

FILED

JUL 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 297667

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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

Appellant,

v.

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

Respondents.

RESPONDENT LARRY SHANNON'S BRIEF

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Ms. Michelle A. Green, WSBA #40077
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I. INTRODUCTION

Evergreen MoneySource Company, dba Evergreen Home Loans ("Evergreen"), a residential lender, maintains branch offices in eight western states. The only Evergreen branch office in Washington east of the Cascade crest is in Wenatchee.

Larry Shannon has worked since 1977 in real estate lending. Since 1997, his Moses Lake office has served as a branch office for the following residential lenders:

Years	Company
1997-1999	Mortgage One
1999-2000	Crossland Mortgage
2000-2001	Citi Mortgage
2001-2004	Select Capital Mortgage
2004-2005	Royal Bank of Canada
2005-2007	New Century Financial, Home 123 Mortgage
2007-2009 (3/28/07- 4/30/09)	Evergreen MoneySource Mortgage Company dba Evergreen Home Loans
2009-Present	Guild Mortgage

The following testimony remains undisputed. Larry Shannon's office ended its affiliation with Evergreen because of Evergreen's inability to fund or inability to timely fund residential loans that Larry Shannon's office had ready to close. On the April 30, 2009 termination of the Evergreen-Shannon Agreement, Larry Shannon's office shipped every

one of Evergreen's files to Evergreen. No one from Evergreen made any effort to contact any potential borrower whose name appeared in the files that Evergreen received from Larry Shannon's office. After May 1, 2009, Evergreen made no request to Larry Shannon for any assistance with the closing of any loan that he did not honor. Neither Larry Shannon nor anyone from his office ever solicited any former potential customer of Evergreen to apply for a loan from Guild. Larry Shannon's office closed a total of one loan for Guild in May 2009, i.e., the first month after termination of the Evergreen-Shannon Agreement.

Evergreen's 6/13/09 Complaint alleged the following three claims:

- 2.5 "March of 2009, Shannon began originating loans for Guild." (**Lost Loans Claim**) [CP 5]
- 2.7 "Shannon apparently originated fictitious loans for Evergreen" (**Fictitious Loans Claim**) [CP 5]
- 2.8 "Shannon has also solicited Evergreen Employees to work for Guild" (**Employee Solicitation Claim**) [CP 5]

Evergreen's Complaint asserted the following five causes of action based on its three claims:

- III Breach of Contract [CP 6]
- IV Breach of Duty of Loyalty [CP 6]
- V Tortious Interference with Business Expectancy [CP 7]

VI Tortious Interference with
Contractual Relations [CP 7-8]

VII Violation of Washington Consumer
Protection Act [CP 8-9]

The court's January 10, 2011 order denied Evergreen's motion to amend its complaint, that Evergreen first filed (1) ten months after Evergreen had received all information on the basis of which it sought to amend its complaint, (2) six months after the May 18, 2010 deadline to amend pleadings that the November 17, 2009 Scheduling Order had set, (3) one month after the October 20, 2010 deadline to complete discovery, and (4) only after Shannon had filed a summary judgment motion seeking dismissal of Evergreen's claims.

Evergreen provided neither law nor facts to support its claims. Accordingly, the trial court's February 8, 2011 "Order Granting Shannon's Motion for Summary Judgment" dismissed each of Evergreen's claims. Evergreen has not appealed dismissal of its fictitious loans claim and its holdback/bonus claim.

II. SHANNON'S STATEMENT OF THE CASE

Larry Shannon's tenure with Evergreen began on 3/28/07. CP 215. In August 2007, Evergreen presented to Larry Shannon its "Evergreen Home Loans Branch Manager Agreement" ("Agreement") which the parties signed on 8/9/07. CP 215, 221-229. Germane portions of the

Agreement follow:

- “**After agent leaves Evergreen’s employment**, Agent shall not...solicit...any employees of Evergreen.” (§ 7) CP 227.
- “The parties agree that their **relationship shall be one of contract....**” (§ 10) CP 227.
- “...Employment is **at will** and as such **Agent may terminate this Agreement at any time with or without cause** upon 30 days written notice to Evergreen. Evergreen may terminate this Agreement at any time with or without cause and without notice. Either party may terminate this Agreement with cause immediately upon discovery of such cause without a requirement of prior notice. **Upon termination of this Agreement, Agent shall deliver to Evergreen all documents in Agent’s possession or control**, including without limitation a complete and current list of all pending loan applications and loan transactions that Agent has originated. Upon termination, draws of any kind will cease”

After 12 months of continuous employment, with respect to loans originated by Agent which Evergreen has begun processing and which are not closed prior to termination, **Evergreen may request the cooperation of the Agent in ensuring the timely closing of such transactions.** Evergreen will determine whether to compensate Agent, at its sole discretion,” ... (§ 11) CP 227-28.

- “Agent promises to utilize his ...exclusive efforts during the term of this Agreement...to originate loans for

Evergreen...he ...is an **at-will** employee of Evergreen.” (¶1) CP 222.

CP 221-29 (emphasis added).

The Agreement contains no non-compete provision. *Id.*

Beginning in November 2008, Evergreen could not fund or timely fund a number of loans that Larry Shannon’s office had ready to close. CP 215-216; CP 350. Larry Shannon discussed this with Evergreen’s president, Keith Frachiseur, on several occasions. CP 215-16. Mr. Frachiseur responded with promises that neither Larry Shannon nor those in his office believed Evergreen could fulfill. CP 215-16; CP 350. As a consequence, Evergreen and Larry Shannon’s office concluded their relationship effective April 30, 2009. CP 216.

Keith Frachiseur called Larry Shannon in mid-May 2009 telling him that he and Don Burton, the CEO of Evergreen, were going to come after him as an example to other Evergreen branch managers that no manager could leave Evergreen unless Evergreen agreed to it. CP 220. Evergreen proceeded to file its 6/13/09 Complaint in which it alleged its three claims. CP 3-10.

In its August 20, 2010 “Supplement to Evergreen’s Answers and Responses to Defendant Larry Shannon’s First Set of Interrogatories” Evergreen for the first time identified 17 loans that it alleged made up its claim 1, its “Lost Loans Claim.” CP 431, 459-60. CP 961-964 contains a

summary of all admissible evidence relating to each of these 17 loans.

III. LEGAL ARGUMENT

a. **The trial court properly entered Summary Judgment, dismissing each of Evergreen's claims against Shannon.**

De novo constitutes the standard of review of summary judgment decisions. *Osborn v. Mason Cnty.*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006).

Washington courts require a party opposing a summary judgment motion to "set forth **specific facts** showing that there is a genuine issue for trial." *Grimwood v. University of Puget Sound Inc.*, 110 Wn.2d 355, 359, 753 P.2d 517 (1988) (emphasis added). Arguments in memoranda do not constitute evidence and cannot defeat a motion for summary judgment. *Smith v. Ohio Cas. Ins. Co.*, 37 Wn.App. 71, 73, 678 P.2d 829 (1984). Speculation, argumentative assertions and/or conclusory statements in declarations or memoranda, as a matter of law, remain insufficient to preclude summary judgment. *Meyer v. University of Washington*, 105 Wn.2d 847, 852, 719 P.2d 98 (1986); *Cranwell v. Mesec*, 77 Wn.App. 90, 103, 890 P.2d 491, *rev. denied*, 127 Wn.2d 1004 (1995) ("(a) naked assertion of unresolved factual questions is not sufficient to oppose a motion for summary judgment.").

Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619,

626-627, 818 P.2d 1056 (1991) amplifies:

A party may not preclude summary judgment by **merely raising argument and inference** on collateral matters:

[T]he party opposing summary judgment **must be able to point to some facts** which may or will entitle him to judgment, or **refute the proof of the moving party in some material portion**, and that the opposing party may not merely recite the incantation, "Credibility," and have a trial on the hope that a jury may disbelieve factually uncontested proof.

(emphasis added).

- i. Appellant's Brief does not contest dismissal of Evergreen's Fictitious Loans Claim or its Holdback/Bonus Claim.

Appellant's Brief makes no mention of the dismissal of its fictitious loans claim and its holdback/bonus claim. RAP 10.3(a)(6) requires an appellant to include argument in its brief that supports the issues that it presents for review, together with citations to legal authority. See e.g., *State v. Olson*, 126 Wn.2d 315, 320, 893 P.2d 629 (1995). When an appellant fails to raise an issue in the assignments of error and fails to present supporting argument or legal citations, the appellate court will not consider the merits of that issue. *Viereck v. Fibreboard Corp.*, 81 Wn.App. 579, 582, 915 P.2d 581 (1996) (citing *Olson*, 126 Wn.2d at 321), *review denied*, 130 Wn.2d 1009 (1996). Even an appellant who assigns error to

a trial court ruling, but fails to provide supporting argument, “is deemed to have abandoned it.” *In re Marriage of Lutz*, 74 Wn.App. 356, 372, 873 P.2d 566 (1994). Evergreen has abandoned its fictitious loans claim and its holdback/bonus claim.

ii. For its “Employee Solicitation Claim,” Evergreen put forward no admissible evidence or law to support either entitlement or damages.

1. *Entitlement.* Shannon’s Interrogatory No. 12 asked Evergreen to “identify each of the “Evergreen employees” whom Evergreen alleges that “Shannon...solicited to work for Guild.” CP 1000. Evergreen responded:

Larry Shannon: Personally solicited the following Evergreen Branch Managers to work for Guild: Kevin Pangle, Leslie Girard, and Rick Graybill.

CP 1004, 1002-03.

However at the 10/20/10 deposition of its president and representative, Mr. Frachiseur, Evergreen admitted that it had no admissible evidence to support its employee solicitation claim:

- Larry Shannon did not solicit Rick Graybill.

CP 1010, p. 26:3-10, p. 27:1.

- Evergreen had no admissible evidence that Larry Shannon solicited Kevin Pangle or Leslie Girard.

CP 1009, p. 25:12-25; CP 1010, p. 26:1-2.

- Rick Graybill, Kevin Pangle, and Leslie Girard neither left Evergreen nor gave any indication that they were leaving Evergreen because of any alleged solicitation.

CP 1010, p. 29:18-22; CP 1011, p. 30:1.

- Evergreen is “not aware of any” Shannon “solicitation of any type, direct or indirect, of any Evergreen employee” after he left Evergreen’s employ.

CP 1011, p. 30:2-8.

Evergreen sought to avoid summary judgment by alleging in its response to Shannon’s Motion for Summary Judgment that, in addition to soliciting Rick Graybill, Kevin Pangle, and Leslie Girard, “Shannon solicited the Moses Lake branch employees to move to Guild in violation of Paragraph 7 of the Agreement.” CP 899, ll. 4-5. Yet Evergreen cites as the sole basis to reverse the dismissal of its “Employee Solicitation Claim:” (a) inadmissible hearsay in Pat Dias’ Declaration regarding statements that Clark Schweigert and Sarah Bullinger allegedly made (CP 676),¹ and (b) deposition testimony of Rita Nicholas (CP 543-545). Evergreen then argues “[a]pparently, the employees felt pressured to follow Shannon to Guild.” (Appellants Brief, p. 12.)

The declaration testimony of Clark Schweigert, Anne Fisher, and

¹ Larry Shannon filed a Motion to Strike the inadmissible assertions in the Dias Declaration. CP 1015-1021. Likewise, Shannon filed a motion to strike the inadmissible portions of the Franchiseur declaration. CP 843-859.

Larry Shannon, the only loan officers who worked at Larry Shannon's office, and the deposition testimony of the loan processor who also worked at Larry Shannon's office, Rita K. Nicholas, establishes the complete lack of any basis for Evergreen's Employee Solicitation Claim:

Paragraph 3 of my November 9, 2010 Declaration accurately states what happened:

In November 2008, Evergreen began not being able to fund or timely fund certain loans that we had arranged. This situation continued into the spring of 2009. In early April, 2009, Keith Frachiseur of Evergreen came to our office in Moses Lake and spoke to all staff. He made promises about what Evergreen would do about funding of loans, and he promised a \$5,000 retention bonus to each of us if we stayed with Evergreen. **I listened to Mr. Frachiseur's promises, but I did not believe him. I decided to leave Evergreen. Each of my coworkers told me that they made the same decision.**

After listening to Keith Frachiseur in early April 2009, I and my co-workers concluded that we would not be able to carry on our business effectively if we remained affiliated with Evergreen. **Larry Shannon stated nothing to me that led to my decision.**

CP 788, II. 3-15 (emphasis added).

In the second week of April, 2009, Keith Frachiseur came to our Moses Lake office and told all of us what Evergreen would do if we remained with Evergreen. He made promises about what Evergreen would do to remedy problems that we had experienced with obtaining funding for loans for which we had

made application on behalf of our customers. He offered a \$5000 bonus to each of us to stay with Evergreen. After Mr. Frachiseur left, we discussed what he had said. As a group, we made the decision to leave Evergreen.

CP 340, II. 9-15.

In November 2008, Evergreen had difficulty funding loans that our office had ready to close. Evergreen either could not fund or timely fund a number of loans that we had ready to close. I discussed this with Evergreen's Keith Frachiseur several times. Mr. Frachiseur responded with representations and promises about Evergreen's funding of loans and a retention bonus to each member of our staff if they stayed. Attached as Exhibit "B" are emails that allude to Mr. Frachiseur's representations and promises. I shared these representations and promises with the members of the office. On April 10, 2009, Mr. Frachiseur came to the Moses Lake office and discussed with office staff and me what Evergreen would do if our office chose to remain with Evergreen. He repeated the representations and promises that he had made to me. After considering Mr. Frachiseur's representations and promises and the realistic likelihood of Evergreen's being able to meet them, our office elected to terminate with Evergreen.

CP 215, II. 15-20; CP 216, II. 1-9.

Q. Did you have an understanding at the time where you decided to go from Evergreen to Guild as to who was going to go with you? ...

...

A. Yes, I have an understanding.

Q. And what was that understanding?

A. That it was our individual choices if we decided to go with Guild.

CP 544, p. 24-25:9.

Evergreen never cited any admissible evidence to controvert the testimony of Clark Schweigert, Anne Fisher, Larry Shannon, or Rita Nicholas because none exists.² Rather, Evergreen attempted and attempts to rely on unsupported argumentative assertions to defend summary judgment [e.g., “he (Larry Shannon) acted as a “cheerleader” for Guild to persuade the other employees to go with him” (Appellant’s Brief, 26)]. Evergreen has set forth no “specific facts showing that there is a genuine issue for trial.” *Grimwood*, 110 Wn.2d at 359. “A party may not preclude summary judgment by merely raising argument and inference on collateral matters.” *Howell*, 117 Wn.2d at 626-27. This necessitates affirmance of the dismissal of Evergreen’s Employee Solicitation Claims.

2. *Damages*. Evergreen’s representative testified:

Q. List any and all damage, monetary or otherwise, that Evergreen sustained due to your contention that Larry Shannon personally solicited the following Evergreen branch managers to work for Guild: Kevin Pangle, Leslie Girard, and Rick Graybill.

...

A. None for that act.

² Each employee at Larry Shannon’s office had begun work there years before the affiliation with Evergreen began in 2007. CP 216:12-18.

CP 440, p. 29:18-25; CP 441, p. 30:1.

The absence of any damages precludes Evergreen's Employee Solicitation Claim from surviving summary judgment. *Jacobs Meadow Owner's Association v. Plateau 4411, LLC*, 139 Wn. App. 743, 754, 162 P.3d 1153 (2007); *Hodges v. Gronvold*, 54 Wn.2d 478, 480-481, 341 P.2d 857 (1959).

- iii. The trial court properly dismissed Evergreen's Lost Loans Claim because neither admissible evidence nor applicable law supported that claim and Evergreen identified no damages attributable to that claim.

Appellant's Brief repeatedly argues "at least 17 Evergreen customers ended up closing loans with Guild." (See Appellant's Brief, p. 15, p. 16, p. 21.)³ CP 961-964 summarizes the only admissible evidence on each of the 17 "lost loans" that make up Evergreen's Lost Loans Claim:

- Evergreen expressly released to Guild three of the "Lost Loans," thereby waiving any claim for those.
- Two of the "Lost Loans" closed neither with Evergreen nor Guild, so Evergreen cannot claim any lost profits for these.
- Two of the "Lost Loans" did not meet Evergreen's underwriting criteria, so Evergreen can make no claim for these.
- For the remaining ten "Lost Loans," each involved a loan application that began after the 4/30/09 termination of the Agreement and the customer, in each instance, alone sought

³ For example, Appellant's Brief asserts "17 known Evergreen customers closed loans at Guild." (Appellant's Brief, p. 21.)

out Larry Shannon's office, not the other way around.

CP 961-964.

1. *Entitlement.* Appellant's Brief at pages 22-23, lists three loans ["L.G. or G.L.", "T.D. or D.T.", and "C.T. or T.C."], arguing that these support reversal of the dismissal of its Lost Loans Claim. Leah Gorden's declaration provides the admissible evidence for the L.G. loan:

In early 2009, I went to Larry Shannon's office to get information about a possible home loan. I had not picked out any property but I wanted to see if I could qualify for a grant to help with a down payment if I located a property. To apply for the grant, I had to try to get pre-qualified for a loan. I let the matter drop.

In October 2009, I found a house that I wanted to buy. On October 12, 2009, I signed a Real Estate Purchase and Sale Agreement for that house. A copy of that is attached as Exhibit "B."

I had to obtain financing to buy the house. I went to Larry Shannon's office to apply for a loan. Larry Shannon told me that he had no records on me because his office had a few months before affiliated with a new company, and he had sent all my records to the company that his office had been formerly affiliated with. I told Larry Shannon that I wanted to work with his office.

I applied for a loan for the property. The loan closed on December 2, 2009, and I obtained my deed.

Neither Larry Shannon nor anyone from his office ever contacted me asking for my

business. I contacted Larry Shannon's office. It was my decision to go with his office because it was local.

CP 1087-88.

The entirety of Evergreen's argument for reversal follows:

- GL appears in the pipeline reports for both Evergreen and Guild.
- GL contacted Shannon while he was employed at Evergreen for a loan.
- While at Evergreen, Shannon pulled a credit score for GL and drafted a good faith estimate.
- GL also filled out a loan application.

(Appellant's Brief, p. 22-23.)

That which Evergreen argues proves insufficient as a matter of law to state a *prima facie* claim. As a matter of law, nothing that Larry Shannon did breached any provision of the Agreement or any other legal obligation. As a matter of law, nothing that Larry Shannon did gave rise to a claim for tortious interference. Only if there existed a non-compete provision in the Agreement could Evergreen legitimately argue that Larry Shannon's acts gave rise to a claim. However, the Agreement contains no non-compete.

Evergreen next argues that the loan of "T.D. or D.T." requires reversal of the trial court's dismissal of its lost loans claim. (Appellant's Brief, p. 23.) Troy Dammel testified to what occurred:

In February 2009, I wanted to look into the possibility of buying a house. I had not picked

out any house. However, I wanted to see if I qualified to obtain VA financing. I contacted Larry Shannon at his Moses Lake office. Larry Shannon reviewed my credit with me. The upshot was my credit score was too low to qualify for a VA loan. Larry Shannon suggested ways to clean up my credit.

In May, 2009, I located the home that I wanted to buy – the home that I now own. I again went to Larry Shannon's office to see if I could obtain financing. He told me that he had no records on me because he had shipped all my records to the company with which his office had previously been affiliated. I told Larry Shannon that I wanted him to work on my loan. He located a USDA rural housing loan program. He worked with me to clean up my credit score.

On June 16, 2009, I applied for the USDA loan. My loan application was approved and my loan closed in August. I got the deed to my house on August 5, 2009. A copy of my deed is attached as Exhibit "A."

Neither Larry Shannon nor anyone at his office ever contacted me soliciting my business. I made the decision that I wanted Larry Shannon to work with me to obtain financing. I initiated all contact with his office.

CP 967-968.

Evergreen puts forward no admissible evidence contraverting any of Mr. Dammell's testimony, because it cannot. Again, Evergreen's failure to "set forth specific facts showing that there is a genuine issue for trial" necessitated the trial court's summary judgment dismissal.

Finally, Evergreen argues that the loan of “C.T. or T.C.” entitles it to avoid dismissal of “Lost Loans Claim.” (Appellant’s Brief, p. 23.) However, Christopher Turner testified:

In the spring of 2009, I had located a house that I wanted to buy. I went to Larry Shannon to see about financing to purchase that house. The sale did not go through.

In May 2009, I located another house. On May 23, 2009, I signed a Real Estate Purchase and Sale Agreement to buy this house. Attached as Exhibit “B,” is a copy of that agreement. I went to Larry Shannon to arrange for financing. Larry Shannon told me that his office had affiliated with a new company. I told him that I wanted to deal with him because he was local. I did not want to deal with a company that did not have a local office. He took my loan application. In August 2009, the loan closed and I bought my house.

Neither Larry Shannon nor anyone from his office ever contacted me asking for my business. It was my decision to go to Larry Shannon. I went to him because he was local.

CP 973-74.

Again, Appellant’s Brief points to no facts to dispute the testimony of Christopher Turner because none exists.

Evergreen’s sole argument for reversing the dismissal of its T.C. Lost Loans Claim follows: (1) “loan funded with Guild;” (2) “T.C. appears in the pipeline reports for both Evergreen and Guild;” and (3) a “file was started with Evergreen.” (Appellant’s Brief, p. 23.) Appellant’s Brief

demonstrates that Evergreen attempts to reverse summary judgment not with “specific facts showing that there is a genuine issue for trial,” but “by merely raising argument and inference on collateral matters.” Washington courts unanimously hold that such remains insufficient as a matter of law to prevent summary judgment dismissal.

Paragraph 11 of the Agreement spelled out the obligations of Larry Shannon after termination of the Evergreen/Shannon Agreement:

11. TERMINATION

Agent understands that employment is at-will ...Upon termination of this Agreement, Agent shall deliver to Evergreen all documents in Agent's possession or control, including without limitation a complete and current list of all pending loan applications and loan transactions that Agent has originated...

[W]ith respect to loans originated by Agent which Evergreen has begun processing and which are not closed prior to termination, **Evergreen may request the cooperation of the Agent in ensuring the timely closing of such transactions.** Evergreen will determine whether to compensate Agent, at its sole discretion, based on the level of assistance needed to close a transaction. Evergreen will also decide the amount of compensation based on that assistance. ...

CP 227-28 (emphasis added).

Upon the 4/30/09 termination of the Evergreen-Shannon Agreement, the undisputed evidence establishes that Larry Shannon's office did just what the Agreement required:

After we decided to leave Evergreen, I worked at closing all Evergreen files that I could. I then worked with the other persons in our office to box up and ship to Evergreen all its files, records, and computers. We kept none of Evergreen's files.

CP 350, ll. 14-17. Likewise, the evidence remains undisputed that after the 4/30/09 termination of the Agreement, each of the 17 persons whom Evergreen identifies as making up its "Lost Loans Claim" alone sought out Larry Shannon's office, and each person's doing so had nothing to do with Larry Shannon's office's former affiliation with Evergreen. CP 218-220.

The Agreement contains no provision precluding Larry Shannon from continuing in the residential loan business after its termination. CP 222-229. Stated otherwise, the Agreement contains no non-compete clause. *Id.* However, Evergreen resisted dismissal of its Lost Loans Claim by attempting to convert the language of the Agreement into a non-compete. Washington law does not permit this:

A court may not create a contract for the parties which they did not make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties.

Agnew v. Lacey Co-Ply, 33 Wn.App. 283, 288, 654 P.2d 712 (1983).

2. *Damages.* Evergreen's inability at the 10/20/10 deposition of its representative to identify any amount of damages that Evergreen attributed to its Lost Loans Claim likewise necessitated dismissal of

Evergreen's lost loans claim:

Q. [H]ow do I detail the amount that Evergreen contends that it is entitled to receive from Larry Shannon for lost loans? I need a dollar figure.

...

Mr. Hecker: I advise my client not to answer. Go ahead because he's answered it three times with respect to loans.

...

He's answered three times he can't do it.

CP 444, p. 108:7-109:7; CP 194-96. Evergreen's failure to establish any damages for its Lost Loans Claim required dismissal of that claim:

'This court has held that, where the action is one for damages only, there being involved no property or personal rights having value in themselves, a failure to prove substantial damages is a failure to prove the substance of the issue, and warrants a judgment of dismissal.

Ketchum v. Albertson Bulb Gardens, 142 Wn. 134, 139, 252 P. 523 (1927).

The undisputed evidence precluded Evergreen from asserting that it would have closed any of the 17 loans that made up its Lost Loans Claim. Evergreen provided no evidence that (1) it attempted to make any contact with any of the 17 persons whom it listed in its Lost Loans Claim, (2) that if it had made contact, any of the 17 would have chosen Evergreen over any other mortgage lender, or (3) that Evergreen could have or would have funded any of these loans. As a matter of law,

speculation remains insufficient proof of damages:

Sufficiency of the evidence to prove damages must be established with enough certainty to provide a reasonable basis for estimating it. Although the precise amount of damages need not be shown, damages must be supported by competent evidence in the record.

ESCA Corp. v. KPMG Peat Marwick, 86 Wn.App. 628, 639, 939 P.2d 1228, 1233 (1997).

To counter the specific facts that the declarations of Leah Gorden, Troy Dammel, Christopher Turner, Clark Schweigert, Anne Fisher, each of the three realtors, and Larry Shannon contain, Evergreen attempts to rely on speculation and conjecture as a basis to reverse the trial court. Such proves insufficient as a matter of law.

- iv. The trial court properly dismissed Evergreen's Consumer Protection Act Claim because this case involves a private dispute between competitors.

Evergreen argues as the sole basis for its contention that the trial court improperly dismissed its Consumer Protection Act Claim: “[T]here is a dispute of material fact that Shannon’s conduct impacts the public interest.” (Appellant’s Brief, p. 40.) Evergreen provides no evidence on which to base its assertion, because no such evidence exists. Again, argumentative assertions in memoranda remain insufficient to preclude entry of summary judgment. *Smith*, 37 Wn.App. at 73.

This case does not involve a consumer transaction, but a private dispute brought by a multi-state lending corporation. As a matter of law, Evergreen states no a claim under Washington’s Consumer Protection Act (“CPA”):

Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 790, 719 P.2d 531 (1986). To have established a claim under the CPA, Evergreen had to demonstrate that the conduct about which it complains impacted public interest. *Hangman Ridge*, 105 Wn.2d at 784. As a matter of law, no claim meets the public interest requirement when, as here, (1) the act occurred during a private transaction, rather than a consumer transaction, and (2) the parties acted as equal bargainers (i.e., the parties had a history of business expertise and were not

representative of bargainners subject to exploitation and unable to protect themselves). *Id.* at 794.

Conduct not directed at the public, but rather at a competitor, has no capacity to impact the public in general, a necessary element of a CPA claim. *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn.App. 732, 744, 935 P.2d 628 (1997). In *Goodyear Tire*, the court dismissed the tire company's CPA claim, holding that the defendant tire dealer's alleged unfair/deceptive tactics used to secure dealership expansions did not affect the public interest:

Here, Goodyear committed the allegedly unfair and deceptive acts in the course of its business dealings with Whiteman. However, the relationship between it and Whiteman was not typical of those present in cases giving rise to cognizable consumer protection complaints. Rather, Mr. Whiteman was an experienced businessman who had dealt with Goodyear for years. Even dealers without such a long association with Goodyear were persons whose experience indicated they were better able than the average consumer to judge for themselves the risks associated with Goodyear's proposals. They are not representative of bargainners vulnerable to exploitation. **Accordingly, we hold as a matter of law Goodyear's alleged unfair and deceptive acts did not affect the public interest.**

Goodyear, 86 Wn.App. at 745 (emphasis added).

Evergreen, a sophisticated mortgage lender with branches throughout the Western half of the United States, does not, as a matter of

law, qualify as the type of entity, vulnerable to exploitation, that the CPA covers. Accordingly, Evergreen's CPA claim against Shannon fails as a matter of law. *Id.* at 745.

- v. The trial court properly dismissed the Duty of Loyalty Claim because Evergreen provided no admissible evidence of any conduct on which to base this claim.

Appellant's Brief argues, without any citation to the record:

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

(Appellant's Brief, p. 24-25.) Speculation, argumentative assertions and/or conclusory statements in affidavits/declarations or memoranda, as a matter of law, remain insufficient to preclude summary judgment. *Meyer*, 105 Wn.2d at 852; *Cranwell*, 77 Wn.App. at 103 (“(a) naked assertion of unresolved factual questions is not sufficient to oppose a motion for summary judgment.”).

The same un rebutted testimony of Clark Schweigert, Anne Fisher, Larry Shannon and Rita Nicholas that precludes Evergreen's Employee Solicitation Claim and the same un rebutted testimony summarized at CP 961-964 that precludes Evergreen's Lost Loans Claim also leaves

Evergreen with no duty of loyalty claim.

- b. The trial court properly exercised its discretion in denying Evergreen's Motion to Amend its Complaint because (i) the request was untimely under the Scheduling Order; (ii) Evergreen unduly delayed in bringing the motion; (iii) the amendment would have worked substantial prejudice to Shannon; and (iv) the futile amendment doctrine precluded the claim.**

To overturn the trial court's denial of Evergreen's Motion to Amend its Complaint, Evergreen must establish that the trial court abused its discretion. "The amendment of pleadings is addressed to the sound discretion of the trial court, whose determination will be overturned on review only for abuse of such discretion." *Walla v. Johnson*, 50 Wn.App. 879, 882, 751 P.2d 334 (1988) (citing *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 573 P.2d 1316 (1978)).

The trial court properly denied Evergreen's Motion to Amend for at least five reasons.

- (1) With no justification, Evergreen failed to comply (a) with this Court's 11/17/09 Scheduling Order, that set 5/18/10 as the cutoff to "Amend Pleadings," and (b) with Grant County LR 8(a)(2).
- (2) Evergreen did not in any manner identify any trade secrets claim either in its 2/19/10 responses or 8/20/10 supplemental responses to Larry Shannon's 9/3/09 Interrogatories.
- (3) Evergreen did not assert any trade secrets claim at the 10/20/10 deposition of its representative, Keith Frachiseur.
- (4) Evergreen's proposed amendment would have caused serious prejudice to Larry Shannon. In compliance with the

Scheduling Order, Larry Shannon had completed all discovery on all claims that Evergreen identified in its 6/13/09 Complaint, in its 2/19/10 responses and 8/20/10 supplemental responses to Larry Shannon's 9/3/09 Interrogatories, and in the 10/20/10 deposition of its representative, Mr. Frachiseur. Reopened discovery would have required additional interrogatories and requests for production, compelling Evergreen to provide complete responses to existing interrogatories and requests for production, retaking the deposition of Evergreen's representative, taking additional depositions of other Evergreen personnel and possibly retaining a witness(es) to provide expert testimony on the newly submitted trade secrets claim.

- (5) The futile amendment doctrine necessitated rejection of Evergreen's Motion to Amend.
 - i. Evergreen waited to file its Motion to Amend until five months after the deadline to amend pleadings and until one month after the discovery cutoff date that the court set in the Scheduling Order.

The trial court's November 17, 2009 Scheduling Order set 5/18/10 as the last date for the parties to "Amend Pleadings." CP 21. Grant County Local Rule 8(a)(2) recites:

The Court may, upon motion of a party made before expiration of a deadline, extend any deadline in the Scheduling Order **for good cause shown**.

GCLR 8(a)(2) (emphasis added). Evergreen filed no motion, let alone a motion before the 5/18/10 deadline, to extend the 5/18/10 "Amend Pleadings" deadline. Evergreen neither had nor could provide any "good cause shown" for an extension of the deadline because none existed.

Evergreen claimed in its Motion to Amend:

However, during the discovery process, it was revealed that Shannon had disclosed Evergreen's confidential business information to Guild. Specifically, Shannon disclosed Evergreen's **profit and loss statements, loan originator agreement**, and **rates** to Charles Nay of Guild.

CP 680, ll. 8-12 (emphasis added).

On February 5, 2010, Guild had supplied to Evergreen each of the documents on which it based its Motion to Amend - "profit and loss statements" (CP 108-120), "loan originator agreement" (CP 121-130), and "rates" (CP 131-142). Thus, Evergreen had all documents and information on which it based its Motion to Amend over three months before the 5/18/10 deadline to "Amend Pleadings." With this information in hand, Evergreen did nothing to amend its pleadings or to supplement its interrogatory answers.

Enforcement of the trial court's November 17, 2009 Scheduling Order and LR 8(a)(2) necessitated rejection of Evergreen's non-timely Motion to Amend. It remains fundamentally unfair to allow Evergreen, without any justification whatsoever, to ignore the deadlines specified in the Scheduling Order, to ignore its obligation to provide complete responses to interrogatories and deposition questions, to let the discovery cut off deadline pass, and then, in response to a motion for summary judgment, seek to amend its complaint to add a previously undisclosed

claim that would force new time-consuming and expensive discovery onto Larry Shannon.

Wallace v. Lewis County, 134 Wn.App. 1, 26, 137 P.3d 101 (2006), upheld the trial court's denial of plaintiff's motion to amend to add new claims in a factual context similar to that of this case (denial of motion to amend proper, "especially where they waited to file an amended complaint until shortly before a dispositive summary judgment hearing, despite having had over a year to seek amendment."); *see also*, *Donald B. Murphy Contractors, Inc. v. King Co.*, 112 Wn.App. 192, 199, 49 P.3d 912 (2002) (affirming denial of motion to amend brought ten days before adverse party's summary judgment hearing, even though the discovery cutoff had not yet expired). When a party seeks to amend its complaint after the filing of a motion for summary judgment, "the normal course of proceedings is disrupted and the trial court should consider whether the motion could have been timely made earlier in the litigation." *Ensley v. Mollmann*, 155 Wn.App. 744, 759, 230 P.3d 599 (2010) (finding trial court properly denied motion for amendment where motion was brought two years after original complaint, ten months after deposition, seven months after summary judgment, and two weeks before discovery cut off). Similarly, the Washington Supreme Court upheld a trial court's denial of leave to amend when the movant had been aware of the factual basis for the proposed amendment for nearly one year, but waited until the eve of

trial to seek amendment. *Wilson v. Horsley*, 137 Wn.2d 500, 507, 974 P.2d 316 (1999).

ii. Evergreen unduly delayed in bringing its motion to amend; allowing the amendment would have worked substantial prejudice on Shannon.

1. *Evergreen's Responses to 9/3/09 Interrogatories and Requests for Production.*

Evergreen's Complaint alleges three claims as the bases for its five causes of action: (1) originating loans for Guild, (2) originating fictitious loans for Evergreen, and (3) soliciting Evergreen's employees to work for Guild.

Larry Shannon's 9/3/09 Interrogatories to Evergreen asked about each claim that Evergreen alleged. To assure that there existed no other claim or cause of action that Evergreen asserted, Interrogatory No. 19 asked:

INTERROGATORY NO. 19: List any other damages or relief to which EMC claims entitlement other than that previously identified in answer to the preceding interrogatories...

CP 809. CR 33(a) required Evergreen to provide a complete answer to each interrogatory:

Each interrogatory shall be answered separately **and fully** in writing under oath...

Carlson v. Lake Chelan Community Hospital, 116 Wn.App. 718, 75 P.3d 533 (2003) upheld the trial court's preclusion of the defendant's putting

forward any explanation for plaintiff's termination beyond that which its interrogatory answer disclosed:

Here, the **responses** provided by LCCH **were not complete** and did not comply with "the letter, spirit and purpose of the rules." ... **LCCH should have disclosed its reasoning** when Mr. Carlson **requested this information in his Interrogatories and Requests for Production. Also, LCCH should have updated its responses.** CR 26(e).

Id. at 738-739 (emphasis added).

Evergreen, both when it provided its 2/19/10 responses and its 8/20/10 supplemental responses to Larry Shannon's interrogatories, had in hand all documents on which it based its Motion to Amend, i.e., "profit and loss statements," "loan originator agreement," and "rates." With that information, Evergreen in no manner indicated in its responses that it asserted a trade secrets claim or other claim for disclosure of alleged confidential information. In reliance upon Evergreen's responses to discovery requests, Larry Shannon prepared his defense, made his decision about the necessity of expert testimony, chose whom to depose, and took the deposition of Evergreen's representative. Only after passage of the discovery deadline and in response to the 11/10/10 Motion for Summary Judgment did Evergreen, for the first time, assert, in its motion to amend, that it sought to add a trade secrets claim:

Evergreen requests that the Court enter an Order allowing it to file an Amended Complaint

to add a claim for violation of the Washington Uniform Trade Secrets Act ...Evergreen also requests that the prayer for relief be amended to include an award of damages, punitive damages and attorney's fees and costs pursuant to the Washington Uniform Trade Secrets Act.

CP 679-680:20-1.

Evergreen's failure to abide by its obligations under CR 33(a), CR 26(e)(2), and CR 26(g) called for rejection of Evergreen's delinquent attempt to amend its Complaint after the discovery cutoff deadline had passed and after Shannon had filed his motion for summary judgment dismissal of Evergreen's claims.

2. *Deposition of Evergreen's Representative.*

Evergreen based its Motion to Amend on the following:

However, during the discovery process, it was revealed that Shannon had disclosed Evergreen's confidential business information to Guild. Specifically, Shannon disclosed Evergreen's profit and loss statements, loan originator agreement, and rates to Charles Nay of Guild. See Declaration of Lindsay Truscott submitted with Plaintiff's Motion for Partial Summary Judgment, **Exs. 5-7**.

CP 680, ll. 8-13.

Indisputably, Evergreen had all documents on which it based its 11/15/10 Motion to Amend on 2/5/10, eight months before the 10/20/10 deposition of its representative Mr. Frachiseur.

Evergreen testified at the 10/20/10 deposition of its representative, its president, Mr. Frachiseur, that Evergreen's 2/19/10 answers to Larry Shannon's interrogatories needed no change. CP 840, p. 24:10-25:1. He identified as the damages that Evergreen sought three items only: lost loans, lost profits, and a hold back:

Q. Detail if you would for me, please, each amount that Evergreen contends that Larry Shannon owes it.

...

A. The **dollar amount** is based on, as we delve through, **which of these loans should** or should not **be included**, the gross revenue minus the commission expense that we would have paid on the loans that we finally determine **should have been funded through Evergreen**. In addition to that, we believe that **he owes the bonuses that were paid for him** - - to him, as he had already signed with Guild and was not representing - - and violated his contract and was not representing Evergreen Home Loans as management, and in **directing his entire branch**, he is responsible for damages for the loss of production in that branch.

CP 841, p. 99:6-22.

Q. Am I correct in understanding that you played some role in determining what damages Evergreen alleges in this suit?

A. Yeah. This was preliminary and --

Q. I'm not terribly concerned about the numbers themselves.

A. Yes.

Q. You would agree that this E-mail identifies three categories of damages; lost loans,

lost profits, and something called a hold back?

A. Yes.

CP 842, p. 146:2-12.

Evergreen's representative identified no claim for damages for disclosure of alleged trade secrets. Nevertheless, Evergreen's motion to amend asked that its "prayer for relief be amended to include an award of damages, punitive damages, and attorney's fees and costs pursuant to the Washington Uniform Trade Secrets Act." CP 679-680.

CR 30(h)(4) requires a deponent to "answer all questions directly and without evasion." Because Evergreen's representative did not testify that Evergreen sought damages for any alleged disclosure of trade secrets, no questioning of Mr. Frachiseur on that which Evergreen must establish to assert a prima facie trade secrets claim occurred.

3. *Undue Delay by Evergreen and Prejudice to Larry Shannon.*

"The touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party." *Wilson*, 137 Wn.2d at 505. The necessity of additional discovery constitutes sufficient prejudice to deny a motion to amend a complaint to add a claim:

Flow's showing of prejudice was adequate to justify denial of the motion. A new round of discovery would have been necessary.

Oliver v. Flow Intl. Corp., 137 Wn.App. 655, 664, 155 P.3d 140 (2007).

Preliminarily, the fact that Evergreen filed a motion to amend its complaint manifests that it had not pled, explicitly or implicitly, a trade secrets claim. The record demonstrates the baselessness of Evergreen's assertion that Larry Shannon knew that Evergreen was making a trade secrets claim against him, and that he explored that claim through discovery. In reliance upon the allegations in Evergreen's pleadings and its responses to discovery, Larry Shannon made no inquiry during discovery about any of the elements necessary for Evergreen to state a *prima facie* trade secrets claim:

- (1) That it had a trade secret;
- (2) That Larry Shannon misappropriated its trade secret; and
- (3) That the misappropriation proximately caused damages to it.

RCW 19.108.010; *The Confederated Tribes of the Chehalis Nation v. Johnson*, 135 Wn.2d 734, 749, 958 P.2d 26 (1998); *McCallum v. Allstate Property and Casualty Insurance Company*, 149 Wn.App. 412, 424 204 P.3d 944 (2009); *Ed Nowogroski Insurance, Inc. v. Rucker*, 137 Wn.2d 427, 971 P.2d 936 (1999). If Evergreen had disclosed that it was asserting a trade secrets claim against Larry Shannon, Larry Shannon would have conducted discovery on the following matters:

- How, in Evergreen's view, "profit and loss statements," a "loan originator agreement," and the "rates" that Evergreen changed

to its borrowers could qualify as a trade secret as RCW 19.109.010(4) defines that.

- How, in Evergreen's view, could anything that it alleges that Larry Shannon did qualify as "misappropriation," as RCW 19.108.010(2) defines that.
- How, in Evergreen's view, could any alleged conduct of Larry Shannon constitute "improper means," as RCW 19.108.010(1) defines that.
- How, in Evergreen's view, could any of the three items on the basis of which it sought to amend its complaint have "independent economic value" in light of those factors that WPI 351.05 requires a plaintiff to prove to demonstrate "independent economic value."
- What actions Evergreen claimed that it took to meet its burden of establishing that it made reasonable efforts to maintain the secrecy of the three items (see WPI 351.08).

Because Evergreen made no allegation in its Complaint that it asserted a trade secrets claim, and in no way identified in its 2/19/10 interrogatory responses or its 8/20/10 supplemental interrogatory responses that it asserted a trade secrets claim, Larry Shannon made no inquiry during any discovery about the above elements necessary to state a *prima facie* trade secrets claim.

Evergreen's first attempt to assert this claim appeared in its 11/15/10 motion to amend that came after the 10/20/10 discovery deadline. The amendment that Evergreen sought would have necessitated repeat of already conducted discovery and substantial additional discovery with that discovery's attendant time and expense, about: the basis for Evergreen's claim that the three items qualify as trade secrets, about "misappropriation," "improper means," "independent economic value," efforts to maintain secrecy, and the like. The additional rounds of discovery would work substantial prejudice to Larry Shannon. Just as in *Oliver*, this prejudice called for rejection of Evergreen's non-timely Motion to Amend. The trial court's denial of the amendment did not constitute an abuse of discretion.

iii. Evergreen's incorrect statement of law.

Evergreen argues that the "[f]ailure to include findings on the record is an abuse of discretion that supports reversal." (Appellant's Brief, p. 47.) Washington law does not require a trial court to enter findings as a part of denying a motion to amend. Non-entry of written findings does not constitute an abuse of discretion under *Walla* or other Washington law. In *Walla*, the court stated:

Because the trial court in the case before us declined to state a reason on the record for its denial of the motion to amend the pleadings, we cannot ascertain whether its decision was based on untimeliness of the motion or on

some other reason.

Walla, 50 Wn.App. at 883. The court then analyzed the record before it to determine if it contained specific facts that supported a finding of prejudice. *Id.* at 883-84. Because the record contained “no specific facts to support a finding of prejudice,” the court concluded that the trial court had abused its discretion in denying the motion to amend.

Here, the record amply demonstrates the substantial prejudice that the requested amendment would have caused Shannon. Accordingly, the trial court properly exercised its discretion, denying Evergreen’s Motion to Amend.

iv. The trial court properly exercised its discretion in denying the Motion to Amend because the futile amendment doctrine barred that amendment.

Washington courts do not permit futile amendments, and an order amending pleadings to add a futile claim constitutes error. *See Ino Ino, Inc. v. City of Bellevue*, 132 Wn.2d 103, 142, 937 P.2d 154 (1997), *cert. denied*, 522 U.S. 1077 (1998) (trial court properly denied request for amendment where evaluation of the proposed claim made “clear that the challenged ordinances are not wholly arbitrary and capricious or irrational. Thus, ... claim would have been futile”); *see also, Shelton v. Azar, Inc.*, 90 Wn.App. 923, 926, 954 P.2d 352 (1998) (trial court erred in granting motion to amend to add third party complaint against one whom the appellate court deemed immune; “[e]rror to permit amendment to add a

futile claim”); *Bank of America NT & SA v. David W. Hubert, P.C.*, 153 Wn.2d 102, 123, 101 P.3d 409 (2004) (trial court properly denied a motion to amend when no factual basis for the proposed amendment exists); *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn.App. 356, 374, 112 P.3d 522 (2005) (trial court properly denied motion to amend to add a claim for retaliation because, “[t]here is no evidence in the record and Hines cites no evidence that he requested an accommodation, threatened legal action, or voiced opposition to his termination.”); *Oliver*, 137 Wn.App. at 664 (the trial court properly denied the motion to amend complaint to add a futile claim for contract reformation as there was no showing of inequitable conduct necessary to state a cause of action for reformation based on unilateral mistake).

The Washington Civil Procedure Desk Book summarizes:

If amendment would be futile, leave to amend under CR 15(a) will be denied. An amendment may be considered futile either because it is procedurally infirm or lacks a valid substantive legal basis, or because the proponent of the amendment fails to convince the court that the proponent can support its legal claim with facts.

Washington Civil Procedure Desk Book, Volume I, Second Addition, pp 15-13; su-15-3.

Evergreen based its procedurally infirm motion to amend on its assertion that Exhibits 5, 6, and 7 to the 11/15/10 Truscott Declaration

constituted trade secrets. CP 680. Exhibit 5 summarized the profit of Larry Shannon's office for October, November, and December 2008. CP 738, ll. 16-17. Exhibit 6 consisted of the "contract that I [Larry Shannon] used with my loan officers." CP 739, ll. 3-4. Evergreen's rate sheet as of 3/21/09 made up Exhibit 7. CP 739, ll. 16-17.

Exhibit 5 listed loans that Larry Shannon's office made during three months and the amount and type of those loans. CP 738, ll. 17-18. Stewart/Security Title Guaranty of Moses Lake published this information for all lenders in Grant County each month. CP 738, 18-20. Stewart/Security Guaranty's monthly report recited:

Information included in this report is gathered from documents recorded in Grant County Washington.

CP 742. In upholding the trial court's matter of law determination that "records showing the amount of the "community contribution paid by an Indian tribe" did not constitute trade secrets under Washington's Uniform Trade Secrets Act, the Washington Supreme Court ruled:

To be a trade secret, information must be shown to be "novel." (citations omitted)...

The Tribe's bear the burden of proving the existence of a legally protectable trade secret. (citations omitted).

Through general statements and declarations, the Tribes maintain that their competitors would gain an advantage over them if the amount of the 2% community contributions

were made public. In the Tribes' view, a potential competitor could use the 2% figure to calculate gross revenue and then could gauge the market and market saturation. Therefore, the Tribes argue the information derives economic value from not being generally known.

However, there is no evidence in the record before us that knowledge of a casino's profitability could not be generally ascertained by visiting the casino site, through newspaper articles about the casino, or through employees, tribal members, or local service agencies which are recipients of community contributions. Even if the information were not readily ascertainable, there is no evidence in the record to support the Tribes' contention that the information derives "independent economic value" from not being generally known. We hold that the information sought to be protected here is not a trade secret under Washington law.

The Confederated Tribes of the Chehalis Reservation v. Johnson, 135 Wn.2d, 734, 749, 958 P.2d 260 (1998).

The profit/loss of the Moses Lake branch for October, November, and December 2008 could not, as a matter of law, qualify as "novel" or as having "independent economic value." As a consequence, the futile amendment doctrine precluded the proposed amendment.

Exhibit 6 to the 11/15/10 Truscott Declaration, a blank form contract that Larry Shannon utilized for loan officers (CP 739, II. 3-4), proves analogous to the claim manuals, training manual, claim bulletins, and the "McKinsey document" that the court, in *McCallum v. Allstate Property and*

Casualty Insurance Company, 149 Wn.App. 412, 424-25, 204 P.3d 944

(2009), held as a matter of law did not constitute trade secrets:

One of the legislature's purposes in enacting chapter 19.108 RCW, the Uniform Trade Secrets Act, was to protect commercial information concerning business methods. A key factor in determining whether information has "independent economic value" under the statute is the effort and expense that was expended in developing the information.

...

The *Woo* court focused on whether Fireman's Fund established that the manuals had " 'novelty and uniqueness.' "

...

It found that the claims managers' declarations were too conclusory to prove that the manuals compiled the information in an innovative way because they failed to provide concrete examples to illustrate how the Fireman's Fund strategies or philosophies in claims handling were materially different from those of other insurers. The court noted that just because the manuals set forth details and fine points of handling claims does not make them novel.

The *Woo* court also emphasized that "[a] trade secret must derive independent economic value from not being known to or generally ascertainable by others who can obtain economic value from their disclosure or use."

...

And finally, the *Woo* court emphasized that the party seeking to protect documents as trade secrets must show that it has made reasonable efforts to maintain the secrecy of the materials.

McCallum, 149 Wn.App. at 424-25 (internal citations omitted). There

existed no conceivable basis for the blank form contract qualifying as novel and unique. CP 746-781.

Evergreen's loan rates as of 3/21/09, Exhibit 7 to the Truscott Declaration, were available online for anyone who chose to look. CP 739, ll. 16-21; CP 782-786. Any person making inquiry about a loan at an Evergreen office could obtain those loan rates simply for the asking. As a matter of law, this information could not constitute a trade secret.

Evergreen based its non-timely motion to amend to add a claim for trade secrets on documents that, as a matter of law, in light of indisputable fact, could not qualify as trade secrets. The futile amendment doctrine precludes any amendment that lacks a valid substantive legal basis that Evergreen supports with fact. Here, Evergreen could not, as a matter of law, establish that the three items, that it belatedly labeled "trade secrets," qualified as such. In addition to the undue delay and prejudice to Shannon, the futile amendment doctrine necessitated the trial court's rejection of the amendment that Evergreen belatedly sought.

c. Evergreen's Complaint does not "Implicitly" plead a Trade Secrets Claim.

Evergreen argues that it "implicitly pled a general claim for the unlawful transfer for (sic) Evergreen's proprietary information to Guild." (Appellant's Brief, p. 39.) As pointed out above, Evergreen pled no claim of disclosure of trade secrets, confidential information, or proprietary

business information either explicitly or implicitly. If Evergreen wanted to assert such a claim, it needed to disclose it in its complaint. It also needed to identify the claim in its answer or supplemental answer to Larry Shannon's Interrogatory 19. It did not do so. Allowing the post-discovery cut off amendment that Evergreen submitted in response to Larry Shannon's motion for summary judgment would have effectively condoned "trial by ambush." The trial court did not abuse its discretion in denying Evergreen's Motion to Amend, restricting Evergreen to the claims set forth in its Complaint and discovery responses.

d. Shannon is entitled to his attorney's fees on appeal.

The trial court properly awarded Shannon the reasonable attorney fees and costs that he incurred in the defense of Evergreen's claims as the Agreement authorized:

In the event that it shall become necessary or desirable for the Agent or Evergreen to retain legal counsel and/or incur other costs and expenses in connection with the enforcement of any and all rights under this Agreement, the prevailing party shall be entitled to recover from the other his or her reasonable attorney's fee, costs and expenses incurred in connection with the enforcement of said rights.

CP 228. Shannon requests that this Court award the additional reasonable attorney fees and costs that he has incurred in his defense on this appeal.

IV. CONCLUSION

The trial court properly granted Shannon's Motion for Summary Judgment, dismissing Evergreen's claims against Shannon. No admissible evidence in the record supported any of Evergreen's claims. Evergreen's attempt to have this Court reverse dismissal of its claims without "setting forth specific facts showing that there is a genuine issue for trial" fails as a matter of law. Evergreen attempts to rely on speculation, argumentative assertions, and conclusory statements to get this Court to reverse the trial court. As a matter of law, this proves insufficient. Given the undisputed and undisputable evidence in the record, Evergreen stated no legally cognizable Lost Loans Claim, Fictitious Loans Claim, Employee Solicitation Claim, or Holdback/Bonus Claim, and the trial court properly dismissed Evergreen's claims.

The trial court properly exercised its discretion in denying Evergreen's Motion to Amend its Complaint. Evergreen identified each of its three claims that served as the bases for its five causes of action in its 6/13/09 Complaint, its 2/19/10 responses and 8/20/10 supplemental responses to Larry Shannon's 9/3/09 Interrogatories and Requests for Production, and in the 10/20/10 deposition testimony of its representative. No justification existed for Evergreen's undue delay in seeking an amendment. The amendment that Evergreen sought after the 10/20/10 deadline for completion of discovery would have necessitated (1)

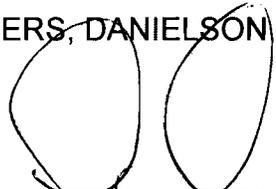
reopening discovery, (2) both additional interrogatories and requests for production and compelling Evergreen to provide complete answers to Larry Shannon's 9/3/09 interrogatories, (3) taking additional depositions, (4) retaking the deposition of Evergreen's representative, and (5) possibly retaining a witness(es) to provide expert testimony on the newly proposed claim. All of that would have worked a severe prejudice to Larry Shannon, who would have to bear the substantial expense to defend against the unjustifiably non-timely claim. Furthermore, the futile amendment doctrine precluded the proposed amendment. The trial court properly denied Evergreen's Motion to Amend, restricting Evergreen to the pleadings set forth in its Complaint.

Larry Shannon respectfully requests that this Court affirm the trial court's decision in all aspects. In addition, Shannon requests an award of his reasonable attorney fees and costs incurred in the defense of this matter on appeal.

Dated this 21 day of July, 2011.

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

By



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