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No. 57068-4-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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MICHAEL STEPHENS, on behalf of himself and all others  
similarly situated, Respondent

v.

OMNI INSURANCE COMPANY  
a foreign insurance company, Petitioner  
and

CREDIT CONTROL SERVICES, INC.,  
d/b/a Credit Collection Services, Petitioner

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**BRIEF OF RESPONDENT MICHAEL STEPHENS**

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## I. INTRODUCTION

No matter how much Appellants wish or pretend that this case is all about a motor vehicle accident with an uninsured motorist, it is not. This case concerns the deceptive and illegal means that corporations, if left unchecked, will employ to wrongfully extract money from the pockets of individuals in Washington, even though such persons lawfully owe the corporations nothing.

Appellant/Defendant Credit Control Services, Inc. (“CCS”) was caught in a scheme whereby it was sending thousands of debt collection notices<sup>1</sup> to members of the Washington public for debts that, in truth, did not exist. Notwithstanding that no such money was actually owed, the scheme was highly successful: over the last few years, it has netted CCS and its collaborators in excess of 1.6 million dollars, all wrongfully extracted from persons who legally owed nothing. CP 517, 533-34.

The scheme involves sending self-styled “Formal Collection Notices” to persons who had been involved in motor vehicle accidents, and were believed to lack liability insurance. The notices were sent on

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<sup>1</sup> Why CCS asserts there is no evidence its form “collection” notices were sent to others in Washington, CCS Br. at 26, 30, is unfathomable. These notices were sent to several thousand others in Washington. CP 515-16, 531. In fact, when CCS sought discretionary review by this Court, CCS indicated one reason supporting review was that the matter involved “potentially tens of thousands of additional persons who allegedly received similar letters ....” CCS Motion for Discretionary Review, at 12 (filed Nov. 2, 2005).

behalf of various insurance companies that provided uninsured motorist and/or PIP coverage to the other vehicle involved, which made payments to its insureds in connection with the accident.

In this case, for example, on June 9, 2003, plaintiff/respondent Michael Stephens was involved in an automobile collision with a Ms. Carrine York. Apparently, Ms. York subsequently sought medical treatment for alleged injuries, and submitted a claim to her insurer, defendant/appellant Omni Insurance Company ("Omni"), under her UIM coverage. In turn, Omni apparently paid Ms. York a total of \$6,412.00, which included both special and general damages. At the time, there was some question as to whether Mr. Stephens had valid insurance coverage.

Unilaterally deciding that: (i) Stephens was wholly at fault in the accident, and (ii) \$6,412.00 was the amount of damages to which Ms. York was entitled, Omni then unilaterally decided that Stephens was indebted to Omni for this amount. Thus, although no case had ever been filed, no judicial determination had been made as to liability, and no judgment had been rendered as to damages, Omni had CCS – a debt collection agency – send Stephens a self-styled "Formal Collection Notice" for a claimed "Amount Due" of \$6,412.00.

Apparently, a significant number of people, when faced with the threats made in similar collection notices, have been deceived, intimidated

and/or coerced enough to simply send the money demanded even though they, like Stephens, lawfully owed no such debt. Stephens, however, decided to investigate the matter. During this time, Stephens necessarily incurred various out-of-pocket costs and expenses, and also lost time from his self-run landscaping business. Ultimately, Stephens decided to stand up to the threats, attempted intimidation and coercion, and filed the instant suit for violation of the Washington Consumer Protection Act (“CPA”).

The scheme that CCS has conducted with the insurers with which it works has caused substantial harm to the Washington public. Most obviously, the public has been harmed by the wrongful transfer of substantial amounts of money from individuals’ pockets to the coffers of CCS and Omni and others. But the public is further harmed by these tactics, as they also constitute an unlawful and unfair competitive advantage as compared to other insurers and collection agencies in Washington who decline to engage in deceptive or sharp business practices. The lawsuit was filed to stop the scheme, which by all appearances continues unabated.

## **II. COUNTERSTATEMENT OF THE ISSUES PERTAINING TO APPELLANTS’ ASSIGNMENTS OF ERROR**

1. Are the protections against deceptive business practices afforded by Washington’s Consumer Protection – Unfair Competition and

Acts statute limited solely to “consumers,” even though the Act contains no such limitation and permits “any person” to seek relief?

2. Does sending threatening, self-styled “Formal Collection Notices” demanding an “Amount Due” to individuals who lawfully owe *nothing*, deceptive under the CPA?

3. Did CCS and Omni – a collection agency and an insurance company – engage in “trade or commerce” when they used debt collection mechanisms (such as the “Formal Collection Notices”) to try to extract money from numerous Washington residents?

4. Is Omni liable for its own conduct under the CPA, where Omni put the “wheels in motion” on the unlawful and deceptive “collection” activities?

5. Is Omni liable for CCS’s unlawful activities under any theory of agency or joint or vicarious liability, when the evidence establishes, *inter alia*, that Omni put the “wheels in motion” on the unlawful and deceptive “collection” activities, and had the right – whether exercised or not – to control CCS’s activities?

6. Can CCS and Omni escape liability under the doctrine of *res judicata*, even though, *inter alia*, there is no prior action, the matters do not involve the same evidence, there is no infringement of the same right, and no common nucleus of transactional facts?

7. Should the Court affirm the trial court's order of partial summary judgment in favor of Stephens, when Stephens has established all five elements of his CPA claim?

8. Is there a sufficient basis to remand for discovery when the evidence is simple, straightforward and direct, and there is no showing that any new evidence would alter the decision or that Appellants did not have a fair opportunity to conduct the discovery they now seek?

### III. COUNTERSTATEMENT OF THE CASE

In late April 2004, Mr. Stephens opened an envelope he received in the mail. The letter inside pointedly informed him that:

**THIS IS A FORMAL COLLECTION NOTICE**

(The "April 16 Collection Notice"). CP 74-75. At the top of the notice in oversized, capitalized typeface was CCS's trade name, "CREDIT COLLECTION SERVICES." CP 74. On either side of that were the seals of two collection agency associations (the American Collectors Association and the American Commercial Collectors Association). CP 74. In short, the April 16 Collection Notice appeared to be just what it said it was – a formal collection notice, with little difference from any standard dunning letter for an actual debt, due and owing. CP 74-75.

The collection notice informed Mr. Stephens that he owed an

“**AMOUNT DUE**” of **\$6,412.00**. CP 74. It also provided instructions for him to make “instant payment.” CP 74. The problem was, no such debt or “amount due” existed. Nearly a year earlier, in June 2003, Mr. Stephens had been involved in a two-vehicle automobile accident. CP 68. The other car involved was operated by a Ms. Carrinne York. CP 198, 424. Although it was a rear-end accident, legal liability for the accident had not been established, nor was the extent of any purported damages.

At the time of the accident, defendant Omni provided automobile insurance coverage to Ms. York, including, apparently, UIM coverage. CP 177, 198-99. Sometime after the accident, Ms. York apparently sought medical care for alleged injuries, and thereafter submitted a claim to Omni under her UIM coverage. CP 177, 199. Omni, possibly believing that the bills Ms. York incurred for medical care were reasonable and necessary and related to the accident – or possibly just deciding that the modest amount claimed wasn’t worth fighting about – paid \$5,112 for Ms. York’s medical bills. CP 199, 424. Omni also apparently decided to value Ms. York’s alleged general damages (*e.g.*, pain, suffering, etc.), arbitrarily setting it at \$1,300, and apparently paid that amount to her. CP 199, 424. Omni asserted that by virtue of these payments, it gained subrogation rights in the amount of \$6,412 to any personal injury claim Ms. York might possess. CP 199.

At the time of the April 16 Collection Notice, however, Mr. Stephens owed Ms. York nothing – no suit had been filed, no judgment rendered, no liability had been admitted, etc. CP 8, 795. Indeed, all Ms. York has ever possessed is the ability to pursue a tort claim and attempt to establish that Mr. Stephen owed her something.<sup>2</sup> Even then, of course, Ms. York would then have to prove the specific amount to which she was entitled. Furthermore, since Mr. Stephens owed nothing to Ms. York, he necessarily owed nothing to her subrogee, Omni, nor to Omni's agent and/or joint venturer, CCS.

Despite the fundamental fact that Mr. Stephens was indebted to no one, Omni went out and retained a *debt collection agency*, CCS, for the purpose of attempting to extract money from Stephens. CP 199, 425. In connection with those efforts, CCS, using its d/b/a of Credit Collection Services, sent the April 16 Collection Notice. CP 74-75. And when Mr. Stephens called and spoke with CCS representatives, they specifically told him that the matter was in "collection," insisting he had to pay the purported "Amount Due." CP 69.

CCS continued to pursue Mr. Stephens for the alleged indebtedness. In early May 2004, Mr. Stephens received another

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<sup>2</sup> Ms. York has never instituted any such action.

purported “collection notice” from CCS (the “May 7 Collection Notice”). This one, like the first, included the trade name “Credit Collection Services” in bold letters at the top, along with the two collection agency seals on either side. CP 69, 77. It also continued to assert the existence of an actual, bona fide debt, again asserting that Mr. Stephens was indebted for an “**AMOUNT DUE**” of \$6,412.00. The notice pointed out that Mr. Stephens had “failed to respond to [the earlier collection] notice requesting full payment.” CP 69, 77. This time, the white-on-black oversized lettering was used for the word “**ATTENTION**,” which was used eight times around the edge of the collection notice to form a border. CP 77. The notice further threatened to pursue “full *payment* in accordance with federal and state law(s) ...” (emphasis added). CP 77. It warned Mr. Stephens that he had to “Act immediately, as your file is pending further action.” CP 77. In addition, the center of the notice highlighted the menacing threat: “**ACTIVITY PENDING TEN (10) DAYS.**” CP 77.

Despite the continuing representations to Mr. Stephens that a debt was due, owing and in “collection,” it is clear both Omni and CCS knew no such debt existed.<sup>3</sup> For example, if the collection notices had been sent in pursuit of an actual “debt,” they would have needed to include various

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<sup>3</sup> This is in addition to the fact that two entities such as appellants would clearly know that an unliquidated, unadjudicated potential tort claim does not constitute a “debt.”

language mandated by the FDCPA.<sup>4</sup> But it is clear from the face of the collection notices that there was absolutely no effort to comply with even the most basic requirements of the FDCPA. CP 74-75, 77.

The explicit and implicit threats in the “collection notices” were plainly designed to generate activity (and in fact specifically told Mr. Stephens he had better act; *see* CP 74-75, 77). What Omni and CCS undoubtedly desired, of course, was for Stephens to take “immediate” action and make the “instant payment” demanded by the collection notices. CP 74-75, 77. Not surprisingly, the collection notices did scare Mr. Stephens into taking action, albeit not necessarily the action CCS and Omni desired. As noted above, Mr. Stephens first called CCS and spoke with one of its representatives.<sup>5</sup> The only thing to come out of the call, however, was a reaffirmation that Stephens purportedly owed a debt that was in “collection,” and they fully expected him to pay the purported “AMOUNT DUE.” CP 69.

Consequently, in order to protect his interests, Mr. Stephens was forced to further investigate the nature and validity of the alleged debt, and to try to determine what other options might be available to him in

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<sup>4</sup> *See, e.g.*, 15 U.S.C. § 1692g.

<sup>5</sup> Mr. Stephens called and spoke with CCS representatives on at least two occasions, but with similar results each time. CP 69.

responding to the notices. To that end, Mr. Stephens quite logically decided to consult with an attorney. CP 69. In doing so, however, he was forced to divert time and resources away from his self-owned and operated small business, Proscap Landscaping. CP 69. For example, before hiring an attorney, he took time away from his business to locate and investigate the qualifications of potential attorneys, including performing Internet research, reviewing the yellow pages, and having several telephone conversations with potential attorneys. CP 69-70. Mr. Stephens then took time away from his business to travel from Bellevue to Seattle to provide the attorney with copies of the "collection notices," and to meet with the attorney on at least two separate occasions early on. CP 70. Furthermore, Mr. Stephens had to take additional time away from his business to discuss the "collection notices" at times when his attorney called him during regular business hours, at least some of which actually occurred while Mr. Stephens was on a job site. CP 70-71.

Mr. Stephens also necessarily incurred various costs and expenses in connection with addressing the collection notices. These include motor vehicle operating expense (*e.g.*, cost of gas, wear and tear) and parking expense incurred on the occasions when he drove to the attorney's office. It also includes the use of resources from his small business, such as office supplies, copy costs and cell phone charges. CP 69-71.

Mr. Stephens' costs and expenses also include \$49.95 that he paid to obtain a current copy of his credit report from a credit reporting agency. CP 71, 79. Around the same time that CCS and Omni were sending him the "collection notices," Mr. Stephens was looking into the possibility of purchasing a home. Since he was concerned that the purported "collection" activity might be reported and damage his credit and, thereby, his ability to purchase a house, he was forced to obtain the credit report to see if it had been reported and, if so, so that he could respond. CP 71. In fact, because the threat from CCS and Omni was ongoing, he also purchased a credit "watch" service for an additional \$9.95 per month. CP 71, 82. Finally, in addition to the various out-of-pocket costs and expenses Mr. Stephens has himself incurred, he has obviously had other costs and expenses incurred on his behalf in the context of this litigation.

#### **IV. AUTHORITY & ARGUMENT**

##### **A. STANDARD OF REVIEW AS TO SUMMARY JUDGMENT**

The standard of review is well established. When reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court, *Denaxas v. Sandstone Court of Bellevue, L.L.C.*, 148 Wn.2d 654, 662, 63 P.2d 125 (2003), and "reviews the facts and law ... *de novo*." *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 119, \_\_\_ P.3d \_\_\_ (2005) (quoting *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665

(1995)). “Summary judgment is appropriate only when, after reviewing all facts and reasonable inferences in the light most favorable to the nonmoving party, there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Viking Props.*, 155 Wn.2d at 119 (emphasis added) (citing CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

Moreover, “an appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court.” *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965)). This is true so “long as the record has been sufficiently developed to fairly consider the ground.” *Caulfield v. Kitsap Cty.*, 108 Wn. App. 242, 251, 29 P.3d 738 (2001) (citing RAP 2.5(a); *Nast*, 107 Wn.2d at 308.).

**B. THE CPA IS BROAD, FAR-REACHING AND DESIGNED TO  
PROTECT THE WASHINGTON PUBLIC IN GENERAL**

**1. The CPA Must Be Given A Liberal Construction To  
Ensure That Its Beneficial Purposes Are Served**

“The Washington Legislature passed the Consumer Protection Act for a laudable purpose: to protect Washington citizens from unfair and deceptive trade and commercial practices.”<sup>6</sup> *Dwyer v. J.I. Kislak*

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<sup>6</sup> The beneficial purposes of the CPA are so important that it was amended in 1970 to provide for a private right of action, in addition to existing enforcement actions by the

*Mortgage Corp.*, 103 Wn. App. 542, 547-48, 13 P.3d 240 (2000), *rev. denied*, 143 Wn.2d 1024 (2001) (citations omitted). Accordingly, the CPA “shall be *liberally construed* [so] that its beneficial purposes may be served.” RCW § 19.86.920 (emphasis added). *See also Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) (“This court continues to give effect to the intended broad construction of these terms.”); *State Farm v. Hunyh*, 92 Wn. App. 454, 458, 962 P.2d 854 (1998) (“The CPA is to be liberally construed to serve its purpose, *i.e.*, to protect the public, and foster fair and honest competition.”).

## 2. The So-Called “Consumer” Protection Act Covers Much More Than Consumer Sales Fraud

Disregarding the CPA’s own mandate that it be broadly and liberally interpreted, Omni and CCS contend that the CPA is actually quite narrow in scope. For example, Omni and CCS make a great deal of the fact that the short title is the “Consumer” Protection Act, and marshal every casual use of the word “consumer” elsewhere in an effort to bolster their position. Appellants make much ado about nothing. To begin with, it is hornbook law that the actual provisions of a statute determine its meaning and reach – not such things as chapter headings or a short title, or

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Attorney General. *See Hangman Ridge*, 105 Wn.2d at 784 (“In apparent response to the escalating need for additional enforcement capabilities, the State Legislature in 1970 amended the CPA to provide for a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA.”).

even an Act's full title for that matter.<sup>7</sup>

In any event, the CPA is not merely a narrowly targeted "sales fraud" law as Appellants' purport. *E.g.*, CCS Br. at 1. Rather, by its own language, it is expansive, far-reaching legislation designed to address a number of matters well beyond "consumer" fraud. For example, in addition to generally including any "unfair or deceptive acts or practices," such as those at issue here, the CPA very specifically also includes unfair methods of competition (*see* RCW § 19.86.020 & .050), restraints of trade (*see* RCW § 19.86.030), and monopolistic practices (*see* RCW § 19.86.040). That all of the foregoing provisions are part of the "Consumer" Protection Act, highlights the fact the Act's short title is meaningless.<sup>8</sup>

Similarly, the CPA makes it clear that its purpose and goal are likewise broad and far-reaching; the Act does not say it is designed to protect "consumers," something which the legislature could easily have

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<sup>7</sup> Even so, if we are looking at titles, it is worth mentioning that the original Act was titled "Consumer Protection – Unfair Competition and Acts;" the 1970 amendment (which created the private right of action) was titled "Unfair Business Practices and Consumer Protection," and the 1983 amendment was titled "Antitrust/Consumer Protection Improvements Act." *See* Laws of 1961, ch. 216, p. 1956; Laws of 1970, ch. 26, p. 202; Laws of 1983, ch. 288, p. 1402, respectively. When the CPA was amended in 1983, the stated purposes included: "to strengthen public and private enforcement of the *unfair business practices – consumer protections act ...*" *See* Laws of 1983, ch. 288, p. 1403.

<sup>8</sup> *See also* RCW § 19.86.920 ("the purpose of this act is to complement the body of federal law governing *restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices ...*") (emphasis added).

stated. Rather, the CPA states that its purpose is to protect the Washington *public in general*. See RCW § 19.86.920 (purpose is “to protect the *public* and foster fair and honest competition ....”).<sup>9</sup> The language selected speaks volumes, and severely undermines Omni’s and CCS’s arguments to the contrary.<sup>10</sup>

3. A CPA Plaintiff Need Not Have a “Consumer” or  
“Contractual” Relationship With the Defendants

As the preceding discussion illustrates, the CPA is a broad statute with a wide reach geared to protect the public in general. Even so, Omni and CCS also assert such things as that it only protects “consumers” of “goods and services sold or offered from sale,” *e.g.*, CCS Br. at 1, or those in a “direct relationship” with the CPA defendant. *E.g.*, Omni Br. at 13. The actual provisions of the CPA,<sup>11</sup> however, as well as controlling case law, amply establish that the reach of the Act is far greater than what

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<sup>9</sup> See also *Dwyer*, 103 Wn. App. at 548 (CPA’s purposes include protection of “Washington *citizens*”) (emphasis added); *State Farm v. Hunyh*, 92 Wn. App. 454, 458, 962 P.2d 854 (1998) (CPA purposes include protection of the “*public*”) (emphasis added).

<sup>10</sup> Of course, this is in addition to the fact that the Act also specifically states it is to be liberally construed for precisely such reasons. See *id.*; see also *supra*, Part IV.B.1.

<sup>11</sup> See RCW § 19.86.090 (“any person” may assert CPA claim). See also *Hall v. Walter*, 969 P.2d 224, 233-34 (Colo. 1998) (observing that Washington CPA’s “plain language makes [a right of action] available to ‘any person’ injured by a violation of the act.”) (emphasis added).

Omni and CCS contend, and covers exactly the circumstances at bar.<sup>12</sup>

Despite appellants' assertions, the lack of a direct contractual or consumer relationship between the parties is no bar to suits under the CPA. Washington courts have long held that there need not be a consumer or contractual relationship between a CPA plaintiff and CPA defendant. In fact, there need not be any particular relationship between the parties, other than the requisite causal relationship between the defendant's deceptive conduct and the injury or damages sustained by a plaintiff. *See Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 795 P.2d 1143 (1990). This does not, however, need to arise from contractual, or even direct, dealings between the parties.

The Supreme Court has very pointedly stated:

“The leading CPA case of *Hangman Ridge* ... does *not* include a requirement that a CPA claimant be a direct consumer or user of goods or in a direct contractual relationship with the defendant. Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, *there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services.*”

*Physicians Ins. Exch. v. Fisons Corp.*, 122 Wn.2d 299, 312-13, 858 P.2d

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<sup>12</sup> Furthermore, given the CPA's express application to matters of unfair competition, it is likely that a suit based on the conduct at issue here could also have been filed by one of the Appellants' competitors, since Appellants' deception permits them to circumvent the more costly process of actually establishing a lawfully-owed obligation.

1054 (1993) (emphasis added; citations omitted). Particularly noteworthy in this passage is that when pointing out that *no* such relationship need exist, the Supreme Court uses the *same* words Omni and CCS use (“consumer” and “direct”) to argue that such a relationship *must* exist.

Both CCS and Omni rely extensively on the portion of *Fisons* that follows the above quoted passage. In that portion of the opinion, the Court goes on to note (“Additionally ...”) that the relationship between the CPA plaintiff (prescribing doctor) and the CPA defendant (drug manufacturer) was akin to the ordinary consumer in other settings, and that the physician in such circumstances was a logical private attorney general. *See* 122 Wn.2d at 313. The fact the Court added this discussion, however, does not undermine the Court’s plain, unequivocal statement just preceding it: “*Hangman Ridge* ... does *not* include a requirement that a CPA claimant be a direct consumer or ... in a direct contractual relationship with the defendant. ... [and] there is *no* language in the Washington act which requires [it].” 122 Wn.2d at 312-13. The language Omni and CCS cling to is, at best, dicta.

On the “relationship” issue, Omni also cites *State Farm v. Huynh*, although Omni styles it in terms of the “trade or commerce” element (discussed below). In that case, State Farm sued a chiropractor under the CPA for authoring false injury reports. Although the court did say it

considered State Farm as akin to a “purchaser” of the chiropractor’s services for the benefit of its insureds, the fact is State Farm never paid for the reports or the chiropractor’s bills, and thus never actually engaged in *any* transaction with the chiropractor. *See* 92 Wn. App. at 458.

Other cases provide further support for the notion that no special relationship need exist between the CPA plaintiff and the CPA defendant. For example, in *Nordstrom*, the conduct at the heart of the CPA claim was not even directed at plaintiff Nordstrom. Instead, the CPA claim arose from conduct by the defendant that allegedly had the capacity to deceive *customers* of plaintiff Nordstrom. In other words, the only “consumer” relationship even remotely implicated was between the CPA defendant and persons who were not even party to the suit. In this regard, the deceptive conduct was not even directed at the CPA plaintiff (Nordstrom); but Nordstrom possessed a viable CPA claim because the deceptive conduct caused Nordstrom harm.<sup>13</sup> *See* 107 Wn.2d at 733.

Similarly, in *Northwest Airlines, Inc. v. Ticket Exchange, Inc.*, 793 F. Supp. 976 (W.D. Wash. 1992), the CPA claim was based on a ticket broker’s brokering of Northwest’s frequent flier awards to air travelers. The ticket broker had absolutely no consumer relationship or direct

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<sup>13</sup> Although the plaintiff and the defendant had certain contractual dealings (the defendant had been a subtenant of Nordstrom), this relationship was not the basis for the CPA claim. *See* 107 Wn.2d at 733.

dealings with Northwest, however, and so challenged Northwest's standing to bring a CPA claim for "lack of a 'direct consumer relationship' or 'transaction' between the parties." *Id.* at 979. The court rejected the argument, finding no such requirement existed, and granted Northwest summary judgment on the CPA claim. *Id.* at 979-80.

Additional support is also found in *Schmidt v. Cornerstone Investments*, 115 Wn.2d 148, 795 P.2d 1143 (1990). In that case, plaintiffs sued a number of defendants under various theories in a matter involving a real estate investment gone bad. One of the defendants, Austin, had obtained an essentially fraudulent appraisal of the property in question. 115 Wn.2d. at 153. Austin had apparently provided the appraisal to Cornerstone Investments in connection with his sale of the property from Grand Investments to Cornerstone. Cornerstone then provided the appraisal to Pacific Home Equity in order to help secure \$75,000 of financing through a second position deed of trust. A Pacific sales agent then went to the Schmidts, provided them with the appraisal, and convinced them to put up the \$75,000. *Id.* at 154. In short, Austin's actionable conduct was substantially more attenuated to the Schmidts than the actionable conduct of CCS and Omni as to Mr. Stevens.

On appeal, Austin argued that the Schmidts' CPA claim failed as to him because there was no link between him and the Schmidts. *See id.*

at 167. The Supreme Court, however, disagreed, pointing out that Austin's analysis was flawed, as the only link required is a link between the deceptive conduct and the resulting injury or damages – not a link between the parties themselves:

Austin asserts that a causal link must exist between plaintiffs and himself in order to satisfy this part of the test. This is incorrect. Instead, the causal link must exist between the deceptive act (the inflated appraisal) and the injury suffered. *Travis [v. Washington Horse Breeders Ass'n, Inc.]*, 111 Wn.2d 396, 407, 759 P.2d 418 (1988); *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 741, 733 P.2d 208 (1987). There is no doubt such a causal link exists in this case. Plaintiffs testified at various stages throughout the litigation that had they not been shown the inflated appraisal, they never would have made the investment which led to the injury now complained of.

*Schmidt*, 115 Wn.2d at 167-68 (1990).

As it has done previously in support of its so-called “standing” argument, CCS also cites to cases that involve the breach of the contractual duty of good faith owed to an insured. On their faces, such cases are wholly inapplicable. For example, *Green v. Holm*, 28 Wn. App. 135, 622 P.2d 869 (1981), merely stands for the proposition that only an insured can bring a *per se* CPA action against an insurer for breaching its contractual duty of “good faith,” as an insurer does not owe such a contractual duty to a non-insured (*i.e.*, third party claimant). This has no application here, of course, as Mr. Stephens has not asserted a *per se* CPA

claim based on an insurer's alleged "bad faith" breach of contractual duties, which is the only CPA claim that would require such a contractual relationship. The same applies with regard to other such "bad faith" cases, including *Marsh v. General Adjust. Bureau, Inc.*, 22 Wn. App. 933, 592 P.2d 676 (1970) and *Bowe v. Eaton*, 17 Wn. App. 840, 565 P.2d 826 (1977).<sup>14</sup> In short, nothing in the line of "bad faith" cases stands for the proposition that an insurer can act unlawfully toward any person, as long as that person is not an insured or is in an adversarial relationship with the insurer. *See Dussault v. Am. Int'l Group, Inc.*, 123 Wn. App. 863, 870-71 (2004) (notwithstanding *Marsh* and *Bowe*, plaintiff – a non-insured adversary of an insurer – was not barred from bringing misrepresentation claims against the insurer).

Finally, in addition to the lack of statutory or case law support, Appellants' argument also ignores that the analysis of the "public interest" element explicitly recognizes that the CPA covers more than just "consumer transactions," as the first step in that analysis involves determining whether the matter involves primarily a "consumer transaction" or a "private dispute." *See infra* (discussion of public interest element). If the Act only applied to "consumer" transactions, this part of

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<sup>14</sup> Additionally, *Bowe* is outdated and its holding on the issue was long ago rejected. *See, e.g., Escalante v. Sentry Ins.*, 49 Wn. App. 375, 386, 743 P.2d 832 (1987) (Div. I).

the analysis would have no purpose and would not exist.

In sum, arguing a CPA claim requires a direct “contractual” or “consumer” relationship contravenes not only established Washington precedent, but the very language of the CPA itself, which expressly provides that “*any person*” who sustains injury or damage has standing to bring such a claim. *See* RCW § 19.86.090 (emphasis added).

C. THE TRIAL COURT CORRECTLY HELD THAT ALL FIVE REQUISITE CPA ELEMENTS ARE PRESENT

A CPA claim consists of the following five elements: (1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) that affects the public interest; (4) injury to plaintiff’s business or property; and (5) causation. *See, e.g., Hangman Ridge*, 105 Wn.2d at 785, 787, 792. All five elements have been established here.

1. Unfair or Deceptive Act or Practice

This first element for a CPA claim can be satisfied by establishing the conduct in question constitutes either of two alternatives: that the conduct is deceptive, *or* that the conduct is unfair. *See* RCW § 19.86.020. *See also Hangman Ridge*, 105 Wn.2d at 785 (either an “unfair *or* deceptive act or practice”) (emphasis added) (citing statute), *Blake v. Federal Way Cycle*, 40 Wn. App. 302, 310-11, 698 P.2d 578 (1985) (discussing unfair as distinct from deceptive). Here, the conduct at issue –

sending self-styled “Formal Collection Notices” and threatening various debt collection activities in order to extract money when, in truth, no money is owed and no such debt exists – plainly satisfies the *deceptive* conduct alternative for this first CPA element.<sup>15</sup>

The following facts are uncontroverted or facially apparent: (i) Mr. Stephens lawfully owed no money or debt to Ms. York or Omni, her subrogee; (ii) Omni nevertheless hired a *debt collection agency*, CCS, for the purpose of having it attempt to extract money from Mr. Stephens; and (iii) CCS sent Mr. Stephens a notice that not only was designed to be interpreted as an actual debt collection notice, but itself claimed to be a “FORMAL COLLECTION NOTICE” for a purported “AMOUNT DUE.”

To satisfy the “deceptive” element, a plaintiff need merely establish that the conduct has the *capacity to deceive* a substantial portion of the public. *E.g., Hangman Ridge*, 105 Wn.2d at 785 (citations omitted); *Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581, 592, 675 P.2d 193 (1983). A CPA plaintiff does *not* need to establish either an intent to

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<sup>15</sup> Because plaintiff has chosen the “**deceptive**” alternative of the first CPA element, any discussion of cases concerning the FTC’s interpretation of the other alternative – “unfairness” – is completely uninforming. Thus, for example, CCS’s extended discussion of FTCA § 45 (15 U.S.C. § 45) completely misses the mark. *See* CCS Br. at 17-20. Notably, CCS’s own discussion points out that its lead case, *Blake v. Federal Way Cycle Center*, spoke of determining whether a practice is “**unfair.**” CCS Br. at 18. In any event, the CPA law in Washington is settled: it is as set out in *Hangman Ridge*.

deceive,<sup>16</sup> or, any actual deception.<sup>17</sup> This purposefully low threshold for satisfying the “deceptive” element is entirely consistent with and supportive of the beneficial purposes underlying the CPA, including the desire to deter deceptive conduct *before* injury occurs. *See Hangman Ridge*, 105 Wn.2d at 785 (citing 60 Wn. L. REV. 925, 944 (1985)).

In application, the “capacity to deceive” test essentially involves deciding whether reasonable people *could be* misled by the conduct or practice at issue. *See, e.g., Dwyer*, 103 Wn. App. at 547 (holding statement had the capacity to deceive because “a reasonable consumer *could* believe [the] declaration [in question] to mean [something that was not true]”) (emphasis added). This is clearly the case with regard to the April 16 Collection Notice self-styled “FORMAL COLLECTION NOTICE” that CCS, on Omni’s behalf, sent to Mr. Stephens (as well as to numerous others in Washington). The notice was styled as, titled as, and gave the illusion of being a debt collection notice for an amount of alleged indebtedness “DUE” and owing.<sup>18</sup> Any reasonable person receiving this collection notice could easily be, and many likely were, misled into

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<sup>16</sup> *E.g., Robinson v. McReynolds*, 52 Wn. App. 635, 638 n.2, 762 P.2d 1166 (1988) (“No intent to deceive is required for a Consumer Protection Act violation.”) (citation omitted).

<sup>17</sup> *Dwyer*, 103 Wn. App. at 547 (citing *Aubrey’s R.V. Ctr., Inc. v. Tandy Corp.*, 46 Wn. App. 595, 609, 731 P.2d 1124 (1987); *Nelson v. Nat’l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992)).

<sup>18</sup> The deception was further reinforced by the similarly styled May 7 Collection Notice.

believing that CCS and Omni were trying to collect an existing, valid debt that was legally due and owing. Furthermore, any reasonable person receiving this notice could easily be, and many likely were, misled into believing that they had no choice but to pay the purported “AMOUNT DUE” if they desired to avoid the negative ramifications and other unpleasantness associated with the threatened debt collection activities. In short, the self-styled “Formal Collection Notice” possesses an inherent capacity to deceive because a reasonable person easily could be misled into believing the notices to mean something that simply was *not true* – that they owed a valid and legitimate debt, and that they must pay as ordered or suffer the threatened consequences of debt collection activity. *See, e.g., Dwyer*, 103 Wn. App. at 547. Such conduct falls squarely within the “capacity to deceive” test. *E.g., Hangman Ridge*, 105 Wn.2d at 785; *Bowers*, 100 Wn.2d at 592; *Dwyer*, 103 Wn. App. at 547.<sup>19</sup>

*Dwyer* is particularly instructive. The plaintiffs (the Dwyers) decided to pay off the home mortgage they had with defendant Kislak and refinance with another lender. In order to effect the closing of the new

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<sup>19</sup> If Mr. Stephens had actually owed something but been overcharged, such as being billed for services that were never actually performed, there would be little question but that the conduct was deceptive. Notably, although the situation here is somewhat analogous, it is actually *more* egregious, as Mr. Stephens was essentially “billed” by Omni and CCS when he lawfully owed nothing.

loan and transfer of title, the Dwyers requested Kislak provide a mortgage payoff. *Dwyer*, 103 Wn. App. at 544. Kislak's statement provided: "This statement reflects the amount needed to prepay this mortgage in full;" and then listed, among other amounts, a "Misc Service Chgs" fee of \$50.00. The Dwyers paid the entire amount on the statement, and the closing was completed. *Id.* at 544-45. The Dwyers then brought, *inter alia*, a CPA claim against Kislak, asserting the payoff statement was deceptive "because a reasonable consumer would believe that [it meant] Kislak would not release the mortgage without payment of the miscellaneous service charges included in the stated balance due."<sup>20</sup> *Id.* at 545.

The Court reversed the trial court's entry of summary judgment in favor of Kislak on the CPA claim, stating:

*A plain reading of Kislak's statement considered in light of its purpose reveals its capacity to deceive a substantial portion of the public. The Dwyers requested the statement to learn the sums due to obtain a release of their mortgage. It is reasonable to assume that Kislak's response would include only those charges actually required to release the mortgage, or if other fees appeared, that they would be specifically identified as extraneous charges that need not be paid in order to obtain a release of the prior lien.*

The document Kislak provided is *entitled*, 'Payoff Statement' and the balance due is headed by a paragraph which begins, 'This statement reflects the amount needed

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<sup>20</sup> This was untrue because insisting on payment of such fees before reconveying the deed of trust would violate the terms of the deed. *Id.* at 545.

to prepay this mortgage in full.’ *Taken at face value*, a reasonable consumer could believe that declaration to mean that unless all sums included on the statement are paid, Kislak will not release the mortgage.

*Id.* at 547 (emphases added).<sup>21</sup>

Similarly, the “Formal Collection Notice” here, taken at face value and in light of its purpose, could cause reasonable consumers to believe that it is, in fact, a “collection notice” for an existing, valid debt that must be paid. This representation, however, is just as untrue as Kislak’s implicit representation that the “miscellaneous services charges” had to be paid before the Dwyer’s mortgage would be released. Likewise, just as the Dwyers would reasonably assume that Kislak would only include amounts on its payoff statement that actually had to be paid, Mr. Stephens (and others receiving the notices) would reasonably assume that CCS and Omni would only send them “Formal Collection Notices” if they in fact owed existing, valid debts actually subject to debt collection.

As the *Dwyer* Court succinctly put it: “Our holding protects Washington citizens by ensuring that they are clearly and *accurately* informed about the nature and extent of their obligations to Kislak.” *Id.* at 548 (emphasis added). Mr. Stephens and the others receiving the bogus,

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<sup>21</sup> See also *Pickett v. Bebachick*, 101 Wn. App. 901, 920, 6 P.3d 63 (2000) (deceptive to represent passenger fees as “government charges, taxes and fees” when they were not those things).

self-styled “FORMAL COLLECTION NOTICES” deserve no less.

It should be noted that reaching such a conclusion does not improperly interfere with an insurance company’s ability to pursue rights it believes it has acquired by subrogation. It is not the “end” that is of concern here, but rather the “means,” because regardless of whether the end may otherwise be lawful (e.g., subrogation recovery), employing unlawful means (e.g., deception) to get there is, of course, still unlawful. For example, although it is clear Mr. Stephens owed nothing to Ms. York, Omni or CCS, even if he had owed a legitimate debt, it still would be impermissible and unlawful for Omni or CCS (or, for that matter, Ms. York) to employ such means as fraud, theft, conversion or deception to collect it.<sup>22</sup> This is in line with *Kislak*, where the Court pointedly distinguished Kislak’s right to *charge* various fees (the “end”), versus its right to do so *deceptively* (the “means”):

In reaching this conclusion, we have taken care not to improperly interfere with Kislak’s right to conduct its business. . . . Our holding does not infringe on Kislak’s right to charge a fax fee. *It merely forecloses the ability to do so in a deceptive manner.*

*Id.* at 548 (emphasis added). In sum, it is not the *mere pursuit* of Omni’s

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<sup>22</sup> In fact, if Mr. Stephens had owed an actual “debt,” such conduct would be prohibited by not only the CPA, but the FDCPA and our Collection Agency Act, RCW § 19.16.100, *et seq.*, as well. That someone who actually owes *nothing* would be entitled to *less* protection (or, according to Appellants – *no* protection) makes little sense.

claimed subrogation rights that is unlawful, what is unlawful is the *deceptive conduct* employed by the two in pursuing those claimed rights.

Finally, although it is clear that a plaintiff need not establish actual deception, it bears mentioning that many persons apparently were indeed deceived by the self-styled “collection notices,” as this further supports the conclusion that the notices possess the requisite “capacity to deceive.” Using notices substantially the same as the ones employed here and in substantially similar circumstances, CCS, on behalf of Omni and other insurance companies, such as Farmers Insurance Company of Washington, has admittedly extracted more than 1.6 million dollars from persons in Washington between 2002 and 2004 alone. CP 515-517, 531-534. It is highly unlikely so many people would pay so much money unless they believed they were legally obligated to pay it.<sup>23</sup>

2. The Misconduct Occurred in the Conduct of Trade or Commerce

The CPA specifies that “[t]rade” and “commerce” includes not only “the sale of ... services,” but “*any* commerce directly *or indirectly* affecting the people of the State of Washington.” RCW § 19.86.010(2) (emphasis added). “Prior rulings by [the Washington Supreme Court]

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<sup>23</sup> Another indication of the intent to deceive is seen by comparing the deceptive, threatening collection” notices sent to Mr. Stephens, with the much more benign letter sent to GEICO once Appellants became aware that Mr. Stephens actually had insurance coverage. Compare CP 74-75 & 77 to CP 539.

have *broadly* interpreted this provision to include every person conducting unfair acts in *any* trade or commerce.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987) (emphasis added) (citing *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984)).

Omni and CCS were clearly engaged in trade or commerce in connection with their “formal collection notice” scheme. CCS, for example, was engaging in purported collection activity – the very heart of its business activities as a professional collection agency. Omni, for its part, was claiming to pursue the purported debts pursuant to subrogation rights it claimed in connection with insurance contracts it had issued.<sup>24</sup>

In addition, there is the fact that Omni and CCS had themselves entered into an agreement covering these activities. CCS provided “collection” services to Omni pursuant to agreement. The objective of these services was to obtain monies Omni sought from Washington residents. As soon as CCS began sending dunning letters on Omni’s behalf to Washington residents, including Stephens, he and such other Washingtonians were thereby affected. That is all the CPA requires.

Appellants try to narrow the analysis, and argue that the “trade or commerce” involved must have occurred in the context of a consumer

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<sup>24</sup> Both the insurance industry and the debt collection business are heavily regulated business activities, and to say that engaging in these activities does not constitute “trade or commerce” in Washington is simply untenable.

transaction with the CPA plaintiff. This is essentially a repackaged version of their argument that plaintiff need be a “consumer” and that the CPA only applies to “sales.” Just as with that argument, however, there is nothing in either the statute or the relevant case law to support it. *See, e.g., Salois v. Mutual Of Omaha*, 90 Wn.2d 355, 359-360, 581 P.2d 1349 (1978) (“The fact that the [CPA’s] definition of those [“trade or commerce”] state that they shall ‘include’ sales must mean that there is encompassed more than just sales. *If the legislature had intended to so limit the act it could have said that it applies only to sales.* Not only did it not do so, it went on to include “*any commerce directly or indirectly affecting the people of the state of Washington.*”) (emphasis added). *See also supra*, discussion of Appellants’ “standing” argument.

Finally, even were Appellants’ argument correct, it would still not assist them. By contacting Mr. Stephens for Omni, CCS established a relationship between Omni/CCS and Stephens that likewise occurred in the conduct of trade or commerce (*i.e.*, their efforts to extract money).

### 3. Defendants’ Conduct Affects the Public Interest

“[W]hether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the

context in which the alleged acts were committed.”<sup>25</sup> *Hangman Ridge*, 105 Wn.2d at 789-90. Although the factors applicable vary and can depend on whether the situation involves a public transaction<sup>26</sup> or a private dispute,<sup>27</sup> no one factor is dispositive, nor is it necessary that all be present. *Id.* at 790-911. Instead, “[t]he [exemplar] factors ... represent *indicia of an effect on public interest* from which a trier of fact could reasonably find public interest impact.” *Id.* at 791 (emphasis added).

Under these guiding principles, the public interest element is satisfied here. The numerous factors that support this conclusion include that: (i) the misconduct was performed in the course of the business activities of Omni and CCS; (ii) their acts are part of a pattern of conduct, as illustrated by the multiple “collection notices” sent to Mr. Stephens;

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<sup>25</sup> As with the first two CPA elements, “the public interest element may [also] be satisfied *per se*,” which “requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact.” *Hangman Ridge*, 105 Wn.2d at 791 (citing *Haner v. Quincy Farm Chems., Inc.*, 97 Wn.2d 753, 762, 649 P.2d 828 (1982)). “Examples of statutes which include a specific declaration of public interest include ... RCW [§] 48.01.030 (public interest in the business of insurance).” *Id.*

<sup>26</sup> Relevant factors can include: “(1) Were the alleged acts committed in the course of defendant’s business? (2) Are the acts part of a pattern or generalized course of conduct? (3) Were repeated acts committed prior to the act involving plaintiff? (4) Is there a real and substantial potential for repetition of defendant’s conduct after the act involving plaintiff? (5) If the act complained of involved a single transaction, were many consumers affected or likely to be affected by it?” *Hangman Ridge*, 105 Wn.2d at 790.

<sup>27</sup> Relevant factors can include: “(1) Were the alleged acts committed in the course of defendant’s business? (2) Did defendant advertise to the public in general? (3) Did defendant actively solicit this particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant occupy unequal bargaining positions?” *Id.* at 790-91.

(iii) they engaged in similar activities against other members of the Washington public, both before and after that which was directed at Mr. Stephens; (iv) there is a great likelihood of continued repetition; (v) substantially the same “collection notices” were sent to thousands of other Washington citizens, thus affecting a great many people; and (vi) Omni and CCS each holds a substantially superior and more powerful position vis-à-vis Mr. Stephens or the other numerous individuals to whom they sent the purported “formal collection notices.”

While each of the foregoing constitutes “indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact,” *Hangman Ridge*, 105 Wn.2d at 791, the requisite public interest is just as clearly established through one simple observation: through this scheme, CCS, in conjunction with Omni and other insurance companies, has illicitly obtained more than 1.6 million dollars that does not lawfully belong to those entities, taking it from the pockets of numerous members of the Washington public.

In any event, Omni previously admitted that the defendants’ conduct, as set forth in the Complaint, occurred in trade or commerce, *see* CP 523, and has failed to argue otherwise on appeal. *See* Omni Br. at 12 & n.1. CCS likewise made this admission, *see* CP 517-18 (*see* *Ide* Decl. Ex. 2), and although CCS later sought to change its admission, it never

effectively did so. *See* CR 36(b).

#### 4. The Deceptive Conduct Caused Stephens Injury

To satisfy the fifth CPA element, a plaintiff need merely establish some injury.<sup>28</sup> *See* RCW § 19.86.090. Indeed, the CPA very specifically employs the term “injured” when addressing the basis for *bringing* a claim: “Any person who is *injured* in his or her business *or* property ... may bring a civil action ....” RCW § 19.86.090 (emphasis added).<sup>29</sup> In contrast, the term “damages” is only employed later on in that section, where it addresses the various forms of recovery and relief available to a CPA plaintiff. *See id.* (CPA plaintiff may obtain injunctive relief, recover “actual damages,” etc.). Thus, “under the CPA, *injury* is distinguished from *damages*.” *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002) (emphasis added) (citing *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). *See also Nordstrom*, 107 Wn.2d at 740 (pertinent language of RCW § 19.86.090 “uses the term ‘injured’ rather than suffering ‘damages’”).

What this means is that while a plaintiff may certainly satisfy the “injury” element by establishing traditional monetary damages, a plaintiff

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<sup>28</sup> The fourth CPA element, causation, is subsumed within this discussion.

<sup>29</sup> As the language indicates, the injury may be to the plaintiff’s business, or to the plaintiff’s property – either satisfies this element.

does not need to establish such “damages” to meet the injury requirement. See, e.g., *Nordstrom*, 107 Wn.2d at 740 (it is “clear that no monetary damages need be proven ...”) (emphasis added); *Sorrel*, 110 Wn. App. at 298 (“No monetary damages need be proven ...”) (citing *Mason*, 114 Wn.2d at 854) (emphasis added).

Moreover, the threshold for establishing the requisite “injury” is not demanding. Injury is shown if the plaintiff’s “property interest or money is *diminished* ... even if the expenses caused by the statutory violation are *minimal*.” *Mason*, 114 Wn.2d at 854 (emphasis added). The injury need not even be specifically quantifiable. *Nordstrom*, 107 Wn.2d at 740 (even “*nonquantifiable* injuries, such as loss of goodwill ... suffice for this element”) (emphasis added). Rather, the plaintiff need merely establish “*some* injury to property or business.” *Sorrel*, 110 Wn. App. at 298 (citing *Mason*, 114 Wn.2d at 854) (emphasis added). Any identifiable injury will suffice, no matter how slight. See *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 563, 825 P.2d 714 (1992) (needs to be some injury, “*however slight*”) (emphasis added) (citations omitted).

In sum, the fourth and fifth elements of a CPA claim are established by showing any form of a causally-related injury, which includes causally-related damages (which are really just a form of injury), to either the plaintiff’s business or the plaintiff’s property. Here, the

evidence easily satisfies the injury requirement under both alternatives: injury to property and injury to business.<sup>30</sup>

a. Injury to Property

The “collection notices” plainly made threats and demanded action, and Mr. Stephens understandably believed he needed to act to protect his interests. Omni and CCS, of course, hoped that the action Mr. Stephens chose was to send them the money they demanded. Although both defendants certainly knew that Mr. Stephens didn’t really owe the purported “AMOUNT DUE,” the “FORMAL COLLECTION NOTICES” had fooled or intimidated numerous others out of their money, so there was every reason to hope it would work this time too.

Rather than simply send in the money demanded, however, Mr. Stephens chose a different course of action to protect his interests: he acted to investigate the matter to determine how to proceed and respond to the notices. To do so, however, Mr. Stephens was forced to incur various costs and expenses that he otherwise would not have incurred. For example, Mr. Stephens incurred costs and expenses associated with operating his motor vehicles, as well as parking expenses incurred during the course of his investigation and while determining how to proceed and

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<sup>30</sup> For simplicity, this discussion primarily speaks in the broader term of establishing “injury.” To the extent the evidence provides a sufficient basis for quantifying various costs or expenses (*e.g.*, credit report), however, such amounts also constitute “damages.”

respond. In addition, because of the threat represented by the collection notices to his credit rating and ability to obtain financing, Mr. Stephens also incurred the expense of obtaining a credit report and a credit watch service. Absent his receipt of the deceptive, self-styled “formal collection notices,” Mr. Stephens would not have been forced to incur, and would not have incurred, any of these costs and expenses.<sup>31</sup>

Although Appellants complain about these expenses on the basis that, in fact, the “collection” activity was not reported to any credit agencies, Mr. Stephens wasn’t told it wouldn’t be reported.<sup>32</sup> Moreover, he certainly did not know this – and could not know this – until he obtained the reports. Indeed, getting the credit report and acting to monitor his credit rating in the face of the self-described “collection” activity is a manifestly logical and classic effort at trying to mitigate harm.

Appellants have previously sought to denigrate the amounts they forced Mr. Stephens to incur, averring that these amounts are too small to satisfy the CPA’s “injury” requirement. Their argument ignores the fact

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<sup>31</sup> Again, to the extent that these can be sufficiently quantified at trial, such amounts also constitute “damages” under this CPA element. This includes, for example, the \$49.95 paid for the credit report, the \$9.95 charges for the credit watch service, as well as the motor vehicle operating expenses, parking and other such costs.

<sup>32</sup> Although Appellants imply the “collection” activity stopped on May 19, 2004, *e.g.*, Omni Br. at 7, no such fact was ever communicated to Mr. Stephens. Moreover, to imply that it was dropped at that point is patently misleading; it is a matter of record that Omni later sought to recover the amount through a counterclaim in this action. That CCS stopped sending collection notices is meaningless.

that when an individual is caused to take money out of his or her pocket by the deceptive and wrongful conduct of another, *any* amount is too much. More importantly, such an argument ignores the fact that the “injury” requirement is satisfied by a showing of *any* monetary loss, no matter how small, and regardless of whether it is even quantifiable. *See, e.g., Mason*, 114 Wn.2d at 854 (injury element met “if [plaintiff’s ] money is *diminished* because of the unlawful conduct even if the expenses ... are *minimal*.”) (emphasis added); *Nordstrom*, 107 Wn.2d at 740 (“injury *without monetary damages* will suffice”) (emphasis added); *Sign-O-Lite Signs*, 64 Wn. App. at 563 (any injury suffices, “*however slight*”) (emphasis added) (citations omitted); *Sorrel*, 110 Wn. App. at 298 (“[n]o monetary damages need be proven so long as there is *some* injury ...”) (emphasis added) (citing *Mason*).

In short, any contention that an “injury” can be considered “too small” to justify invocation of the CPA lacks any statutory basis. *See* RCW § 19.86.090. Furthermore, any suggestion that either there is, or should be, some minimum level of “injury” (other than something more than nothing) cannot withstand analysis. Since the Act fails to indicate that any such minimum exists, establishing such a minimum by judicial declaration would impermissibly tread on the authority of the legislative branch to promulgate the law.

Moreover, if a court did decide to declare a minimum level of “injury” before it would “count” for purposes of the CPA, how would that level be determined? Not only does the Act fail to provide a basis for any “minimum” amount of injury, but it likewise provides no basis for determining, for example, that \$50 is enough, but \$25, or \$9, or some other amount may not be.<sup>33</sup> Finally, it is difficult to see how such any such “minimum” amount can be reconciled with the case law that has established that CPA injury need not be quantifiable in the first place. *E.g., Nordstrom*, 107 Wn.2d at 740.<sup>34</sup>

Similarly, any attempt to distinguish the type of the expense incurred as not counting for some reason fails for the same reasons. Specifically, there is nothing in the statute that supports the proposition that travel or other such expenses don’t count for purposes of the CPA. As discussed above, whether such expenses are large or small makes no difference. If the deceptive conduct had been of such a nature that Mr. Stephens would, for example, had to fly to Spokane to address the matter, the cost of that flight would plainly satisfy the injury or damage

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<sup>33</sup> In *Dwyer*, the injury/damages claimed was \$50.00. *See Dwyer*, 103 Wn. App. at 544. *See also Strenge v. Clarke*, 89 Wn.2d 23, 30, 569 P.2d 60 (1977) (although addressing a jurisdictional issue, the Court noted that the alleged CPA injury was for only \$39.15).

<sup>34</sup> Moreover, establishing a minimum amount would effectively eliminate the statutorily-provided distinction between “injury” and “damages.” *See RCW* § 19.86.090.

requirement. There is nothing in the case law or the Act to justify treating the cost of land travel and parking any differently, or for that matter, copy charges or cell phone expense.

Mr. Stephens took action to limit the amount of injury he would sustain from his receipt of the deceptive “FORMAL COLLECTION NOTICES.” The action he took was to investigate the matter, and in doing so he incurred costs and expenses. This is precisely the course of action chosen by State Farm in the *State Farm v. Huynh* case. When State Farm received the chiropractor bills, rather than simply pay the amount claimed, State Farm conducted an investigation and ultimately determined to *not pay* the bills. *See* 92 Wn. App. at 458 (“After State Farm completed its investigation of the incident, it ... refused to pay [the chiropractor’s] bills.”). Nevertheless, the money State Farm spent *in conducting the investigation* constituted cognizable damages:

After McKeehen received and read Kiniry’s false reports and billings, State Farm continued to investigate this claim for approximately six months. During this time, State Farm incurred expenses for experts, interpreters, transcribers, attorneys, and its employees. ... The costs incurred in reviewing and investigating these fraudulent documents therefore constitute damages that were suffered by State Farm.

*Id.* at 468. Thus, even if Mr. Stephens’ resulting injury was as modest as Appellants suggest, liability based on it is entirely in harmony with the

CPA's desire to see that deceptive conduct is stopped before injury occurs. *See Hangman Ridge*, 105 Wn.2d at 785 (citation omitted).

Omni and CCS further seek to discredit the costs and expenses Mr. Stephens incurred during his investigation to the extent they were incurred in connection with consulting an attorney on the matter. That Mr. Stephens chose to consult with an attorney, however, is a fact of no consequence. Just like State Farm did upon receipt of the chiropractor's bills, Mr. Stephens decided to investigate the matter when he received the collection notices. Just like State Farm, he sought out and consulted with those whom he believed might be able to assist him and provide insight. Indeed, in *State Farm*, part of the investigatory costs incurred by State Farm were the costs for *attorneys* and experts. *See* 92 Wn. App. at 458.

Appellants cite to *Sign-O-Lite Signs*, but on this issue the case involves a wholly different context. In that case, Sign-O-Lite filed a breach of contract action against DeLaurenti for a sign the company had made for her. In response, DeLaurenti asserted a CPA counterclaim. On those facts, the court held that: "DeLaurenti's *mere involvement* in having to *defend* against Sign's collection action and having to prosecute a CPA counterclaim is insufficient to show injury to her business or property, contrary to the trial court's conclusion." *Id.* at 564 (emphasis added). The court was concerned that: "To hold otherwise would be to invite

defendants in most, if not all, routine collection actions to allege CPA violations as counterclaims.” *Id.*

First, Mr. Stephens has established more than his “mere involvement” in this action as evidence of injury or damage. In addition to that involvement, Mr. Stephens has also established that *well before his suit was filed*, he incurred various out-of-pocket cost and expenses while investigating and determining his response and course of action after his receipt of the purported “collection notices.” He has also established that he incurred the out-of-pocket cost and expense of obtaining a current copy of his credit report in response to the threats made in the “collection” letters. These costs and expenses are in complete harmony with the language of *Sign-O-Lite* that: “There must be *some* evidence, *however slight*, to show injury to the claimants' business or property.” *Id.* at 563 (emphasis added) (citing *Hangman Ridge*, 105 Wn.2d at 792).

Second, the concern expressed by the *Sign-O-Lite* court is not present here. There was no existing collection action to which Mr. Stephens merely asserted a CPA counterclaim. The misleading “collection” notices made threats and demanded action, and Mr. Stephens incurred costs and expenses as a result. Litigation only followed later.<sup>35</sup>

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<sup>35</sup> And, when litigation did commence, it was neither a routine collection matter, nor instituted by someone who had a legitimate claim of a debt.

Third, *beyond* the foregoing costs and expenses, Mr. Stephens has incurred *additional* costs and expenses in connection with the institution and prosecution of this lawsuit. The actual language of *Sign-O-Lite* is that “DeLaurenti’s *mere involvement* in having to *defend* against Sign’s collection action and having to prosecute a CPA counterclaim is insufficient to show injury ...”<sup>36</sup> *Id.* at 564 (emphasis added). Even so, Appellants cite *Sign-O-Lite* for the proposition that the very real costs and expenses a plaintiff might incur in connection with any lawsuit can never “count” as injury or damages for purposes of the CPA. If *Sign-O-Lite* is truly meant to stand for this proposition, then Mr. Stephens respectfully submits that the Court should take this opportunity to revisit it.

When you have a situation, such as here, where a person is forced to take action to protect himself as a result of the deceptive or unfair conduct of others, and part of that protective action is to consult with a professional whom the person believes has the education, skill or training to assist him, the costs and expenses incurred for the consultation and assistance should clearly be considered causally-related injury and/or

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<sup>36</sup> As noted above, this language can be distinguished from the situation here on two grounds: (i) Mr. Stephens has established he incurred costs and expenses well before any litigation commenced; and (ii) there was no existing suit to which he merely counterclaimed.

damages. Indeed, such was the result in *State Farm*.<sup>37</sup>

Furthermore, although the Court need not necessarily go so far, even had the situation been different and Mr. Stephens asserted his CPA claim as a counterclaim in a suit brought by the defendants, it is still difficult to see why this distinction should make any difference. Even in that situation, either the action instituted by defendants is legitimate or it is not. If defendants did nothing wrong, then no CPA action would lie. If defendants acted wrongfully, however, then it seems to be a statement of the obvious to say that the CPA plaintiff has suffered injury and damages to the extent he incurred costs and expenses to defend against the wrongful activities. *See St. Paul Ins. Co. v. Updegrave*, 33 Wn. App. 653, 659, 656 P.2d 1130 (1983) (“Practically speaking, the greatest expense to be borne by a consumer in defending an action such as the present one is for attorney’s fees. . . . To say that Lad has not been damaged for purposes of the [CPA] is to ignore the obvious.”).<sup>38</sup>

#### b. Injury to Business

As a result of the need to address the situation created by the self-

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<sup>37</sup> “State Farm incurred expenses for experts, interpreters, transcribers, attorneys, and its employees. . . . The costs incurred in reviewing and investigating these fraudulent documents therefore constitute damages . . . .” 92 Wn. App. at 468.

<sup>38</sup> Although *Sign-O-Lite* rejected the holding in *St Paul* as overbroad, the stated reason was that “no injury to the claimants’ business or property was ever alleged,” and that “mere involvement” in such an action is insufficient. *See* 64 Wn. App. at 563-64.

styled “collection” notices, Mr. Stephens was forced to take substantial amounts of time away from the operation of his self-owned and operated small business. Recognizing the importance of time to the self-employed small business owner, our courts have determined that such an imposition constitutes an “injury to business” for purposes of the CPA. *See Sign-O-Lite Signs*, 64 Wn. App. at 564. Moreover, this is true whether or not the loss to the business can be quantified or otherwise expressed in monetary terms.<sup>39</sup> *See id.* at 564; *see also Nordstrom*, 107 Wn.2d at 740 (“nonquantifiable injuries ... suffice”).

In fact, *Sign-O-Lite Signs* is particularly instructive on this point. There, as here, the CPA plaintiff was self-employed and ran her own small business, and was required to take time away from that business as a result of the deceptive and unfair conduct. *See* 64 Wn. App. at 564. Addressing the CPA’s injury element, the Court cogently summarized:

DeLaurenti specifically testified that because of her involvement with Sign, she was unable to tend to her store the way she normally would have. Moreover, for at least 3 hours each month for 4 years DeLaurenti was drawn away from her business and from her consulting work (for which she typically charged \$35 per hour) in order to address matters regarding her contract with Sign. Given that the clear purpose of the CPA is to deter and protect against unfair or deceptive acts or practices, the evidence in this case – including the fact that DeLaurenti is self-employed

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<sup>39</sup> Contrary to Omni’s assertion, loss of income is not a “personal injury.”

and the sole owner of her business – is sufficient to support an inference that there was *some* injury to DeLaurenti’s business, even though as discussed *infra* that injury was not quantifiable.

*Id.* (emphasis added). The *Sign-O-Lite Signs* Court also succinctly address the causation element in such circumstances:

The link between Sign’s actions (through Kelly, its representative) and DeLaurenti’s injury is clear from the record. Sign’s deceptive acts significantly interfered with DeLaurenti’s ability to tend to her store and to perform a portion of her consulting work.

*Id.* *Sign-O-Lite Signs* and its observations on this issue are directly on point here. It is equally clear here that the time Mr. Stephens lost from running his business to investigate, determine and embark on his course of self-protective action was caused – indeed, directly resulted from – the deceptive “collection” activity at issue. Thus, the requirement that plaintiff show “some” injury to business (or property) is met.

Omni, for the first time, now argues that since the “collection” notices were sent to Stephens in his “personal capacity” and not to his business, the injury to business caused by the notices cannot support Mr. Stevens’ CPA claim. The only support for this illogical proposition, however, is Omni’s assertion that the CPA plaintiff in *Sign-O-Lite Signs* was a corporation, and that that fact makes a difference. Omni Br. at 29. Omni is wrong in its facts and its reasoning.

The focus of the injury analysis is on whether Stephens sustained injury. As discussed above, Stephens can show either he sustained injury to his property, or injury to his business. Since Stephens is the sole proprietor of his business, injury to that business is *necessarily* injury to Stephens. In contrast, to the extent the CPA plaintiff in *Sign-O-Lite Signs* was DeLaurenti's corporation,<sup>40</sup> it would actually make the injury there *more* attenuated, since the corporation is a wholly separate legal entity from DeLaurenti. Here, Stephens and his business are one and the same.

#### D. THE FDCPA HAS NO APPLICATION HERE

The defendants in this and the linked *Panag* appeal have attempted to invoke the Fair Debt Collection Practices Act in one manner or another. In *Panag*, the defendants primarily assert misguided pre-emption type arguments. Here, CCS and Omni argue that the FDCPA is analogous law that informs on the CPA. *See* CCS Br. at 20; Omni Br. at 23-25. Either way, the truth is the FDCPA is simply inapplicable, and the most that can be said about that Act is it (arguably<sup>41</sup>) does provide a basis for relief here.

To begin with, by its own terms the FDCPA does not affect any

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<sup>40</sup> It appears that the CPA plaintiff in *Sign-O-Lite Signs* actually included both the corporation and DeLaurenti individually. *See* 64 Wn. App. at 556.

<sup>41</sup> Although Stephens does not assert a FDCPA claim, there is some case law to support pursuing such a claim under an estoppel theory. *See Hanson v. Ticket Track, Inc.*, 280 F. Supp. 2d 1196, 1203 (W.D. Wash. 2003); *Shula v. Lawent*, 359 F.3d 489, 491 (7<sup>th</sup> Cir. 2004); *Vasquez v. Allstate Ins. Co.*, 937 F. Supp. 773, 775 (N.D. Ill. 1996).

other state law unless, first, the state law is inconsistent with the FDCPA, and even then, the FDCPA only applies to the extent that the state law affords a person *less protection* than the FDCPA. *See* 15 U.S.C. § 1692n. Neither is true here.

Notwithstanding its inapplicability, CCS and Omni argue that the FDCPA is applicable by analogy. For example, Omni cites *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367 (11<sup>th</sup> Cir. 1998), promising that the “court’s reasoning is directly applicable ....” Omni Br. at 24. *See also* CCS Br. at 20 (“analogous federal law ... confirm the threshold requirement that a consumer relationship is required.”) (also citing to *Hawthorne*). Their arguments are, at best, less than forthcoming: what neither defendant points out is that the term “debt” is a specifically defined term under the FDCPA, and that definition specifically includes the term “consumer.” *See* 15 U.S.C. § 1692a(5). In fact, the term “consumer” itself is also a defined term under the FDCPA. *See* 15 U.S.C. § 1692a(3).<sup>42</sup>

Thus, the threshold question for FDCPA applicability is *not* whether the plaintiff is a “consumer” – the threshold question is whether the matter involves a “*debt*” as specifically *defined* by the FDCPA. *E.g.*,

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<sup>42</sup> In contrast, in our CPA, not only is there no mention of any limitation to “consumers,” “consumer” is not even a defined term. Instead, the term “person” (as in, “any person” may bring a claim) is defined: and includes: “natural persons, corporations, trusts, unincorporated associations and partnerships.” RCW § 19.86.010.

*Turner v. Cook*, 362 F.3d 1219, 1227 (9th Cir. 2004) (“Because not all obligations to pay are considered debts *under the FDCPA*, a threshold issue in a suit *brought under the Act* is whether or not the dispute involves a ‘debt’ within the meaning of *the statute*.”) (citation omitted).<sup>43</sup>

Similarly, in *Hawthorne*, the court also noted “section 1692e makes the existence of a ‘debt’ a threshold requirement for [FDCPA] *applicability*,” and then, finding no “debt” as defined by the Act, merely held that since it was not applicable, it did not provide a basis for relief. 140 F.3d at 1367. The same result was reached in *Betts v. Equifax Credit Info. Servs., Inc.*, 245 F. Supp. 2d 1130, 1134 (W.D. Wash. 2003), although the specific grounds was that there was no “transaction” as defined by the FDCPA.<sup>44</sup> (“[B]ecause no ‘transaction’ took place as required by the statute, plaintiffs’ claim falls *outside the scope* of the FDCPA”) (emphasis added).

#### E. OMNI IS EQUALLY LIABLE WITH CCS

Omni argues that even if CCS is liable for the deceptive “collection” scheme, Omni is not. Its argument fails. First, Omni is responsible for its *own* conduct, and that conduct itself violated the CPA. Second, Omni is alternatively liable on other grounds, including joint

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<sup>43</sup> Notably, the plaintiff’s *state law* claims were dismissed *without prejudice*, presumably to permit their pursuit in state court. *See* 362 F.3d at 1225.

<sup>44</sup> The existence of a “transaction” is part of the FDCPA’s definition of “debt.” *See* 15 U.S.C. § 1692a(5).

and/or concurrent tortfeasor liability, joint venturer liability, or vicarious liability for the acts of CCS as its agent.

1. Omni's Own Conduct Violated the CPA

Although it was CCS that actually sent the deceptive "collection" notices, it was Omni that put everything in motion. Omni unilaterally determined that Stephens was at fault in the accident, and then went on to purport to determine how that fault should be allocated. Omni determined that the medical bills Ms. York apparently incurred were reasonable and customary in amount, and that they all related to the accident. Omni also determined the value to be placed on Ms. York's amorphous general damages. Critically, Omni then went out and hired a professional debt collector to attempt to collect the "debt" Omni alleged it was owed – all the while fully realizing that no such debt existed. In short, Omni sat as judge and jury, then appointed CCS as its executioner. Without Omni's misconduct, this case never exists.

2. Omni is Liable as a Joint Tortfeasor

Omni has already acknowledged that CCS was acting as its agent in connection with trying to extract money from Mr. Stephens (discussed further below). Also, because the scheme employed by Omni and CCS involved a concert of action with a unity of purpose, each party acting with the knowledge and consent of the other, it is appropriate to treat them

as joint tortfeasors.<sup>45</sup>

Omni's assertion that there was no concert of action is hollow. For example, Omni determined that Mr. Stephens "owed" it money, identified Stephens to CCS, and dictated the amount to be collected from him.<sup>46</sup> CCS, for its part, CCS incorporated this information into the deceptive dunning letter it sent. Likewise, there is an obvious "unity of purpose" in the actions of CCS and Omni. CCS was to be paid a percentage of monies it collected for Omni from Stephens. A clearer unity of purpose than the collection of money to pay both interested parties is difficult to imagine.

Moreover, CCS and Omni each acted with the knowledge and consent of the other. Obviously, Omni, having contracted with "Credit Collection Services" to collect the unliquidated subrogation claim,<sup>47</sup> knew CCS was a debt collector and would pursue collection activity. Omni told CCS who to pursue and for what amount, thereby consenting to and authorizing CCS's collection activities, just as CCS consented to act against the person Omni identified, and in the amounts Omni designated.

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<sup>45</sup> See, e.g., *Elliott v. Barnes*, 32 Wn. App. 88, 90-91, 645 P.2d 1136 (1982) ("where distinct actors work in concert according to a general plan in committing a single tort they are joint tortfeasors." (citing *Michigan Millers Mut. Fire Ins. v. Oregon-Washington R.R. & Nav. Co.*, 32 Wn.2d 256, 201 P.2d 1324 (1976))).

<sup>46</sup> At the summary judgment hearing, Omni admitted it designated the amount to be collected. RP at 22, line 5, to 23, line 23. See also CP 385-86 (Shapiro Declaration) (the notices sought recovery "of the exact amount communicated to CCS as having been paid by Omni in subrogation").

<sup>47</sup> CP 221 (Decl. of James Quigley).

### 3. Omni is Liable as A Concurrent Tortfeasor

Unlike joint tortfeasors (who act in common, or breach a joint duty) concurrent tortfeasors “are those whose independent acts concur to produce the injury.”<sup>48</sup> Even if this Court determined that Omni and CCS are not joint tortfeasors, they are at least concurrent tortfeasors. CCS could not have acted here *unless* Omni first acted to (1) decide Stephens was purportedly liable for the accident, (2) determine the amount of money Stephens allegedly owed, and (3) hire a debt collector to pursue the amount it sought. Absent Omni’s conduct, CCS could not start debt collection proceedings. Likewise, absent CCS’s actions, Omni would not obtain monies from Stephens or others whom it assigned to CCS for collection. Thus, both parties’ acts combined to cause Stephens’ injury.

### 4. Omni is Liable as a Joint Venturer

Joint ventures arise from express or implied contracts.<sup>49</sup> Here, CCS and Omni agreed to share in the profits of the joint enterprise they created. CCS was to be paid a percentage or commission of the monies it collected for Omni from Washington’s unsuspecting public, while both companies

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<sup>48</sup> *Seattle-First Nat’l Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 235, 588 P.2d 1308 (1978) (“The harm caused by both joint and concurrent tortfeasors is *indivisible*.”) (emphasis original).

<sup>49</sup> *E.g., Adams v. Johnston*, 71 Wn. App. 599, 610, 860 P.2d 423 (1993).

got nothing if CCS collected no money, thereby sharing in the losses.<sup>50</sup>

A joint venture involves “(a) a common purpose and intention to act as joint venturers; (b) a community of interest; and (c) an equal right to a voice accompanied by an equal right of control.”<sup>51</sup> Here, CCS and Omni shared a common purpose and intent to pursue Stephens (and others) for the non-existent debt, each shared a community of interest in the sums to be collected,<sup>52</sup> and each had equal rights to control the venture.<sup>53</sup>

It does not matter that each joint venturer “might have performed a different function because of his past training, experience, and expertise” in order to establish a right to an equal voice and a right to equal control.<sup>54</sup> Absent Omni’s actions in setting the wheels in motion, no “collection activity” would have been initiated in the amount requested, or indeed at all, from Stephens. Thus, Omni’s argument that it should not be liable for

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<sup>50</sup> CCS and Omni had a “shared interest” in the amounts collected. (See Omni Opening Br. at 21). And, “[w]here parties agree to share profits, the law will presume that they agreed to share losses.” *Gleason v. Metropolitan Mortgage Co.*, 15 Wn. App. 481, 495, 551 P.2d 147 (1976) (citing *Refrigeration Eng’r Co. v. McKay*, 4 Wn. App. 963, 486 P.2d 304 (1971)).

<sup>51</sup> *Adams*, 71 Wn. App. at 611 (citations omitted).

<sup>52</sup> See Omni Opening Brief at 21 (Omni acknowledged that “CCS was attempting to recover a subrogation claim, and Omni had an interest in that claim...this *shared interest* in the claim...” (emphasis added). In any event, it is not required that each party have “ownership” or “proprietary” rights in the subject matter of the joint venture. *Gleason*, 15 Wn. App. at 493-94.

<sup>53</sup> Omni directed the amount to be collected, while CCS wrote the dunning letters, each thereby having and exerting equal rights of control (*i.e.*, without the acts and control of each, the venture would necessarily collapse).

<sup>54</sup> *Id.* at 494-95.

CCS's "collection" efforts<sup>55</sup> do not and cannot shield it from liability.

#### 5. Omni is Liable for the Acts of Its Agent

Omni had the right and ability to control the actions of CCS – whether or not Omni chose to exercise that right. These were Omni's accounts, and Omni could reassign them from CCS if it didn't like the manner in which CCS pursued them. Moreover, Omni alone made the determination that Stephens "owed" it money, identified Stephens to CCS, and designated the amount to be collected from him, thus controlling key details of the transaction, without which CCS could not have proceeded.<sup>56</sup>

Omni argues it is not liable because CCS is only an "independent" agent – a vague term of no particular significance. Presumably, Omni is trying to characterize CCS as an independent contractor, but that is of no avail under well settled law. The Court in *Norwegian Danish*<sup>57</sup> held:

The relations of contractor and agent are not necessarily repugnant....a[n] [independent] contractor acts in his own right and for himself; whereas an agent or servant [CCS] acts for and in the name of another [Omni].<sup>58</sup>

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<sup>55</sup> Omni's acknowledgement of "collection efforts," see Omni's Br. at 21, is a tacit admission that this unliquidated claim was being treated as a debt.

<sup>56</sup> See *supra*, note 53.

<sup>57</sup> *Norwegian Danish Methodist Episcopal Church of Spokane v. Home Telephone Company*, 66 Wash. 511, 119 P. 834 (1912).

<sup>58</sup> *Id.* at 513-14.

At bottom, Omni is also vicariously liable for CCS's conduct.<sup>59</sup>

#### F. RES JUDICATA IS WHOLLY INAPPLICABLE

CCS tosses in a short, throw-away argument asserting this matter is controlled by *res judicata*, but the doctrine has no place here. *Res judicata* prohibits the relitigation of identical claims and issues that were litigated in a prior action.<sup>60</sup> Here, there plainly was no prior action. CCS rests its argument, therefore, on the erroneous assertion that a Confession of Judgment on a counterclaim,<sup>61</sup> entered *after* this case was filed and which left the remaining claims to be litigated, can somehow be shaped into a judgment in a *prior* legal proceeding. CCS cannot, however, rewrite history and alter legal doctrine merely to suit its litigation ends.

Moreover, even were we to actually need to look at the *res judicata* analysis, it is clear it provides no relief to Appellants. In *Pederson v. Potter*,<sup>62</sup> the Supreme Court articulated the factors required to apply *res judicata*: “(1) whether the rights or interests established in the prior judgment would be *destroyed or impaired* by the prosecution of the

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<sup>59</sup> See, e.g., *Kroshus v. Koury*, 30 Wn. App. 258, 264, 633 P.2d 909 (1981).

<sup>60</sup> See, e.g., *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995).

<sup>61</sup> Even a Confession of Judgment from an earlier proceeding is not necessarily a final judgment for purposes of *res judicata*. See *Pederson v. Potter*, 103 Wn. App. 62, 70, 11 P.3d 833 (2000) (no “bright-line” rule; rather, courts should “analyze when a particular judgment is a final judgment on the merits on a case by case basis.”).

<sup>62</sup> *Id.*

*second action*; (2) whether substantially the *same evidence* is presented in the two actions; (3) whether the suits involve infringement of the *same right*; and (4) whether the two suits arise out of the *same nucleus of transactional facts*.<sup>63</sup> These are discussed below.

First, though, we must point out that CCS's misguided *res judicata* argument rests on the flawed and untenable assertion that *this case* arises from the tortious conduct of Mr. Stephens. That is plainly incorrect; *this case* arises from the unlawful and deceptive conduct of CCS and Omni whereby CCS pursued collection activity for non-existent debts. This case *does not* arise from Stephens' conduct in connection with the automobile accident – tortious or otherwise – nor from the permissive counterclaim filed by Omni.<sup>64</sup> Simply put, the Court's inquiry is whether, in mid April 2004, Stephens owed an existing, bona fide debt in favor of Omni. The answer is that he clearly did not. Thus, the gravamen of Mr. Stephens' suit is not that a lawsuit must be filed in subrogation matters, and reduced to judgment in every instance, nor that informal resolution may not be attempted, by way of letter or otherwise. Plaintiff merely submits that if

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<sup>63</sup> *Id.* at 72 (emphasis added); *see also Kuhlman v. Thomas*, 78 Wn. App. 115, 122, 897 P.2d 365 (1995).

<sup>64</sup> It is of no moment whether some unliquidated, potential claim of one of the defendants (Omni only) might arguably have had some basis, nor whether such a claim could lawfully have been pursued and either settled or reduced to a judgment.

defendants want to seek recovery informally, they must not act in a deceptive manner in doing so.

1. This CPA Action Does Not Destroy or Impair Established Rights

The rights established by the Confession of Judgment have been satisfied by payment; thus, they *cannot* be prejudiced by litigation of the issue whether CCS and Omni acted wrongfully in misrepresenting, at the time the deceptive collection notices were sent, that an existing debt was due and owing. In addition, the Confession of Judgment did not purport to resolve any of Stephens' claims, and *by its terms* was specifically limited to the Omni counterclaim, leaving open for later resolution all of the different claims asserted by Stephens. Unlike in *Pederson*, no claims of Stephens against Omni or CCS were released.<sup>65</sup>

2. The Two Matters Do Not Involve the Same Evidence

The evidence establishing Omni's and CCS's liability in this CPA case does not require evidence as to who was purportedly at fault in the 2003 automobile accident, nor what damages might allegedly been sustained, what medical care and treatment was reasonable and necessary, what pain and suffering Ms. York might have endured, and so on.

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<sup>65</sup> Cf. *Knuth v. Beneficial Wash, Inc.*, 107 Wn. App. 727, 732, 31 P.3d 694 (2001) (the Confession of Judgment there specifically "released and forever discharged" as to claims that were or could have been asserted in the litigation).

3. The Matters Do Not Involve Infringement of the Same Right

The subject matter of the two claims is hardly “identical.”

Stephens sued under the CPA for injury and damages (and to protect the Washington public) resulting from defendants’ deceptive conduct. His claim, and that of the putative class, has nothing to do with personal injuries purportedly sustained by Ms. York in 2003. Moreover, unlike in *Pederson*, where the Pedersons could have, but did not bring a counterclaim in a prior suit, Stephens initiated suit; by the terms of the Confession of Judgment itself, those claims remained untouched.

4. The Two Matters Do Not Arise From the Same Nucleus of Transactional Facts

No matter how many times Appellants’ assert it, this case does not arise from Stephens’ allegedly tortious behavior. Rather, it arises from the unfair and deceptive business conduct of CCS and Omni at the time they issued the deceptive collection notices. These underlying transactional facts determine whether CCS and Omni are liable to Stephens and the class – not the facts of the 2003 automobile accident.

G. CCS’S REQUEST TO REMAND FOR DISCOVERY SHOULD BE REJECTED

CCS attempt to avoid the trial court’s holding by claiming a need for further discovery rings hollow. First, the parties entered into a

Stipulation, signed by the trial judge,<sup>66</sup> specifically setting the date for summary judgment motions. Knowing of these deadlines, CCS and Omni could have, but did not, take Stephens' deposition.<sup>67</sup> Because of the foregoing, including the scheduling stipulation, CCS failed to establish cause for relief under CR 56(f).<sup>68</sup> Second, the information CCS now claims it needs to pursue will not alter the facts CCS complains it did not have an opportunity to test, and is thereby irrelevant to the outcome. Stephens undeniably incurred the various costs and lost time from his self-owned business. He even provided receipts for the charges made on his credit cards. The "circumstances" of those trips are fully detailed in Stephens' sworn declaration, which thus governs those matters. A deposition on such matters is unlikely to materially change these facts.

## V. CONCLUSION

Appellants continually try to smear Mr. Stephens with references to the illegality of driving without insurance, and speak of the myriad penalties applicable to such conduct. Ignoring for the moment that Mr.

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<sup>66</sup> See CP \_\_\_\_ (Stipulated Protective Order and Discovery and Motions Schedule, dated May 27, 2005) (Sub. 49 on the CCIS, designated in Respondent's Supplemental Designation filed concurrently with this brief).

<sup>67</sup> Notably, in the linked *Panag* case, although Ms. Panag had requested it, and obtained an order to that effect from the trial court, CCS never made a representative available for deposition prior to the summary judgment hearing.

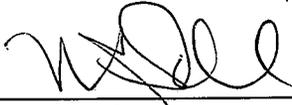
<sup>68</sup> In addition, both CCS and Omni each filed their *own motions* for summary judgment. Since pleadings must be filed in good faith, this implies they believed enough discovery was completed for the trial court to rule as a matter of law.

Stephens actually did have insurance, *none* of the penalties include being subjected to fraudulent “collection” activities.

The facts establish that: (i) Omni retained CCS, a professional debt collector, to pursue Stephens for a debt that did not exist; (ii) CCS, on Omni’s behalf, sent Stephens self-described “FORMAL COLLECTION NOTICES” for the non-existent debt; and (iii) Stephens is self employed, and had to divert time away from his business as a result of the notices and debt collection activity, and had to spend money out of pocket to address the situation. Such conduct: (i) is deceptive under the CPA, as it has the capacity to deceive (and has actually deceived) a substantial portion of the public; (ii) was performed by Omni and CCS within the broad definition of “trade or commerce;” (iii) has greatly impacted – and as an ongoing scheme, continues to impact – Washington’s public interest; and (iv) & (v) caused injury to Stephens’ business by requiring him to take time away from it, as well as cost him out-of-pocket damages.

For the foregoing reasons, Respondent Stephens requests the Court affirm the trial court’s September 19, 2005, order granting partial summary judgment in his favor.

April 12, 2006.

  
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DECLARATION OF SERVICE

I certify that on April 12, 2006, I caused to be filed with the Court of Appeals, Division I, via messenger, the original and one copy of the foregoing Brief of Respondent Michael Stephens, and caused to be delivered, via messenger, true and accurate copies to:

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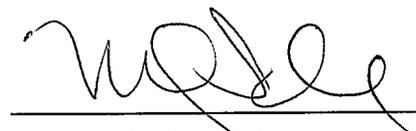
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, Washington, this 12th day of April, 2006.

  
Matthew J. Ide

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