

No. 297667

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Plaintiff/Appellant,

v.

LARRY SHANNON and JANE DOE SHANNON, husband and wife; and
GUILD MORTGAGE COMPANY, a California State Corporation,

Defendants/Appellees.

APPELLEE GUILD MORTGAGE COMPANY'S BRIEF

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I. INTRODUCTION & RELIEF REQUESTED

This appeal arises from the Trial Court's denial of Evergreen Moneysource Mortgage Company's (hereinafter "Evergreen") motion for partial summary judgment and the Trial Court's grant of Guild Mortgage Company's (hereinafter "Guild") and Larry Shannon's motions for summary judgment. This is not an appeal from a Trial Court order granting a motion to dismiss under Rule 12(b)(6). As such, Evergreen (as the Plaintiff and the non-moving party) was not entitled to rest on allegations and denials. However, that is precisely what Evergreen did, and the Trial Court correctly dismissed Evergreen's claims.

A. **EVERGREEN ELECTED HOW TO SHAPE ITS COMPLAINT, AND EVERGREEN'S APPEAL MUST BE EVALUATED BASED UPON THE CLAIMS IT ACTUALLY BROUGHT.**

This case arises from Defendant Shannon's and the other members' of his Moses Lake Washington mortgage origination branch decisions to leave Evergreen and to join Guild. Evergreen alleges that Mr. Shannon disclosed, to Guild, confidential information that belonged to Evergreen. Evergreen also contends that Guild improperly used that information to solicit the branch staff to leave Evergreen and to join Guild. Lastly, Evergreen contends that Mr. Shannon and other members of his branch staff improperly transferred (again to Guild) loans that belonged to Evergreen.

Based upon those allegations, Evergreen asserted five separate causes of action. (CP 1-11). Evergreen asserted claims for breach of contract and breach of the duty of loyalty against Mr. Shannon. (*Id.*). Evergreen asserted two separate claims for tortious interference – one related to the Moses Lake employees and one related to 17 disputed loan transactions. (*Id.*). Evergreen's final claim alleged a violation of Washington's Consumer Protection Act (RCW Ch. 19.86) (hereinafter "CPA"). (*Id.*). The tortious interference and CPA claims were asserted against both Mr. Shannon and Guild. (*Id.*).

After the discovery cut off and the time for amendments had lapsed, the Defendants moved for summary dismissal. In response, Evergreen filed a cross motion for partial summary judgment (on liability) and sought to amend its complaint to add a claim for violations of Washington's Trade Secret Act. The Trial Court properly denied Evergreen's eleventh hour attempt to add a new claim to this litigation, the Trial Court granted the Defendants' motions for summary judgment, and the Trial Court denied Evergreen's cross motion.

On appeal, Evergreen contends that the Trial Court's "decision to dismiss Evergreen's claim for the unlawful disclosure and use of Evergreen's proprietary and confidential business information was based upon the premise that the claim had not been properly pled by Evergreen."

(Appellant's Brief, p. 31). First, no such claim exists.¹ Evergreen's argument is an attempt to side-step the Trial Court's proper denial of Evergreen's motion to amend. Second, the contention is simply untrue. Evergreen's claims received full airing and full consideration, and the Trial Court properly concluded that Evergreen failed to meet its burden at summary judgment. In fact, the Trial Court considered, and dismissed, each of Evergreen's claims against Guild based upon Evergreen's failure to support those claims. That is, each claim asserted against Guild was dismissed on its merits.

The Trial Court considered this matter based upon the claims that Evergreen pled. The Trial Court considered the merits of each of those claims and found Evergreen's claims to be unsupported by admissible evidence. The Trial Court also properly denied Evergreen's untimely attempt to interject a new claim after the close of discovery, after the time allowed for amendments had passed, and after Guild had made an affirmative showing that none of the information that Evergreen alleged to be trade secrets had been used by Guild. The Court of Appeals should, likewise, consider this appeal based upon the claims that Evergreen

¹ Research identifies no cause of action for "unlawful disclosure and use of proprietary and confidential business information." Instead, such claims are adjudicated under contract, tortious interference, or trade secret theories – all of which are part of this appeal.

actually brought, and the Court of Appeals should affirm the Trial Court in every respect.

B. THE TRIAL COURT SHOULD BE AFFIRMED BECAUSE EVERGREEN FAILED TO MEET ITS BURDEN AT SUMMARY JUDGMENT, BOTH AS A MOVING AND AS A RESPONDING PARTY.

As the Plaintiff and moving party, Evergreen was obliged to present admissible and undisputed evidence establishing its entitlement to relief on each element of each of its claims. Evergreen failed to do so.

On the other hand, the Defendants' motions for summary judgment challenged Evergreen to bring forward admissible evidence creating triable issues on each element of its claims (pursuant to *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986)) and pointed out those portions of the record that demonstrate a lack of material issues of genuine fact. The Defendants pointed those portions of record out through admissible and competent declaration testimony. Rather than responding with facts and evidence, Evergreen offered only allegations and argument. Evergreen failed to rebut or contradict any of the Defendants' declaration testimony.

Evergreen alleges that Mr. Shannon disclosed Evergreen's confidential information to Guild and that Guild used that information to improperly interfere with Evergreen's business/contractual relationships

with its former Moses Lake employees.² However, Evergreen offered no evidence demonstrating that any of the information at issue was confidential. Evergreen offered no evidence demonstrating that Guild used any of the information at issue. And Evergreen offered no evidence that Guild interfered with any relationship between Evergreen and one or more of its former employees. Moreover, Evergreen failed to challenge or respond to declaration testimony establishing: (i) that the information at issue is not confidential; (ii) that Guild did not use any of the information at issue; (iii) that the Moses Lake employees contacted Guild seeking to leave Evergreen; and (iv) that none of Evergreen's former employees were solicited by Guild.

Evergreen also alleges that Mr. Shannon and other Moses Lake branch staff improperly transferred customer loans to Guild.³ Evergreen failed to offer any evidence showing that Guild was aware of Evergreen's purported claim to any of those loans. Moreover, the Defendants offered declaration testimony **establishing the propriety of each loan** at issue, and Evergreen completely failed to respond to any of that testimony.

² These allegations underlie one of Evergreen's claims for Tortious Interference and aspects of Evergreen's CPA claim.

³ These allegations underlie Evergreen's other claim for Tortious Interference and Evergreen's CPA claim.

Evergreen is the Plaintiff. Evergreen initiated this suit. Before the Trial Court, Evergreen bore the burden of proving its allegations, yet Evergreen failed to rebut any of the evidence offered by the Defense, and Evergreen failed to bring forward admissible evidence creating triable issues of fact regarding the elements of its claims. The Trial Court correctly dismissed Evergreen's claims, and the Court of Appeals should affirm the Trial Court's decision.

II. ISSUES PRESENTED

A. A Trial Court is entitled to enforce its own orders, including its scheduling orders. And a motion for leave to amend is properly denied if granting it will impose undue prejudice on the Defendants. Did the Trial Court abuse its discretion in denying the Plaintiff's untimely motion to amend its complaint, where granting it would have delayed resolution of the matter and subjected the Defendants to a new round of discovery?

B. Facing a motion for summary judgment, the Plaintiff must bring forward evidence creating triable issues regarding each element of its claims. Cross-moving for summary judgment, the Plaintiff bears the greater burden of establishing its right to relief by undisputed facts that are amenable to only one interpretation. On these cross motions for summary judgment, Evergreen failed to offer evidence establishing its claims, or

establishing triable issues thereon. Did the Trial Court err in summarily dismissing Evergreen's claims?

III. STATEMENT OF FACTS

This case arose within the home loan origination industry. Both Guild and Evergreen are in the business of making home loans. Mr. Shannon and his Moses Lake branch staff are in the business of originating home loans. (CP 214-15). In the home loan origination business, it is common for branches to change which lenders they are affiliated with. (CP 1046). Such changes can occur multiple times throughout a branch's existence. (*Id.*, *see also* CP 214-15; 511).

Larry Shannon has operated and managed a Moses Lake home loan origination office since 1997. (CP 214). Since that time, Mr. Shannon's Moses Lake Branch has been affiliated with eight separate banks or lending institutions. (CP 214-15). Mr. Shannon's Moses Lake office was affiliated with Evergreen from March 2007 to April 2009. (CP 215). And since May 2009, Mr. Shannon's Moses Lake office has been affiliated with Guild. (CP 216).

A. GUILD DID NOT SEEK OUT OR SOLICIT ANY PERSON TO LEAVE EVERGREEN TO JOIN GUILD.

In February 2009, Larry Shannon contacted Guild regarding the possibility of moving his Moses Lake branch from Evergreen to Guild.

(CP 1045, 1050). Mr. Shannon's Moses Lake branch elected to leave Evergreen because Evergreen could not fund, and/or timely fund, the loans that the branch had arranged. (CP 215-16, 220). Evergreen offered no evidence to the contrary; therefore, it is undisputed that Guild did not solicit or recruit Mr. Shannon or any other employee of his branch to leave Evergreen and/or to join Guild. (*See* CP 1045, 1050). It is undisputed that Guild merely investigated whether it could accommodate Mr. Shannon's request to have his branch join Guild. (CP 1045-47, 1050).

B. GUILD HAD NO KNOWLEDGE REGARDING WHAT, IF ANY, CONTRACTUAL OBLIGATIONS MR. SHANNON OWED TO EVERGREEN.

In addition to loan origination branches frequently changing lender affiliation, the relationships between branches and the lenders take many different forms. (CP 1046). Some branches operate as independent contractors, while others operate as employees. (*Id.*). At no time did Mr. Shannon tell Guild that he was under any contractual restraint, or inform Guild regarding what contractual obligations existed between himself and Evergreen. (CP 1045-46).

As discussed below, prior to Guild offering Mr. Shannon and his branch positions with Guild, Mr. Shannon provided Guild with certain information regarding the Moses Lake branch. (CP 1046). Guild was not aware, and did not believe, that any of that information belonged to

Evergreen. (CP 1046). The information at issue is related to the internal workings of Mr. Shannon's branch, and Guild believed that Mr. Shannon was entitled to share that information. (*Id.*). Guild never saw any contract between Mr. Shannon and Evergreen, and Mr. Shannon never discussed any contractual restrictions with Guild. (CP 1045). Moreover, despite knowing that the Moses Lake branch was considering a move to Guild, Evergreen took no steps to inform Guild of its claims prior to this dispute arising. (*See* Appellant's Brief, pp. 12-13; CP 670).

C. NONE OF THE INFORMATION AT ISSUE WAS SHOWN TO BE CONFIDENTIAL, AND GUILD HAD NO KNOWLEDGE OF EVERGREEN'S CLAIM OF CONFIDENTIALITY.

During Mr. Shannon's conversations with Guild, he provided three documents that Evergreen now alleges to be confidential. (Appellant's Brief, p. 10). Those documents were: (i) a loan pricing list; (ii) Mr. Shannon's branch's profit and loss statement; and (iii) a sample loan officer agreement. (*Id.*; CP 1046). Despite Evergreen's allegations, it offered no evidence that any of the information was actually confidential, that any of the information was treated confidentially, and/or that Guild was on notice of Evergreen's claims of ownership, of confidentiality, or Evergreen's claim of trade secret (which was not asserted until Evergreen sought leave to amend).

1. The "Price List" Contained No Confidential Information.

Unlike many industries, there is a vast amount of publicly available information regarding the mortgage lending business. (CP 1048). For example, any title insurance company in Grant County could (and can) generate a report (from publicly available sources) of each loan closed by Guild, by Evergreen, or by any other lender – during any requested time frame. (CP 738-39, 742-45, 1049). That report would include (i) the borrower's name, (ii) the property address, (iii) the sales price, (iv) the loan amount, (v) the loan type (e.g. conventional, FHA, or VA), and most important to this matter (vi) the interest rate and the closing costs, including all non-interest rate loan pricing information (e.g. points). (*Id.*). In short, that report would contain all of the "price list" information that Evergreen contends to be confidential. (*Id.*).⁴ Moreover, Evergreen posted such rate information on the internet. (CP 739). Evergreen cannot assert any confidential interest in information so publicly available.

Evergreen offered no contradictory evidence. Evergreen offered no evidence to show that any of the "price list" information was

⁴ It was also undisputed that Evergreen shares its loan pricing information each and every day, with each and every person who contacts Evergreen regarding a potential loan. Information that is so publicly disseminated cannot be deemed confidential or a trade secret.

confidential. Likewise, Evergreen failed to challenge the undisputed evidence that Guild was not aware, and did not believe, that Evergreen claimed a confidentiality interest in the price list. (CP 1046). In fact, it is undisputed that Guild believed the price list to be Mr. Shannon's own internal branch information and that he had a right to share it. (*Id.*).

2. *The Sample Loan Officer Agreement Contained No Confidential Information.*

Evergreen places great emphasis on the sample loan officer agreement because it is the sole item that Guild asked Mr. Shannon to provide.⁵ (*See* Appellant's Brief, pp. 10-11). Evergreen has alleged that the amount of each of its employees' salaries constitutes confidential information belonging to Evergreen. (*See Id.*). However, Evergreen failed to produce any evidence to support that allegation. In fact, the only evidence of record demonstrates that an employer does not have any confidential interest in the amounts of its employees' salaries. (*See* CP 1050-51). It is undisputed that it is a common and appropriate business practice for a prospective employer to ask a candidate what his or her salary expectations are. (*See Id.*). Lastly, Mr. Shannon offered testimony that the sample agreement was largely identical to the ones that he used while his office was affiliated with prior lenders. (CP 739). Mr. Shannon

⁵ Despite this undisputed fact, Evergreen's brief falsely implies that Guild requested each piece of the information at issue. (Evergreen's Brief, p. 2).

also testified that Evergreen did not attempt to keep the document confidential. (*Id.*).

3. *Evergreen Failed to Come Forward with Evidence Establishing the Confidentiality of Mr. Shannon's Branch Profit and Loss Statement.*

The final piece of information at issue in this case is a branch profit and loss statement that Mr. Shannon provided to Guild. (Appellant's Brief, p. 10; CP 1046). Like the price list, this information was provided to Guild without request. (CP 1046-47, 1049). And like the price list and the sample loan officer agreement, Evergreen did not meet its burden at summary judgment to bring forward evidence of the information's confidentiality. Nor did Evergreen offer any evidence to establish that Guild was aware of Evergreen's claim of confidentiality. In fact, the only evidence of record is the exact opposite – namely, that Guild believed Mr. Shannon to have a right to share the information. (CP 1046).

D. REGARDLESS OF ITS CONFIDENTIALITY OR LACK THEREOF, GUILD DID NOT USE ANY OF THE INFORMATION THAT MR. SHANNON PROVIDED.

Evergreen alleges that Guild used the loan officer agreement, price list, and profit and loss statement to unfairly compete and to tortiously interfere with Evergreen's contracts and expectancies. However, the undisputed evidence demonstrates that Guild did not use any of the information at issue.

1. Guild Did Not Use Mr. Shannon's "Price List."

Guild did not use any of the information on the "price list." (CP 1049). In fact, the undisputed evidence before the Court is that Guild cannot recall looking at the "price list" and does not believe that it ever did. (*Id.*). In fact, the "price list" information was irrelevant and useless to Guild. (*Id.*). Like all other lenders, Guild's loan pricing is set by market forces and the company's internal cost structure. (*Id.*). Thus, Evergreen's price list, being based upon its own cost structure and its own market forces, simply could not apply to Guild, could not impact Guild, and was of no use to Guild. (*Id.*). Evergreen offered no evidence to the contrary, and Evergreen did not rebut or refute any of this evidence.

2. Guild Did Not Use the Sample Loan Officer Agreement.

Similarly, Guild did not use the sample loan officer agreement. (CP 1050). It is important to recall that Guild was approached by Mr. Shannon's Moses Lake branch. (CP 1045, 1050). Rather than recruiting, Guild investigated whether it could accommodate the branch. (*Id.*). As such, Guild extended each of Mr. Shannon's staff members an employment offer based upon Guild's standard employment terms. (CP 1050). Those terms were previously established and were applicable across Guild's branches. (*Id.*). None of the offers were tailored or negotiated. (*Id.*).

Despite Evergreen's unsupported argument to the contrary, Guild did not use the sample loan officer agreement to sculpt compensation plans to lure the Moses Lake branch away from Evergreen. (*See* Appellant's Brief, p. 11). That is but another unsupported allegation, which could not defeat summary judgment. Instead, each member of the Moses Lake branch left Evergreen on its own. The branch approached Guild on its own, and Guild offered to accommodate the branch members' requests to join Guild with Guild's customary and basic compensation package. (CP 215, 340, 544, 788, 1045-46, 1050). That customary and basic compensation package was more appealing to the Moses Lake branch than was Evergreen's promise of continued employment plus bonus pay. (*See* CP 215-16, 670, 1050).

3. *Guild Did Not Use Mr. Shannon's Branch's Profit and Loss Statement.*

Evergreen alleges that Guild used the profit and loss information provided by Mr. Shannon to create a *pro forma* analysis of Mr. Shannon's branch's anticipated performance with Guild. (Appellant's Brief, p. 11).⁶ That allegation is directly contradicted by the evidence. Guild did not use

⁶ At the top of page 11 of Evergreen's brief, Evergreen asserts (as a fact) that Guild used Mr. Shannon's profit and loss information to prepare the *pro forma* analyses. Evergreen follows that misstatement of fact with a citation to five separate portions of the Clerk's Papers. Not one of the portions of the Clerk's Papers referenced in that citation support Evergreen's contention.

the profit and loss information provided by Mr. Shannon for any purpose. (CP 1046-48). And Guild specifically did not use the profit and loss information to prepare any *pro forma* analysis for Mr. Shannon's branch. (*Id.*).

Guild did produce a *pro forma* analysis of Mr. Shannon's branch's anticipated performance. (CP 1047). It was prepared by placing Mr. Shannon's projections of his anticipated loan volume within a model based upon Guild's pre-existing pricing, business structure, and cost. (*Id.*). Mr. Shannon provided these projections verbally. (CP 537). Prepared in that manner, the *pro forma* analysis created a projection of how Mr. Shannon's branch would perform if affiliated with Guild. (*Id.*).

Evergreen's contention that Guild used the profit and loss information to prepare a *pro forma* analysis does not stand up to logical examination. A *pro forma* analysis could only provide a useful projection of Mr. Shannon's branch's performance with Guild, if it captured Guild's cost structure, pricing structure, and every other aspect of Guild's business model. (CP 1047). Therefore, using Evergreen's profit and loss information (which would reflect Evergreen's cost, pricing, and business structure) to create a *pro forma* for Guild would not make any sense. (*See Id.*). Doing so would not yield usable information. (*Id.*). The only figure that Guild obtained from Mr. Shannon was his projected loan volume (that

is, how many loans did Mr. Shannon anticipate would come through his branch), and Mr. Shannon's projections would not appear on any profit and loss statement, which provides retrospective information – not prospective projections. (*See* CP 1046-47).

E. NEITHER GUILD NOR MR. SHANNON IMPROPERLY CLOSED LOANS THAT BELONGED TO EVERGREEN.

1. *The Defendants Offered Undisputed Evidence Demonstrating the Propriety of each Loan that Evergreen Claims Rights to.*

Evergreen also contends that Guild interfered with Evergreen's business/contractual relationships with customers by closing approximately 17 loans that allegedly belonged to Evergreen. (*See* Appellant's Brief, pp. 29-30). It was undisputed that Mr. Shannon and his branch were entitled to close any loans that were originated after May 1, 2009 with Guild. (*See* CP 218, 670-71). Evergreen did not offer any evidence to show that any of the 17 loans at issue belonged to Guild. Evergreen did not offer any evidence to show that any of those 17 loans would have closed but for some conduct by the Defendants. Instead, Evergreen's entire claim is based upon the fact that approximately 17 borrowers' names appear in both Evergreen's and Guild's pipeline reports.⁷

⁷ "Pipeline report" is an industry term for a report identifying a home loan originator's work in progress. *Stat.*

The Defendants offered declaration testimony explaining the facts and circumstances surrounding each of those 17 loans. (CP 218-20; 961-64).⁸ Those declarations demonstrate that approximately 10 of the 17 loans involve transactions that commenced after May 1, 2009, and that Evergreen, therefore, had no claim to them. (*Id.*; *see also* CP 218, 670-71). At least 3 involved transactions wherein Evergreen affirmatively released the loans to Guild. (*Id.*). Two of the loans were not closed by either Evergreen or Guild. (*Id.*). And the balance involved loan applications that failed to satisfy Evergreen's underwriting criteria but that satisfied Guild's. (*Id.*).

None of that evidence was disputed or contradicted by Evergreen. That evidence demonstrates, as a matter of undisputed fact, that Evergreen had no right or claim to any of the 17 loans at issue and/or would not have been able to close those loans. Evergreen, therefore, failed to produce any evidence creating triable issues regarding its claim to any of the disputed loans.

⁸ Pages 961 through 964 of the Clerk's Papers is a summary of 8 different declarations and portions of deposition testimony. The citation to pages 961 through 964 of the Clerk's Papers is intended to incorporate each citation contained therein. (CP 218-20, 337-40, 349-50, 354-55, 367-68, 373-74, 395, 409-11).

2. *Evergreen's Contention that Guild's Pro Forma Evidences an Intent to Misappropriate Evergreen Loans is a Serious Misrepresentation of Fact.*

Evergreen seriously and substantially misrepresents the facts regarding Guild's *pro forma* analyses. (See Appellant's Brief, p. 11). Evergreen asserts that the *pro forma* analysis "shows than Shannon's branch at Guild would make approximately \$3.1 to 3.33 million in the first month with Guild." (*Id.*). That is not a disputed fact. That is not a disputed inference. That is simply a misrepresentation of the record.

Guild's *pro forma* analysis did not indicate that the Moses Lake branch would make \$3.1 to \$3.3 million in its first month of affiliation with Guild. (CP 1047-48). The *pro forma* analyses do not even attempt to project what loan volume Mr. Shannon's branch would do in its first month of being affiliated with Guild – or in any specific month for that matter. (*Id.*). Instead, it takes an assumed loan volume (which Mr. Shannon provided) and projects what revenue and profit the branch would realize at specific and assumed percentages of that loan volume. (*Id.*). And those assumed percentages are reflected in three separate scenarios – one wherein the branch did 100% of the projected loan volume, one wherein the branch did 120% of projected loan volume, and the third wherein the branch did 140% of projected loan volume. (*Id.*; CP 1054). Those three scenarios are identified on the *pro forma* as "Month 1,"

"Month 2," and "Month 3," respectively. (CP 1047-48, 1054). However, those labels do not signify any specific month or any specific sequence of months. (CP 1047-48). In fact, it is undisputed that Mr. Shannon's branch closed a single loan in its first month with Guild. (CP 740).

IV. ARGUMENT: MOTION FOR LEAVE TO AMEND

A. STANDARD OF REVIEW.

The decision to grant or deny leave to amend pleadings is reserved to the Trial Court's discretion. *Northwest Animal Rights Network v. State*, 158 Wn. App. 237, 247 (2010). The Trial Court abuses its discretion only if the decision was manifestly unreasonable, was based upon untenable grounds, or was made for untenable reasons. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 88 (2003).

B. THE TRIAL COURT PROPERLY DENIED EVERGREEN'S MOTION FOR LEAVE TO AMEND ITS COMPLAINT.

In the interest of brevity, Guild joins in Mr. Shannon's briefing as it pertains to the Trial Court's decision to deny Evergreen's motion for leave to amend. (Appellee Shannon's Brief, pp. 24-43). Guild incorporates Mr. Shannon's arguments as though they were fully set forth below. (*Id.*). Nonetheless, a few issues warrant additional emphasis.

Evergreen brought its motion far too late. On November 17, 2009, the Trial Court issued a scheduling order that established May 18, 2010 as

the last day to amend pleadings. (CP 21). Nonetheless, Evergreen failed to bring its motion to amend until November 17, 2010 – half a year after the scheduling order's deadline. (CP 679). "[A] scheduling order is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril." *Burnet v. Spokane Ambulance*, 131 Wn.2d 848, 508 (1997) (quoting *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610-11 (9th Cir. 1992) (Internal quotations omitted). And the Trial Court enjoys authority to enforce its own orders, including its own scheduling orders. *Burnet*, 131 Wn.2d at 508; *Keller v. Keller*, 52 Wn.2d 84, 88 (1958).

In light of Evergreen's undue delay, the Trial Court was within its discretion to deny Evergreen's motion to amend its complaint. *See Wilson v. Horsley*, 137 Wn.2d 500, 505-06 (1999). Evergreen attempted to add a wholly new claim two months after the discovery cut off had passed (*See* CP 21), and that new claim would have required substantial additional expenditures on discovery. *See Oliver v. Flow Intern. Corp.*, 137 Wn. App. 655, 664 (2006) (a new round of discovery constitutes sufficient prejudice to support denial of motion to amend). Lastly and in addition to the reasons stated in Mr. Shannon's brief, Evergreen's purported trade secret claim was futile because the Defendants had already shown that none of the information was confidential, none of the information had

economic value, and most importantly, that none of the information was used by Guild. *See Confederated Tribes of the Chehalis Reservation v. Johnson*, 135 Wn.2d 734, 749 (1998); *Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142 (1997). That evidence defeated Evergreen's purported claim before it was even pled. The Trial Court's order denying Evergreen's motion to amend was not an abuse of discretion, and it should be affirmed.

V. ARGUMENT: CROSS MOTIONS FOR SUMMARY JUDGMENT

A. STANDARD OF REVIEW.

The Court of Appeals reviews orders on motions for summary judgment de novo. *Sheikh v. Choe*, 156 Wn.2d 441, 447 (2006). As a result, the Court of Appeals undertakes the same analysis as the Trial Court. *Id.* However, because this appeal involves review of the Trial Court's Order summarily dismissing Evergreen's claims and review of the Trial Court's Order denying Evergreen's affirmative motion for partial summary judgment, the Court of Appeals must evaluate the summary judgment aspect of this appeal under two distinct standards. *See Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991).

1. Facing the Defendants' Motions for Summary Judgment, Evergreen Was Obligated to Come Forward with Admissible Evidence on Each Element of its Claims – It Failed To Do So.

At summary judgment, the moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. If the moving party is a defendant, that initial showing requires nothing more than pointing out that there is an absence of evidence to support the plaintiff's case. *Id.* at 325 (cited by *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, n.1 (1989)).

The burden then shifts, and if the plaintiff “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial,” the trial court should grant the motion. *Celotex*, 477 U.S. at 322. In making this responsive showing, the Plaintiff cannot rely on the allegations made in its pleadings. *Young*, 112 Wn.2d at 225. A plaintiff opposing summary judgment must create more than “some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

As such, Evergreen bore the burden of providing significant and probative evidence to support each element of each of its claims. *Intel*, 952 F.2d at 1558. And in doing so, it was not entitled to rest upon mere

allegations or denials, but was obliged to set forth competent facts to establish every essential element of its claim. CR 56(e). However, Evergreen did not confront the defense motions for summary judgment with evidence. Instead, Evergreen did precisely what the Rules forbid – relied upon arguments, allegations, and denials.

2. *As a Plaintiff Moving for Partial Summary Judgment, Evergreen Faced an Even Higher Burden, which it Failed to Address, Much Less Meet.*

Evergreen also brought an affirmative cross motion for summary judgment, and Evergreen elected to appeal the Trial Court's denial of that cross motion as well. In that respect, Evergreen bears an even higher burden than it did to defeat the defense motions. As a Plaintiff moving for summary judgment, Evergreen bore the burden to offer undisputed facts and evidence establishing that it is entitled to judgment as a matter of law. When a plaintiff moves for summary judgment, a much higher standard applies because the plaintiff bears the ultimate burden of proof. *See Graves v. P.J. Taggares Co.*, 99 Wn.2d 298, 302 (1980). *See also Robax Corp. v. Professional Parks, Inc.*, 2008 WL 3244150, at *2 (N.D. Tex. 2008). Evergreen, as the Plaintiff and the moving party, was obliged to establish:

beyond peradventure all of the essential elements of [its] claims. This means that [it] must demonstrate that there are no

**genuine and material fact disputes on any
of the essential elements of each claim.**

See Id. (emphasis added) (citing *Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 412 (5th Cir. 2003)). Evergreen’s burden was to “**affirmatively demonstrate through [its] summary judgment briefing and evidence that no reasonable trier of fact could find against [it] . . .**” *Id.* (emphasis added) (citing Fed. R. Civ. Proc. 56(e); *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir.2007); *Watts v. United States*, 703 F.2d 346, 347 (9th Cir. 1983)).

Evergreen failed to offer any evidence on most of the *prima facie* elements of its claims. In fact, both Evergreen’s motion for summary judgment and its appeal read like a defense *Celotex* motion – that is, Evergreen states its allegations and purports to challenge the Defendants to come forward with evidence to disprove Evergreen's claims. *See Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 236-8 (1989). However, as a plaintiff, Evergreen must affirmatively prove each element of each of its claims, and Evergreen cannot move for summary judgment in the *Celotex* fashion. *See Id.*; *Graves*, 94 Wn.2d at 302; *Robax Corp.*, 2008 WL 3244150, at *2. Independently of the other issues raised herein, the Trial Court should be affirmed because Evergreen failed to offer admissible evidence to establish its claims.

B. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT ON EVERGREEN'S CLAIM FOR TORTIOUS INTERFERENCE VIS A VIS THE MOSES LAKE EMPLOYEES.

Evergreen's claims for tortious interference required proof of the following five elements: (i) the existence of a valid contractual relationship or business expectancy; (ii) that Guild had knowledge of that relationship or expectancy; (iii) that Guild intentionally interfered, thereby inducing or causing a breach or termination of the contract or the expectancy; (iv) that Guild interfered for an improper purpose or used improper means; and (v) that Evergreen suffered damages as a result. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 157 (1997); *Westmark Development Corp v. City of Burton.*, 140 Wn. App. 540, 557 (2007).

Evergreen failed to produce admissible evidence creating triable issues of fact regarding those elements. The Trial Court was, therefore, correct to dismiss Evergreen's claims.

1. *Evergreen Enjoyed no Contract or Business Expectancy in the Moses Lake Employees' Continued Employment.*

Evergreen's claim for tortious interference with the Moses Lake branch's continued employment required Evergreen to prove that it had a valid expectancy in those employees' continued employment. *See Woody v. Stapp*, 146 Wn. App. 16, 23-24 (2008). While employed with

Evergreen, each of the Moses Lake employees was an at-will employee, and that undisputable fact posed a substantial roadblock to Evergreen's claim. *See National City Bank, N.A. v. Prime Lending, Inc.*, 2010 WL 2854247 (E.D. Wash. 2010); *Woody v. Stapp*, 146 Wn. App. 16, 24 (2008). More importantly, the facts of this case conclusively demonstrate that the Moses Lake branch was actively looking to leave Evergreen. (CP 215-16, 220, 1045, 1050). The undisputed facts are that: (i) the Moses Lake branch was dissatisfied with its affiliation with Evergreen; and (ii) Mr. Shannon (on the branch's behalf) contacted Guild and asked if the branch could join Guild. (*Id.*).

Those facts are fatal to Evergreen's claim. Those facts make it impossible for Evergreen to establish any expectancy in the Moses Lake branch's continued employment – the Moses Lake employees had already decided to leave. *See Lincor Contractors, Ltd v. Hyskell*, 39 Wn. App. 317, 323 (1984); *Island Air, Inc. v. LaBar*, 18 Wn. App. 129, 140-41 (1977). The only evidence before the Court shows that the Moses Lake branch had elected to terminate their relationships with Evergreen before Guild was even approached.

Evergreen did not introduce any evidence to establish that it had any right or expectancy to its former employees' continued employment. Instead, Evergreen merely alleged that such an expectancy existed.

Evergreen was not entitled to rest upon mere allegations. Evergreen was obliged to confront the Defendants' motions for summary judgment with affirmative and admissible evidence. Evergreen failed, and its claim was properly dismissed.

2. *Evergreen Failed to Create Issues of Fact Regarding the "Knowledge" and/or "Interference" Elements of its Claim.*

The second and third necessary elements of Evergreen's tortious interference claim require evidence that Guild was aware of Evergreen's purported contractual and/or business expectancies and that Guild intentionally interfered with those expectancies. *See Leingang*, 131 Wn.2d at 157. The Trial Court properly dismissed Evergreen's claim because there was no evidence that Guild was aware that Evergreen enjoyed a contractual and/or a business expectancy to its former employees' continued employment. *See Id.* Likewise, the Trial Court properly dismissed Evergreen's claim because there was no evidence that Guild did anything other than hire individuals who approached Guild and asked to be hired. (CP 215-16, 220, 1045, 1050). That is, there was no evidence that Guild did anything to interfere with Evergreen's relationships with its former employees. Guild simply hired candidates who approached it for employment. (*Id.*).

3. ***Guild Did Not Act with Improper Means and Had No Improper Purpose.***

Even if intentional, interference with a contractual or business expectancy is only tortious if it is done for an improper purpose or done via improper means. *JKR, LLC v. Linen Rental Supply, Inc.*, 157 Wn. App. 1041, *2 (2010); *see also Leingang*, 131 Wn.2d at 157. Interference is improper “if it is wrongful by some measure beyond the interference itself, such as a statute, regulation, recognized rule of common law, or an established standard of trade or profession.” *Newton Ins. Agency and Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158 (2002). Evergreen never even identified any statute, regulation, or other standard on the basis of which it contended Guild to have acted improperly, and “[e]xercising one’s legal interests in good faith is not improper interference.” *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership*, 2010 WL 4159298 *9 (2010). Therefore, “[w]hen one acts to promote lawful economic interests, bad motive is essential, and incidental interference will not suffice.” *Birkenwald Distributing, Co. v. Heublein, Inc.*, 55 Wn. App. 1, 11 (1989). In fact, Washington’s Court of Appeals has specifically “decline[d] to hold that merely inquiring about a competitor’s pricing and offering a lower price . . . constitutes improper means.” *JKR*, 157 Wn. App. at *4.

Evergreen contends that Guild acted improperly by “using” confidential information belonging to Evergreen. However, and discussed above, Evergreen offered no evidence to establish that Guild used any confidential information. Quite to the contrary, the evidence of record is that Guild did not. Evergreen simply failed to meet its burden. Evergreen has done nothing but allege that Guild acted improperly, and allegations cannot defeat a motion for summary judgment.

C. THE TRIAL COURT PROPERLY ENTERED SUMMARY JUDGMENT ON EVERGREEN'S CLAIM FOR TORTIOUS INTERFERENCE *VIS A VIS* THE 17 DISPUTED LOANS.

Evergreen also contends that Mr. Shannon and Guild tortuously interfered with Guild’s customer relationships by allegedly diverting loans from Evergreen to Guild. The sole evidence that Evergreen offered to establish rights to those loans is that 17 borrowers’ names later appeared on Evergreen’s pipeline and the same borrowers' names appeared on Guild's pipeline reports. Evergreen quite literally offered no other evidence, and the fact that the same name appears in both companies’ reports is inadequate to create triable issues and defeat summary judgment.

The Defendants offered declaration testimony explaining the facts and circumstances surrounding each of those 17 loan transactions. (CP

961-64).⁹ In light of those declarations, Evergreen was required to establish, via specific and admissible facts, that it had expectancy rights in each of those disputed loans. And because an enforceable right or expectancy exists only where the plaintiff can demonstrate “a prospective contractual or business relationship that would be of pecuniary value,” Evergreen was obligated to establish an ability to timely fund and close each of the 17 disputed loans in order to avoid summary dismissal. *See Newton Ins. Agency & Brokerage, Inc. v. Caledonian Ins. Group, Inc.*, 114 Wn. App. 151, 158 (2002). There was no such evidence.

Nor is there any evidence that Guild had knowledge of Evergreen's purported claim to any of the disputed loans, that Guild did anything to interfere with Evergreen's alleged relationships with any of those borrowers, or that Guild acted improperly with respect to those loans. *Leingang*, 131 Wn.2d at 157. In fact, the record shows that none of those borrowers were solicited to leave Evergreen. (CP 961-64). Evidence sufficient to create triable issues of fact regarding each of those elements was necessary for Evergreen to defeat the Defendants' motions for summary judgment. However, Evergreen did not even attempt to offer evidence on the necessary elements of its claims. Therefore, the Trial

⁹ See footnote number 8.

Court was correct to dismiss Evergreen's claim based upon the 17 disputed loans, and the Court of Appeals should affirm.

D. THE TRIAL COURT PROPERLY DISMISSED EVERGREEN'S CONSUMER PROTECTION ACT CLAIM.

Washington's Consumer Protection Act (RCW Ch. 19.86), commonly known as the CPA, provides that: “Unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” *See* RCW 19.86.020. There are five necessary elements of proof in any claim under the CPA: (i) an unfair or deceptive practice; (ii) that is occurring in trade or commerce; (iii) that has an impact on the public interest; (iv) that proximately caused; (v) damage to the Plaintiff's property or business. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986).

In some instances, the State Legislature has declared that certain statutory violations automatically satisfy one or more elements of a CPA claim. In those cases, the Courts describe the claim as one involving a *per se* violation of the CPA or involving a *per se* “x” where “x” is the specific element that the legislature chose to establish as a matter of law – such as a *per se* public interest case or a *per se* deceptive act case. *Hangman Ridge*, 105 Wn.2d at 792.

Evergreen did not allege any *per se* violation of the CPA.

Therefore, each element of Evergreen's CPA claim must be established by admissible evidence. *See Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816 (2010); *Hangman Ridge*, 105 Wn.2d at 789-90. Failure to meet any one element is fatal to a plaintiff's claim. *Brown*, 157 Wn. App. at 816.

1. Evergreen Failed to Establish that Guild Committed any Unfair or Deceptive Act.

To establish the first element of a CPA claim, a plaintiff needs to either: (i) demonstrate that a *per se* unfair trade practice exists; or (ii) demonstrate that the act in question “. . . had the capacity to deceive a substantial portion of the public.” *Id.* (quoting *Hangman Ridge*, 105 Wn.2d at 785). Evergreen has done neither.

Evergreen failed to identify any statute that it alleges Guild to have violated, and Evergreen failed to create triable issues of fact regarding whether the conduct alleged would have the capacity to deceive anyone, much less a substantial portion of the public. Evergreen did not even allege any specific deception or deceptive acts. The claim was, therefore, properly dismissed.

2. *The Dispute at Issue Was a Private Dispute Between Business Competitors – It Did Not Have any Impact on the Public Interest.*

Like the first element, public interest may be established in one of two separate ways. *Id.* at 789. Those ways are: (i) through a statutory *per se* claim; or (ii) by the plaintiff satisfying a factor test derived from the *Hangman Ridge* case. *Hangman Ridge*, 105 Wn.2d at 789-90. And because Evergreen has not pled or asserted any *per se* violation, to establish the public interest element of its CPA claim, Evergreen must have offered admissible evidence to satisfy the *Hangman Ridge* factor test. It failed to do so.

The test first draws a distinction between consumer transactions and private disputes. *Id.* at 790. There is no disagreement that this case involves only a private dispute. The parties are business competitors, and the dispute is purely private and commercial in nature.

Being a private dispute, the factors that determine whether there is an impact on the public interest are: (i) whether the acts were committed in the course of defendant's business; (ii) whether the defendant advertised to the public in general; (iii) whether the defendant actively solicited this particular plaintiff, indicating potential solicitation of others; and (iv) whether the plaintiff and defendant occupy unequal bargaining positions. *Id.* Where advertising is relevant, it must relate to the subject of the suit.

See Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-05 (2009); *Ambach v. French*, 167 Wn.2d 167, 178-79 (2009). That the Defendant is in business or provides services to the public is insufficient. *See Id.* No one of the *Hangman Ridge* factors is dispositive, nor is it necessary that all be present.” *Hangman Ridge*, 105 Wn.2d at 790-91. However, Evergreen failed to satisfy any meaningful aspect of the test.

The *Hangman Ridge* test exists because “it is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.” *Id.* at 790. And Evergreen bears the burden of showing a “real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act’s being repeated.” *Michael*, 165 Wn.2d at 604-05.

The dispute between Evergreen and Guild is a private dispute between two sophisticated businesses, and it does not impact the public interest. Evergreen complains of two separate acts. First, that Guild had access to and allegedly used information that Evergreen contends to be (but has not established with admissible evidence to be) confidential to hire Evergreen’s former Moses Lake branch’s staff. And second, that Guild planned to, and did, take 17 loans that Evergreen contends belonged to it. Evergreen failed to satisfy its burden to create triable issues of fact

regarding the *Hangman Ridge* elements:

- There was no transaction between Guild and Evergreen;
- there is no evidence that Guild advertised at all, much less advertised regarding the acts that Evergreen complains of;
- the only evidence before the Court shows that Guild did not advertise or solicit any of the Moses Lake branch employees to leave Evergreen and join Guild – instead, Guild was directly approached regarding hiring the branch (CP 215-16, 220, 1045, 1050);
- there is no evidence that Guild actively solicited Evergreen (“this particular plaintiff”); and
- it cannot be fairly contended but that the parties enjoy equal bargaining power; they are both sophisticated lenders.

Hangman Ridge, 105 Wn.2d at 790. Evergreen’s allegations do not fit within the CPA. The Trial Court properly dismissed it, and the Court of Appeals should affirm.

3. *Evergreen Has Not Offered Evidence to Establish Proximate Cause or Damages.*

Hangman Ridge requires CPA plaintiffs to establish a causal link “between the unfair or deceptive act complained of and the injury suffered.” 105 Wn.2d at 785. Washington’s State Supreme Court clarified that CPA’s causation element requires an affirmative showing that “the injury complained of . . . would not have happened if not for defendant’s violative acts.” *Schall v. AT&T Wireless Services, Inc.*, 168 Wn.2d 125, 144 (2010) (quoting *Indoor Billboard/Washington, Inc. v.*

Integra Telecom of Washington, Inc., 162 Wn.2d 59, 82 (2007)).

Evergreen failed its burden of making out a *prima facie* showing of causation and damages to defeat the defense motions for summary judgment. *Hangman Ridge*, 105 Wn.2d at 780; *Young*, 112 Wn.2d at 225.

Pointedly, Evergreen has not offered any evidence that establishes that “but for” Mr. Shannon and Guild’s conduct, the Moses Lake employees would have remained employed by Evergreen or that Evergreen would have closed any of the 17 loans at issue. Those are two of the most glaring failures of evidence in this case. And those failures require all of Evergreen's claims to be dismissed. Without establishing that Guild's conduct proximately caused harm, all claims must fail.¹⁰

This matter, however, is not solely about a failure of proof. The undisputed evidence is that the Moses Lake employees had decided to leave Evergreen independent of any conduct by Guild. (CP 215-16, 220, 1045, 1050). Additionally, the Defendants submitted declaration testimony that established that none of the conduct that Evergreen alleges was a cause for any of those 17 loans not being closed at Evergreen. (CP 961-64). There were legitimate, appropriate, non-tortious, and non-

¹⁰ Evergreen’s failure to establish legally compensable harm beyond speculation is also fatal to Evergreen’s other claims. This argument is ably made in Mr. Shannon’s brief. Guild incorporates those arguments as though fully set forth herein.

contract breaching reasons that Evergreen did not close those loans. (*Id.*). Lastly, Evergreen's charge that Guild improperly used confidential information was defeated by un rebutted evidence. Evergreen did not offer any evidence to establish that any of the information at issue was confidential. Critically, Evergreen did not rebut the Defendants' evidence that none of the information at issue was, in fact, confidential. (CP 738-39, 742-45, 1046-50). Likewise, Evergreen failed to rebut the Defendants' evidence establishing that none of the information at issue was used to interfere with any of Evergreen's relationships. (CR 1046-50).

In short, there is no evidence that the conduct that Evergreen complains of caused either (i) any of the Moses Lake employees to leave Evergreen; or (ii) any of the disputed loans not to be closed at Evergreen. Those failures were fatal to Evergreen's claim, and Evergreen's claims were properly dismissed.

VI. CONCLUSION

Evergreen's untimely motion to amend its complaint was properly denied. Evergreen failed to meet its burden as a Plaintiff moving for summary judgment. And Evergreen failed to meet its burden as a Plaintiff opposing summary judgment.

The Trial Court considered the merits of each of Evergreen's claims against Guild. The Trial Court found each of those claims to be

lacking. The Trial Court's order dismissing Evergreen's claims was not in error, and Guild respectfully asks the Court of Appeals to affirm the Trial Court's decision in every respect.

RESPECTFULLY SUBMITTED, this 20th day of June, 2011.

WITHERSPOON · KELLEY



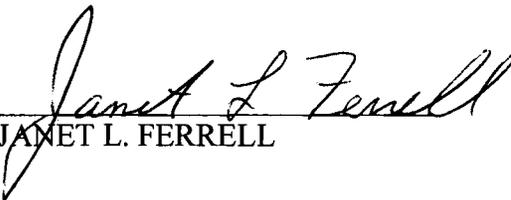
MATTHEW W. DALEY, WSBA # 36711
Counsel for Defendant, Guild Mortgage Company

DECLARATION OF SERVICE

On the 20th day of June, 2011, I caused to be served a true and correct copy of the within document described as APPELLEE GUILD MORTGAGE COMPANY'S BRIEF on all interested parties to this action as follows:

<p>Jordan Hecker Lindsey Truscott Hecker, Wakefield & Feilberg, P.S. 321 First Avenue West Seattle, Washington 98119</p> <p>Phone: (206) 447 1900 Fax: (206) 447 9075 Email: jordanh@heckerwakefield.com lindseyt@heckerwakefield.com</p> <p>Counsel for Appellant</p>	<p><input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail, postage paid <input type="checkbox"/> Overnight Mail <input checked="" type="checkbox"/> Facsimile Transmission <input checked="" type="checkbox"/> Via Electronic Mail</p>
<p>David E. Sonn Jeffers, Danielson, Sonn & Aylward, P.S. 2600 Chester Kimm Road PO Box 1688 Wenatchee, Washington 98801</p> <p>Phone: (509) 662 3685 Fax: (509) 662 2452 Email: davids@jdsalaw.com</p> <p>Counsel for Appellee Shannon</p>	<p><input type="checkbox"/> Hand Delivery <input checked="" type="checkbox"/> U.S. Mail, postage paid <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile Transmission <input checked="" type="checkbox"/> Via Electronic Mail</p>

WITHERSPOON KELLEY


 JANET L. FERRELL

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Court of Appeals of Washington,
Division I.
CORNISH COLLEGE OF THE ARTS, a Washington
public benefit corporation, Respondent,
v.
1000 VIRGINIA LIMITED PARTNERSHIP, a
Washington limited partnership; One Thousand Vir-
ginia, a general partnership; and Donn Etherington,
Jr., an individual, Appellants.

Nos. 63790-8-I, 63792-4-I.
Oct. 25, 2010.

Background: Private college filed action against owner and manager of leased building, seeking specific performance of an option to purchase and damages for wrongful eviction. Defendants counter-claimed for tortious interference with economic relations. On summary judgment, the Superior Court, King County, Steven Gonzalez, J., granted college an equitable grace period to extend its purchase option, ordered specific performance of purchase option, found defendants liable for wrongful eviction, and dismissed defendants' tortious interference counter-claim. Following bench trial, the Superior Court, 2009 WL 2173138, awarded consequential damages in addition to specific performance of purchase option. Subsequently, attorney fees were awarded to college. Defendants appealed.

Holdings: The Court of Appeals, Dwyer, C.J., held that:

- (1) circumstances justified grant of equitable grace period to extend purchase option;
- (2) trial court acted within its equitable power in granting specific performance of purchase option;
- (3) college did not have improper motive in meeting with state agency with which building owner had agreement to provide low-income housing on upper floors, nor did college cause owner injury by doing so, precluding recovery on tortious interference claim;
- (4) manager's deposition testimony contradicting his prior testimony did not create genuine issue of material fact, so as to preclude summary judgment on wrongful eviction claim, as to whether notice of lease

termination complied with lease;
(5) trial court did not abuse its discretion by awarding college \$2.4 million in consequential damages in addition to awarding specific performance of purchase option contract;
(6) trial court abused its discretion in finding manager jointly and severally liable for attorney fees and costs incurred on claims as to which college prevailed only against owner;
(7) application of proportionality rule was required in order to determine appropriate award of attorney fees and costs as between college and manager; and
(8) trial court properly awarded to college the attorney fees it incurred in litigating against owner's bankruptcy petition.

Affirmed in part, reversed in part, and remanded.

West Headnotes

[1] Specific Performance 358 ↪57

358 Specific Performance
358II Contracts Enforceable
358k57 k. Options. Most Cited Cases

There was no evidence that private college seeking specific performance of option to purchase leased building had acted inequitably so as not to be entitled to an equitable grace period within which to extend the purchase option; alleged efforts by college to "renegotiate" option contract were made in light of the increasingly apparent likelihood that owner would not be willing to fulfill its contractual obligation to deliver clear title due to its obligation under another agreement to provide low-income housing on top four floors of building for a certain term of years.

[2] Vendor and Purchaser 400 ↪18(3)

400 Vendor and Purchaser
400I Requisites and Validity of Contract
400k18 Options, Preemptive Rights, and Exercise Thereof
400k18(3) k. Exercise. Most Cited Cases

Vendor and Purchaser 400 ↪57

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k57 k. Options. Most Cited Cases

As a general rule, option contracts for purchase of real property are to be strictly construed and time is of the essence.

[3] Vendor and Purchaser 400 ↪57

400 Vendor and Purchaser
400II Construction and Operation of Contract
400k57 k. Options. Most Cited Cases

Equitable relief from strict construction of an option contract for purchase of real property may be warranted in limited circumstances where an inequitable forfeiture would otherwise result.

[4] Equity 150 ↪24

150 Equity
150I Jurisdiction, Principles, and Maxims
150I(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General
150k24 k. Penalties and forfeitures. Most Cited Cases

Forfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.

[5] Colleges and Universities 81 ↪6(3)

81 Colleges and Universities
81k6 Property and Funds
81k6(3) k. Right to acquire, hold, and convey property. Most Cited Cases

Circumstances justified grant of equitable grace period to private college to extend its option under commercial lease to purchase building, as college would otherwise forfeit a substantial investment of approximately \$600,000 to remodel and improve the property due to a payment made only a few days late, college intended at all times to exercise the option to purchase, its failure to timely extend option period was inadvertent, and owner did not demonstrate any

change in position or prejudice as a result of late option payment.

[6] Colleges and Universities 81 ↪6(3)

81 Colleges and Universities
81k6 Property and Funds
81k6(3) k. Right to acquire, hold, and convey property. Most Cited Cases

By failing to act earlier to enforce their rights, owner and manager of building that was leased to private college waived college's alleged default on lease as a basis for denying college an equitable grace period to extend its purchase option under the lease.

[7] Specific Performance 358 ↪57

358 Specific Performance
358II Contracts Enforceable
358k57 k. Options. Most Cited Cases

Trial court acted within its equitable power in granting specific performance of private college's purchase option under building lease; money damages would be inadequate to compensate college because property at issue was part of its "master campus plan" to relocate campus, property was of particular significance because it was just across an alley from college's theater, and an award consisting solely of money damages could be difficult or impossible to collect given owner's financial condition.

[8] Appeal and Error 30 ↪949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

Because the trial court has broad discretionary authority to fashion equitable remedies, appellate court reviews such remedies under the abuse of discretion standard.

[9] Specific Performance 358 ↪3

358 Specific Performance

358I Nature and Grounds of Remedy in General
358k3 k. Grounds of relief in general. Most Cited Cases

Specific performance may be granted only if a valid contract exists, a party has threatened or is threatening to breach the contract, the terms of the contract are clear, and the contract is not the product of fraud or unfairness.

[10] Specific Performance 358 ↪ 57

358 Specific Performance
358II Contracts Enforceable
358k57 k. Options. Most Cited Cases

A lease containing an option to purchase is enforceable by specific performance.

[11] Contracts 95 ↪ 167

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k167 k. Existing law as part of contract. Most Cited Cases

The general law in force at the time of the formation of the contract is a part thereof.

[12] Contracts 95 ↪ 167

95 Contracts
95II Construction and Operation
95II(A) General Rules of Construction
95k167 k. Existing law as part of contract. Most Cited Cases

Statutes and the settled law of the land at the time the contract is made are presumed to be incorporated into contract.

[13] Torts 379 ↪ 243

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k243 k. Landlord and tenant. Most

Cited Cases

Private college to which owner leased first two floors of building did not have improper motive in meeting with state agency with which owner had agreement to provide low-income housing on top four floors for a certain number of years, and therefore owner failed to establish claim of tortious interference with economic relations; college's purpose was to protect its legal interest in the property by understanding housing restrictions that could prevent owner from conveying clear title as it had contracted to do in a purchase option in college's lease.

[14] Torts 379 ↪ 243

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)2 Particular Cases
379k243 k. Landlord and tenant. Most Cited Cases

Private college to which owner leased first two floors of building with an option to purchase did not cause injury to owner by meeting with state agency with which owner had agreement to provide low-income housing on top four floors for a certain number of years, and therefore owner failed to establish claim of tortious interference with economic relations; agency's director of compliance testified that conversations between college and agency were not grounds for the decision not to reduce the duration of owner's housing obligations.

[15] Torts 379 ↪ 211

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)1 In General
379k211 k. Business relations or economic advantage, in general. Most Cited Cases

Torts 379 ↪ 212

379 Torts
379III Tortious Interference
379III(B) Business or Contractual Relations
379III(B)1 In General

379k212 k. Contracts. **Most Cited Cases**

A claim of tortious interference with economic relations requires (1) the existence of a valid contractual relationship of which the defendant has knowledge, (2) intentional interference with an improper motive or by improper means that causes breach or termination of the contractual relationship, and (3) resultant damage.

[16] Torts 379 ⚡ **219**

379 Torts

379III Tortious Interference

379III(B) Business or Contractual Relations

379III(B)1 In General

379k219 k. Injury and causation. **Most Cited Cases**

To support claim of tortious interference with economic relations, defendant's improper purpose or use of improper means must in fact cause injury to the contractual relationship.

[17] Torts 379 ⚡ **220**

379 Torts

379III Tortious Interference

379III(B) Business or Contractual Relations

379III(B)1 In General

379k220 k. Defense, justification or privilege in general. **Most Cited Cases**

For purposes of a claim of tortious interference with economic relations, exercising one's legal interests in good faith is not improper interference.

[18] Judgment 228 ⚡ **185.2(8)**

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.2 Use of Affidavits

228k185.2(8) k. Operation and effect of affidavit. **Most Cited Cases**

Property manager's deposition testimony that lease termination notice was sent to tenant in April due to unsuccessful efforts in March to remedy stucco falling from the building did not create genuine issue

of material fact, so as to preclude summary judgment for tenant on wrongful eviction claim, as to whether notice complied with lease provision authorizing either party to terminate lease upon "substantial destruction" of the premises by giving written notice within 30 days of the casualty, where that testimony contradicted manager's prior testimony that he sent termination notice due to safety concerns that arose as a result of engineer's report from the previous December.

[19] Landlord and Tenant 233 ⚡ **278**

233 Landlord and Tenant

233IX Re-Entry and Recovery of Possession by Landlord

233k278 k. Wrongful ejection of tenant. **Most Cited Cases**

Commercial tenant's knowledge of defects in leased building did not preclude landlord's liability on wrongful eviction claim that was premised on landlord's alleged failure to comply with lease provision requiring a party that terminated lease because of "substantial destruction" of the premises to give notice of termination within 30 days of the casualty.

[20] Landlord and Tenant 233 ⚡ **278**

233 Landlord and Tenant

233IX Re-Entry and Recovery of Possession by Landlord

233k278 k. Wrongful ejection of tenant. **Most Cited Cases**

Tenant did not waive its claim that landlord's failure to give it notice of termination within 30 days of "substantial destruction" of the premises amounted to wrongful eviction, by remaining on the property after landlord's untimely termination notice.

[21] Judgment 228 ⚡ **185.2(8)**

228 Judgment

228V On Motion or Summary Proceeding

228k182 Motion or Other Application

228k185.2 Use of Affidavits

228k185.2(8) k. Operation and effect of affidavit. **Most Cited Cases**

In summary judgment context, when a party has given clear answers to unambiguous deposition questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.

[22] Specific Performance 358 ↪129

358 Specific Performance
358IV Proceedings and Relief
358k125 Relief Awarded
358k129 k. Recovery of damages in addition to specific performance. Most Cited Cases

Trial court did not abuse its discretion by awarding private college \$2.4 million in consequential damages in addition to awarding specific performance of college's option to purchase building pursuant to lease, where trial court determined the amount in question was necessary to place college in the position it would have been in had owner not breached purchase option agreement.

[23] Specific Performance 358 ↪129

358 Specific Performance
358IV Proceedings and Relief
358k125 Relief Awarded
358k129 k. Recovery of damages in addition to specific performance. Most Cited Cases

Consequential damages awarded in addition to specific performance are not awarded for breach of the contract, but are awarded at the equitable discretion of the trial court in an attempt to make the nonbreaching party whole.

[24] Appeal and Error 30 ↪949

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k949 k. Allowance of remedy and matters of procedure in general. Most Cited Cases

Appellate court does not disturb an exercise of equitable discretion absent a clear showing of abuse of discretion, i.e., discretion that is manifestly unreasonable or exercised on untenable grounds.

[25] Specific Performance 358 ↪126(1)

358 Specific Performance
358IV Proceedings and Relief
358k125 Relief Awarded
358k126 Performance of Contract in General
358k126(1) k. In general. Most Cited Cases

To the extent possible, specific performance should place the parties in the condition that they would have been in had the contract been performed.

[26] Specific Performance 358 ↪129

358 Specific Performance
358IV Proceedings and Relief
358k125 Relief Awarded
358k129 k. Recovery of damages in addition to specific performance. Most Cited Cases

Consequential damages are permitted in addition to specific performance because the contract is being enforced retrospectively, and the equities should be adjusted accordingly.

[27] Specific Performance 358 ↪129

358 Specific Performance
358IV Proceedings and Relief
358k125 Relief Awarded
358k129 k. Recovery of damages in addition to specific performance. Most Cited Cases

Because consequential damages are awarded in addition to specific performance in order to restore the nonbreaching party as nearly as possible to the position he would have been in had the seller performed, such damages must run from the date at which the contract required performance.

[28] Corporations and Business Organizations 101 ↪1067

101 Corporations and Business Organizations
101II Disregarding Corporate Entity; Piercing Corporate Veil

101k1057 Particular Occasions for Determining Corporate Entity

101k1067 k. Landlord and tenant. Most Cited Cases

(Formerly 101k1.6(6))

Trial court abused its discretion, in commercial tenant's action against limited partnership that owned building and against building manager, who was the managing member of the limited partnership's general partner, in finding manager jointly and severally liable for attorney fees and costs incurred by tenant on claims as to which tenant prevailed only against the limited partnership; without piercing the corporate veil, trial court could not simply disregard the liability implications of the business structures involved.

[29] Appeal and Error 30 ⚡984(5)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k984 Costs and Allowances

30k984(5) k. Attorney fees. Most Cited

Cases

An attorney fee award made pursuant to a contract may be reversed only if the trial court manifestly abused its discretion.

[30] Appeal and Error 30 ⚡842(9)

30 Appeal and Error

30XVI Review

30XVI(A) Scope, Standards, and Extent, in General

30k838 Questions Considered

30k842 Review Dependent on Whether Questions Are of Law or of Fact

30k842(9) k. Mixed questions of law and fact. Most Cited Cases

Whether a party is a "prevailing party" for purposes of awarding attorney fees is a mixed question of law and fact that appellate court reviews under an error of law standard.

[31] Costs 102 ⚡194.16

102 Costs

102VIII Attorney Fees

102k194.16 k. American rule; necessity of contractual or statutory authorization or grounds in equity. Most Cited Cases

Attorney fees and costs may be awarded when authorized by a contract, a statute, or a recognized ground in equity.

[32] Costs 102 ⚡194.32

102 Costs

102VIII Attorney Fees

102k194.24 Particular Actions or Proceedings

102k194.32 k. Contracts. Most Cited Cases

When a contract includes a bilateral attorney fees provision, it is the terms of the contract to which the trial court should look to determine if such an award is warranted.

[33] Contracts 95 ⚡147(2)

95 Contracts

95II Construction and Operation

95II(A) General Rules of Construction

95k147 Intention of Parties

95k147(2) k. Language of contract.

Most Cited Cases

Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.

[34] Costs 102 ⚡194.14

102 Costs

102VIII Attorney Fees

102k194.14 k. Prevailing party. Most Cited Cases

As a general rule, a "prevailing party," for purposes of awarding attorney fees, is one who receives an affirmative judgment in its favor.

[35] Costs 102 ⚡194.14

102 Costs

102VIII Attorney Fees

102k194.14 k. Prevailing party. Most Cited Cases

To recover attorney fees, a defendant need not have made a counterclaim for affirmative relief, but can recover as a prevailing party for successfully defending against the plaintiff's claims.

[36] Costs 102 ↪ 194.32

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases

In a contract dispute where several distinct and severable claims are at issue, court applies proportionality approach in awarding attorney fees, pursuant to which each party is awarded fees for the claims on which it succeeds or against which it successfully defends and the awards are then offset.

[37] Costs 102 ↪ 194.34

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.34 k. Leases. Most Cited Cases

Application of proportionality rule was required in order to determine appropriate award of attorney fees and costs as between commercial tenant and building manager after tenant prevailed on its wrongful eviction claim against manager and successfully defended against three counterclaims, but manager successfully defended against tenant's ownership claim seeking specific performance of a purchase option contract; tenant would be awarded fees incurred for its occupancy claim and those incurred in defending against counterclaims, while manager would be awarded fees incurred in defending against ownership claim.

[38] Costs 102 ↪ 194.34

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.34 k. Leases. Most Cited Cases

Commercial tenant and building manager against whom tenant asserted successful wrongful eviction claim and unsuccessful claim for specific performance of purchase option contract would have the burden, in context of allocating attorney fees between them under the proportionality rule, of demonstrating which fees were incurred for their respective successful claims, as any hours pertaining to unsuccessful theories or claims had to be excluded.

[39] Costs 102 ↪ 207

102 Costs
102IX Taxation
102k207 k. Evidence as to items. Most Cited Cases

Commercial tenant that prevailed on wrongful eviction claim against building's owner and manager, but prevailed only against owner on claim for specific performance of purchase option contract, would have burden for purposes of awarding attorney fees of showing which fees were incurred as to each of the defendants, given that manager could not be held liable for fees and costs incurred by tenant for claims on which it prevailed only against owner.

[40] Costs 102 ↪ 194.34

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.34 k. Leases. Most Cited Cases

Specific Performance 358 ↪ 134

358 Specific Performance
358IV Proceedings and Relief
358k134 k. Costs. Most Cited Cases

Commercial tenant was the "substantially prevailing party" within meaning of lease in litigation against owner, such that application of proportionality approach was not necessary to determine attorney fees and costs as between the parties; tenant prevailed on both its wrongful eviction claim and its claim seeking specific performance of purchase option contract, and tenant successfully defended against each of owner's three counterclaims.

[41] Specific Performance 358 ↪ 134

358 Specific Performance
358IV Proceedings and Relief
358k134 k. Costs. Most Cited Cases

Commercial tenant that brought successful action against owner for specific performance of purchase option contract could recover attorney fees, under lease provision entitling “substantially prevailing party” in action to enforce rights under the contract to reasonable attorney fees, though tenant's payment of deposit to extend the purchase option was a few days late, where trial court granted tenant an equitable grace period, such that tenant had a right to receive contractual performance from owner.

[42] Specific Performance 358 ↪ 134

358 Specific Performance
358IV Proceedings and Relief
358k134 k. Costs. Most Cited Cases

Trial court properly awarded to commercial tenant, which prevailed on claim against building owner for specific performance of purchase option contract, the attorney fees incurred by tenant in litigating against owner's bankruptcy petition; tenant's involvement in bankruptcy proceedings was initiated to protect its contractual rights pursuant to purchase option agreement, and thus fell within contractual attorney fee provision.

[43] Costs 102 ↪ 194.32

102 Costs
102VIII Attorney Fees
102k194.24 Particular Actions or Proceedings
102k194.32 k. Contracts. Most Cited Cases

An action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute.

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Richard C. Yarmuth, Rachel Hong, Jordan Gross, Yarmuth Wilsdon Calfo, Seattle, WA, for Respondent.

DWYER, C.J.

***210** ¶ 1 A superior court has the authority to grant an equitable grace period to the holder of an option to purchase property when an inequitable forfeiture would otherwise result. When monetary damages are inadequate to compensate a nonbreaching party, a lease containing an option to purchase is enforceable by specific performance. Properly finding that Cornish College of the Arts would otherwise suffer an inequitable forfeiture, the trial court herein granted to Cornish an equitable period of grace. Because a suitable substitute for the disputed property would be highly difficult-if not impossible-to procure, the trial court correctly awarded to Cornish specific performance of the option to purchase. Moreover, the trial court did not err in awarding to Cornish consequential damages, given that an award of consequential damages in addition to specific performance is permissible when necessary to make the nonbreaching party whole. The trial court erred, however, in finding defendant Donn Etherington, Jr. jointly and severally liable for Cornish's attorney fees and costs. Accordingly, we affirm as to the substantive claims raised below, and we affirm in part and reverse in part as to the award of attorney fees and costs.

I

¶ 2 Cornish College of the Arts is a private, non-profit college offering bachelor's degrees in the visual and performing arts. ***6** 1000 Virginia Limited is a Washington limited partnership. Its sole asset, and the property which is the subject of this dispute, is a parcel of real property at 1000 Virginia Street in Seattle. Donn Etherington, Jr. is the ***211** managing member of Virginia-Terry, LLC, which is the general partner of Virginia Limited.^{FN1} Etherington manages the property at 1000 Virginia Street.

FN1. There is some confusion in the record on appeal as to the exact business structure of these entities. It is clear that 1000 Virginia Limited is a limited partnership, but Virginia-Terry, LLC is at times referred to as a limited partnership, rather than a limited liability company. However, the parties and the trial court proceeded as if Virginia-Terry is

an LLC, with the protections from individual liability that such a business structure provides.

¶ 3 In April 2005, Cornish and Virginia Limited executed the “Commercial Sublease with Option to Purchase” (the Agreement). The Agreement provided for Cornish to sublease the bottom two floors of the six-story building located at 1000 Virginia Street from Etherington, who was in turn leasing the property from Virginia Limited. The lease term of 42 months was to terminate on December 31, 2008.

¶ 4 The Agreement also granted to Cornish an option to purchase the entire building and the land at 1000 Virginia Street. Pursuant to the Agreement, Cornish could exercise this option through December 2006 for a purchase price of \$3 million due at closing.^{FN2} The Agreement provided that Cornish could extend the option period for an additional year by paying a deposit of \$50,000 by January 1, 2007. If Cornish exercised its option to purchase, Virginia Limited was required to deliver clear title to the property and to demolish the upper four floors of the building.

^{FN2.} The Agreement established a closing date of July 1, 2008.

¶ 5 The Agreement also provided for early termination by either party in the event of “substantial destruction” of the property. The pertinent provision states:

Substantial Destruction. If the damage to the Leased Premises is so substantial that repair of such damage will require more than 180 days to complete (or will require more than 90 days to complete if such casualty occurs after January 1, 2008), then either Etherington or Lessee may elect, by written notice given to the other not later than thirty (30) days after the date of such casualty, to terminate this Lease effective as of the date of such casualty.

*212 This provision was presumably included due to the poor condition of the building.^{FN3}

^{FN3.} Years prior to the parties' agreement, Virginia Limited constructed four stories of wood-frame housing on top of what was then

a two-story concrete structure. Construction defects led to water intrusion that compromised the structure of the building. Virginia Limited brought a lawsuit against third party contractors to recover for the building defects. Virginia Limited settled the lawsuit, receiving \$2.5 million.

¶ 6 Finally, the Agreement included an attorney fees provision, which provides:

In the event that Cornish College, Etherington, or Virginia Limited shall commence proceedings or institute action to enforce any rights hereunder ... the substantially prevailing party shall be entitled to costs and reasonable attorney's fees, including those for appeal.

¶ 7 The Agreement between Cornish and Virginia Limited was not, however, the only contractual obligation affecting the property at 1000 Virginia Street. The property was also subject to an agreement with the Washington State Housing Finance Commission (WSHFC), pursuant to which Virginia Limited was obligated to provide low-income housing in the top four floors of the building for a certain term of years. In exchange, Virginia Limited would annually receive nearly \$400,000 in tax credits for 10 years.

¶ 8 During the parties' negotiations, Etherington told Cornish that the obligation to provide low-income housing would end on December 31, 2007. In fact, Virginia Limited's obligation pursuant to its agreement with the WSHFC was to run through 2022. After discovering this-and believing that Virginia Limited's obligation to provide low-income housing would prevent Etherington **7 from delivering clear title as required by the option agreement-Cornish representatives met with “attorneys, engineering consultants, housing groups and other interested parties, trying to find a way to help Mr. Etherington meet his obligations to deliver clear title.”

¶ 9 On December 18, 2006, Cornish's chief financial officer, Jeff Riddell, requested disbursement of a \$50,000 *213 check to extend the option period through December 31, 2007. Riddell intended to give the check to Etherington at a meeting on December 28. Riddell testified that when the meeting did not occur, he returned the check to his briefcase upon seeing that the postage meter at the college had al-

ready been set ahead to January 1. Riddell mailed the check on January 5. The payment to extend Cornish's option to purchase was, therefore, a few days late. The check contained only one signature, despite language on the check indicating that two signatures were required for amounts greater than \$7,500. Etherington rejected the check, returning it to Cornish later that month.

¶ 10 Subsequently, a July 2007 appraisal commissioned by Etherington estimated that the value of the property, which was priced at \$3 million in the Agreement, had risen to \$7.7 million due to zoning changes by the city of Seattle.

¶ 11 In December 2007, Cornish attempted to exercise its option to purchase, maintaining that its late extension payment, though returned by Etherington, had extended the option period. Cornish included a check for \$50,000, stating that it was an amount to which Etherington was entitled, given that the option was extended. Virginia Limited rejected Cornish's attempt to exercise the option, stating that Cornish had not timely extended the option.

¶ 12 Also in December 2007, Virginia Limited's structural engineer sent a letter to Etherington stating that certain parts of the building had deteriorated to a "dangerous" level. Four months later-nine months before the lease term ended-Etherington delivered to Cornish a "Notice of Lease Termination" ordering Cornish to vacate the premises. In a letter accompanying this notice, Etherington cites the "deterioration noted by our engineer in late December" as the event precipitating the eviction notice. Cornish fully vacated the premises by July 2008. Cornish then leased and renovated three separate spaces for classrooms and studios in order to replace its former space at 1000 Virginia Street.

*214 ¶ 13 Cornish sued Virginia Limited and Etherington, seeking specific performance of the option to purchase and damages for wrongful eviction. Virginia Limited and Etherington asserted counterclaims for breach of the lease, tortious interference with economic relations, and slander of title, all of which were dismissed by the trial court.

¶ 14 The trial court disposed of Cornish's substantive claims on summary judgment in favor of Cornish. The trial court granted to Cornish an equita-

ble period of grace for the late option payment and ordered that the property be conveyed according to the terms of the parties' agreement. Although the trial court initially ordered both Etherington and Virginia Limited to convey the property, it later struck Etherington from the order because it found that he had no legal ownership of the property. The trial court, on summary judgment, found both Etherington and Virginia Limited liable for wrongful eviction.

¶ 15 Subsequent to the trial court's grant of an equitable grace period and award of specific performance to Cornish, Virginia Limited filed for bankruptcy. In its petition, Virginia Limited sought to reject its agreement with Cornish.^{FN4} The bankruptcy court denied Virginia Limited's motion to reject the Agreement, and the bankruptcy petition was dismissed. The bankruptcy court found that the filing "was a litigation tactic rather than a bona fide effort to reorganize." Cornish incurred approximately \$55,000 in attorney fees litigating against Virginia Limited's bankruptcy petition.

FN4. The bankruptcy court opined that "the primary reason for this motion to reject [the parties' agreement] is that the sale price under the lease option is \$3 million, while the property may have a current value well in excess of \$7 million dollars. In short, 1000 Virginia wants to take advantage of the appreciation."

**8 ¶ 16 Rather than proceed with a jury trial on the issue of damages for wrongful eviction, the parties stipulated that, were a jury asked to determine such damages, Cornish would be entitled to damages in the amount of \$69,600. They further stipulated that Virginia Limited and Etherington were jointly and severally liable for that amount, subject to the defendants' right to appeal the liability judgment.

*215 ¶ 17 The case then proceeded to trial on those issues not resolved by summary judgment. After a three day bench trial, the trial court found that specific performance was inadequate to make Cornish whole and, thus, it additionally awarded to Cornish approximately \$2.4 million in money damages. This amount, the trial court determined, was "necessary to place Cornish in the position it would have been in had the [Agreement] been performed according to its terms." The trial court found that rental payments of

over \$1.7 million and renovation costs of almost \$700,000 to replace Cornish's lost use of the 1000 Virginia property were reasonable and necessary expenses. In calculating consequential damages, the trial court determined that the damages "begin to flow ... from the date upon which performance should have occurred had the option been recognized by the owner."

¶ 18 Posttrial, the trial court found that Cornish was the only "substantially prevailing party" pursuant to the attorney fees provision in the Agreement. The trial court awarded to Cornish over \$640,000 in attorney fees and costs-including those incurred litigating against Virginia Limited's bankruptcy petition-and found Virginia Limited and Etherington jointly and severally liable for the full amount of attorney fees and costs.

¶ 19 Virginia Limited appeals, assigning error to the grant of an equitable grace period, the order of specific performance, the wrongful eviction judgment, the award of consequential damages, and the dismissal of the tortious interference counterclaim. Virginia Limited further appeals from the award of attorney fees and costs. Etherington appeals, assigning error to the wrongful eviction judgment and the attorney fees award.

II

¶ 20 "The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." *216 *Folsom v. Burger King*, 135 Wash.2d 658, 663, 958 P.2d 301 (1998). In reviewing an order for summary judgment, we engage in the same inquiry as the trial court. *Folsom*, 135 Wash.2d at 663, 958 P.2d 301. Summary judgment is properly granted where the pleadings, affidavits, depositions, and admissions on file demonstrate "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). A material fact "is a fact upon which the outcome of the litigation depends, in whole or in part." *Lamon v. McDonnell Douglas Corp.*, 91 Wash.2d 345, 349, 588 P.2d 1346 (1979) (quoting *Morris v. McNicol*, 83 Wash.2d 491, 494-95, 519 P.2d 7 (1974)). All evidence must be considered in the light most favorable to the nonmoving party, and summary judgment may be granted only where there is but one conclusion that could be reached by a reasonable person. *Lamon*, 91

Wash.2d at 349-50, 588 P.2d 1346 (quoting *Morris*, 83 Wash.2d at 494-95, 519 P.2d 7).

III

[1] ¶ 21 Virginia Limited first contends that the trial court erred by granting to Cornish an equitable grace period within which to extend the option to purchase. Virginia Limited asserts that, as a threshold issue, Cornish is not entitled to any form of equitable relief. Virginia Limited then asserts that, even if Cornish is entitled to equitable relief, no exception to the general rule of strict contract enforcement applies in this case. We disagree with both contentions.

¶ 22 Equity jurisprudence requires the party seeking equitable relief to have acted in good faith and to come into equity with clean hands. *Cascade Timber Co. v. N. Pac. Ry. Co.*, 28 Wash.2d 684, 711, 184 P.2d 90 (1947) (quoting 49 Am.Jur. 10, § 6). Virginia Limited posits several ways in which Cornish acted inequitably, including Cornish's alleged **9 attempts to "renegotiate" the option and to seek "substantial concessions." However, despite its fervent insistence that Cornish acted inequitably, *217 Virginia Limited provides no facts to support this assertion. See *Snohomish County v. Rugg*, 115 Wash.App. 218, 224, 61 P.3d 1184 (2002) (holding that to raise a genuine issue of material fact, a party opposing summary judgment must set forth "facts evidentiary in nature, i.e., information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion"). Instead, the evidence supports Cornish's contention that its alleged efforts to "renegotiate" the contract were "made in light of the increasingly apparent likelihood that defendants would not be willing to ... fulfill their contractual obligation to deliver to Cornish clear title to the property" due to the low-income housing restrictions. Virginia Limited failed to set forth evidentiary facts sufficient to raise a genuine issue of material fact regarding Cornish's alleged inequitable conduct. Thus, the trial court did not err by concluding that Cornish was entitled to equitable relief.^{FN5}

^{FN5}. Virginia Limited also contends that Cornish is not entitled to equitable relief because, Virginia Limited asserts, Cornish did not act with vigilance. Specifically, Virginia Limited asserts that Cornish was not vigilant because its extension payment-in-addition to being late-was defective, as it

contained only one signature and was uncertified. However, once Etherington returned the check to Cornish, “advising Cornish that the check was late,” Cornish had no reason to believe that, should it cure such defects, Virginia Limited would then accept the late payment.

[2][3][4] ¶ 23 Even where a party is entitled to equitable relief, the grant of an equitable grace period is appropriate only in limited circumstances. As a general rule, option contracts “are to be strictly construed and time is of the essence.” *Pardee v. Jolly*, 163 Wash.2d 558, 572, 182 P.3d 967 (2008). However, equitable relief from such strict construction may be warranted in limited circumstances where an inequitable forfeiture would otherwise result. *Wharf Rest., Inc. v. Port of Seattle*, 24 Wash.App. 601, 611, 605 P.2d 334 (1979). This is because “ [f]orfeitures are not favored in law and are never enforced in equity unless the right thereto is so clear as to permit no denial.” *Pardee*, 163 Wash.2d at 574, 182 P.3d 967 (alteration in original) (internal quotation marks omitted) (quoting *Hyrkas v. Knight*, 64 Wash.2d 733, 734, 393 P.2d 943 (1964)). When the holder of an option makes valuable *218 permanent improvements to the property with the intention to give its notice to exercise or extend the option, but then fails to timely give such notice, an equitable period of grace may be appropriate.^{FN6} *Wharf*, 24 Wash.App. at 611, 605 P.2d 334 (quoting 1 ARTHUR L. CORBIN, *CORBIN ON CONTRACTS* § 35, at 146-47 (1963)); see also *Pardee*, 163 Wash.2d at 573, 182 P.3d 967 (holding that an equitable grace period may be appropriate because “the optionee was allowed to occupy the property and make substantial improvements thereon”).

FN6. Virginia Limited questions the applicability of this case law, arguing that there are no cases in which a “mere” right to extend an option-as is the case here-was at issue. However, whether the exercise of an option or the “mere” extension of an option is at issue is irrelevant, as both may result in inequitable forfeiture-which is precisely the outcome that the rule providing for an equitable grace period is intended to prevent.

¶ 24 In determining that an equitable grace period was appropriate, we articulated five special circum-

stances in the *Wharf* decision that, in that case, justified the trial court’s decision to grant equitable relief: (1) the failure to give notice was purely inadvertent, (2) an inequitable forfeiture would have resulted without the equitable relief, (3) the failure to give timely notice did not prejudice or change the position of the other party, (4) the lease was for a long term, and (5) there was no undue delay in giving notice, given that the other party had “substantially contributed to cause the delay” by “previously accept[ing] even later exercises of lease options ... without comment.” *Wharf*, 24 Wash.App. at 612-13, 605 P.2d 334. We did not hold, however, that all five of these circumstances need be present in every case in which an equitable grace period is granted.^{FN7} **10 Indeed, such an inflexible approach would be inconsistent with the trial court’s broad discretion to fashion equitable remedies. *SAC Downtown Ltd. P’ship v. Kahn*, 123 Wash.2d 197, 204, 867 P.2d 605 (1994).

FN7. Virginia Limited assigns error to the trial court’s finding that Virginia Limited was at fault for causing the delay in Cornish’s option extension payment. Because an equitable grace period may be granted in cases in which not all of the *Wharf* circumstances are present, we need not determine Virginia Limited’s responsibility for this delay.

[5] *219 ¶ 25 The circumstances of this case similarly justify the trial court’s grant to Cornish of an equitable period of grace. Without the trial court’s grant of equitable relief, Cornish would forfeit a substantial investment in the property due to a payment made only a few days late. Cornish invested approximately \$600,000 to remodel and improve the property. Such extensive improvements are easily adequate to constitute a forfeiture. Indeed, our Supreme Court in *Pardee* determined that a forfeiture of \$20,669 in repairs and 2,500 hours of work on the property constituted a “significant forfeiture.” 163 Wash.2d at 576, 182 P.3d 967.

¶ 26 Furthermore-and despite Virginia Limited’s conjectures to the contrary^{FN8}-the record supports Cornish’s contention that it at all times intended to extend the option period and exercise the option to purchase. Cornish not only invested \$600,000 in the 1000 Virginia Street property; in 2006, it also applied for (and later received) \$425,000 in public grants awarded for the purpose of purchasing the property,

\$350,000 of which can be used for this purpose only. Furthermore, this particular property is integral to Cornish's "Master Campus Plan" to relocate its campus to the Seattle neighborhood wherein the 1000 Virginia Street property is located. Were it precluded from purchasing the property, Cornish would forfeit a substantial investment. Given that Cornish at all times intended to exercise the option to purchase, and that its payment was only a few days late, such a substantial forfeiture would be inequitable.

FN8. Virginia Limited, relying almost exclusively on minutes from Cornish board meetings in which Cornish's financial situation is discussed, contends that Cornish never intended to exercise the option. Again, Virginia Limited attempts to raise an issue of material fact by offering conjecture rather than "facts evidentiary in nature." Rugg, 115 Wash.App. at 224, 61 P.3d 1184.

¶ 27 Moreover, many of the factors we deemed important in *Wharf* are also present in this case. First, Cornish's failure to timely extend the option period-by mailing the check three days late-was inadvertent. Wharf, 24 Wash.App. at 612, 605 P.2d 334 (stating that the failure to give notice was inadvertent, as "[i]t was not the result of intentional, culpable or ... 'grossly *220 negligent' conduct"). Cornish's CFO, Riddell, stated in a declaration to the trial court that he intended to give the check to Etherington at a December 28 meeting. He further stated that, when the meeting did not occur, he did not immediately mail the check because the postage meter at the college had already been set ahead to January. He then forgot to mail the check until January 5. Virginia Limited claims that Cornish made the late payment as part of an intentional "scheme," in order to give the appearance of a valid extension payment while not actually legally binding Cornish to purchase the property under the terms of the Agreement-thus, enabling Cornish to attempt to "renegotiate" those terms. Virginia Limited failed, however, to provide facts supporting this supposition.

¶ 28 Furthermore, Virginia Limited has not demonstrated any change in position or prejudice as a result of the late option payment. Virginia Limited concedes that "no intervening event occurred" between the due date of the payment and the date it was received. Despite this, it contends that it will suffer

"significant adverse consequences" by virtue of the grant of an equitable grace period. However, the only "adverse consequence" identified by Virginia Limited is that it must sell the property for the agreed upon contract price of \$3 million-a price that, due to rezoning, may be more than \$4 million less than the current value of the property. This "prejudice," however, was not caused by Cornish's untimely extension payment. Virginia Limited failed to identify any prejudice caused by the three-day delay.

[6] ¶ 29 Due to the discretionary nature of decisions made in equity, granting equitable relief on summary judgment may be inappropriate in many cases. See **11 Folsom, 135 Wash.2d at 663, 958 P.2d 301 (stating that summary judgment is appropriate only if "a reasonable person could reach only one conclusion"). In this case, however, the evidence strongly supports the trial court's conclusion that Cornish is entitled to an equitable grace period. A response to summary judgment must "set forth specific facts showing *221 that there is a genuine issue for trial." CR 56(e); Grimwood v. Univ. of Puget Sound, Inc., 110 Wash.2d 355, 359, 753 P.2d 517 (1988). Because Virginia Limited failed to set forth such facts, we affirm the trial court's ruling on this question.^{FN9}

FN9. Virginia Limited and Etherington also appealed from the trial court's order denying the defendants' motion for partial summary judgment and its order denying the defendants' motion for summary judgment. These motions dealt primarily with the same issues as did Cornish's motion for summary judgment regarding the late option payment; thus, in holding that the trial court correctly granted Cornish's motion, we also hold that the trial court did not err by denying the defendants' motions. The defendants also argued, however, that Cornish should not be permitted to extend the option because it was in default of the lease-an issue not explicitly determined in the grant of summary judgment to Cornish. However, any default that may have occurred was waived by the defendants' failure to act earlier to enforce their rights. See Port of Walla Walla v. Sun-Glo Producers, Inc., 8 Wash.App. 51, 54-56, 504 P.2d 324 (1972).

IV

[7] ¶ 30 Virginia Limited next contends that the trial court erred by awarding to Cornish specific performance of the option to purchase the property at 1000 Virginia Street. We disagree.

[8] ¶ 31 Because the trial court has broad discretionary authority to fashion equitable remedies, we review such remedies under the abuse of discretion standard. *SAC Downtown Ltd. P'ship*, 123 Wash.2d at 204, 867 P.2d 605.^{FN10} An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Gildon v. Simon Prop. Group, Inc.*, 158 Wash.2d 483, 494, 145 P.3d 1196 (2006).

FN10. In reviewing a recent case decided on summary judgment, our Supreme Court stated that "a decree of specific performance rests within the sound discretion of the trial court." *Crafts v. Pitts*, 161 Wash.2d 16, 29, 162 P.3d 382 (2007), and reviewed the trial court's decision to grant specific performance for an abuse of that discretion. *Crafts*, 161 Wash.2d at 30, 162 P.3d 382. The court did not explain how this approach was consistent with its earlier pronouncement in *Folsom* that the "de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion." 135 Wash.2d at 663, 958 P.2d 301. Because the *Crafts* decision is more recent than *Folsom* and, unlike *Folsom*, deals with a dispute precisely of the type presented here, we follow the court's method of analysis set forth in *Crafts*.

[9][10] ¶ 32 "When a court's legal powers cannot adequately compensate a party's loss with money damages, *222 then a court may use its broad equitable powers to compel a party to specifically perform its promise." *Crafts v. Pitts*, 161 Wash.2d 16, 23-24, 162 P.3d 382 (2007) (awarding specific performance of conveyance of real property on summary judgment) (citing RESTATEMENT (SECOND) OF CONTRACTS § 360 (1981)). "When determining whether damages would provide adequate compensation, courts inquire as to (i) the difficulty of proving damages with reasonable certainty, (ii) the difficulty of procuring a suitable substitute, and (iii) the likelihood that an award of damages could not be collected."

Crafts, 161 Wash.2d at 24, 162 P.3d 382 (citing RESTATEMENT (SECOND) OF CONTRACTS § 360). Furthermore, because land is unique and difficult to value, specific performance is often the only adequate remedy for a breach of contract regarding real property. *Pardee*, 163 Wash.2d at 568-69, 182 P.3d 967. Specific performance may be granted "only if a valid contract exists, a party has threatened or is threatening to breach the contract, the terms of the contract are clear, and the contract is not the product of fraud or unfairness." *Pardee*, 163 Wash.2d at 569, 182 P.3d 967. A lease containing an option to purchase is enforceable by specific performance. *Carpenter v. Folkerts*, 29 Wash.App. 73, 76, 627 P.2d 559 (1981).

¶ 33 Money damages would be inadequate to compensate Cornish for the property at 1000 Virginia Street. The property is part of Cornish's "Master Campus Plan" to relocate **12 the campus from its Capitol Hill location to downtown Seattle. Pursuant to this plan, Cornish now owns, or holds an option to purchase, nine properties downtown. Vicki Clayton, Cornish's chief operations officer, specified in a declaration the difficulties of finding property in this location, including the "acute shortage of space [in the area]" and "development in the South Lake Union area [that] has priced many potential properties beyond Cornish's reach."

¶ 34 The location of the 1000 Virginia Street property is of particular significance. Because the property is just across an alley from the college's theater, Cornish located its scene shops at 1000 Virginia Street. Clayton explained *223 that "[t]he difficulty of moving lighting, costumes, sets and other delicate and heavy equipment designed and built at the scene shop to the theater renders the immediate proximity of the scene shop to the theater of unique and irreplaceable value to the school." Certainly, procuring a suitable substitute for the property at 1000 Virginia Street would be exceedingly difficult, if not impossible. See *Crafts*, 161 Wash.2d at 24, 162 P.3d 382.

¶ 35 Furthermore, given Virginia Limited's purported financial condition, an award solely of money damages may be difficult or impossible for Cornish to collect.^{FN11} See *Crafts*, 161 Wash.2d at 24, 162 P.3d 382 (stating that courts may consider "the likelihood that an award of damages could not be collected" when determining whether money damages would adequately compensate the nonbreaching party (citing

RESTATEMENT (SECOND) OF CONTRACTS § 360)).

FN11. Etherington contends that Virginia Limited's bankruptcy petition was brought due to a shortage of operating funds.

¶ 36 Virginia Limited contends that Cornish had no right to specific performance because Virginia Limited did not breach or threaten to breach the Agreement. Virginia Limited asserts that, because its obligation to honor Cornish's extension payment was "non-existent until the trial court granted an extra-contractual grace period," it did not breach the parties' agreement by failing to honor Cornish's payment. Virginia Limited is incorrect.

[11][12] ¶ 37 "One of the basic principles of contract law is that the general law in force at the time of the formation of the contract is a part thereof." Arnim v. Shoreline Sch. Dist. No. 412, 23 Wash.App. 150, 153, 594 P.2d 1380 (1979). Indeed, it has long been held to be "the universal law that the statutes and laws governing citizens in a state are presumed to be incorporated in contracts made by such citizens, because the presumption is that the contracting parties know the law." Lejendecker v. Aetna Indem. Co., 52 Wash. 609, 611, 101 P. 219 (1909); accord Fischler v. Nicklin, 51 Wash.2d 518, 522, 319 P.2d 1098 (1958) ("[E]xisting law is a part of every *224 contract, and must be read into it."). This principle applies both to "statutes and the settled law of the land at the time the contract is made." In re Kane, 181 Wash. 407, 410, 43 P.2d 619 (1935). The right of an option holder, under appropriate circumstances, to an equitable period of grace in exercising the option was the "settled law" of Washington long before the Agreement herein was signed by the parties. See, e.g., Heckman Motors, Inc. v. Gunn, 73 Wash.App. 84, 87-88, 867 P.2d 683 (1994) (noting that an equitable grace period is appropriate in some circumstances, though not pursuant to the facts of that case) (quoting 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 35, at 146-47); Wharf, 24 Wash.App. at 611, 605 P.2d 334 (quoting 1 ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 35, at 146-47). Thus, Cornish possessed this right from the outset; it was not "created" by the trial court when it ruled in Cornish's favor. For this reason, Virginia Limited was obligated pursuant to the parties' agreement to extend the option period upon receipt of Cornish's late payment. Not doing so

was a breach of the Agreement.

¶ 38 Virginia Limited further contends that the trial court erred by awarding specific performance without balancing the equities between the parties. However, despite this contention, there is insufficient support in the record to demonstrate that compliance with the specific performance order was impossible**13 or caused undue hardship to Virginia Limited. Given the trial court's "broad discretionary power to fashion equitable remedies," SAC Downtown Ltd. P'ship, 123 Wash.2d at 204, 867 P.2d 605, we disagree that the trial court improperly awarded specific performance.

¶ 39 Because it would be exceedingly difficult, if not impossible, for Cornish to procure a suitable substitute for the 1000 Virginia Street property, money damages would undoubtedly be inadequate to compensate Cornish. The trial court acted well within its equitable power to grant specific performance of the option to purchase the property. Thus, we affirm the trial court's order awarding specific performance.

*225 V

[13][14] ¶ 40 Virginia Limited next contends that the trial court erred by dismissing on summary judgment the defendants' counterclaim for tortious interference. Because no genuine issue of material fact precluded the entry of summary judgment on this claim, we disagree.

[15][16][17] ¶ 41 A claim of tortious interference requires (1) the existence of a valid contractual relationship of which the defendant has knowledge, (2) intentional interference with an improper motive or by improper means that causes breach or termination of the contractual relationship, and (3) resultant damage. Leingang v. Pierce County Med. Bureau, Inc., 131 Wash.2d 133, 157, 930 P.2d 288 (1997). The defendant's improper purpose or use of improper means must "in fact cause injury to the ... contractual relationship." Leingang, 131 Wash.2d at 157, 930 P.2d 288. Exercising one's legal interests in good faith is not improper interference. Leingang, 131 Wash.2d at 157, 930 P.2d 288 (citing Schmerer v. Darcy, 80 Wash.App. 499, 506, 910 P.2d 498 (1996)).

¶ 42 Virginia Limited failed to provide evidentiary facts sufficient to raise a genuine issue of material fact-as required to oppose summary judgment.

ment-regarding Cornish's motive in meeting with the WSHFC. Rugg, 115 Wash.App. at 224, 61 P.3d 1184 (evidentiary facts include "information as to what took place, an act, an incident, a reality as distinguished from supposition or opinion"). Despite Etherington's testimony as to his "fear" that "some kind of deal is brewing behind the scenes," he failed to point to any evidence in support of this contention. Indeed, he testified that he had no firsthand knowledge of the substance of the meetings between Cornish and the WSHFC.

¶ 43 Instead, the evidence supports Cornish's contention that, in meeting with the WSHFC, it was "motivated exclusively by [its] desire to protect its legal interest in the Property." Riddell testified that Cornish's purpose in meeting with the WSHFC was to attempt to understand the *226 low-income housing restrictions on the property—restrictions that could prevent Virginia Limited from conveying clear title as it had contracted to do. The only reasonable inference that can be drawn from the evidence is that Cornish had no improper motive. Rugg, 115 Wash.App. at 229, 61 P.3d 1184 (holding that while all reasonable inferences must be drawn in favor of the nonmoving party on summary judgment, "[u]nreasonable inferences that would contradict those raised by evidence of undisputed accuracy need not be so drawn").

¶ 44 Moreover, there is no evidence suggesting that Cornish's communications with the WSHFC caused injury to Virginia Limited. Virginia Limited posits that the meetings between Cornish and the WSHFC frustrated Virginia Limited's ability to reduce the duration of its low-income housing obligations. The testimony of Tim Sovold, the director of compliance at the WSHFC, directly contradicts this supposition: when asked whether the conversations between Cornish and the WSHFC were grounds for the decision not to reduce the housing obligations, Sovold replied, "No, absolutely not."

¶ 45 Virginia Limited failed to set forth facts sufficient to raise a genuine issue of material fact regarding the elements required to establish a tortious interference claim. Accordingly, we affirm the trial court's dismissal of the counterclaim.

VI

[18] ¶ 46 Virginia Limited and Etherington contend that the trial court erred by **14 finding them

liable for wrongful eviction on summary judgment. We disagree.

¶ 47 Pursuant to the parties' agreement, either party may terminate the lease upon "substantial destruction" of the premises by giving written notice to the other within 30 days of the casualty.^{FN12} In Etherington's letter giving notice *227 to Cornish of the early termination—sent in April 2008—he cites the "deterioration noted by our engineer in late December" as the event triggering termination. Etherington also testified that he sent this letter to Cornish due to safety concerns that arose as a result of the engineer's report in December 2007. A month after this testimony, however, Etherington testified in a deposition that the termination notice was sent due to unsuccessful efforts in March 2008 to remedy stucco falling from the building. This subsequent testimony contradicts his earlier testimony that he viewed the structural deterioration in March as "more of a confirmation" of—rather than different from—the engineer's December analysis.

FN12. Again, the pertinent provision provides:

Substantial Destruction. If the damage to the Leased Premises is so substantial that repair of such damage will require more than 180 days to complete (or will require more than 90 days to complete if such casualty occurs after January 1, 2008), then either Etherington or Lessee may elect, by written notice given to the other not later than thirty (30) days after the date of such casualty, to terminate this Lease effective as of the date of such casualty.

[19][20][21] ¶ 48 Despite Etherington's assertion that "substantial destruction" occurred in March, he has failed to raise a genuine issue of material fact regarding the timeliness of the early termination notice to Cornish. " 'When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony.' " Marshall v. AC & S, Inc., 56 Wash.App. 181, 185, 782 P.2d 1107 (1989) (alteration in original) (quoting Van T. Junkins & Assocs., Inc. v. U.S. Indus., Inc., 736

F.2d 656, 657 (11th Cir.1984)). To the extent that Etherington's subsequent declaration contradicts his prior testimony, an issue of material fact does not arise. See *Klontz v. Puget Sound Power & Light Co.*, 90 Wash.App. 186, 192, 951 P.2d 280 (1998). Thus, the only reasonable inference is that "substantial destruction" occurred, if at all,^{FN13} in December 2007-and, consequently, that the *228 April 2008 termination notice was untimely pursuant to the parties' agreement.^{FN14}

FN13. The record suggests that "substantial destruction" may not have occurred at all. However, we need not determine whether an issue of material fact exists as to the occurrence of "substantial destruction." Whether or not a triggering event occurred, Virginia Limited and Etherington violated the lease, either by terminating without the triggering event of "substantial destruction" or by untimely terminating more than 30 days after that event.

FN14. Virginia Limited and Etherington further contend that they are not liable for wrongful eviction because: (1) the deteriorating condition of the building was caused by third parties, (2) Cornish assumed the risk of early termination because it knew of the defects, and (3) Cornish waived any claim for wrongful eviction by remaining in the premises for months after the termination notice.

Whether the appellants caused the defects is irrelevant to the wrongful eviction claim. Cornish claims that the defendants are liable not for causing the so-called "substantial destruction," but for failing to act in accord with the parties' agreement. Similarly, Cornish's knowledge of the defects-which Cornish admits-is of no consequence for its claim. Finally, because Cornish was not constructively evicted, but was instead *actually* evicted, Cornish did not waive its claim by remaining on the property.

Etherington also assigns error to the trial court's finding that Etherington was the general contractor for construction of the

low-income housing. Because we do not rely on this finding in our holding that Cornish was wrongfully evicted, we do not reach this issue.

¶ 49 Because Virginia Limited and Etherington failed to raise a genuine issue of material fact as to whether their early termination of the lease comported with the parties' agreement, we affirm the trial court's wrongful termination judgment.

VII

[22] ¶ 50 Virginia Limited next contends that the trial court erred by awarding to Cornish \$2.4 million in consequential damages in addition to awarding specific performance**15 of the option to purchase the property. We disagree.

[23][24] ¶ 51 Consequential damages awarded in addition to specific performance are not awarded for breach of the contract. Rather, they are awarded at the equitable discretion of the trial court in an attempt to make the nonbreaching party whole. *Rekhi v. Olason*, 28 Wash.App. 751, 757, 626 P.2d 513 (1981). We do not disturb an exercise of such discretion absent a clear showing of abuse of discretion-that is, "discretion that is manifestly unreasonable*229 or exercised on untenable grounds." *Paris v. Allbaugh*, 41 Wash.App. 717, 720, 704 P.2d 660 (1985).

[25][26] ¶ 52 To the extent possible, specific performance should place the parties in the condition that they would have been in had the contract been performed. *Chan v. Smider*, 31 Wash.App. 730, 736, 644 P.2d 727 (1982). However, specific performance alone can rarely achieve this objective:

"[A] decree for specific performance seldom brings about performance within the time that the contract requires. In this respect such a decree is nearly always a decree for less than exact and complete performance. For the partial breach involved in the delay, money damages will be awarded along with the decree for specific performance."

Rekhi, 28 Wash.App. at 758, 626 P.2d 513 (alteration in original) (quoting *Restatement of Contracts*, § 365 cmt. d). Thus, consequential damages are permitted because "the contract is being enforced retrospectively, [and] the equities should be adjusted accordingly." *Rekhi*, 28 Wash.App. at 758, 626 P.2d

513.

[27] ¶ 53 Because consequential damages are awarded in addition to specific performance in order to restore the nonbreaching party “as nearly as possible to the position he would have been in had the seller performed,” *Rekhi*, 28 Wash.App. at 757, 626 P.2d 513, such damages must run from the date at which the contract required performance.^{FN15} Thus, the trial court *230 was correct in concluding that consequential damages “begin to flow not from the date the court ordered specific performance, but from the date upon which performance should have occurred had the option been recognized by the owner.”

FN15. If, as Virginia Limited contends, the “delay” for which consequential damages compensates is the period between the decree of specific performance and the actual performance, the nonbreaching party would not be made whole pursuant to the terms of the parties' agreement. Virginia Limited relies on the court's holding in *Rekhi* in support of its contention that consequential damages should run from the date of the specific performance decree. In that case, the trial court granted specific performance to the purchasers of property when the vendor failed to convey the property; however, the trial court denied the purchasers' request for consequential damages, despite finding that they suffered loss due to delays associated with the breach. *Rekhi*, 28 Wash.App. at 752-53, 626 P.2d 513. The appellate court remanded, instructing the trial court to award the consequential damages and any additional consequential damages resulting from the delay caused by the appeal. *Rekhi*, 28 Wash.App. at 758, 626 P.2d 513. Because the damages at issue were sought at the trial where specific performance was awarded, they could not have compensated for the delay subsequent to the decree, as that delay would not yet have occurred. Virginia Limited's interpretation of *Rekhi* is not only incorrect, it would also fall short of making whole the nonbreaching party, which is the purpose for which consequential damages are awarded.

¶ 54 Virginia Limited contends that the money damages awarded are contract damages and, thus, are

impermissible in addition to an award of specific performance. However, as explained above, consequential damages are permitted to account for losses incurred when specific performance does not result in performance at the time required by the parties' agreement. *Rekhi*, 28 Wash.App. at 757-758, 626 P.2d 513. Thus, such money damages are not impermissible contract damages. Furthermore, the fact that \$2.4 million is a substantial amount of damages is not itself problematic, if this is the amount necessary to place Cornish in the position that it would have been in had Virginia Limited not breached the Agreement.

¶ 55 The trial court has broad discretion in fashioning equitable relief. *SAC Downtown Ltd. P'ship*, 123 Wash.2d at 204, 867 P.2d 605. It did not abuse its discretion in awarding to Cornish \$2.4 million in consequential **16 damages. Accordingly, we affirm the trial court's decision on this issue.

VIII

[28] ¶ 56 Etherington contends that the trial court erred by finding him jointly and severally liable for the full amount of Cornish's attorney fees and costs. He further asserts that the trial court erred by not applying the proportionality rule to determine the award of attorney fees and by not awarding to Etherington attorney fees and costs. We agree that the trial court erred by finding Etherington jointly and severally liable for Cornish's attorney fees, insofar as those fees were incurred for claims on which Cornish prevailed only against Virginia Limited. We further agree that the *231 proportionality rule must be applied to allocate attorney fees between Etherington and Cornish.

[29][30] ¶ 57 An attorney fee award made pursuant to a contract may be reversed only if the trial court manifestly abused its discretion. *Noble v. Safe Harbor Family Pres. Trust*, 167 Wash.2d 11, 17, 216 P.3d 1007 (2009). Whether a party is a “prevailing party” is a mixed question of law and fact that we review under an error of law standard. *Eagle Point Condo. Owners Ass'n v. Coy*, 102 Wash.App. 697, 706, 9 P.3d 898 (2000).

[31][32][33] ¶ 58 Attorney fees and costs may be awarded when authorized by a contract, a statute, or a recognized ground in equity. *Kaintz v. PLG, Inc.*, 147 Wash.App. 782, 785, 197 P.3d 710 (2008). When a contract includes a bilateral attorney fees provision, “it is the terms of the contract to which the trial court

should look to determine if such an award is warranted.” *Kaintz*, 147 Wash.App. at 790, 197 P.3d 710. “Where the terms of a contract are plain and unambiguous, the intention of the parties shall be ascertained from the language employed.” *Marine Enters., Inc. v. Sec. Pac. Trading Corp.*, 50 Wash.App. 768, 773, 750 P.2d 1290 (1988) (quoting *Schawerman v. Haag*, 68 Wash.2d 868, 873, 416 P.2d 88 (1996)).

[34][35][36] ¶ 59 As a general rule, a prevailing party is one who receives an affirmative judgment in its favor. *Marassi v. Lau*, 71 Wash.App. 912, 915, 859 P.2d 605 (1993), abrogated on other grounds by *Wachovia SBA Lending, Inc. v. Kraft*, 165 Wash.2d at 481, 200 P.3d 683 (2009). But see *Marine Enters., Inc.*, 50 Wash.App. at 773, 750 P.2d 1290 (holding that when parties provide specific contract language regarding attorney fees, “reliance on cases holding that the prevailing party is the party with an affirmative judgment rendered in his favor ... is misplaced”). However, a successful defendant can also recover as a prevailing party. *Marine Enters., Inc.*, 50 Wash.App. at 772, 750 P.2d 1290. Such a defendant need not have made a counterclaim for affirmative relief, as the defendant can recover as a prevailing party for successfully defending against the plaintiff’s claims. See *232 *Marassi*, 71 Wash.App. at 916, 859 P.2d 605. In a contract dispute where “several distinct and severable claims” are at issue, the determination of the prevailing party may be subjective and difficult to assess. *Marassi*, 71 Wash.App. at 917, 859 P.2d 605. In such a case, we apply the proportionality approach, pursuant to which each party is awarded attorney fees for the claims on which it succeeds or against which it successfully defends and the awards are then offset. *Marassi*, 71 Wash.App. at 918, 859 P.2d 605.^{FN16}

^{FN16}. We are familiar with Washington authority holding that “where both parties prevail on major issues, neither is entitled to attorney fees.” *Sardam v. Morford*, 51 Wash.App. 908, 911, 756 P.2d 174 (1988). However, in extensive briefing, neither party cited this authority. When questioned at oral argument regarding this rule, both parties suggested that it was not the appropriate resolution in this case.

¶ 60 We first evaluate whether the trial court abused its discretion by finding Etherington jointly and severally liable for the full amount of Cornish’s

attorney fees and costs. Cornish brought two major claims against Virginia Limited and Etherington—an ownership claim brought pursuant to the option to purchase and an occupancy claim originating in the leasehold provisions of the Agreement. The trial court dismissed Cornish’s ownership claim against Etherington, finding that Etherington did not own the property at 1000 Virginia Street and, thus, had no authority^{**17} to convey it. The trial court subsequently rejected Cornish’s request to pierce the corporate veil such that Etherington would be held individually liable for the actions of the partnership. The trial court denied Cornish’s motion to reconsider that decision, and Cornish did not appeal from the decision.^{FN17}

^{FN17}. At oral argument, Cornish asserted that Etherington should be liable for the full amount of Cornish’s attorney fees and costs pursuant to a theory that the obligors are presumed to be co-promisors and to be jointly liable. We decline to address this issue, as it was raised for the first time at oral argument. *RAP 12.1(a)*; *Apostolis v. City of Seattle*, 101 Wash.App. 300, 306, 3 P.3d 198 (2000).

¶ 61 Without piercing the corporate veil, the trial court cannot simply disregard the liability implications of the business structures of Virginia Limited and Virginia-Terry, LLC. Thus, the trial court was compelled to evaluate not only which party substantially prevailed, but also *against whom* that party prevailed. If Virginia Limited and *233 Etherington are not evaluated individually in determining who is the substantially prevailing party, then Etherington would be liable for the full amount of Cornish’s attorney fees and costs even if he were not found liable on any of Cornish’s claims. This cannot be the correct result, particularly where all of Cornish’s claims against Etherington were resolved prior to trial. The trial court abused its discretion in failing to consider Virginia Limited and Etherington separately when determining which party substantially prevailed.

¶ 62 In this case, attorney fees and costs are available to the “substantially prevailing party” pursuant to the parties’ agreement.^{FN18} When a contract includes a bilateral fees provision, we generally look to the parties’ language to determine which party, if any, is entitled to an award of fees. *Kaintz*, 147

Wash.App. at 790, 197 P.3d 710. However, when “several distinct and severable claims” are at issue, as in this case, we apply the proportionality approach in our award determination. Marassi, 71 Wash.App. at 917, 859 P.2d 605 (applying the proportionality approach where the parties’ contract provided for attorney fees and costs to the “successful party”).

FN18. Again, the attorney fees provision in the Agreement provides:

In the event that Cornish College, Etherington, or Virginia Limited shall commence proceedings or institute action to enforce any rights hereunder ... the substantially prevailing party shall be entitled to costs and reasonable attorney’s fees, including those for appeal.

[37] ¶ 63 Cornish brought two major claims against both Virginia Limited and Etherington—an ownership claim and an occupancy claim. Virginia Limited and Etherington brought three counterclaims against Cornish, all of which the trial court dismissed. As between Etherington and Cornish, Cornish prevailed on its occupancy claim and successfully defended against the three counterclaims. However, the trial court dismissed Cornish’s ownership claim as to Etherington; thus, Etherington successfully defended against this claim. Pursuant to the proportionality approach, each party is awarded attorney fees for those claims upon which it prevails or against which it successfully*234 defends, and the awards are then offset. Marassi, 71 Wash.App. at 918, 859 P.2d 605. Cornish will be awarded the fees incurred for its occupancy claim and those incurred defending against the defendants’ counterclaims. Etherington will be awarded the fees he incurred defending against Cornish’s ownership claim.

[38][39] ¶ 64 Pursuant to Washington’s lodestar method of determining attorney fees, “the party seeking fees bears the burden of proving the reasonableness of the fees.” Mahler v. Szucs, 135 Wash.2d 398, 433-34, 957 P.2d 632, 966 P.2d 305 (1998). Because any hours pertaining to unsuccessful theories or claims must be excluded, Mahler, 135 Wash.2d at 434, 957 P.2d 632, both Cornish and Etherington will have the burden of demonstrating which fees were incurred for their respective successful claims. Cornish will also have the burden of showing which fees

were incurred as to each of the other parties, given that Etherington cannot be held liable for the attorney fees and costs incurred by Cornish for claims on which it prevailed only against Virginia Limited.

**18 ¶ 65 We reverse and remand the trial court’s award of attorney fees and costs as between Etherington and Cornish. On remand, the trial court should apply the proportionality rule to determine the appropriate award of attorney fees and costs as between these parties.

IX

[40] ¶ 66 Virginia Limited contends that the trial court erred by not applying the proportionality rule to determine attorney fees and costs. It further contends that the trial court erred by awarding to Cornish the attorney fees and costs it incurred litigating against Virginia Limited’s bankruptcy petition. We disagree.

[41] ¶ 67 Cornish is clearly the “substantially prevailing party” with regard to Virginia Limited. Cornish prevailed against Virginia Limited on both its ownership claim and its occupancy claim. Moreover, Cornish successfully defended against the defendants’ three counterclaims, all of *235 which were dismissed by the trial court. We need not apply the proportionality approach to determine attorney fees and costs as between Cornish and Virginia Limited, given that Cornish is the prevailing party on all such claims. Because Cornish is the substantially prevailing party on all claims as to Virginia Limited, we affirm the trial court’s award of attorney fees and costs as between these two parties.^{FN19}

FN19. Virginia Limited also contends that Cornish is not entitled to attorney fees and costs because the contract provides for such an award only to enforce rights under the Agreement, and Cornish’s action, Virginia Limited argues, was brought in order to excuse it from the requirements of the contract. However, the trial court’s grant to Cornish of an equitable grace period established Cornish’s right to extend and exercise the option. Thus, Cornish had a right to receive contractual performance from Virginia Limited and brought the action on the contract in order to enforce that right.

Similarly, Virginia Limited’s contention

that the trial court erred by not entering adequate findings is without merit. The trial court entered detailed findings and conclusions regarding its award of attorney fees, thus providing an adequate record upon which we can review the award. See *Mahler*, 135 Wash.2d at 435, 957 P.2d 632.

[42][43] ¶ 68 Nor did the trial court err by awarding to Cornish attorney fees and costs incurred litigating against Virginia Limited's bankruptcy petition. In Washington, "an action is on a contract for purposes of a contractual attorney fees provision if the action arose out of the contract and if the contract is central to the dispute." *Tradewell Group, Inc. v. Mavis*, 71 Wash.App. 120, 130, 857 P.2d 1053 (1993). Virginia Limited petitioned for removal of this case to bankruptcy court, where it attempted to reject the option to purchase in the Agreement. The bankruptcy court denied Virginia Limited's motion to reject the option agreement and dismissed the bankruptcy petition. The bankruptcy court stated its view that the petition "was a litigation tactic rather than a bona fide effort to reorganize." Because Cornish's involvement in the bankruptcy proceedings was initiated to protect its contractual rights pursuant to the Agreement, the trial court properly awarded to Cornish *236 attorney fees and costs incurred in connection with Virginia Limited's bankruptcy filing.^{FN20}

^{FN20}. For the reasons explained herein, Etherington is correct that the trial court erred in holding him individually liable for Cornish's attorney fees and costs incurred litigating against Virginia Limited's bankruptcy petition.

¶ 69 We affirm the trial court's award of attorney fees and costs as between Virginia Limited and Cornish.

X

¶ 70 All parties request attorney fees and costs associated with this appeal. Contractual authority as a basis for an award of attorney fees at trial also supports such an award on appeal. RAP 18.1. Furthermore, the Agreement explicitly provides for attorney fees and costs on appeal to the "substantially prevailing party."

¶ 71 On appeal, Cornish has prevailed on all of its substantive claims against both Virginia Limited and Etherington. As between Virginia Limited and Cornish, we award attorney fees and costs on appeal to Cornish. However, because we reverse the trial court's award to Cornish of attorney fees and **19 costs as to Etherington, Etherington has prevailed on that issue. Thus, pursuant to the proportionality approach, we award to Etherington and Cornish attorney fees and costs on appeal for those claims upon which each has prevailed. Upon proper application by the parties, a commissioner of this court will enter the necessary order.

¶ 72 Affirmed in part. Reversed in part and remanded.

We concur: SPEARMAN and BECKER, JJ.

Wash.App. Div. 1, 2010.
Cornish College of the Arts v. 1000 Virginia Ltd. Partnership
158 Wash.App. 203, 242 P.3d 1, 261 Ed. Law Rep. 1104

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▷ Only the Westlaw citation is currently available.

United States District Court,
E.D. Washington.
NATIONAL CITY BANK, N.A. and the PNC Financial Services Group, Inc., Plaintiffs,
v.
PRIME LENDING, INC.; Ronald D. Thomas and John Does 1-20, Defendants.

No. CV-10-034-EFS.
July 19, 2010.

West KeySummary **Antitrust and Trade Regulation**
29T ↪421

29T Antitrust and Trade Regulation
29TIV Trade Secrets and Proprietary Information
29TIV(A) In General
29Tk421 k. Customer Lists and Information. Most Cited Cases

Antitrust and Trade Regulation 29T ↪433

29T Antitrust and Trade Regulation
29TIV Trade Secrets and Proprietary Information
29TIV(B) Actions
29Tk433 k. Questions of Law or Fact. Most Cited Cases

An employee's former employer's allegations were adequate to state a trade secret misappropriation claim against the employee's subsequent employer that could survive dismissal. The complaint stated that employee had access to and agreed not to disclose proprietary information and that employee took, and subsequent employer profited from, other information besides customer lists that were publicly available records in the County Auditor's office. Although customer lists would not be a trade secret if they were readily ascertainable from a public source, whether the other information was a trade secret was a factual determination. West's RCWA 19.108.010(4).

Christopher P. Fisher, Isaac J. Eddington, Joseph A. Castrodale, Ulmer & Berne LLP, Cleveland, OH, Matthew W. Daley, Thomas Dean Cochran, With-

erspoon Kelley Davenport & Toole, Spokane, WA, Scott A. Meyers, Ulmer & Berne LLP, Chicago, IL, for Plaintiffs.

James E. Breitenbucher, Karen F. Jones, Riddell Williams PS, SEATTLE, WA, Erik H. Thorleifson, Patrick Joseph Kirby, Campbell Bissell & Kirby PLLC, Spokane, WA, for Defendants.

ORDER ENTERING COURT'S RULINGS FROM APRIL 27, 2010 HEARING

EDWARD F. SHEA, District Judge.

*1 A hearing occurred in the above-captioned matter on April 27, 2010. Christopher Fisher, Isaac Eddington, Joseph Castrodale, Thomas Cochran, and Matthew Daley appeared for Plaintiffs; James Breitenbucher and Karen Jones appeared for Defendant Prime Lending, Inc. ("Prime"); and Erik Thorleifson and Patrick Kirby appeared for Defendant Ronald Thomas ("Thomas"). Before the Court were Defendants' Motions to Dismiss (Ct. Recs. 26 & 29), in which they move to dismiss several of Plaintiffs' claims and to strike the request for punitive damages, and Plaintiffs' Motion for Leave to Amend (Ct.Rec.72). For the reasons given below, the Court grants Defendants' motions in part and grants Plaintiffs' motion as revised.

I. Background^{FN1}

FN1. When deciding a motion to dismiss, the Court must accept all the Complaint's material factual allegations and draw any reasonable inferences therefrom. *See Broam v. Bogan*, 320 F.3d 1023, 1028 (9th Cir.2003).

Plaintiff National City Bank ("National City") is a nationwide banking group based in Ohio whose operations include mortgage lending. Its headquarters for its Eastern Washington and Idaho operations were in Spokane, Washington, and over several years it steadily built up its business in the region. Last year, National City merged with PNC Financial Services Group, Inc. ("PNC"), and PNC is the surviving company.

Thomas was National City's Spokane Market

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Manager for seven years. In that position, he managed several National City offices in the Northwest and was among the most senior managers in the region. As a reward for his service, in 2007 Thomas accepted some National City stock subject to a Restricted Stock Agreement. Both the Restricted Stock Agreement and Thomas's Bank Manager Compensation Agreement prohibited Thomas from recruiting National City employees, using National City's trade secrets, and soliciting National City customers for some time after leaving employment with National City.

Prime is a mortgage lender based in Dallas. In the spring of 2009, Prime was trying to enter the Spokane market. Around that time, Thomas met with Prime to discuss future employment opportunities, and, after agreeing to join Prime, began recruiting National City Bank employees for Prime. Thomas arranged for almost all of National City's Spokane employees to resign on July 14, 2009. Thereafter, they began working for Prime. This mass resignation effectively shut down National City's operations in the region and handed them over to Prime. Thomas remained a National City employee for three weeks after his subordinates left, pretending he did not know in advance that the employees planned to leave. Meantime, he worked surreptitiously for Prime while still on National City's payroll. He was part owner of the LLC that owned National City's office space, and he arranged to have National City move out of its Spokane office. He then leased the space to Prime. Finally, on August 6, 2009, Thomas resigned and joined Prime, taking with him confidential customer information and using it to solicit customers for Prime's benefit, as well as continuing to recruit National City employees from other branches.

*2 Plaintiffs filed their Complaint in the Northern District of Ohio on September 16, 2009, alleging Defendants violated several state and federal laws. At the court's urging, the parties engaged in extensive settlement negotiations. After those negotiations failed, Defendants filed motions to dismiss for improper venue and lack of personal jurisdiction, or in the alternative, to transfer venue to this district. The court declined to decide jurisdiction and venue. Instead, it transferred the case to this Court.

II. Standard

A motion to dismiss under Federal Rule of Civil Procedure 12(b) (6) tests the legal sufficiency of the

pleadings. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir.2001). A complaint may be dismissed for failure to state a claim under Rule 12(b)(6) where the factual allegations do not raise the right to relief above the speculative level. *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009); *Bell Atl. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Conversely, a complaint may not be dismissed for failure to state a claim where the allegations plausibly show that the pleader is entitled to relief. *Twombly*, 550 U.S. at 555. In ruling on a motion under Rule 12(b)(6), a court must construe the pleadings in the light most favorable to the plaintiff, and must accept all material factual allegations in the complaint, as well as any reasonable inferences drawn therefrom. *Broam*, 320 F.3d at 1028.

III. Discussion

A. Successive Rule 12 Motion

Plaintiffs argue that the motions to dismiss are procedurally improper under Federal Rule of Civil Procedure 12(g)(2) because Defendants already filed motions under Rule 12(b)(2) and (3). Generally speaking, defendants must raise all defenses at the first opportunity and may not bring successive motions to dismiss. Fed.R.Civ.P. 12(g)(2); *Wafra Leasing Corp. 1999-A-1 v. Prime Capital Corp.*, 247 F.Supp.2d 987, 998 (N.D.Ill.2002); *United States v. Columbia Gas & Elec. Corp.*, 1 F.R.D. 606 (D.Del.1941). A motion to dismiss for failure to state a claim is not waived if not asserted at the first available opportunity, however. Rather, a defendant may raise the defense in its answer, a motion for judgment on the pleadings under Rule 12(c), or at trial. Fed.R.Civ.P. 12(h)(2).

Judicial economy favors ignoring the motions' technical deficiencies. Defendants did not waive their defense of failure to state a claim. Rule 12(g) merely prohibits them from raising it before filing an answer because they did not raise it in their initial response under Rule 12(b). Plaintiffs do not dispute that Defendants would simply be able to renew their motion as a Rule 12(c) motion for judgment on the pleadings after filing an answer. The Court declines to pass on this opportunity to narrow the issues because Defendants are entitled to raise these defenses even if they already filed a motion to dismiss. Nor do the motions result in prejudice or surprise. The Court finds good cause to consider them now.

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B. Dismissal of Claims

1. Misappropriation of Trade Secrets-Uniform Trade Secrets Act (“UTSA”)

*3 According to Defendants, Plaintiffs' trade secrets claim is inadequately pled because all the information alleged to have been taken is publicly available through title searches. Plaintiffs respond that the information Defendants misappropriated includes far more than just customer lists. Defendants allegedly took customers' confidential information, identities of prospective customers, and mortgage loan applications.

Washington adopted the UTSA to govern claims for trade secret misappropriation. RCW 19.108. The UTSA defines a trade secret as

information ... that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

RCW 19.108.010(4). A trade secret requires effort and expense in compilation. *Ed Nowogroski Inc., Inc. v. Rucker*, 137 Wash.2d 427, 438-39, 971 P.2d 936 (1999). Generally, a confidential customer list is a trade secret. *Thola v. Henschell*, 140 Wash.App. 70, 78, 164 P.3d 524 (2007). But the customer list is not a trade secret if it is readily ascertainable from a public source. See *Boeing v. Sierracin Corp.*, 108 Wash.2d 38, 49-50, 738 P.2d 665 (1987); *MP Med. Inc. v. Wegman*, 151 Wash.App. 409, 421-22, 213 P.3d 931 (2009); *West v. Port of Olympia*, 146 Wash.App. 108, 120, 192 P.3d 926 (2008); *Spokane Research & Def. Fund v. City of Spokane*, 96 Wash.App. 568, 578, 983 P.2d 676 (1999); *Precision Moulding & Frame, Inc. v. Simpson Door Co.*, 77 Wash.App. 20, 36, 888 P.2d 1239 (1995). Whether information is a trade secret is a factual determination. *Ed Nowogroski*, 137 Wash.2d at 436, 971 P.2d 936.

Dismissal of this claim is inappropriate. Because

existence of a trade secret is a factual determination, and because the confidential information allegedly misappropriated was not limited to publicly-available customer lists, Plaintiffs sufficiently alleged trade secret misappropriation. The Complaint says that Thomas had access to and agreed not to disclose proprietary information such as “mortgage loans, mortgage loan applications, customers, customer lists, customer files, mortgage loan pipeline reports, sales manuals, policy and procedure manuals and other internal reports...” (Ct. Rec. 21 Ex. 1 at 9.) As Plaintiffs note, the Complaint alleges Thomas took, and Prime profited from, other information besides the customer lists that Thomas and Prime could have compiled by spending a few hours at the County Auditor's office and sifting through public records. Accordingly, Defendants' motion is denied with respect to this claim.

2. Computer Fraud and Abuse Act (“CFAA”)

Defendants argue that Ninth Circuit case law bars Plaintiffs' CFAA claim. Thomas notes that National City had a similar claim dismissed in an unrelated case in the Western District of Washington, and posits that collateral estoppel precludes the claim. Additionally, Defendants say that Plaintiffs did not adequately plead the required loss amount during the relevant period.

*4 The CFAA prohibits accessing a protected computer ^{FN2} without authorization and exceeding authorized access on a protected computer. 18 U.S.C. § 1030(a). The Ninth Circuit held that an employee who is allowed to use the employer's computer for work never accesses it without authorization for the purposes of CFAA, even if the employee does so to further personal interests. *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1133 (9th Cir.2009). In *Brekka*, an employee consultant e-mailed himself documents he obtained and created while working for LVRC, his employer. *Id.* at 1129-30. Eventually, the consultant left LVRC, and LVRC was concerned he was using those documents to compete with it. *Id.* at 1130.

^{FN2}. The term “protected computer” includes any computer used in or affecting interstate or foreign commerce or communication. 18 U.S.C. § 1030(e)(2)(B). Thus, any computer connected to the internet is a protected computer. Kyle W. Brenton, *Trade Secret Law and the Computer Fraud and*

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Abuse Act, 2009 U. Ill. J.L. Tech. & Pol' y 429, 433 (2009).

The court decided that disloyal employees do not have sufficient notice that they could be liable for civil CFAA violations. *Id.* at 1134-35. Because the CFAA is a criminal statute, the Ninth Circuit interpreted the CFAA through the lens of the rule of lenity, which requires interpretation in accordance with ordinary usage. An ordinary person would understand that an employee who is permitted or required to use a computer for work does not access the computer without technological authorization, even if the employee does so to compete with the employer. *Id.* The employee's subjective state of mind, the purpose for which the employee accesses the documents, and whether the employee breaches a state law duty of loyalty to the employer by so doing are irrelevant to whether he exceeds the scope of authorization. *Id.* at 1135 n. 7.

Brekka squarely forecloses Plaintiffs' CFAA claim. The facts as alleged are indistinguishable from *Brekka* in relevant respects. Both in this case and in *Brekka*, employees allegedly took confidential information from computers that they were permitted to use for work and used it to compete with the employer.^{FN3}

FN3. The cases from other jurisdictions that Plaintiffs cite do not persuade the Court because they conflict with the controlling law in this circuit. For instance, the authority relied on by the court in *Motorola, Inc. v. Lemko Corp.*, 609 F.Supp.2d 760, 767 (N.D.Ill.2009), was specifically rejected by the Ninth Circuit in *Brekka*. 581 F.3d at 1134. Similarly, *United States v. John*, 597 F.3d 263, 273 (5th Cir.2010), a criminal case, held that an employee who uses the employer's computers to perpetrate criminal fraud is liable under the CFAA, but also recognized that the Ninth Circuit interprets the statute differently. To the extent *John* is persuasive authority, it does not apply in this situation because Plaintiffs do not allege Defendants committed any crime or fraud.

Finally, Prime is not vicariously liable under the CFAA even if we assume that Prime directed National City employees to take information from National City's computers. Those employees were authorized to

access the information. If the agent who accessed the computer had authorization, the principal who ordered the download cannot be liable either. See *Nat'l City Bank, N.A. v. Republic Mortgage Home Loans, LLC*, No. C 09-1550 RSL, 2010 WL 959925, at *5 (W.D.Wash. Mar.12, 2010); *Charles Schwab & Co. v. Carter*, No. 04 C 7071, 2005 WL 2369815, at *6-*7 (N.D.Ill. Sept.27, 2005) (holding that an employer may be vicariously liable for urging its employee to exceed authorized access on a computer for the employer's benefit). This claim is properly vindicated under the trade secret laws. Accordingly, Defendants' motion to dismiss is granted in part: Plaintiffs' CFAA claim is dismissed with prejudice.

3. Tortious Interference with Business Expectancy

Defendants urge that Plaintiffs had no valid expectation that their at-will employees would continue to work for them, so they have no claim for tortious interference with a business expectancy. A cause of action for tortious interference with a business expectancy under Washington law has five elements: 1) a valid business expectancy; 2) defendants had knowledge of the relationship; 3) defendants intentionally interfered, causing a breach of the relationship; 4) defendants interfered for an improper purpose or using improper means; and 5) damages. *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wash.2d 133, 157, 930 P.2d 288 (1997) (citing *Commodore v. Univ. Mech. Contractors, Inc.*, 120 Wash.2d 120, 137, 839 P.2d 314 (1992); *Roger Crane & Assocs. v. Felice*, 74 Wash.App. 769, 777-78, 875 P.2d 705 (1994)). A business expectancy exists when there is a relationship between parties contemplating a contract. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wash.2d 342, 353 n. 2, 144 P.3d 276 (2006). This requires only a reasonable expectancy that the contract will come to fruition, and not a completed contract. *Scymanski v. Dufault*, 80 Wash.2d 77, 84-85, 491 P.2d 1050 (1972); *Brotten v. May*, 49 Wash.App. 564, 569, 744 P.2d 1085 (1987).

*5 Washington courts have held that at-will employees have no business expectancy in continued employment. *Woody v. Stapp*, 146 Wash.App. 16, 24, 189 P.3d 807 (2008). At-will employment clearly limits an employee's expectation of job security. *Raymond v. Pac. Chem.*, 98 Wash.App. 739, 747, 992 P.2d 517 (1999), overruled on other grounds by *Brown v. Scott Paper Worldwide Co.*, 143 Wash.2d 349, 20 P.3d 921 (2001).

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The Court holds that Plaintiffs did not have a business expectancy in their future relationship with their at-will employees. It is undisputed that those employees could quit at any time. Although Plaintiffs had valid *contracts* with those employees, Plaintiffs also sue for tortious interference with contract. Accordingly, Defendants' motion to dismiss is granted in part: Plaintiffs' tortious interference with business expectancy claim is dismissed with prejudice.

4. Corporate Raiding

The Court agrees with Defendants that "corporate raiding" is not a recognized cause of action under Washington law. Research revealed no Washington authority discussing a cause of action for corporate raiding, and Plaintiffs provided none. The conduct that forms the basis for this claim may be vindicated under other theories.

C. Motion to Strike Punitive Damages

Defendants argue that punitive damages are prohibited because Washington law applies to Plaintiffs' tort claims. Plaintiffs urge that Ohio law applies, or if not, Idaho law applies to some claims, and punitive damages are permitted for those claims.

To resolve this dispute, the Court must determine which state's law applies to this case. The Restricted Stock Agreement and Bank Manager Compensation Agreement between National City and Thomas included a clause indicating that they are governed by Ohio law. The parties agree that the contract claims are governed by Ohio law, but dispute whether Ohio or Washington law applies to the tort claims.

A federal court sitting in diversity jurisdiction ^{FN4} must apply the forum state's choice of law rules. *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1182 (9th Cir.2009). When a case is transferred between districts, the court must apply the transferor state's choice of law rules, unless the case was transferred for improper venue or lack of personal jurisdiction. *Muldoon v. Tropitone Furniture Co.*, 1 F.3d 964, 965-67 (9th Cir.1993); *Tel-Phonic Servs. Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134, 1141 (5th Cir.1992). In this case, the Northern District of Ohio did not specifically decide whether personal jurisdiction and venue were proper there, and transferred "in the interest of justice and upon the agreement of all parties."

FN4. Initially, this case involved a federal question and pendent jurisdiction over related state law claims. With the dismissal of the CFAA claim, however, no federal question remains and the only basis for jurisdiction is diversity of citizenship. Nevertheless, the following analysis applies equally to federal question cases involving supplemental jurisdiction over state law claims. *See Paulsen v. CNF, Inc.*, 559 F.3d 1061, 1080 (9th Cir.2009) (citing *Patton v. Cox*, 276 F.3d 493, 495 (9th Cir.2002)); *Bass v. First Pac. Networks, Inc.*, 219 F.3d 1052, 1055 n. 2 (9th Cir.2000); *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1164 (9th Cir.1996) (citations omitted).

It is unnecessary to decide which state's conflict of law provisions apply because there is no conflict of laws. Under either Washington or Ohio law, Washington law applies to the tort claims and Ohio law applies to the contract claims. The courts of both Ohio and Washington adopted the Restatement of the Law (Second) Conflict of Laws § 187(2) to determine whether the parties' contractual choice of law clause is valid. *Erwin v. Cotter Health Ctrs.*, 161 Wash.2d 676, 694, 167 P.3d 1112 (2007); *Schulke Radio Prods., Ltd. v. Midwestern Broad. Co.*, 6 Ohio St.3d 436, 453 N.E.2d 683, 686 (Ohio 1983). Under that section, courts honor the parties' contractual choice of law as long as the chosen state has some connection to the parties, there is some other reasonable basis for the choice, or application of the law of the chosen state does not violate the fundamental policy of a state with a greater interest in determination of the issue. *Restatement (Second) Conflict of Laws § 187*. The parties do not argue that Thomas's and National City's contractual choice of Ohio law is invalid, and the Court agrees that their choice meets the criteria.

*6 Both Ohio and Washington law would apply Washington law to the tort claims. Courts in both states follow the *Restatement (Second) Conflict of Laws § 145* and apply the tort law of the state with the most significant relationship to the occurrence and the parties. *Zenaida-Garcia v. Recovery Sys. Tech., Inc.*, 128 Wash.App. 256, 259-60, 115 P.3d 1017 (2005) (citations omitted); *Morgan v. Biro Mfg. Co.*, 15 Ohio St.3d 339, 474 N.E.2d 286, 289 (Ohio 1984). Factors to consider in determining which state has the most significant relationship include 1) the place where the

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injury occurred; 2) the place where the conduct causing the injury occurred; 3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and 4) the place where the relationship, if any, between the parties is centered. Restatement (Second) Conflict of Laws § 145. Ohio courts also will consider the interests of the states and the parties in the application of a specific state's law. Morgan, 474 N.E.2d at 289.

Considering these factors, Washington has the most significant relationship to this dispute. Plaintiffs' injury occurred in Washington, Idaho, and Ohio, in that Plaintiffs lost branches in Washington and Idaho, and their business is headquartered in Ohio. The parties are domiciled in Washington, Ohio, and Texas. But all of Thomas's relevant conduct occurred in Spokane. That is where he allegedly orchestrated the scheme to move Plaintiffs' business to Prime. Also, the parties' entire relationship was centered in Washington. Taking together all the factors, Washington has a more significant connection than either Ohio or Idaho. The only connection to Ohio is Plaintiffs' domicile. And although some parts of the claim arose in Idaho because Plaintiffs' Idaho employees defected, by Plaintiffs' own admission most of the claim arose in Washington.

Moreover, even the claims arising out of Plaintiffs' losses in Idaho have a more significant relationship to Washington. The conduct causing those injuries occurred in Washington, and none of the parties is an Idaho resident. Indeed, Plaintiffs say in their Complaint that the "epicenter" of the whole scheme was in Spokane and the Spokane Valley. (Ct. Rec. 21 Ex. 2 at 4.) The purpose of choosing a state's tort law is to apply only the law of the state with the most significant relationship to the claim. See Restatement (Second) Conflict of Laws § 1. Applying several states' laws to different tort claims in the same case thwarts that purpose.

Plaintiffs cite unpersuasive cases to argue that the contractual choice of law provision was intended to encompass torts. In Plaintiffs' cases, courts used a contractual choice of law provision to apply the chosen state's law to tort claims. But the language in those contracts was materially broader than the provision in this case. For example, in Moses v. Business Card Express, Inc., 929 F.2d 1131 (6th Cir.1991), the provision said that "[t]his Franchise and License Agree-

ment and the construction thereof shall be governed by the laws of the state of Michigan..." Id. at 1139. The court determined that the language specifically indicated that the clause refers to both the agreement and its entire construction. Id. at 1139-40. Additionally, it held that because the plaintiffs' tort claims sought to avoid enforcement of the contract itself, the validity of the contract was at issue so it was necessary to apply the law specified in the contract to the tort claims as well. Id. at 1140.

*7 In contrast, the Restricted Stock Agreement says it "shall be construed in accordance with, and governed by the internal substantive laws of, the State of Ohio." (Ct. Rec. 52 Ex. 3 at 5.) The Bank Manager Compensation Agreement says it "shall be governed by the laws of the State of Ohio." (Ct. Rec. 21 Ex. 2 at 5.) This language is not as all-encompassing as the language from the contract in Moses. It does not say that the construction of the agreements is governed by Ohio law, just the agreements themselves. Neither do Defendants dispute that the contract itself was initially valid.

Plaintiffs also cite K.S. v. Ambassador Programs, Inc., No. CV-08-243-FVS, 2009 WL 539695 (E.D.Wash. Feb.27, 2009), in support of their position. In that case, Plaintiffs were Virginia residents and Defendants were residents of Washington. Id. at *2. The parties had a contract with a choice of law clause selecting Washington law, but Plaintiffs sued for tort claims in addition to breach of contract. Id. at *1-*2. The Court, citing Washington law holding that a contractual choice of law provision may be one element affecting the "most significant relationship" test, determined that before discovery there was insufficient evidence to decide whether Washington or Virginia law should govern tort claims. Id. at *2; see also Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 159 (1987) ("Although a choice of law provision in a contract does not govern tort claims arising out of the contract, it may be considered as an element in the most significant relationship test used in tort cases.") (emphasis added).

Ambassador Programs does not persuade the Court that the contractual language encompasses torts. Washington has the most significant relationship to the torts at issue, even taking into account the contractual choice of law provision.

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Washington law prohibits punitive damages awards absent express statutory authorization. *See, e.g., McKee v. AT & T Corp.*, 164 Wash.2d 372, 401, 191 P.3d 845 (2008); *Dailey v. N. Coast Life Ins. Co.*, 129 Wash.2d 572, 575, 919 P.2d 589 (1996). There is no statute authorizing punitive damages for Plaintiffs' common law claims. Accordingly, the Court grants Defendants' motion in part and strikes Plaintiffs' request for punitive damages.

D. Motion for Leave to Amend

Plaintiffs move for leave to file an amended complaint. The proposed amended complaint does not add new parties or causes of action. Nor does it change the theory for recovery. It identifies certain non-parties who were allegedly involved in the wrongdoing and clarifies that the case concerns Defendants' takeover of National City branches in Washington, Oregon, Idaho, and Montana. Defendants do not consent to amendment. They claim that there is no justification for the six-month gap between filing of the initial complaint and the request for leave to amend because Plaintiffs knew about most of the new allegations from the start. Defendants say they are prejudiced by the amendments because they broaden the scope of the preliminary injunction, and the proposed amendment is futile and frivolous in light of evidence from the preliminary injunction hearing.

*8 A district court should freely grant leave to amend under Federal Rule of Civil Procedure 15(a). *Wyshak v. City Nat'l Bank*, 607 F.2d 824, 826-27 (9th Cir.1979); *but see Fidelity Fin. Corp. v. Fed. Home Loan Bank of S.F.*, 792 F.2d 1432, 1438 (9th Cir.1986) (holding that the court's discretion to deny leave to amend is especially broad when the court previously granted leave to amend). Leave to amend should be denied only when the defendant is prejudiced or the plaintiff unduly delayed in moving to amend by waiting until an advanced stage in litigation. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir.1990). Prejudice exists if discovery has concluded or the plaintiff acted in bad faith. *Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1520 (9th Cir.1983) (holding that the plaintiff acted in bad faith when the plaintiff requested amendment two years after filing the initial complaint and sought to invert the legal theory, the amended complaint provided no practical benefits, and it appeared that amendment was a bad-faith litigation tactic).

The Court finds good cause to grant Plaintiffs' motion for leave to amend. Plaintiffs did not delay unduly in filing the motion to amend, and amendment will not prejudice Defendants. Plaintiffs filed their motion to amend slightly over six months after filing their original Complaint. Although some expedited discovery took place before the preliminary injunction hearing, discovery is far from over. Even if Plaintiffs knew about the additional facts they wish to allege in the amended complaint at the time of the first complaint, a six-month delay is acceptable because the case is still in its early stages. *Cf. Granus v. N. Am. Philips Lighting Corp.*, 821 F.2d 1253, 1256 (6th Cir.1987) (holding that the district court did not abuse its discretion in granting amendment of an answer eleven months after initiation of the case and after significant discovery had taken place). Plaintiffs appropriately focused their energies on settlement at first and moved to amend only after those efforts failed.

After the hearing on the motion to dismiss, Plaintiffs filed a revised motion to amend their Complaint. In the revised proposed amended complaint, Plaintiffs extend their claims to include Prime's alleged violations during the takeover of PNC's Oak Harbor, Washington branch. That switch occurred in April 2010. Defendants oppose this amendment for two reasons. First, they assert that the claims are entirely new. Second, they claim that John Schleck's testimony at the preliminary injunction hearing shows no possible basis for claims against Prime from the Oak Harbor takeover. According to Defendants, Plaintiffs are barred by Federal Rule of Civil Procedure 11 from raising any claims related to the Oak Harbor office because such claims would be frivolous.

The Court agrees with Plaintiffs and grants leave to amend as requested. The claims are not new. In their original Complaint, Plaintiffs alleged that Prime directed a region-wide conspiracy to take over National City branches by pirating employees, and that those actions constituted tortious interference with contract, unfair competition, and civil conspiracy. The claims are thus not new at all. Plaintiffs merely extended them to an office that did not defect to Prime until after Plaintiffs filed the first version of the amended complaint.

*9 Moreover, Mr. Schleck's testimony does not convince the Court that the amendment is futile, frivolous, or in bad faith. Mr. Schleck testified that he did

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not know whether Prime recruited the Oak Harbor employees or whether Defendant Thomas had anything to do with the defection in that office. (Ct. Rec. 138, Ex. 1 at 7-8.) This is no surprise, however. The expedited discovery that took place in advance of the preliminary injunction hearing did not include the Oak Harbor branch. It stands to reason that Schleck did not know anything about unlawful recruitment that may have taken place at Oak Harbor because discovery did not yet address that branch. Dissatisfied, departing employees commonly refrain from telling their supervisors about their new jobs and how they obtained them, especially when they leave under the circumstances of dubious legality that are alleged to have existed in this case.

It is also important to note that Defendants did not move to dismiss the claims for tortious interference with contract, unfair competition, and conspiracy. Those claims are legally cognizable and adequately pled. Plaintiffs merely allege that the same activities that underlay those claims against Prime with respect to the other branches also apply to Oak Harbor. If true, those allegations support claims against Prime for wrongful conduct in connection with acquiring the Oak Harbor branch, as they support a claim for similar conduct with respect to other branches. It remains to be seen whether the facts will support those claims. Merely because Plaintiffs possessed insufficient evidence at the time of the preliminary injunction hearing to show a likelihood of success on the merits of all of their claims does not mean the evidence does not exist and cannot be obtained through discovery. Therefore, amendment is not futile.

Amendment will not prejudice Defendants. The only prejudice Defendants claim is that the preliminary injunction's scope will be expanded if the new allegations are added. Plaintiffs filed a supplemental motion that clarifies that the proposed injunction applies only to former employees in National City's Eastern Washington and Idaho branches and the amendment does not expand the requested injunction. (Ct.Rec.128.) That supplement eliminates Defendants' concerns.

The cases Defendants cite in which leave to amend was denied are inapposite. In *Jackson*, the court upheld denial of a motion to amend when the plaintiff delayed over a year and did not allege new information gleaned through discovery in the

amended complaint. 902 F.2d at 1388. Here, although Plaintiffs knew about the new allegations when they first filed, the delay period is much shorter and only limited discovery took place so far. *Cf., e.g., Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir.2004) (upholding refusal to grant leave to amend when the amended complaint did not allege legally cognizable claims); *Chodos v. West Publ'g Co.*, 292 F.3d 992, 1003 (9th Cir.2002) (holding that amendment should not be granted if it is requested in bad faith, would cause undue delay, or is employed as a dilatory tactic, and refusing to grant leave to amend to include facts known from the time the plaintiffs first filed their complaint); *Sweaney v. Ada County*, 119 F.3d 1385 (9th Cir.1997) (holding that leave to amend need not be granted when the proposed amended complaint includes no allegations that amount to legal violations). Plaintiffs' proposed amendment is a good-faith attempt to include all relevant conduct in their Complaint. Given the excusable delay and lack of prejudice, the Court grants Plaintiffs' motion.

IV. Conclusion

***10 Accordingly, IT IS HEREBY ORDERED:**

1. Defendant Prime's Motion to Dismiss in Part and Strike Punitive Damages (Ct.Rec.29) is **GRANTED AND DENIED IN PART**. Plaintiffs' claims for CFAA violations, tortious interference with a business expectancy, and corporate raiding are **DISMISSED with prejudice**. Plaintiffs' claim for punitive damages is **STRICKEN**.

2. Defendant Thomas's Motion for Joinder (Ct.Rec.25) and Motion to Dismiss CFAA Claims (Ct.Rec.26) are **GRANTED**.

3. Plaintiffs' Motion for Leave to File First Amended Complaint (Ct.Rec.72) and related Motion to Expedite (Ct.Rec.68) are **DENIED as moot**. Plaintiffs' Revised Motion for Leave to File First Amended Complaint (Ct.Rec.133) is **GRANTED**. Plaintiffs shall file an Amended Complaint no later than August 20, 2010.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and distribute copies to counsel.

ORDERED.

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E.D.Wash.,2010.
National City Bank, N.A. v. Prime Lending, Inc.
Slip Copy, 2010 WL 2854247 (E.D.Wash.)

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(Cite as: 2008 WL 3244150 (N.D.Tex.))

C

Only the Westlaw citation is currently available.

United States District Court,
N.D. Texas,
Dallas Division.
ROBAX CORPORATION d/b/a Texas Waterworks,
Plaintiff,
v.
PROFESSIONAL PARKS, INC., et al., Defendants.

Civil Action No. 3:07-CV-1399-D.
Aug. 8, 2008.

Brian W. Erikson, Quilling Selander Cummiskey &
Lownds, Dallas, TX, for Plaintiff.

Edward Newman Brandt, III, E Brandt & Associates,
Arlington, TX, for Defendants.

MEMORANDUM OPINION AND ORDER
SIDNEY A. FITZWATER, Chief Judge.

*1 Plaintiff Robax Corporation d/b/a Texas Waterworks ("Texas Waterworks") moves for partial summary judgment on three of its seven claims—one based on the Texas Construction Trust Fund Act, Tex. Prop.Code Ann. §§ 162.001-162.033 (Vernon 2007) ("Trust Act"), another on common law tort of misrepresentation, and a third for breach of contract—against defendants Professional Parks, Inc. ("Professional"), Havern Davis ("Davis"), and Dow Mullins ("Mullins").^{FN1} Having determined that Texas Waterworks' summary judgment evidence establishes beyond peradventure only its breach of contract claim against Professional, the court grants the motion in part as to that claim but otherwise denies the motion.

FN1. Although framed as a motion for partial summary judgment, Texas Waterworks asks that, if the court grants the motion, the remaining claims be dismissed and a final judgment entered. P. Mot. 1. It makes a similar request in its brief. P. Br. 17. Because the court is granting Texas Waterworks' motion only as to its breach of contract claim, the court will not dismiss the remaining claims.

I

The City of Frisco contracted with a general contractor, Lee Lewis Construction, Inc. ("Lewis Construction"), to construct the Frisco Recreation and Aquatics Facility in Frisco, Texas ("the Project").^{FN2} Lewis Construction then subcontracted with Texas Waterworks ("Lewis Construction Subcontract") for Texas Waterworks to design and build the indoor and outdoor aquatics facilities for the Project. A principal component of the Lewis Construction Subcontract required Texas Waterworks to provide waterslides for the Project.

FN2. The court attempts to recount the evidence in a light favorable to Professional as the summary judgment nonmovant and draws all reasonable inferences in its favor. See, e.g., U.S. Bank Nat'l Ass'n v. Safeguard Ins. Co., 422 F.Supp.2d 698, 701 n. 2 (N.D.Tex.2006) (Fitzwater, J.) (citing Clift v. Clift, 210 F.3d 268, 270 (5th Cir.2000)). But because Professional has not filed a response brief, it is not entirely clear which of Texas Waterworks' factual assertions Professional contests. Nevertheless, either through its responsive pleading or through its failure to respond to requests for admissions, Professional has admitted most of the facts that the court relates.

Texas Waterworks in turn subcontracted with Professional ("Professional Subcontract") and assigned to Professional the obligation of manufacturing, delivering, and installing the waterslides for the Project. Before the parties entered into the Professional Subcontract, Professional, through Davis, its President, represented to Texas Waterworks that Professional would obtain key waterslides for the Project from Polin, a Turkish waterslide manufacturer and one of the largest waterslide manufacturers in the world.

The Professional Subcontract specified a total contract price of \$286,500. Professional was obligated to substantially complete the manufacture and installation of the waterslides within 120 days of signing of the contract and Texas Waterworks' initial down payment (30% of the contract price). Texas Water-

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works paid the initial down payment on January 5, 2007, and the contract was fully signed by September 27, 2006. Thus Professional was required to achieve substantial completion by May 5, 2007. Additionally, the Professional Subcontract specified that time was “of the essence.” As of August 13, 2007, the date this lawsuit was filed, Professional had not delivered or even manufactured any of the required waterslides. To date, Texas Waterworks has paid Professional \$165,950 pursuant to the Professional Subcontract, and all payments were timely.

In the months after the substantial completion deadline, Texas Waterworks wrote several emails and letters to Professional attempting to determine when Professional would deliver the waterslides, but Texas Waterworks was not able to get an answer from Professional. On June 28, 2007 Texas Waterworks sent Professional a notice of default, which complied with the requirements of the Professional Subcontract. On the same day, Texas Waterworks requested in a separate letter that Professional provide financial assurance of its performance under the Professional Subcontract. Professional has neither provided Texas Waterworks a schedule for delivery of the waterslides for the Project nor has it provided any financial assurances. Texas Waterworks properly terminated the Professional Subcontract based on Professional's default, and in August 2007 Texas Waterworks contracted with another waterslides distributor, Westwind Leisure Group Ltd. (“Westwind”), to provide the waterslides that Texas Waterworks needed to fulfill its obligation under the Lewis Construction Subcontract. The contract price for this new contract with Westwind is \$315,000, a significant portion of which Texas Waterworks has already paid.

*2 Texas Waterworks sued Professional, Davis, and Mullins, another officer of Professional, for seven causes of action.^{FN3} Texas Waterworks now moves for summary judgment on three of its seven claims. Professional has not submitted an opposition brief. Much of Texas Waterworks' summary judgment evidence is based on requests for admissions to which Professional has failed to respond.^{FN4} Professional's deemed admissions are competent summary judgment evidence. See *In re Carney*, 258 F.3d 415, 420 (5th Cir.2001) (“Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or

other evidence in the summary judgment record.”).

FN3. Some of these claims were asserted against Professional, individually, and some included defendants Davis and Mullins.

FN4. Texas Waterworks sent Professional its first request for admissions on December 4, 2007. Defendants have yet to respond to these requests. Accordingly, under Fed.R.Civ.P. 36(a)(3), all of the requested admissions in Texas Waterworks' first request for admissions are deemed admitted. Rule 36(a) specifies that any matter admitted is

conclusively established. In form and substance a Rule 36 admission is comparable to an admission in pleadings or a stipulation drafted by counsel for use at trial, rather than to an evidentiary admission of a party. An admission that is not withdrawn or amended cannot be rebutted by contrary testimony or ignored by the district court simply because it finds the evidence presented by the party against whom the admission operates more credible. This conclusive effect applies equally to those admissions made affirmatively and those established by default, even if the matters admitted relate to material facts that defeat a party's claim.

Am. Auto. Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 1120 (5th Cir.1991) (internal quotation marks and footnotes omitted) (quoting Rule 36 Advisory Committee's Note, 48 F.R.D. 487, 534 (1970)).

II

Because Texas Waterworks bears the burden of proof on the three claims on which it seeks summary judgment, it must establish “ ‘beyond peradventure all of the essential elements of the[se] claim[s].’ ” *Bank One, Tex., N.A. v. Prudential Ins. Co. of Am.*, 878 F.Supp. 943, 962 (N.D.Tex.1995) (Fitzwater, J.) (quoting *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986)). This means that Texas Waterworks must demonstrate that there are no genuine and material fact disputes on any of the essential elements of

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each claim. See *Martin v. Alamo Cmty. Coll. Dist.*, 353 F.3d 409, 412 (5th Cir.2003). The court has noted that the “beyond peradventure” standard is “heavy.” See, e.g., *Cont'l Cas. Co. v. St. Paul Fire & Marine Ins. Co.*, 2007 WL 2403656, at *10 (N.D.Tex. Aug.23, 2007) (Fitzwater, J.). Although Professional has not responded to Texas Waterworks' motion, the court is not permitted to enter a “default” summary judgment, but the court may accept as true all of Texas Waterworks' undisputed summary judgment evidence. See *Tutton v. Garland Indep. Sch. Dist.*, 733 F.Supp. 1113, 1117 (N.D.Tex.1990) (Fitzwater, J.). Moreover, “[a] summary judgment nonmovant who does not respond to the motion is relegated to [its] unsworn pleadings, which do not constitute summary judgment evidence.” *Bookman v. Shubzda*, 945 F.Supp. 999, 1002 (N.D.Tex.1996) (Fitzwater, J.) (citing *Solo Serve Corp. v. Westowne Assocs.*, 929 F.2d 160, 165 (5th Cir.1991)).

III

The court first addresses Texas Waterworks' Trust Act claim against all three defendants.

A

Under the Trust Act, a trustee of trust funds “is liable for misapplication of trust funds if he intentionally or knowingly or with intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds.” *Holladay v. CW & A, Inc.*, 60 S.W.3d 243, 245-46 (Tex.App.2001, pet.denied) (citing § 162.031(a)). The Trust Act defines trust funds as “payments ... made to a contractor or subcontractor or to an officer, director, or agent of a contractor or subcontractor, under a construction contract for the improvement of specific real property in this state.” § 162.001.

*3 A party who misapplies these trust funds is subject to civil liability if (1) it breaches the duty imposed by the Texas Construction Fund Act, and (2) the requisite plaintiffs are within the class of people that the act was designed to protect and have asserted the type of injury the act was intended to prohibit.

Holladay, 60 S.W.3d at 246 (citing *Lively v. Carpet Servs., Inc.*, 904 S.W.2d 868, 873 (Tex.App.1995, writ denied)); see also *Kelly v. Gen.*

Interior Constr., Inc., --- S.W.3d ---, 2008 WL 2605614, at *3 (Tex.App. July 3, 2008, no pet. h.) (citing *C & G, Inc. v. Jones*, 165 S.W.3d 450, 453 (Tex.App.2005, pet.denied)).

B

The court first inquires whether Texas Waterworks' summary judgment evidence demonstrates that it is among the class of persons whom the Trust Act is intended to protect.

1

The Trust Act is intended to protect beneficiaries of trust funds. See *Lively*, 904 S.W.2d at 875. The Trust Act defines “beneficiaries of trust funds” as “[a]n artisan, laborer, mechanic, contractor, subcontractor, or materialman who labors or who furnishes labor or material for the construction or repair of an improvement on specific real property in this state is a beneficiary of any trust funds paid or received in connection with the improvement.” § 162.003. “The Legislature enacted section 162 as a special protection for contractors and subcontractors in order to avoid the injustice of owners' and contractors' refusal to pay for work completed.” *Herbert v. Greater Gulf Coast Enters., Inc.*, 915 S.W.2d 866, 870 (Tex.App.1995, no writ) (citing *Am. Amicable Life Ins. Co. v. Jay's Air Conditioning & Heating, Inc.*, 535 S.W.2d 23, 26 (Tex.Civ.App.1976, writ ref'd n.r.e.)); see also *In re Waterpoint Int'l*, 330 F.3d 339, 345 (5th Cir.2003) (“[Section 162] was enacted to serve as a special protection for subcontractors and materialmen in situations where contractors or their assignees refused to pay the subcontractor or materialman for labor and materials. The Code imposes fiduciary responsibilities on contractors to ensure that subcontractors, mechanics and materialmen are paid for work completed.” (citation omitted)); *Taylor Pipeline Constr., Inc. v. Directional Road Boring, Inc.*, 428 F.Supp.2d 696, 714-15 (E.D.Tex.2006). “Chapter 162 was enacted to give protection to materialmen in addition to that provided by the materialman's liens statutes.” *C & G, Inc.*, 165 S.W.3d at 454 (citing *McCoy v. Nelson Utils. Servs., Inc.*, 736 S.W.2d 160, 164 (Tex.App.1987, writ ref'd n.r.e.)).

2

The money Texas Waterworks paid Professional pursuant to the Professional Subcontract constituted trust funds under the Trust Act. And Professional did not pay to Polin any of the trust funds that Professional

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received from Texas Waterworks. Professional said that Polin would be manufacturing the waterslides for the Project. Since the time it signed the Professional Subcontract, Professional has not paid any money to Polin. Moreover, because Davis and Mullins both had authority to direct how Professional would make payments, and they jointly made the determination not to pay Polin the trust funds, they, along with Professional, are trustees of the trust funds. *See* § 162.002 (“A contractor, subcontractor, or owner or an officer, director, or agent of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds, is a trustee of the trust funds.”); *see also C & G, Inc.*, 165 S.W.3d at 455 (“[T]he key to determining ‘control or direction’ was whether those who could exercise power did so, i.e., whether they actually diverted trust funds and failed to pay the materialman entitled to the funds.”).

*4 Although Texas Waterworks has met many of the elements of a Trust Act claim against defendants, it has not demonstrated that it is among the class of persons whom the Trust Act was intended to protect. The funds Texas Waterworks paid Professional were trust funds, but Texas Waterworks was not a beneficiary of these funds. If anyone was a beneficiary, it was Polin, or anyone else furnishing material or labor in manufacturing the waterslides that Professional was required to deliver to Texas Waterworks. Texas Waterworks was not required to perform, and in fact did not perform, any services to assist Professional in fabricating the waterslides for the Project. The Trust Act was meant to protect those contractors or subcontractors who have completed labor or have provided materials and thus are beneficiaries of these funds. *See Herbert*, 915 S.W.2d at 870; *In re Waterpoint Int'l*, 330 F.3d at 345. Texas Waterworks is not among this class of persons. Texas Waterworks has presented no authority to suggest that non-beneficiaries of misappropriated trust funds can bring a claim under the Trust Act. The court is not aware of any case in which a party in Texas Waterworks' situation—a contractor who has *paid* the trust funds at issue to a downstream subcontractor—has successfully asserted a Trust Act claim against a downstream subcontractor for misappropriation of those funds. Texas Waterworks is complaining of Professional's *non-performance*, not its *non-payment*. Thus Texas Waterworks cannot bring this claim against Professional under the Trust Act.

C

Assuming *arguendo* that Texas Waterworks is among the class of persons whom the Trust Act is intended to protect, the court must still deny summary judgment because Texas Waterworks' evidence, coupled with the deemed admissions, does not establish as a matter of law that Professional misappropriated the trust funds.

Although Professional has admitted that it represented to Texas Waterworks that it would obtain the key waterslide from Polin, this representation is not in the Professional Subcontract. So far as the court can tell, Polin's name is not even mentioned in the Professional Subcontract. The deemed admissions on which Texas Waterworks relies establish that Professional did not have a written contract or purchase order with Polin concerning the waterslides. Moreover, the affidavit of Robert Baxter (“Baxter”), Texas Waterworks' President, indicates that Polin has yet to do *any* work on the waterslides for the Project. In a July 6, 2007 letter to Lewis Construction, Baxter stated that he was “unable to determine if [Professional] even placed an order for waterslides with Polin ... [and was] unable to determine if Polin is fabricating any waterslides for [Professional].” P.App. 98-99. Thus there is no evidence, much less proof that establishes the fact beyond peradventure, that Polin has provided or is contractually obligated to provide any labor or materials for the fabrication of the waterslides for the Project. Thus fact issues remain regarding whether Polin is a beneficiary of the trust funds.

*5 A trustee misapplies trust funds when he “directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first fully paying all current or past due obligations incurred by the trustee to the beneficiaries of the trust funds[.]” § 162.031. The Trust Act defines “current or past due obligations” as “those obligations incurred or owed by the trustee for labor or materials furnished in the direct prosecution of the work under the construction contract prior to the receipt of the trust funds[.]” § 162.005(2). Texas Waterworks has not established beyond peradventure that Professional incurred a financial obligation to Polin for labor or materials that Polin furnished for the Project. Without such a financial obligation to Polin or to some other subcontractor, Professional could not have misappropriated the trust funds, even if Professional never paid Polin any of the

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trust funds.

D

Texas Waterworks posits that if it cannot assert a Trust Act claim against defendants in its own name, it can bring one against defendants in Polin's stead through the doctrine of equitable subrogation.

There are two types of subrogation. Contractual (or conventional) subrogation is created by an agreement or contract that grants the right to pursue reimbursement from a third party in exchange for payment of a loss, while equitable (or legal) subrogation does not depend on contract but arises in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter.

Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co., 236 S.W.3d 765, 774 (Tex.2007) (citations omitted); see also C. Green Scaping, L.P. v. Westfield Ins. Co., 248 S.W.3d 779, 790 (Tex.App.2008, no pet.). “[Equitable subrogation] allows a party who pays the debt of another to put on the released creditor's shoes and collect reimbursement.” C. Green Scaping, 248 S.W.3d at 790. “The purpose of the doctrine is to prevent the unjust enrichment of the debtor who owed the debt that is paid.” Langston v. GMAC Mortgage Corp., 183 S.W.3d 479, 481 (Tex.App.2005, no pet.).

Texas Waterworks' attempt to assert a claim in the shoes of Polin on the basis of equitable subrogation is fraught with problems. First, the summary judgment evidence does not establish beyond peradventure that Polin is a beneficiary of the trust funds held by Professional. As the court notes *supra* at § III(C), Texas Waterworks has not established as a matter of law that Polin has provided, or is contractually obligated to provide, any labor or materials for the fabrication of the waterslides for the Project. Because Texas Waterworks has not demonstrated that Polin is a beneficiary of the trust funds under the Trust Act or that Professional misappropriated the trust funds, fact issues remain concerning whether Polin is entitled to assert a claim against Professional under the Trust Act.

*6 Assuming *arguendo* that Polin was a beneficiary of the trust funds and had a legitimate claim against defendants under the Trust Act, the doctrine of

equitable subrogation would not allow Texas Waterworks to stand in Polin's shoes to assert this claim. For the doctrine to apply in this case, it would be necessary for Texas Waterworks to show that Texas Waterworks has paid a debt to Polin owed by Professional, so that Texas Waterworks could stand in the shoes of Polin as creditor and collect the debt against Professional. Texas Waterworks appears to argue that its payments to Westwind qualify as satisfying a debt payable to Polin. But the court cannot discern how Texas Waterworks' payments to Westwind satisfy a debt that Professional owed to Polin. And even if Texas Waterworks' theory had force, the doctrine of equitable subrogation applies only if the payments satisfying Professional's debt to Polin were made involuntarily. See First Nat'l Bank of Kerrville v. O'Dell, 856 S.W.2d 410, 415 (Tex.1993); Mid-Continent Ins. Co., 236 S.W.3d at 774. Texas Waterworks has not addressed this requirement. Therefore, Texas Waterworks is not entitled to summary judgment on its Trust Act claim.

IV

Texas Waterworks' claim for misrepresentation and omission has three parts. First, Texas Waterworks points to Professional's representation that it would obtain certain waterslides from Polin. Second, Texas Waterworks contends that Professional made further misrepresentations when it periodically invoiced Texas Waterworks for progress that Professional was supposedly making in producing the waterslides. Third, Texas Waterworks posits that, while negotiating the Professional Subcontract, Professional concealed material facts related to its ability to perform its contractual obligations.

A

In analyzing Texas Waterworks' misrepresentation claim based on Professional's statement that it would obtain key waterslides from Polin, the court notes initially that Texas Waterworks' complaint and summary judgment motion do not indicate whether this claim is brought under common law fraud or negligent misrepresentation. Either way, Texas Waterworks' claim based on Professional's statement that it would obtain the waterslides for the Project from Polin requires that this representation be false. See McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests, 991 S.W.2d 787, 791 (Tex.1999); Formosa Plastics Corp. v. Presidio Eng'rs & Contractors, Inc., 960 S.W.2d 41, 47 (Tex.1998).

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“This Court has also repeatedly recognized that a fraud claim can be based on a promise made with no intention of performing, irrespective of whether the promise is later subsumed within a contract.” *Formosa Plastics*, 960 S.W.2d at 46. “A promise of future performance constitutes an actionable misrepresentation if the promise was made with no intention of performing at the time it was made.” *Id.* at 48. “Though a party’s intent is determined at the time of the representation, this intent may be inferred from the party’s acts after the representation is made.” *W & F Transp., Inc. v. Wilhelm*, 208 S.W.3d 32, 48 (Tex.App.2006, no pet.). But “the mere failure to perform a contract is not evidence of fraud.” *Formosa Plastics*, 960 S.W.2d at 48.

*7 The summary judgment evidence conclusively establishes that Professional represented to Texas Waterworks that Professional would obtain key waterslides from Polin for the Project. This was a promise of future performance. This promise could have been false, therefore, only if Professional had no intention of performing it. Request No. 5 in Texas Waterworks’ first requests for admissions seems to establish such an intent. Professional admitted by default that, “[a] t the time that [Professional] signed the [Professional] Subcontract, [Professional] did not intend to obtain some waterslides from Polin for the Project.” P.App. 33. Request No. 5, however, directly contradicts the admission in response to Request No. 4: “At the time that [Professional] signed the [Professional] Subcontract, [Professional] intended to obtain some waterslides from Polin for the project.” P.App. 33.^{FN5}

FN5. The only difference between the two requests for admissions is the “not” contained in Request No. 5.

In *In re Corland Corp.*, 967 F.2d 1069 (5th Cir.1992), the Fifth Circuit addressed the effect of seemingly contradictory Rule 36 admissions. In that case, a central issue was whether certain payments were made pursuant to a Corland promissory note or a Stephenson promissory note. *Id.* at 1074 The defendants admitted a request for admission that the payments were made under the Stephenson note, but then later denied essentially the same statement in another request for an admission. *Id.* Contrary to the former admission, the bankruptcy court found, based

on other evidence, that the payments were made pursuant to the Corland note. *Id.* The Fifth Circuit rejected the trustee’s argument that the defendants were bound by their admission that the payments were made pursuant to the Stephenson note, and that the bankruptcy court did not err in relying on evidence contradicting this particular admission. *Id.* The circuit court also held that the defendants’ admission that the payments were made under the Stephenson note “does not constitute a judicial admission.” *Id.*

The court reads *In re Corland* as standing for the proposition that when a party provides contradictory answers to requests for admissions, the responses do not have the effect of Rule 36 admissions, i.e., they are not binding, and contrary evidence can be offered and admitted. Another district court has similarly read *In re Corland*. See *James v. Harris County*, 2006 WL 2827050, at *9 (S.D.Tex. Sept.28, 2006) (“Moreover, the Fifth Circuit teaches that where an answering party’s responses to two different requests for admissions are contradictory, the admission relied on by the requesting party will not bind the answering party.” (citing *In re Corland*, 967 F.2d at 1074)).^{FN6} Thus following *In re Corland*, neither Request No. 4 nor Request No. 5 binds defendants.

FN6. Another Texas district court has held that when “two admissions are contradictory, then logically either may be used against the person answering the admission.” *Swallow Turn Music v. Wilson*, 831 F.Supp. 575, 578 n. 5 (E.D.Tex.1993). But the *Swallow Turn Music* court did not even mention *In re Corland*.

The only other evidence establishing that Professional did not intend to perform its promise of future performance is Professional’s admissions that, at the time it signed the Professional Subcontract, Professional owed Polin money from unrelated purchases, and Polin had told Professional that Polin would not ship any waterslides to Professional until Professional had paid some or all of its overdue accounts payable. Taken together, however, these admissions do not establish beyond peradventure that Professional lacked the intent to perform its promise of obtaining key waterslides from Polin for the Project. Professional was behind on payments to Polin for unrelated matters and had to resolve some of this indebtedness before obtaining waterslides for the Project. But these

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facts are consistent with Professional's intent to perform its promise of future performance. So far as the summary judgment record shows, Professional could have reasonably thought that it could resolve the arrearage to Polin in time to fulfill its promise to Texas Waterworks. Moreover, Professional's admissions that it was indebted to Polin on other deals does not establish the amount of this indebtedness or the amount of the debt that Professional was obligated to pay before Polin would ship waterslides. Texas Waterworks is not entitled to summary judgment on its fraud or negligent misrepresentation claim based on Professional's statement that it would obtain key waterslides for the Project from Polin.

B

*8 Although Texas Waterworks' complaint alleges that Professional misrepresented the progress of its obligations under the Professional Subcontract by periodically sending Texas Waterworks invoices, Texas Waterworks' summary judgment brief dealing with its claim for misrepresentation does not reference the sending of invoices as a basis for recovery. The court thus declines to grant summary judgment on this theory.

C

Texas Waterworks also asserts a claim for fraudulent concealment, contending that, during the negotiations of the Professional Subcontract, Professional deliberately concealed material facts from Texas Waterworks concerning Professional's ability to perform under the Professional Subcontract.

Professional's deemed admissions conclusively establish the following facts: (1) at the time Professional signed the Professional Subcontract, Professional had outstanding accounts payable with Polin, and Polin had told Professional that it would not ship any waterslides to Professional until Professional paid some of the outstanding debt; (2) at the time Professional signed the Professional Subcontract, Professional was in default on other agreements to provide waterslides, and Professional was involved in litigation and arbitration related to the defaults on these other agreements; and (3) before signing the Professional Subcontract, Professional did not disclose to Texas Waterworks that Professional was in default on other agreements to provide waterslides and did not disclose to Texas Waterworks the litigation and arbitration related to these defaults. Moreover, in his af-

fidavit, Baxter avers that, before entering into the Professional Subcontract, Professional never disclosed to Texas Waterworks that it had outstanding accounts payable with Polin or that there were disputes between Professional and Polin that might prevent Professional from obtaining waterslides for the Project.

"[S]ilence may be equivalent to a false representation only when the particular circumstances impose a duty on the party to speak and he deliberately remains silent." *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex.2001); see, e.g., *Four Bros. Boat Works, Inc. v. Tesoro Petroleum Cos.*, 217 S.W.3d 653, 670 (Tex.App.2007, pet.denied). "Whether such a duty exists is a question of law." *Bradford*, 48 S.W.3d at 755. "Generally, no duty of disclosure arises without evidence of a confidential or fiduciary relationship." *Ins. Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex.1998).

In addition to situations where there is a fiduciary or confidential relationship, ... a duty to speak may arise in an arms-length transaction in at least three other situations: (1) when one voluntarily discloses information, he has a duty to disclose the whole truth; (2) when one makes a representation, he has a duty to disclose new information when the new information makes the earlier representation misleading or untrue; and (3) when one makes a partial disclosure and conveys a false impression, he has the duty to speak.

*9 *Playboy Enters., Inc. v. Editorial Caballero*, 202 S.W.3d 250, 260 (Tex.App.2006, pet.denied); see, e.g., *Solutioneers Consulting, Ltd. v. Gulf Greyhound Partners, Ltd.*, 237 S.W.3d 379, 385 (Tex.App.2007, no pet.); *Four Bros. Boat Works*, 217 S.W.3d at 670-71; *Citizens Nat'l Bank v. Allen Rae Invs., Inc.*, 142 S.W.3d 459, 477 (Tex.App.2004, no pet.).

Texas Waterworks has not demonstrated that Professional had a duty to speak about the facts related to Professional's financial disputes with Polin and other customers. There is no evidence suggesting that Texas Waterworks and Professional had a confidential or fiduciary relationship. There is no proof that Professional revealed information about its financial standing with Polin and other customers that would require it to reveal the whole truth. There is no evidence that Professional made any representation about

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its relations with Polin or other customers that required Professional to supplement relevant information. And there is no proof that Professional made a partial disclosure related to its relationship with Polin or its other customers that would give a false impression about Professional's standing with these individuals. Based on the summary judgment evidence, the court concludes that Texas Waterworks has failed to establish that Professional had a duty to disclose the information related to its financial disputes with Polin and other customers.

Therefore, Texas Waterworks is not entitled to summary judgment based on fraud or negligent misrepresentation.

V

The court next considers Texas Waterworks' claim that Professional breached the Professional Subcontract.

A

The court must first determine which state's law applies to this breach of contract claim, because the Professional Subcontract does not contain a choice-of-law provision. Absent the existence of a choice-of-law provision, Texas courts "consider the facts of the case under the 'most significant relationship' test set forth in section 188 of the *Restatement (Second) of Conflicts of Laws*." *Minn. Mining & Mfg. Co. v. Nishika Ltd.*, 953 S.W.2d 733, 735-36 (Tex.1997).

In the absence of an effective choice of law by the parties ..., the contacts to be taken into account in applying § 6 to determine the law applicable to an issue include:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the location of the subject matter of the contract, and
- (e) the domicil[e], residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their

relative importance with respect to the particular issue.

Restatement (Second) of Conflict of Laws § 188(2) (1971). "We must also evaluate these contacts in the context of certain policy factors listed in section 6 of the *Restatement*." *Minn. Mining & Mfg.*, 953 S.W.2d at 736. These principles include:

- *10 (a) the needs of the interstate and international systems,
- (b) the relevant policies of the forum,
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
- (d) the protection of justified expectations,
- (e) the basic policies underlying the particular field of law,
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Id. (quoting *Restatement (Second) of Conflicts of Laws § 6(2) (1971)*). "[P]olicy analysis is difficult in this case because few of these [§ 6] factors guide us in a discernable way." *Id.* But the last § 6 factor, the ease in determining and applying the law, weighs in favor of applying the law of Texas. *Small v. Small*, 216 S.W.3d 872, 880 (Tex.App.2007, pet.denied) ("Although the burden of a court in applying another state's law might be slight, it is more burdensome to apply foreign law than the law of the forum.").

Many of the § 188 factors are a wash. Texas Waterworks is a Texas corporation with its principal place of business in Texas. Professional is a Tennessee corporation with its principal place of business in Tennessee. The parties signed the contract in their respective states. The summary judgment evidence does not reveal where the Professional Subcontract was negotiated. The place of performance and the subject matter of the contract, however, counsel in favor of applying Texas law. The Professional Subcontract required Professional to manufacture certain

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waterslides, deliver them to Frisco, Texas, and then to install them there. The Professional Subcontract does not indicate where the manufacturing would take place or even who would manufacture the waterslides, since Professional was planning on assigning the task of manufacturing the waterslides to Polin. But Professional's delivery and installation obligations required performance in Texas. Because the place of manufacturing the waterslides is unclear, the court determines that the place of performance for the Professional Subcontract is Texas. And "[t]he most important of these [§ 188] contacts is the place of performance." *Cudd Pressure Control v. Sonat Exploration Co.*, 202 S.W.3d 901, 906 (Tex.App.2006, pet.denied). Moreover, the location of the subject matter of the contract-The Frisco Recreation and Aquatics Facility-is in Texas. The Professional Subcontract conspicuously indicates that the purpose of the contract is to assist in the construction of the Frisco Recreation and Aquatics Facility. Considering the relevant Restatement factors, the court concludes that Texas law applies to Texas Waterworks' breach of contract claim.

B

The court must next determine whether the Texas version of Article 2 of the Uniform Commercial Code ("UCC") applies to the Professional Subcontract. Article 2 of the UCC governs contracts for the sale of goods. See *Tex. Bus. & Com.Code Ann. § 2.102* (Vernon 1994). The Texas Business and Commerce Code defines "goods" as "all things (*including specially manufactured goods*) which are movable at the time of identification to the contract for sale [.]" *Id.* § 2.105(a) (emphasis added). "In the absence of explicit agreement identification occurs (1) when the contract is made if it is for the sale of goods already existing and identified; [or] (2) if the contract is for the sale of future goods ..., when goods are shipped, marked or otherwise designated by the seller as goods to which the contract refers[.]" *Id.* § 2.501(a). When the waterslides described in the Professional Subcontract were to be delivered to Frisco, Texas for installation-the time of identification to the contract for the sale of future goods-they would have been movable. Despite the fact that the waterslides were to be custom made for a particular project, they constitute goods under the Texas UCC. See *Custom Controls Co. v. Ranger Ins.*, 652 S.W.2d 449, 451-52 (Tex.App.1983, no writ) (holding that purchase of 12 wellhead control panels "that were to be specifically designed for and constructed to meet the particular needs of [the buy-

er],” and that were not readily marketable to anyone other than the buyer, were Article 2 goods). Thus the Professional Subcontract provides for the sale of goods.

*11 But it also contains a service component, because Professional was required to install the waterslides after delivering them to Frisco, Texas. “When a contract contains a mix of sales and services, the U.C.C. applies if the sale of goods is the ‘dominant factor’ or ‘essence’ of the transaction.” *Tarrant County Hosp. Dist. v. GE Automation Servs., Inc.*, 156 S.W.3d 885, 893 (Tex.App.2005, no pet.). In *Tarrant County Hospital District* the court held that the dominant factor of a contract requiring the seller “to design, supply, and install a power supply system” was the sale of goods. *Id.* at 887, 893; see also *PPG Indus., Inc. v. JMB/Houston Ctrs. Partners L.P.*, 146 S.W.3d 79, 83 (Tex.2004) (holding that UCC Article 2 applied to contract that required seller to manufacture, deliver, and install 12,000 commercial windows for sky-scraper). The court concludes that the essence of the Professional Subcontract is for the sale of goods, despite the fact that it contains an installation service component.

C

As the court recounted *supra* at § I, the summary judgment evidence conclusively establishes the following facts: the Professional Subcontract required Professional to achieve substantial completion of manufacturing and installing the waterslides for the Project by May 5, 2007; as of August 13, 2007, Professional had not delivered or manufactured *any* of the waterslides for the Project; the Professional Subcontract made time of the essence; Professional properly terminated the Professional Subcontract based on Professional's default; and Texas Waterworks has paid Professional \$165,950 of the \$286,500 contract price. This evidence establishes beyond peradventure that Professional breached the Professional Subcontract, and that this was a breach of the whole contract. See *Tex. Bus. & Com.Code Ann. § 2.612(c)* (Vernon 1994) (“Whenever non-conformity or default with respect to one or more installments substantially impairs the value of the whole contract there is a breach of the whole.”).

1

Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes

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acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract (Section 2.612), the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid (1) “cover” and have damages under the next section as to all the goods affected whether or not they have been identified to the contract[.]

Id. § 2.711. The next section provides:

After a breach within the preceding section the buyer may ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. (b) The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2.715), but less expenses saved in consequence of the seller's breach.

*12 *Id.* § 2.712. “[T]he goods purchased as ‘cover’ need not be identical to those provided in the contract, but must be commercially usable as reasonable substitutes.” Mueller v. McGill, 870 S.W.2d 673, 676 (Tex.App.1994, writ denied). “It is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective.” Toshiba Mach. Co. v. SPM Flow Control, 180 S.W.3d 761, 781 (Tex.App.2005, pet. granted, judgment vacated w.r.m.) (internal quotation marks and brackets omitted).

2

In August 2007 Texas Waterworks attempted to cover by contracting with Westwind to provide the waterslides for the Project for \$315,000. Texas Waterworks may obtain damages under § 2.712(b) if Texas Waterworks' cover with Westwind was reasonable, made in good faith, and without unreasonable delay. *See* § 2.712(a). In the months after Professional was supposed to have achieved substantial completion, Texas Waterworks wrote several emails and letters to Professional attempting to determine when it would deliver the waterslides, but Texas Waterworks was not able to get an answer from Professional. On June 28, 2007, almost two months after Professional was supposed to have achieved substantial completion, Texas Waterworks requested that Professional provide a schedule of delivery for the waterslides, as

well as financial assurance of its performance under the Professional Subcontract. Professional did not provide Texas Waterworks with a schedule for delivery of the waterslides for the Project, and it did not provide Texas Waterworks any financial assurance. As of August 2007 Professional had not delivered or manufactured any of the waterslides for the Project. That month, Texas Waterworks contracted with Westwind to provide the waterslides for the Project. Professional has also admitted that, under these circumstances, Texas Waterworks acted reasonably in mitigating its damages resulting from Professional's default and had no choice but to seek another distributor for the waterslides; that Professional expected that it would cost more money for Texas Waterworks to secure from another vendor the same waterslides; and that Westwind is a reputable distributor of waterslides. Texas Waterworks has established beyond peradventure that its cover with Westwind was reasonable, made in good faith, and without unreasonable delay. Thus Texas Waterworks is entitled to recovery of damages under § 2.712(b).

Texas Waterworks' damages for covering with Westwind under § 2.712(b) are \$28,500 (the difference between the price of Texas Waterworks' contract with Westwind (\$315,000) and the Professional Subcontract price (\$286,500)). Under § 2.711(a), Texas Waterworks is entitled to recover the payments it has already made to Professional: \$165,950. Section 2.712(b) provides that Texas Waterworks can also obtain “incidental or consequential damages.” § 2.712(b). But Texas Waterworks waived its claim for consequential damages in the Professional Subcontract. Thus Texas Waterworks is entitled to recover \$194,450 from Professional on its breach of contract claim.

VI

*13 Texas Waterworks also seeks \$28,910.50 ^{FN7} in attorney's fees.

FN7. In the affidavit of plaintiff's counsel, Brian W. Erikson, Esquire (“Erikson”), he refers to various litigation expenses associated with prosecuting this case, and records these expenses in his billing records. Because plaintiff's summary judgment motion does not specifically request recovery of these litigation expenses or costs, the court will not address whether these expenses are recov-

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erable. Similarly, the court will not address Erikson's anticipated attorney's fees if the court's judgment is appealed, because plaintiff's summary judgment motion does not request recovery of these conditional attorney's fees, and the court does not award them in any event.

State courts make such awards because state trial courts are tribunals that make factual findings and they must award appellate fees before they lose their jurisdiction to do so. Federal district courts do not operate under similar jurisdictional restraints. Therefore, this court uniformly denies appellate fee requests, without prejudice to awarding them on a subsequent application that is based on actual fees incurred.

Corman v. Lifecare Acquisitions Corp., 1998 WL 185517, at *2 (N.D.Tex. Apr.10, 1998) (Fitzwater, J.).

A party who prevails on a breach of contract claim and recovers damages on that claim may recover its reasonable attorney's fees under Tex. Civ. Prac. & Rem.Code Ann. § 38.001 (Vernon 2008). *See, e.g., Green Int'l, Inc. v. Solis*, 951 S.W.2d 384, 390 (Tex.1997). The factors that bear on the reasonableness of attorney's fees are:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood ... that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

Tex. Disciplinary R. of Prof. Conduct 1.04, *reprinted in* Tex. Gov't Code, tit. 2, Subtit. G, App. A (Vernon 2005) (Tex. State Bar R. Art. X, § 9); Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812, 818 (Tex.1997) (adopting Rule 1.04 factors as guidance in determining reasonableness of attorney's fees award).

Texas Waterworks' \$28,910.50 fee request is based on 107 hours of work by Brian W. Erikson, Esquire ("Erikson"), and 6.5 hours of work by his paralegal, Cheryl Moseley ("Moseley"). Erikson billed his legal services at rates between \$240 and \$275 per hour, and Moseley's work was billed at \$105 per hour. Erikson affirmed that he regularly bills Texas Waterworks between \$240 and \$275 per hour for his work. Erikson has been practicing law since 1983. Moseley has been a certified paralegal since 2003 and has received other related professional certificates. Erikson avers that he is familiar with the types of rates and services customarily required for cases like this one, and that, based on his knowledge of the prevailing practices in the Dallas legal market and his regular billing practices, \$28,910.50 in attorney's fees is reasonably necessary for the work that he and Moseley performed.

"It is presumed that the usual and customary attorney's fees for a claim of the type described in Section 38.001 are reasonable." Tex. Civ. Prac. & Rem.Code Ann. § 38.003 (Vernon 2008). "What constitutes reasonable attorney's fees is a question of fact, but clear, direct, uncontroverted evidence of attorney's fees is taken as true as a matter of law[.]" Collins v. Guinn, 102 S.W.3d 825, 836 (Tex.App.2003, *pet.denied*) (internal quotation marks omitted) (holding that attorney's uncontroverted affidavit supporting attorney's fees request established the amount of attorney's fees as a matter of law).

*14 After reviewing Erikson's uncontroverted affidavit and his billing records, and after considering them in light of the Rule 1.04 factors, the court finds

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and concludes that Texas Waterworks' summary judgment evidence in support of its fee request is free of circumstances tending to raise suspicion on the fee request, and that it establishes the reasonableness of the fee request as a matter of law. Therefore, Texas Waterworks is entitled to recover attorney's fees in the sum of \$28,910.50.

* * *

Accordingly, the court grants in part and denies in part Texas Waterworks' May 21, 2008 motion for partial summary judgment.

SO ORDERED.

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