case is not on the eve of trial. *See Walla*, 50 Wn. App. at 883-884. Thus, any resulting prejudice should have been cured by a continuance; the express prohibition of Evergreen’s right to bring its Washington Trade Secrets Act

cause of action on the merits is extreme in the instant situation.

4. The Order Denying The Motion To Amend Does Not Contain Findings For The Denial Of the Motion.

The trial court did not enter findings of prejudice. CP 885-888. The Order simply states that the Motion is denied. CP 885-888. Given there is not a reason for the denial on the record, the Court cannot ascertain the reasons for the denial for purposes of review. Failure to include findings on the record is an abuse of discretion that supports reversal. *See Walla*, 50 Wn. App. at 883.

**C. Evergreen Should Receive Its Attorneys' Fees And Costs Incurred On Appeal.**

An award of fees on appeal is allowed if authorized by law. RAP 18.1. A contractual provision that allows for attorneys' fees and costs is authority to grant such fees and costs on appeal to the prevailing party. *See Farm Credit Bank of Spokane v. Tucker*, 62 Wn.App. 196, 207, 813 P.2d 619 (1991)(citing *Singleton v. Frost*, 108 Wn.2d 723, 729-30, 742 P.2d 1224 (1987)) reviewed denied by 118 Wash.2d 1001, 822 P.2d 287 (1991).

Here, the Agreement contains a fee provision which entitled the prevailing party to its reasonable attorneys' fees and costs. CP 556. If Court reverses the trial court's erroneous decisions, then Evergreen will be

the prevailing party on appeal entitled to its attorneys' fees and costs.

## **VI. CONCLUSION**

For the foregoing reasons, the Court should reverse the trial court's decision to grant Shannon's and Guild's Motion for Summary Judgment, dismissing Evergreen's lawsuit. The Court should grant Evergreen's Motion for Partial Summary Judgment with instructions that the matter proceed to trial on damages. Or, in the alternative, the Court should reverse the trial court's decision to grant Shannon's and Guild's Motion for Summary Judgment, and affirm the denial of Evergreen's Motion for Partial Summary Judgment, with instructions that the matter proceed to trial on all fronts.

The Court should also reverse the trial court's decision to deny the Motion for Reconsideration if it decides to reverse the trial court's decision to grant Shannon's and Guild's Motion for Summary Judgment. As noted, the Motion for Reconsideration dealt with the dismissal of Evergreen's lawsuit against Shannon and Guild, so it makes sense that if that decision is reversed, so should the decision on reconsideration.

In the case of a reversal of the trial court's decision, the Court should also reverse the judgment of attorney fees and costs entered against Evergreen. Indeed, if the decision to grant Shannon's Motion for

Summary Judgment is reversed, he will no longer be the prevailing party entitled to attorney fees and costs.

Lastly, the Court should reverse the trial court's decision to deny Evergreen's Motion for Leave to Amend Complaint, allowing Evergreen to add its cause of action for violation of the Washington Trade Secrets Act against Shannon and Guild.

**RESPECTFULLY SUBMITTED** this 18<sup>th</sup> day of May, 2011.



Jordan M. Hecker WSBA #14374

Lindsey Truscott WSBA #35610

Attorneys for Appellant

HECKER WAKEFIELD & FEILBERG, P.S.

321 First Avenue West

Seattle, WA 98119

(206) 447-1900

# **APPENDIX 1**

**FILED**

**FEB 08 2011**

KIMBERLY A. ALLAN  
Grant County Clerk



07-434961

1                                    IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
2                                    COUNTY OF GRANT

3 EVERGREEN MONEYSOURCE )  
4 MORTGAGE COMPANY d/b/a )  
5 EVERGREEN HOME LOANS, a )  
Washington corporation, )

6                                    Plaintiff, )

7                                    vs. )

8 LARRY SHANNON and JANE DOE )  
9 SHANNON, husband and wife; and )  
GUILD MORTGAGE COMPANY, a )  
California corporation, )

10                                   Defendants. )

NO. 09-2-00929-1  
ORDER GRANTING SHANNON'S  
MOTION FOR SUMMARY  
JUDGMENT

**COPY**

11                                    THIS MATTER came before the Court on the motion of Larry Shannon  
12 ("Shannon") for summary judgment. Larry Shannon appeared in person through  
13 his attorneys of record, Jeffers, Danielson, Sonn & Aylward, P.S. Evergreen  
14 Moneysource Mortgage Company ("Evergreen") appeared through its attorneys  
15 of record, Hecker Wakefield & Feilberg, P.S. Guild Mortgage appeared through  
16 its attorneys of record, Witherspoon, Kelley, Davenport & Toole, P.S. Evergreen

*and Guild*  
*MMO*  
*eb*

ORDER GRANTING SHANNON'S MOTION  
FOR SUMMARY JUDGMENT

Page 1  
834001

Jeffers, Danielson, Sonn & Aylward, P.S.  
Attorneys at Law  
2600 Chester Kim Road / P.O. Box 1688  
Wenatchee, WA 98807-1688  
(509) 662-3683 / (509) 662-2432 FAX

1 also filed a Motion requesting partial summary judgment against Shannon for  
 2 breach of contract and tortious interference with contract and/or business  
 3 expectancy. The Court examined the pleadings and the documents listed on  
 4 Exhibit "A" attached, and heard argument of counsel.

5 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

6 The following claims of Evergreen against Larry Shannon are each  
 7 dismissed WITH PREJUDICE:

*and Guild*  


- 8 (1) Employee Solicitation Claims: \_\_\_\_\_  
 9 \_\_\_\_\_  
 10 \_\_\_\_\_
- 11 (2) Fictitious Loans Claims: \_\_\_\_\_  
 12 \_\_\_\_\_  
 13 \_\_\_\_\_
- 14 (3) Lost Loans Claims: \_\_\_\_\_  
 15 \_\_\_\_\_  
 16 \_\_\_\_\_
- 17 (4) Holdback/Bonus Claims: \_\_\_\_\_  
 18 \_\_\_\_\_  
 19 \_\_\_\_\_
- 20 (5) Breach of Contract Claims: \_\_\_\_\_  
 21 \_\_\_\_\_

- 1 \_\_\_\_\_
- 2 (6) Tortious Interference Claims: \_\_\_\_\_
- 3 \_\_\_\_\_
- 4 \_\_\_\_\_
- 5 (7) Breach of Duty of Loyalty Claims: \_\_\_\_\_
- 6 \_\_\_\_\_
- 7 \_\_\_\_\_
- 8 (8) Consumer Protection Act Claims: \_\_\_\_\_
- 9 \_\_\_\_\_
- 10 \_\_\_\_\_

11 In summary, all Evergreen's claims against Shannon <sup>and Gill ~~MMX~~ B</sup> are dismissed with  
 12 prejudice.

13 In accordance with paragraph 16 of the Evergreen-Shannon Agreement,  
 14 Shannon is the prevailing party in this suit. Shannon is awarded judgment  
 15 against Evergreen for the reasonable attorney fees, costs, and expenses  
 16 incurred that he incurred defending against this suit. Entry of the order setting  
 17 the amount of the fees, costs, and expenses that Evergreen shall pay to  
 18 Shannon will take place at a later hearing.

19 DATED this 8 day of February, 2011.

20 \_\_\_\_\_  
 21 JUDGE JOHN M. ANTOSZ

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Presented by:

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.

By

  
DAVID E. SONN, WSBA #07216  
Attorneys for Defendants Shannon

Approved for entry:

HECKER WAKEFIELD & FEILBERG, P.S.

By

  
JORDAN M. HECKER, WSBA # ~~2015~~  
LINDSEY TRUSCOTT, WSBA #35610  
Attorneys for Plaintiff Evergreen

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.

By

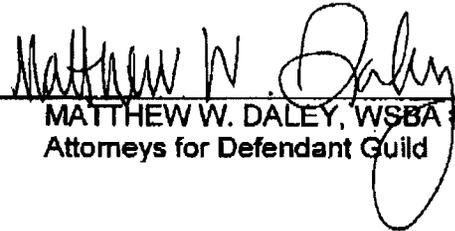
  
MATTHEW W. DALEY, WSBA # 36711  
Attorneys for Defendant Guild

Exhibit "A"

1.	6/13/09	Complaint for Breach of Contract, Tortious Interference with Business Expectancy, Tortious Interference with Contractual Relations, Violation of the Washington Consumer Protection Action in Injunction
2.	11/11/10	Defendant Shannon's Motion for Summary Judgment
3.	11/10/10	Defendant Shannon's Memorandum in Support of Motion for Summary Judgment
4.	11/11/10	Declaration of Larry Shannon
5.	11/11/10	Declaration of Anne Fisher
6.	11/11/10	Declaration of Clark Schweigert
7.	11/11/10	Declaration of Brenda Roosma
8.	11/11/10	Declaration of Trisha Bass
9.	11/11/10	Declaration of Joanne Selmann
10.	11/10/10	Declaration of David E. Sonn
11.	11/15/10	Plaintiff's Motion for Partial Summary Judgment Against Defendants Shannon and Guild Mortgage Company
12.	11/12/10	Declaration of Pat Dias in Support of Plaintiff's Motion for Partial Summary Judgment Against Defendants Shannon and Guild Mortgage Company
13.	11/15/10	Declaration of Lindsey Truscott in Support of Plaintiff's Motion for Partial Summary Judgment Against Defendants Shannon and Guild Mortgage Company
14.	11/15/10	Declaration of Keith Frachiseur in Support of Plaintiff's Motion for Partial Summary Judgment Against Defendants Shannon and Guild Mortgage Company
15.	11/15/10	Defendant Guild Mortgage Company's Joinder in Larry Shannon's Motion for Summary Judgment
16.	12/7/10	Motion to Strike Portions of Declaration of Keith Frachiseur
17.	12/7/10	Memorandum in Support of Motion to Strike Portions of

ORDER GRANTING SHANNON'S MOTION  
FOR SUMMARY JUDGMENT

Page 5  
834001

Jeffers, Danielson, Sonn & Aylward, P.S.  
Attorneys at Law  
2600 Chester Kim Road / P.O. Box 1688  
Wenatchee, WA 98807-1688  
(509) 662-3685 / (509) 662-2432 FAX

1		Declaration Testimony of K. Frachiseur
2	18.	12/7/10 Declaration of David E. Sonn – Motion to Strike
3	19.	12/7/10 Second Declaration of Larry Shannon
4	20.	12/7/10 Second Declaration of Clark Schweigert
5	21.	12/7/10 Second Declaration of David E. Sonn
6	22.	12/13/10 Plaintiff's Opposition to Shannon's Motion to Strike Portions of Declaration Testimony of K. Frachiseur
7	23.	1/10/11 Order Denying Evergreen's Motion to Amend Complaint
8	24.	1/24/11 Shannon's Response to Evergreen's Motion for Summary Judgment
9	25.	1/24/11 Declaration of Troy Dammel
10	26.	1/24/11 Declaration of Christopher P. Turner
11	27.	1/25/11 Declaration of David E. Sonn
12	28.	1/25/11 Motion to Strike Portions of Declaration of Pat Dias
13	29.	1/25/11 Plaintiff's Opposition to Defendant Shannon's Motion for Summary Judgment and Defendant Guild's Joinder Therein
14	30.	1/25/11 Supplemental Declaration of Keith Frachiseur in Support of Plaintiff's Opposition to Shannon's Motion for Summary Judgment and Guild's Joinder Therein
15	31.	1/25/11 Supplemental Declaration of Lindsey Truscott in Support of Plaintiff's Opposition to Shannon's Motion for Summary Judgment and Guild's Joinder Therein
16	32.	1/23/11 Guild Mortgage Company's Response to Plaintiff's Motion for Partial Summary Judgment
17	33.	1/23/11 Declaration of Charles Nay in Response to Plaintiff's Motion for Partial Summary Judgment
18	34.	1/31/11 Shannon's Reply to Plaintiff's Opposition to Shannon's Motion for Summary Judgment and
19	35.	1/31/11 Declaration of Leah Gorden
20	36.	2/1/11 Evergreen's Reply to Shannon's and Guild's Responses to Evergreen's Motion for Partial Summary Judgment
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ORDER GRANTING SHANNON'S MOTION  
FOR SUMMARY JUDGMENT

Page 6  
834001

Jeffery, Danielson, Sons & Aylward, P.S.  
Attorneys at Law  
2600 Chester King Road / P.O. Box 1644  
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(509) 662-3685 / (509) 662-2452 FAX

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37	2/3/11	Guild Mortgage Company's Reply to Plaintiff's Opposition to the Defendant's Motion for Summary Judgment
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38 2/6/2011 Second Supplemental Declaration of Lindsey Tinscott and attached exhibit  
 MUD B

39 2/8/2011 Guild's Statement of supplemental Authority  
 MUD A

## **APPENDIX 2**



07-450722

AMB  
**FILED**

MAR 04 2011

KIMBERLY A. ALLEN  
Grant County Clerk

CERTIFICATE OF TRANSMITTAL  
I declare under penalty of perjury under  
the laws of the state of Washington that  
on the \_\_\_\_ day of February, 2011,  
I sent a copy of the document to which  
this is affixed to the attorneys of record  
for all parties via messenger service, facsimile,  
or by U.S. Mail, postage prepaid.

At Wenatchee, Washington.

**JUDGMENT # 11-9-00324-0**

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

COUNTY OF GRANT

EVERGREEN MONEYSOURCE	)	NO. 09-2-00929-1
MORTGAGE COMPANY d/b/a	)	
EVERGREEN HOME LOANS, a	)	JUDGMENT
Washington corporation,	)	
	)	(Clerk's Action Required)
Plaintiff,	)	
	)	
vs.	)	
	)	
LARRY SHANNON and JANE DOE	)	
SHANNON, husband and wife; and GUILD	)	
MORTGAGE COMPANY, a California	)	
corporation,	)	
	)	
Defendants.	)	

I. JUDGMENT SUMMARY

Judgment Creditors	LARRY SHANNON and MARY SHANNON, husband and wife
Attorney for Judgment Creditors	Jeffers, Danielson, Sonn & Aylward, P.S. by, David E. Sonn

1	Judgment Debtor	EVERGREEN MORTGAGE COMPANY	MONEYSOURCE COMPANY	d/b/a
2		EVERGREEN HOME LOANS,		a
3		Washington corporation		
4	Principal Judgment Amount		\$	N/A
5	Prejudgment Interest		\$	N/A
6	Attorney Fees and Costs			<del>\$98,003.83</del>
7	Interest Rate on Judgment			12% per annum

~~\$98,003.83~~  
**97,755.33**

8 II. ADJUDICATION

9 THIS MATTER came on for hearing on February 8, 2011 on the Motion for  
10 Summary Judgment of Defendants, Guild Mortgage Company ("Guild"), and Larry  
11 Shannon and Mary Shannon, husband and wife ("Shannon"), and the Plaintiff's Motion  
12 for Partial Summary Judgment. The Court heard argument of counsel, entered the Order  
13 Granting Shannon's Motion for Summary Judgment, and denied the Plaintiff's Motion  
14 for Partial Summary Judgment.

15 A hearing took place on February 18, 2011 to address the amount of attorney's  
16 fees that Evergreen Moneysource Mortgage Company, d/b/a Evergreen Home Loans,  
17 owes to Larry Shannon. The Court heard argument of counsel, and orally pronounced its  
18 ruling. The Court has now reviewed:

- 19 1. Affidavit of David E. Sonn in Support of Attorneys' Fees and Costs;
- 20 2. Plaintiff's Opposition to Defendant Shannon's Presentation of Judgment RE:  
21 Attorney's Fees and Costs;

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- 3. Declaration of Paul R. Cressman, Jr.;
- 4. Supplemental Declaration of David E. Sonn in Support of Proposed Judgment;
- 5. Second Supplemental Declaration of David E. Sonn in Support of Proposed Judgment;
- 6. Plaintiff's Objection to Second Supplemental Declaration;
- 7. Declaration of Lindsey Truscott in Support of Plaintiff's Objection to Second Declaration; and
- 8. Declaration of Michelle A. Green in Support of Proposed Judgment.

NOW, THEREFORE,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Shannon recover judgment against Plaintiff, EVERGREEN MONEYSOURCE MORTGAGE COMPANY d/b/a EVERGREEN HOME LOANS, a Washington corporation, for Shannon's reasonable attorney fees, costs, and expenses incurred in defending against this suit (deducting amounts attributable to trade secret claim and tort and Consumer Protection Act element research) in the principal sum of <sup>\$97,755<sup>33</sup></sup> ~~Ninety-Eight Thousand Three and 83/100 Dollars (\$98,003.83)~~. This judgment shall bear interest at the rate of twelve percent (12%) per annum.

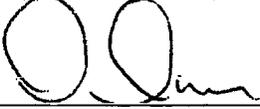
DONE this 4 day of March, 2011.

  
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 JUDGE JOHN M. ANTOSZ

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Presented By:

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.



By \_\_\_\_\_

DAVID E. SONN, WSBA #07216  
MICHELLE A. GREEN, WSBA #40077  
Attorneys Defendants Shannon

Copy Received, Approved for Entry,  
Notice of Presentment Waived,

HECKER WAKEFIELD & FEILBERG, P.S.

By \_\_\_\_\_

JORDAN M. HECKER, WSBA #14374  
LINDSEY TRUSCOTT, WSBA #35610  
Attorneys for Plaintiff Evergreen

WITHERSPOON, KELLEY, DAVENPORT &  
TOOLE, P.S.

By /s/ MATTHEW W. DALEY - approved via email

MATTHEW W. DALEY, WSBA # 36711  
Attorneys for Defendant Guild

# APPENDIX 3

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**FILED**

**FEB 25 2011**

**KIMBERLY A. ALLEN**  
Grant County Clerk

**THE SUPERIOR COURT OF WASHINGTON IN AND FOR GRANT COUNTY**

Evergreen money source }  
Plaintiff(s),  
vs.  
Larry Shannon ; Jane Doe }  
Shannon Defendant.

NO. 09-2-00929-1

**ORDER DENYING OR  
SETTING MOTION FOR  
RECONSIDERATION**

THIS MATTER coming before the Court upon the filing herein of a Motion for Reconsideration,  
filed by Plaintiff on Feb 18, 2011;

IT IS HEREBY ORDERED, pursuant to Civil Rule for Superior Court, CR 59(e)(3):

- Said motion, and all materials submitted therewith, have been reviewed by the court; finding no merit in said motion, it is hereby denied without further argument or proceedings.
- Said motion will be heard on oral argument:
  - On the docket for which it has been noted by the moving party
  - On the following docket day and time: \_\_\_\_\_
- Said motion will be submitted on briefs, without oral argument, on the following schedule:
  - If not filed with the motion, the moving party's brief is due: \_\_\_\_\_
  - Nonmoving parties may file responsive briefs by: \_\_\_\_\_
  - Reply brief by moving party  will not be permitted  is due: \_\_\_\_\_
- and
  - Clerk will note this cause for court's decision on: \_\_\_\_\_

DATED 2-25-11

John Anthony  
JUDGE

**ORDER DENYING OR SETTING  
MOTION FOR RECONSIDERATION**

# APPENDIX 4



1 Aylward, P.S., by David E. Sonn. Guild Mortgage Company appeared through its  
2 counsel of record Witherspoon, Kelley, Davenport & Toole, P.S., by Matthew W.  
3 Daley. The Court examined the pleadings, including those documents listed on  
4 Exhibit "A" attached, and the documents submitted in support and in opposition  
5 to Evergreen's motion. The court also heard argument of counsel.

6 IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

7 (1) Evergreen's Motion to Amend is Denied

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18 DONE this 10 day of JAN, 2011.

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21 JUDGE ANTOSZ

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Presented by:

JEFFERS, DANIELSON, SONN & AYLWARD, P.S.



By \_\_\_\_\_  
DAVID E. SONN, WSBA #07216  
Attorneys for Defendant Shannon

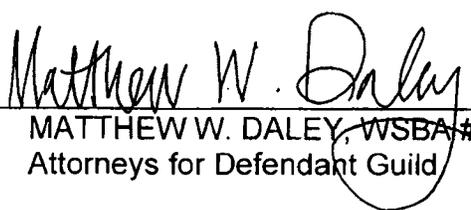
Approved as to form and notice of  
presentment waived:

HECKER WAKEFIELD & FEILBERG, P.S.



By \_\_\_\_\_  
LINDSEY TRUSCOTT, WSBA # 36102  
Attorneys for Plaintiff Evergreen

WITHERSPOON, KELLEY, DAVENPORT & TOOLE, P.S.



By \_\_\_\_\_  
MATTHEW W. DALEY, WSBA # 36711  
Attorneys for Defendant Guild

Exhibit "A"

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1.	6/13/09	Complaint for Breach of Contract, Tortious Interference with Business Expectancy, Tortious Interference with Contractual Relations, Violation of the Washington Consumer Protection Act and Injunction
2.	11/17/09	Scheduling Order
3.	11/24/09	Guild's Answer
4.	2/22/10	Shannon's Answer
5.	9/3/10	Amendment to Scheduling Order
6.	11/15/10	Plaintiff's Motion for Leave to Amend Complaint
7.	11/15/10	Declaration of Lindsey Truscott
8.	12/7/10	Larry Shannon's Opposition to Evergreen's Motion for Leave to Amend Complaint
9.	12/7/10	Second Declaration of Larry Shannon
10.	12/7/10	Second Declaration of David E. Sonn
11.	12/7/10	Motion to Strike Portions of Declaration of Keith Frachiseur
12.	12/7/10	Memorandum in Support of Motion to Strike Portions of Declaration of Testimony of K. Frachiseur
13.	12/7/10	Declaration of David E. Sonn - Motion to Strike
14.	12/7/10	Second Declaration of Clark Schweigert
15.	12/13/10	Plaintiff's Reply to Shannon's Opposition to Motion for Leave to Amend Complaint

16. 12/13/2010 Defendant Guild Mortgage Co's joinder in Dep. L. Shannon's opposition to Evergreen's motion to Amend.

17. Decl. of Keith Frachiseur

18. Plaintiff's ~~declaration~~<sup>to</sup> opposition to motion to Strike