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**NO. 56625-3-I  
COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION I**

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**RAJVIR PANAG, on behalf of herself and all others  
similarly situated,  
Respondent/Cross-Appellant**

**v.**

**FARMERS INSURANCE COMPANY, a domestic  
insurance company, and CREDIT CONTROL  
SERVICES, INC. d/b/a CREDIT COLLECTION  
SERVICES,  
Appellants/Cross-Respondents**

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**COMBINED RESPONSE/REPLY BRIEF OF  
APPELLANT/CROSS-RESPONDENT  
CREDIT CONTROL SERVICES, INC.**

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## I. INTRODUCTION

At issue in the cross-appeal brought by Respondent/Cross-Appellant Panag ("Panag") is the trial court's dismissal of her Consumer Protection Act ("CPA") claims. Panag had alleged that Appellant/Cross-Respondent Credit Control Services, Inc. ("CCS") and its client Appellant/Cross-Respondent Farmers Insurance Company ("Farmers") violated the CPA by sending demand letters to Panag in an effort to recover on Farmers' subrogation claims. CCS and Farmers -- whose interests as subrogors are adverse to the interests of Panag -- sent the letters following an automobile accident for which Panag was at fault. At the time of the accident, Panag was uninsured.

This case is unusual with respect to several fundamental issues. First, Panag elected to bring a cause of action under the CPA even though she was not a *consumer* of services or goods and was not representing the interests of any consumers. Instead, she was in an adversarial relationship. Thus, the parties are not in the typical consumer relationship as contemplated by the CPA. As such, no existing law supports application of the CPA to the facts of this case.

Second, while Panag did initially designate her lawsuit as a class action, she failed to identify any other plaintiff and never sought certification of a class prior to the dismissal of her claims. Thus, this case

is *not* a class action lawsuit, but rather an individual lawsuit that was properly dismissed as a matter of law. Third, Panag alleges to have suffered damages consisting of only the time and expense of retaining counsel to prosecute the claim. In contrast with a typical CPA claim, she has not alleged any direct injury flowing from the subrogation demand letters issued.

Finally, this case is unusual because of the trial court's unconventional and unjust discovery rulings. The trial court properly dismissed Panag's CPA claim on Farmers' motion for summary judgment, thereby terminating this case. Yet, at the same time, the trial court crafted a discovery order authorizing counsel for Panag's counsel (at the considerable expense of CCS) to conduct a hunting expedition of CCS's business and accounting records. That order was expressly aimed at determining whether other putative class members exist who might be able to show the requisite elements of the CPA and who might serve as a putative class representative in a case against CCS. In other words, the trial court seems to have decided that notwithstanding the lack of a viable claim by Panag, CCS and Farmers had violated the CPA and should nevertheless be brought to task.

CCS's briefing to this Court demonstrates that (a) adversaries in an automobile accident claim have no standing to bring a CPA claim for a

subrogation demand letter they find offensive; (b) attorney fees alone are not compensable damages under the CPA; and (c) upon entry of final judgment, further class discovery at the expense of the defendants is abusive and cannot be permitted.

Included in this combined brief are, first, CCS's response to Panag's cross-appeal, and second, CCS's reply in support of its appeal. For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment to CCS (which is the subject of Panag's cross-appeal), and reverse the trial court's entry of orders requiring CCS to produce discovery (which is the subject of CCS's appeal).

## **II. STATEMENT OF THE CASE**

The background facts relevant to CCS's appeal and Panag's cross-appeal were set out in CCS's opening brief and are hereby incorporated by reference.<sup>1</sup>

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<sup>1</sup> The "Statement of the Case" set forth in Panag's brief contains many factual allegations that 1) cannot be characterized as "[a] fair statement of the facts and procedure relevant to the issues presented for review, without argument" as required by RAP 10.3(4), and 2) lack the mandatory references to the record required by RAP 10.3(4). For example, even though there is no supporting evidence in the record, Panag represents as fact that CCS and Farmers engaged in "misconduct," "desired [a particular] response," and "illicitly obtained money." Because these and a number of other inflammatory allegations in Panag's brief are wholly inappropriate and lack factual support, they are to be disregarded by this Court.

**III. RESPONSE TO PANAG'S CROSS-APPEAL:  
ISSUES PERTAINING TO PANAG'S ASSIGNMENTS OF ERROR**

1. Given that Panag lacks standing to assert a CPA claim against CCS or Farmers, should this Court affirm the trial court's summary judgment dismissal of Panag's CPA claim.

2. Where Panag failed to present evidence on the required five elements of the CPA sufficient to survive summary judgment dismissal of her CPA claims, should this Court affirm the trial court's summary judgment dismissal of Panag's CPA claim.

**IV. ARGUMENT: RESPONSE TO PANAG'S CROSS-APPEAL**

**A. STANDARD OF REVIEW: THE TRIAL COURT'S ORDER DISMISSING PANAG'S CLAIMS ON SUMMARY JUDGMENT CAN BE AFFIRMED ON ANY CORRECT GROUND SUPPORTED BY THE RECORD**

The purpose of summary judgment "is the avoidance of long and expensive litigation productive of nothing." *Padron v. Goodyear Tire & Rubber Co.*, 34 Wn. App. 473, 475, 662 P.2d 67 (1983). Conclusory statements, argumentative assertions, and allegations of unanswered questions such as those set forth in Panag's brief will not defeat a motion for summary judgment. *Vacova Co. v. Farrell*, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). As this Court is well aware, summary judgment is appropriate if, from all the evidence viewed in the light most favorable to the nonmoving party, reasonable persons could reach but one conclusion.

*Clements v. Travelers Indem. Co.*, 121 Wn.2d 243, 249, 850 P.2d 1298 (1993); CR 56.

This Court reviews *de novo* all questions of law, including the trial court's order granting summary judgment. *Hill v. Cox*, 110 Wn. App. 394, 402, 41 P.3d 495 (2002). When reviewing a summary judgment order, this Court is to consider "evidence and issues" called to the attention of the trial court. RAP 9.12; *see also* RAP 2.5(a). Thus, this Court is to engage in the same inquiry as the trial court with no deference afforded to the trial court's stated reasons for granting summary judgment. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). Any oral or written findings of fact and corresponding commentary made by the trial court are superfluous and are not to be considered by the appellate court. *See, e.g., Hubbard v. Spokane County*, 146 Wn.2d 699, 706 n.14, 50 P.3d 602 (2002). This Court has the inherent authority to affirm the trial court's ruling on any correct ground supported by the record. *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)).

**B. SUMMARY OF ARGUMENT: THE TRIAL COURT'S DISMISSAL OF PANAG'S CPA CLAIMS MUST BE AFFIRMED**

Panag's only claim against CCS, which she asserted under the CPA, was properly dismissed because Panag is not a consumer and has no

ability to stand in the shoes of a consumer. Because adversaries in an automobile accident have no standing to bring a CPA claim for a subrogation demand letter they find offensive, Panag has no standing to bring a CPA claim. Because Panag lacks standing as a threshold matter, this Court should affirm the dismissal of Panag's claims on that basis alone.

It is therefore unnecessary for this Court to address the five discrete elements of the CPA. Nonetheless, should this Court elect to do so, a review of the record and the law will confirm that Panag failed to present sufficient evidence to support *any* of the CPA elements, let alone all of them as required to survive summary judgment. Panag's failure to come forward with evidence on *any one element* is fatal to her entire CPA claim. This Court may affirm the dismissal of Panag's CPA claim based upon the absence of evidence presented on any one of the required elements. *See Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Because CCS is entitled to judgment as a matter of law on Panag's CPA claim, this Court must affirm the trial court's order granting summary judgment.

**C. PANAG IS NEITHER A CONSUMER NOR AN APPROPRIATE REPRESENTATIVE OF THE CONSUMING PUBLIC AND THEREFORE LACKS STANDING TO ADVANCE ANY CLAIM UNDER THE CPA**

1. As a Threshold Matter, Only Consumers and Persons Standing in the Shoes of Consumers Can Maintain a CPA Cause of Action.

As discussed at length in CCS's Opening Brief in the context of CCS's appeal of the trial court's discovery order, Panag lacks standing to invoke the protections of the CPA against CCS. *See* CCS's Opening Br. at 14-22.<sup>2</sup> Panag's lack of standing not only precludes her from obtaining discovery on the CPA elements, but also precludes her from maintaining a CPA cause of action against CCS.

Despite the well-established CPA legislative history and cases interpreting the statute as protecting only *consumers* and persons standing in the shoes of consumers, Panag baldly asserts that a person's status as a consumer is of no relevance to the application of the *Consumer Protection Act*. Remarkably, Panag even goes so far as to argue that a plaintiff with *no relationship whatsoever* with a defendant is nonetheless entitled to avail herself of the protections of the CPA in an action against that defendant. She argues as follows:

[T]here need not be a consumer or contractual relationship between a CPA plaintiff and CPA defendant. In fact *there need not be any relationship whatsoever* between the

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<sup>2</sup> The referenced sections of CCS's Opening Brief are hereby incorporated by reference.

parties, other than the “cause and effect” relationship between the defendant’s deceptive conduct and the injury or damages sustained by a plaintiff.

Panag’s Opening Br. at 33 (emphasis added). Although Panag repeatedly states that there exists some law to support such a position, a close reading of each and every case cited in her brief confirms that she has been unable to locate any such authority.

Panag, however, places great emphasis upon one Washington Supreme Court decision, *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 312-313, 858 P.2d 1054 (1993). In that case, the Supreme Court stated that a plaintiff need not be a *direct* consumer in order to bring a claim under the CPA. *Fisons*, 122 Wn.2d at 312-13. The *Fisons* court did not eliminate the requisite “consumer” relationship from the *Hangman Ridge* test. Instead, the *Fisons* court stated that the prescribing physician had standing to assert a CPA violation because:

in examining the nature of the relationship between a drug manufacturer, a prescribing physician and a patient, it is the physician who compares different products, selects the particular drug *for the ultimate consumer* and uses it as a tool of his or her professional trade.

*Fisons*, 122 Wn.2d at 313 (emphasis added). To sue under the CPA, a plaintiff can be a direct consumer of the goods or services giving rise to the alleged act. Alternatively, a plaintiff can sue under the CPA if he or

she is sufficiently ensconced in the chain of commerce between the manufacturer and the “ultimate consumer” such that he or she becomes the “logical person to be the `private attorney general”” and “stand[] in the shoes of the `ordinary consumer.”” *Id.* at 313. Whether direct or indirect, this standing requirement remains a mandatory prerequisite for any plaintiff seeking to prosecute a CPA violation as a private attorney general.

Panag’s argument that persons have standing to sue under the CPA despite having *no relationship whatsoever* with the defendant, if accepted, would result in a vast and improper expansion of established CPA jurisprudence. Panag urges this Court to read out of the CPA any requirement that a plaintiff make a showing of the existence of a “consumer” relationship. The required consumer relationship is typically evidenced by a business or contractual relationship, the sale or purchase of goods or services, mass advertising, warranty offers, public offering or solicitation, or any act or practice that impacts Washington’s consuming public. Indeed, even the cases cited by Panag confirm that a business must be engaged in unfair or deceptive practices in the course of its business “with consumers” to be deemed in violation of the CPA. *See, e.g., Sorrel v. Eagle Hardware, Inc.*, 110 Wn. App. 290, 297-98, 38 P.3d 1024 (2002).

2. Panag is Not a Consumer and Cannot Stand in the Shoes of a Consumer; She Therefore is Not Entitled to Maintain a CPA Cause of Action Against CCS.

Here, Panag has no direct or indirect consumer relationship with CCS. As a result, she cannot meet the standing requirement set forth in *Fisons*.

CCS represented Farmers' interests in pursuing an adversary subrogation claim against Panag. This claim was advanced on behalf of Farmers' insured due to injuries sustained by the insured because of the accident that Farmers determined was caused by Panag. In that capacity, CCS sent Panag three letters seeking information on any insurance available to Panag and, in the alternative, recovery of Farmers' subrogation claims.

Panag was never a direct or indirect consumer of goods or services manufactured, sold, warranted, or advertised by Farmers or CCS as contemplated by the CPA or under *Fisons*. In addition, Panag never even participated -- directly or indirectly -- in the chain of commerce between CCS and any "ultimate consumer" of CCS's goods and services. The business of CCS at issue was limited to acting as an agent for subrogation recovery. This business does not involve the manufacturing or sale of any goods or services to the consuming public. Moreover, Panag's interests are squarely adverse to CCS's interests. Thus, the interests of

Washington's consumers were neither directly nor indirectly impaired by Panag's receipt of the CCS letters.

Although she argues unconvincingly to the contrary, Panag's interests as a consumer of goods and services were not impaired by her receipt of the CCS letters. Panag's argument is that she should be granted consumer status because she *feared* that her ability to consume goods and services *could have been* impaired by her receipt of the CCS letters. She further claims that her fear alone prompted her to obtain a copy of her credit report at a cost of \$9.00. Significantly, there is no evidence in the record to indicate that Panag's credit score was actually impaired by the issuance of the CCS letters.

The CPA, of course, does not provide a remedy for anticipatory claims. Plaintiffs who think they might have a claim for harm that may or may not be sustained at some point in the future must wait until harm is actually sustained before bringing suit. Panag's purported fear that her credit rating might be impaired at some future point is simply not compensable damage under the CPA. Likewise, any future impairment of her interests as a consumer *of other businesses' goods or services* is similarly not compensable. Panag has produced no evidence to indicate that her ability to consume the goods and services of other companies was impaired by her receipt of the CCS letters. Although Panag claimed that

she was worried that her credit rating *might* impair her ability to consume goods and services of other companies, she adduced no competent evidence to prove such impairment.

CCS and Farmers did not report Panag to any credit bureaus. Had Panag relied upon the substance of the credit report, it would not have revealed any injury to Panag's credit rating. Simply stated, the credit report is a red herring as evidence of injury or damages.

Moreover, Panag did not obtain a copy of her credit report until *after* she filed her lawsuit against Farmers and CCS. CR 11 requires the plaintiff and her counsel to warrant that "to the best of the party's or attorney's knowledge, information and belief, formed after reasonable inquiry" that the pleading "is well grounded in fact and is warranted by existing law." *See* CR 11(a). Because the credit report was sought and obtained *after* the complaint was filed, it could not have been relied upon by Panag as a basis upon which to establish that her interests as a consumer might have somehow been impaired. This timeline reveals Panag's desperate post-litigation efforts to transform a dispute with her adversaries into a CPA claim reserved only for direct and indirect consumers.

As discussed herein, Panag has utterly failed to come forward with evidence to indicate that her interests as a consumer of goods and services

were impaired by her receipt of the CCS letters. Given that Panag is not a consumer and cannot stand in the shoes of a consumer, she is not entitled to maintain a CPA cause of action against CCS. Although Panag professes to be a class representative of similarly situated individuals, the same infirmities that prevent her from having standing to assert a violation of the CPA likewise impair the CPA claims of the entire class that she purports to represent. Neither she nor any of those putative class members has standing to assert a violation of the CPA against CCS.

As discussed above, because Panag is neither a consumer nor an appropriate representative of the consuming public, she lacks standing to advance any claim under the CPA. Under these circumstances, Panag has failed to establish impairment to her interests as a consumer of goods and services. Accordingly, CCS is entitled to judgment as a matter of law on Panag's CPA claim. This Court should affirm the trial court's dismissal of Panag's claim because she lacks standing to sue under the CPA.

**D. PANAG'S CPA CLAIM WAS PROPERLY DISMISSED  
BECAUSE SHE FAILED TO PRESENT EVIDENCE TO  
PROVE ANY OF THE REQUISITE CPA ELEMENTS**

Because dismissal is appropriate based upon lack of standing, it is not necessary for this Court to analyze the remaining legal issues presented in this case. Nonetheless, should this Court elect to do so, there remain several independent correct grounds on which this Court could

affirm the trial court's summary judgment dismissal of Panag's CPA claim.

To prevail in a private CPA action, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; and (5) causation. *Hangman Ridge*, 105 Wn.2d at 789-90. A plaintiff's failure to meet her burden of proof on any one element is fatal to the entire CPA claim. *Id.* at 780.

Although the record contains no evidence to support a CPA claim against CCS, Panag's brief sets forth conclusory statements, argumentative assertions, and allegations of unanswered questions on each of the five CPA elements in a misguided attempt to defeat summary judgment. *See Vacova* 62 Wn. App. at 395. As discussed herein, Panag's efforts fail as a matter of law.

1. Dismissal of Panag's Claims is Required Because She Failed to Adduce Evidence to Prove: 1) Injury to Business or Property and 2) Actual Damages Causally Related to Her Receipt of the CCS Letters

Although Panag failed to make a *prima facie* showing to meet her burden of proof on any of the *Hangman Ridge* elements, most notable is the lack of evidence on the "injury to plaintiff in his or her business or property" and causation elements, as aptly noted by the trial court. CP 400; *see Hangman Ridge*, 105 Wn.2d at 789-90.

Panag's evidence of "injury to business or property" before she filed her lawsuit consisted of nothing more than costs and fees to consult an attorney she had already retained. After she commenced this lawsuit, Panag purchased a credit history report based upon her misguided belief that her credit score might be adversely impacted. As discussed below, this evidence does not constitute injury to business or property resulting from her receipt of the CCS letters.

a) Attorney Fees Are Not Compensable Damages Under the CPA.

Panag asks this Court to conclude as a matter of law that costs and expenses incurred consulting with an attorney and attorney fees constitute sufficient evidence of "injury to business or property" under the CPA. This Court should decline Panag's invitation to depart from precedent, particularly under the facts presented in this case.

It is well established that Washington follows the American Rule, under which attorney fees are not recoverable unless expressly provided for pursuant to contract, statute, or a recognized ground of equity. *DeAtley v. Barnett*, 127 Wn. App. 478, 486, 112 P.3d 540 (2005). The CPA provides a statutory basis for recovery of attorney fees may be awarded in a proper case where actual damages are first proved:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020, 19.86.030,

19.86.040, 19.86.050, or 19.86.060, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW 19.86.030, 19.86.040, 19.86.050, or 19.86.060, may bring a civil action in the superior court to enjoin further violations, to recover the *actual damages* sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee, . . . .

RCW 19.86.090 (emphasis added). Thus, if Panag were able to prove all five elements of the CPA (which she cannot), only thereafter would she be eligible to seek recovery of her attorney fees.

Panag, however, urges this Court to conclude that attorney fees themselves constitute evidence of the underlying elements of a CPA claim. As support, Panag relies upon the above-quoted statute that applies to the availability of an attorney fee award *after* the CPA elements were established. Where, as here, no CPA violation can be proven, no attorney fee award is available. Certainly, it would render the statute's exceptional attorney fee award provision meaningless if evidence that attorney fees have been incurred could also be used to satisfy one of the requisite underlying CPA elements.

Notably, no case holds that costs and expenses incurred consulting with an attorney and attorney fees can be construed to satisfy the "injury to business or property" and "damages" CPA elements. Despite this, Panag urges this Court to reach this conclusion based upon several cases

that are readily distinguishable. See Panag's Opening Brief, at 23-24. As discussed below, these cases do not support Panag's argument.

In *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 792 P.2d 142 (1990), the Washington Supreme Court limited the applicability of the CPA to a "consumer's property interest or money," which is diminished or lost because of unlawful conduct. *Id.* at 845 (emphasis added). Here, Panag was not a consumer of CCS's goods or services, nor one who could stand in the shoes of a consumer. As a result, any property she claimed loss of use of is simply irrelevant to the establishment of a CPA violation. The *Mason* court also stressed that a loss of use of property must be "causally related" to an unfair or deceptive act or practice. *Id.* In this case, Panag not only failed to establish a loss of use of property, but also failed to establish any such causal relationship.

This Court's decision in *State Farm Fire and Casualty Co. v. Huynh*, 92 Wn. App. 454, 962 P.2d 854 (1998), similarly provides no support for Panag's argument. The *Huynh* decision involved a consumer transaction between an insurer and its insured's chiropractor who submitted fraudulent billings and reports for treatment of uninjured individuals who had staged automobile accidents. *Id.* at 459. The insurer in *Huynh* had a statutory duty to investigate accidents upon the submission of claims by its insureds. Here, by contrast, Panag had no statutory duty

to investigate the CCS letters that arose out of her adversarial, tort-based relationship with Farmers' insured, Mr. Hamilton. Moreover, Panag who cannot stand in the shoes of a consumer (unlike the plaintiff in *Huynh*) is unable to prosecute a CPA claim on behalf of the consuming public.

Panag next cites to *Sign-O-Lite Signs v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992), to support her contention that costs and expenses incurred consulting with an attorney and attorney fees satisfy the "injury to business or property" and "damages" CPA elements. In *Sign-O-Lite Signs*, however, this Court held that attorney fees are *not* "actual damages" as contemplated by the CPA, and that actual damages are required *before* attorney's fees can be awarded. *Sign-O-Lite Signs*, 64 Wn. App. at 565-66 (citing *St. Paul Fire & Marine Ins. Co. v. Updegrave*, 33 Wn. App. 653, 660, 656 P.2d 1130 (1983)). In *Sign-O-Lite Signs*, a florist entered into a contractual relationship with a sign vendor and was charged more than what was agreed for a rented sign that did not work properly. *Id.* at 557-58. This Court commented that "the trial court found no compensable damages but believed that the 'unique circumstances' of the case justified a conclusion that the attorney fees were 'actual damages.'" *Sign-O-Lite Signs*, 64 Wn. App. at 565. This Court went on to find that this belief in a unique basis for damages was erroneous. *Id.* at 566. Panag makes the same erroneous argument here. Given that no such

extenuating circumstances are present in this case, such a departure from the general rule cannot be justified. As such, this Court should reject Panag's argument that attorney fees she incurred are appropriate to satisfy the "injury" and "damages" CPA elements.

Panag also cites to *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 38 P.3d 1024 (2002), as if it supported her argument that attorney fees should constitute "injury" and "damages" under the CPA. In *Sorrel*, this Court concluded that the plaintiff was denied rightful possession of his money when the nursing home he contracted with to care for his wife failed to timely refund an overpayment of unearned prepaid charges. *See id.*, at 293-96. Significantly, the plaintiff in *Sorrel* entered into a consumer transaction with the defendant nursing home, which unlawfully refused to issue a refund. Here, by contrast, Panag did not enter into a consumer transaction with CCS and was not denied the use of her funds by CCS. Thus, the *Sorrel* ruling is inapposite to the facts of this case, as it provides no support for Panag's position that attorney fees should constitute injury under the CPA.

Because the costs and fees incurred to consult an attorney do not constitute compensable damages, this Court should conclude that Panag's attorney consultation expenses are insufficient evidence to establish a

CPA injury to business or property resulting from her receipt of the CCS letters.

- b) Panag's Fear That She Might Suffer Injury in the Future is Not Compensable Damage Under the CPA.

Panag also claims injury in the amount of \$9.00 based upon expenses she incurred to obtain a copy of her credit report to ensure that her credit had not been adversely impacted. As discussed above, Panag's purported fear that her credit rating might impair her future ability to consume goods and services of other businesses is simply not compensable damage under the CPA. Consequently, her purchase of a credit history report based upon her misguided belief that her credit score might be adversely impacted likewise does not constitute injury to business or property resulting from her receipt of the CCS letters.

- c) The Nature of Panag's Evidence Fails to Satisfy The "Injury to Business or Property" and Causation CPA Elements Regardless of the Amount of Damages Claimed.

In an attempt to ignore that the very nature of her evidence fails to satisfy the "Injury to Business or Property" and causation CPA elements, Panag argues that she need only come forward with "some evidence, however slight." See Panag's Opening Brief, at 24, 26. As support for this argument, Panag cites to the following language appearing in *Sign-O-Lite Signs v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 563, 825 P.2d

714 (1992): “There must be some evidence, however slight, to show injury to the claimant’s business or property.” Panag further maintains that attorney fees and/or the \$9.00 she incurred to purchase a credit report constitute evidence of a “slight” injury to satisfy this minimal requirement.

Again, Panag’s arguments miss the point. The reason her evidence of attorney fees and costs, and sums incurred to obtain a credit report do not constitute injury under the CPA is not because of the *de minimus* amount claimed. Rather, it is because of the nature of the claimed sums. Simply put, attorney fees and costs do not constitute injury under the CPA. Likewise, misguided fears that future damage may be suffered are not compensable under the CPA.

Because Panag failed to set forth sufficient evidence to support the injury to plaintiff in his or her business or property and causation CPA elements, her CPA cause of action fails as a matter of law. *See Hangman Ridge*, 105 Wn.2d at 780.

2. Dismissal of Panag’s Claims is Required Because She Failed to Adduce Evidence to Prove That The Dissemination Of The CCS Letter To At-Fault Uninsured Motorists Has the Capacity to Deceive A Substantial Portion Of The Consuming Public

Panag alleges that the CCS letters were deceptive because they contained the following language appearing in large font:

“SUBROGATION CLAIM AMOUNT DUE \$6,442.53.” CP 454. To

establish an unfair or deceptive practice, the question is whether “ ‘the action has the capacity to deceive a substantial portion of the purchasing public.’ “ *Burbo v. Harley C. Douglass, Inc.*, 125 Wn. App. 684, 700, 106 P.3d 258 (2005) (citing *Luxon v. Caviezel*, 42 Wn. App. 261, 268, 710 P.2d 809 (1985)).

CCS sent the letters at issue in this case to a motorist who had failed to carry the mandatory liability insurance and thus was uninsured in violation of Washington law. Panag caused an automobile accident with a motorist who had been insured by Farmers. The CCS letters sought *either* proof of insurance *or* reimbursement of amounts paid. The CCS letters identified: (1) CCS as the entity seeking recovery of the subrogation claim; (2) the letter recipient; (3) date of loss; (4) Farmers as the subrogated insurer; (5) demand for payment or proof of insurance; (6) alternative legal and subrogation claim recovery options; (7) deadline for a response by the letter recipient; and (8) contact information for CCS. CP 454.

Panag has come forward with no evidence to indicate that the CCS letters were in any way inaccurate or untruthful. Panag has never alleged that CCS added charges or fees to the amounts claimed by Farmers in subrogation. Moreover, Panag offered no evidence to indicate that the letters CCS sent to Panag were forwarded to the public at large. There has

thus been no adequate showing of any likelihood of deception. Panag never claimed that she was deceived by the CCS letters. In fact, Panag testified that she never believed that she owed Farmers or CCS any amount, and that the CCS letters did not disabuse her of that notion. Instead, Panag claims that the CCS letters were deceptive simply because they contained the following language appearing in large font:

“SUBROGATION CLAIM AMOUNT DUE \$6,442.53.”

Subrogation is an equitable right which exists as a matter of law when an insurance company pays its insured for a claim:

In general, absent a statute to the contrary, an insurance company will, in making a payment to the insured required under the policy, always be subrogated, either totally or partially . . . to the insured's rights and remedies against the wrongdoer.

*Allan D. Windt, Insurance Claims and Disputes*, § 10:7 at 221 (4<sup>th</sup> ed. 2001). The doctrine “seeks to impose alternate responsibility for a wrong or loss on the party who, in equity and good conscience, ought to bear it.” *Mahler v. Szucs*, 135 Wn.2d 398, 42, 957 P.2d 632 (1998); *Johnny's Seafood Co. v. City of Tacoma*, 73 Wn. App. 415, 422, 869 P.2d 1097 (1994) (subrogating insurer steps into the shoes of its insured); *Winters v. State Farm Mut. Auto Ins. Co.*, 144 Wn.2d 869, 875, 31 P.3d 1164 (2001) (subrogation is an equitable doctrine that permits a party who has paid benefits to one party to collect from another). “Subrogation is always

liberally allowed in the interests of justice and equity.” *Mahler*, 135 Wn.2d at 412. There is no rule which requires that a subrogee must first sue the third person liable for the loss before seeking to collect his claim, although he has that right. *Id.* at 413. Simply stated, the assertion of a subrogation claim does not violate public policy, constitute an unfair or deceptive act, or harm consumers.

Thus, the recitation of an accurate subrogation claim for monies that are believed to be owed set forth in the CCS letters does not have the capacity to deceive a substantial portion of the purchasing public. The presence of words appearing in large font cannot be the sole basis for deception.

Left with no evidence to support the unfair or deceptive practice CPA element, Panag resorts to argumentative statements and conclusory assertions. For example, using unsupported references, Panag pejoratively casts the CCS letters as deceptive. Panag refers to the CCS letters as typifying a “standard dunning letter,” which term Panag neither defines nor explains. Such conclusory statements and argumentative assertions are, of course, insufficient to defeat a motion for summary judgment. *See Vacova*, 62 Wn. App. at 395.

Because Panag failed to set forth sufficient evidence to support the unfair or deceptive practice CPA element, her CPA cause of action fails as a matter of law. *See Hangman Ridge*, 105 Wn.2d at 780.

3. Dismissal of Panag's CPA Claim is Required Because the CCS Letters Did Not Affect A Public Interest Did Not Concern A Private Dispute, And Did Not Involve The Public At Large

Another required element of a CPA violation is that of a public interest showing. *See Hangman Ridge*, 105 Wn.2d at 787. All private plaintiffs in Washington must make a showing of public interest impact. *Id.* at 789. In *Hangman Ridge*, the Washington Supreme Court revised the public interest test from a three-prong inquiry to a consideration of "several factors, depending upon the context in which the alleged acts were committed." *Id.* at 789-90. The Court predicated its recitation of these factors by demarcating two contexts in which the alleged acts could be committed. The first is business acts could arise in the context of a consumer transaction; and the second is business acts could arise in the context of a private dispute, such as in a breach of contract situation.

The "consumer transaction" context involves a transaction including the purchase of goods. *See id.*, at 790. The "private dispute" context is where the transaction is a private dispute affecting no one but the parties to the contract or relationship. *Id.* Typically, one party with unequal bargaining power enters into business transactions in the form of

advertising and solicitation to exploit one or more members of the consuming public. *Id.* Examples of relationships that fall into this context include an attorney-client, insurer-insured, and realtor-property purchaser. *Id.*

Here, the “context in which these acts occurred was that of an essentially private transaction, rather than a consumer transaction.” *Id.* at 794. The context in which Panag’s CPA claim arose was out of a private tort-based dispute. No advertising or solicitation or any other business/consumer transaction took place between Panag and CCS. To the contrary, they have never been in a fiduciary relationship.

Farmers’ entitlement to recover payments it made arose out of Panag’s negligent conduct in causing the automobile accident. CCS sent letters to Panag to obtain proof of insurance or to recover monies. As such, Panag’s CPA claim is not consumer-centric and does not impact any current or future consumer interests held by her or any other Washington resident. By contrast, Panag and CCS are and have always been adversaries. Any communications originating from Farmers or CCS to Panag cannot transform the parties’ adversarial relationship into a consumer transaction or a fiduciary relationship.

Thus, under either the “consumer transaction” or the “private dispute” contexts, Panag cannot meet her burden of proof on the public

interest element. Because Panag failed to set forth sufficient evidence to support this required element, her CPA cause of action fails as a matter of law. *See Hangman Ridge*, 105 Wn.2d at 780.

4. Panag Failed to Produce Evidence to Indicate That CCS's Letters Seeking Recovery Of Subrogated Amounts Constitute "Trade" Or "Commerce"

The purpose of the CPA is to deter unfair or deceptive business practices that adversely impact consumers or the consuming public. A prerequisite for establishing a violation of the CPA is a showing that the complained of act or practice occurred in a business's trade or commerce with the consuming public. *See Hangman Ridge*, 105 Wn.2d at 785; RCW 19.86.010(2).

Without citation to any supporting authority, Panag seeks an expansive reading of this requirement to include within the terms "trade" and "commerce" all practices of a business well beyond the current standard of "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." *See Hangman Ridge*, 105 Wn.2d at 785 (quoting RCW 19.86.010(2)). The term "commerce" is defined as: "the exchange of goods, productions, or property of any kind; the buying, selling and exchanging of articles." *See BLACK'S LAW DICTIONARY*, 6<sup>TH</sup> ED., at 269. Under this definition, the issuance of CCS's letters to recover subrogated amounts does not qualify

as “commerce.” Indeed, it is undisputed that the CCS letters did not solicit the public to buy or purchase anything of value, offer to sell or exchange goods or services, or solicit trading or exchanging anything for value.

Panag relies heavily upon *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1987), for the proposition that the terms “trade” and “commerce” include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington. *Id.* at 740. The *Nordstrom* decision involved a trade name infringement by a lessee amounting to an unfair method of competition that the Supreme Court deemed to be a violation of the CPA. *Nordstrom* and *Tampourlos* were parties to a lease contract, which granted *Tampourlos* the right to operate beauty salons within four *Nordstrom* stores. *Tampourlos* named his salons “Nostrum,” which allegedly infringed on the *Nordstrom* trade name. The Supreme Court found that *Tampourlos* was engaged in trade or commerce because he had used a trade name in advertisements and sold goods and services to the public at large. *Id.* at 740.

Here, Panag has offered no evidence to indicate that CCS engaged in trade or commerce. Panag has offered no evidence to indicate that CCS sold goods or services to the public, solicited the public with advertisements or warranties for the sale of goods or services related to

subrogation recoveries, or that the letters were sent to the public at large. Indeed, CCS only sent letters to Panag after she was identified by Farmers' licensed insurance adjuster as an at-fault driver in order to recover Farmers' legitimate subrogated claim. Panag and CCS are and have always been adversaries involved in a private dispute. Thus, the consuming public could not have been privy to or derived any benefit or incurred any harm from this adversarial relationship. Simply, Panag cannot satisfy the "trade" or "commerce" element of the CPA. Because Panag failed to set forth sufficient evidence to support this CPA element, her CPA cause of action fails as a matter of law. *See Hangman Ridge*, 105 Wn.2d at 780.

5. Panag's Inability To Support *Any* of the CPA Elements Means That Her CPA Claim Was Properly Dismissed

As discussed above, a plaintiff's failure to meet her burden of proof on any one of the five *Hangman Ridge* CPA elements is fatal to her CPA claim. *Hangman Ridge*, 105 Wn.2d at 780. Because the record contains insufficient evidence to support *any* of these elements, Panag's CPA claim fails as a matter of law. Accordingly, this Court must affirm the trial court's order granting summary judgment.

V. ARGUMENT: REPLY IN SUPPORT OF CCS'S APPEAL

A. SUMMARY OF REPLY

As explained in CCS's Opening Brief, all of the trial court's orders requiring CCS to produce discovery must be reversed because Panag (the only identified putative class representative) lacks standing to assert a claim. The trial court's discovery order -- which was entered after the trial court had already concluded that the defendants (CCS and Farmers) were entitled to judgment as a matter of law on all claims -- must also be reversed as contrary to our system of American jurisprudence because this case has been terminated.

Panag responds by simply insisting that the trial court's discovery orders -- albeit contrary to logic, common sense and years of legal precedent -- were somehow justifiable. To support her contention, Panag points to nothing more than a few readily distinguishable cases involving actual class action lawsuits that were permitted to proceed absent the named class representative. In doing so, Panag confuses *putative* class action lawsuits such as hers (which are unilaterally designated as such by plaintiffs' counsel at the time lawsuits such as these commenced) with existing class action lawsuits (which have been declared by a court as having met the specific and extensive legal elements required to certify a class).

Not surprisingly, Panag has not been able to locate any case that stands for the proposition that a trial court has the authority to impose discovery obligations on defendants in a *putative* class action lawsuit *after* every cause of action asserted by the only named plaintiff was dismissed and where the plaintiff never moved for certification of the class. Indeed, discovery is a pre-judgment privilege, not a post-judgment right.

The trial court erred by entering discovery orders that granted Panag's counsel the right to conduct discovery of CCS's business and accounting records. The orders (in particular, the July 1, 2005 order) improperly mandated post-judgment discovery by Panag's counsel on behalf of an uncertified class with no remaining class representative. For the reasons discussed herein and in CCS's Opening Brief, the trial court's discovery orders must be reversed.

**B. PANAG HAD NO COGNIZABLE CLAIM AGAINST CCS;  
IT NECESSARILY FOLLOWS THAT ANY PUTATIVE  
CLASS MEMBERS SHE COULD REPRESENT LIKEWISE  
HAVE NO COGNIZABLE CLAIM AGAINST CCS**

By entry of the July 1, 2005 order granting summary judgment and ordering discovery, the trial court dismissed Panag's sole CPA claim against CCS and Farmers and ordered CCS and Farmers to produce discovery. This order required discovery for the announced purpose of allowing Panag's counsel to identify and contact CCS letter recipients to advise them of the lawsuit, and to solicit their participation in the lawsuit

as named plaintiffs and/or proper class representatives. CP 829-831.

Before this ruling was made, Panag did not seek class certification. As a result, the trial court's July 1, 2005 order granting CCS and Farmers' summary judgment constituted a dismissal of Panag's sole remaining CPA claim, which eliminated all causes of action pending in the lawsuit and terminated any interests Panag may have had in the continuation of the litigation.

Despite this clear legal result, Panag asks this Court to make a special exception that would allow her attorneys to conduct discovery of CCS's business and accounting records. Panag's plea, she maintains, is being made on behalf of unidentified persons that she insists might have somehow been aggrieved. This argument is flawed and must be rejected.

Given that no class members were ever identified and no class was certified, the dismissal on the merits of Panag's CPA claim required a simultaneous dismissal of this entire lawsuit. Dismissal of Panag's CPA claim operated to dismiss any claims that could have been asserted by putative class members that Panag could have represented. Because Panag had no cognizable claim against CCS, it necessarily follows that any putative class members she could represent likewise have no cognizable claims against CCS.

**C. DISMISSAL OF PANAG'S CLAIMS TERMINATED THIS PUTATIVE CLASS ACTION LAWSUIT.**

Panag (the only named plaintiff in this putative class action lawsuit) contends that her lawsuit should proceed on behalf of some unidentified putative class even notwithstanding the dismissal of all the claims asserted by her. As discussed below, Panag is wrong. Her decision not to promptly seek class certification cannot serve to keep her case alive.

To the contrary, where a named plaintiff never makes a motion to certify, a district court may proceed with summary judgment before deciding certification. *See Cavanagh v. Humboldt County, et al.*, 1 Fed. Appx. 686, 2001 U.S. App. LEXIS 484 (9<sup>th</sup> Cir. 2001). Where there exists no certified class action lawsuit, the named plaintiffs can sue only on their own behalf and cannot raise claims of other putative class members. *See id.* It was therefore within the province of the trial court to reach a final resolution on summary judgment to determine whether the named plaintiff had a viable claim on the merits. *See* FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.11 (1995) (stating that “when it is clear that the action lacks merit, dismissal [before certification] will avoid unnecessary expense for the parties and burdens for the court”). Appendix A (attached hereto).

Where, as here, the merits of a plaintiff's claims can be readily resolved on summary judgment, where the defendant seeks an early

disposition of those claims, and where neither the plaintiff nor the putative class members are prejudiced thereby, trial courts are authorized to address the merits of the claims before considering the question of class certification. *See Curtin v. United Airlines, Inc.*, 275 F.3d 88, 93 (D.C. Cir. 2001).

A number of cases have addressed circumstances such as these, where a judge considers a motion for summary judgment prior to considering a motion for class certification. If a court determines that the named plaintiffs' claims lack merit, dismissal on summary judgment "ordinarily. . . disqualifies the named plaintiffs as proper class representatives," thus resolving the issue of class certification. *Chavez v. The Illinois State Patrol, et al.*, 251 F.3d 612, 630 (7<sup>th</sup> Cir. 2001); *accord Cruz v. American Airlines*, 150 F.Supp.2d 103 (D.D.C. 2001) (*both citing Cowen v. Bank United of Texas*, 70 F.3d 937, 941 (7<sup>th</sup> Cir. 1995). Of course, potential plaintiffs other than the named plaintiffs remain free to file their own suits against the defendants within the applicable statute of limitations. *See Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54, 76 L.Ed.2d 628, 103 S.Ct. 2392 (1983).

Here, early class certification was not the choice of Panag or the trial court. The trial court dismissed on the merits Panag's CPA claim. In doing so, the trial court disqualified Panag as a proper class representative,

thus resolving the issue of class certification. The entry of a post-summary judgment discovery order explicitly granting Panag's counsel access to CCS's business and accounting records at CCS's expense was highly irregular and inappropriate. Under these circumstances, this Court must conclude that it was an abuse of discretion for the trial court to subject CCS to discovery.

**D. AUTHORITIES DISCUSSED IN PANAG'S BRIEF OFFER NO SUPPORT FOR HER ARGUMENTS**

Panag cites to a number of older non-Washington cases in an effort to bolster the arguments she makes in defense of the trial court's discovery orders. These cases offer no support for her assertion that a dismissed plaintiff is somehow entitled to conduct discovery at defendants' expense. Indeed, where, as here, at issue is a pre-certification class action lawsuit without a proper representative plaintiff, discovery tools cannot be utilized. This is particularly true when discovery tools are sought to be used as part of an effort to locate and solicit individuals to revive claims that have been dismissed on their merits.

As discussed herein, the cases cited by Panag in defense of the trial court's orders are inapposite. Notably, these cases concern named plaintiffs whom have suffered injury allegedly also suffered by the class. Panag, by contrast, suffered no injury recognized under the CPA and, therefore, any class she could represent likewise suffered no injury. In

several of the cases cited by Panag, the named plaintiff's claims were mooted by changed circumstances such as settlement or cessation of incarceration. Panag's claims did not arise in either context. Indeed, she lacks standing to bring an individual claim on the merits in the first instance and, by failing to satisfy the requisite elements of a CPA violation, she never attained the ability to represent the interests of a putative class as a class representative. Given that there was no cognizable claim to begin with, there was no claim that could have been rendered moot. As a result, the rationale for continuing a case despite mootness is of no consequence to this instant case.

In *Int'l Brotherhood of Electrical Workers v. Westinghouse Elec. Corp.*, 25 Fair Empl. Prac. Cas. (BNA) 1093, 1979 WL 245 (D. Md. 1979), the United States District Court permitted a local union, which represented all female union members in a Title VII sex-based discrimination lawsuit, to conduct class certification discovery following the union's dismissal for unsuitability as a class representative related to its liability for the plaintiffs' damages. *Id.* The court reached this conclusion for the following reasons: there was another claim in the case which could go forward; the union was qualified to represent its members as a class representative in Title VII cases; and to hold otherwise would

unfairly prejudice women who relied upon the union to represent their interests and refrained from initiating their own timely actions. *Id.*

The *IBEW* decision is distinguishable from Panag's case. Significantly, each female putative class member in the *IBEW* case was both a member of the union and therefore necessarily had standing to assert a violation of the civil rights statute against the defendant. Membership in the putative class was tied to gender and each female's employment relationship with the defendant. Finally, each female had notice of the union's timely filed complaint and acceded to the union's right to initiate suit on her behalf.

Here, the dismissal of Panag's CPA claim terminated the litigation as it pertained to Panag, Farmers, and CCS. There were no other claims being asserted by Panag or any other person. Panag failed to prove a violation of the CPA, which was fatal to her claim and the claims of any class members that she purported to represent. The *IBEW* court stated, "an individual class representative must be a member of the class." *Id.* at 6. Clearly, Panag is not a member of any class that can establish a CPA claim against CCS. If such a class were to exist, Panag could not represent that class. No alleged putative class member has been identified or put on notice of this lawsuit; therefore, there could be no reliance upon Panag's initiation of this lawsuit that would have caused any one to refrain

from suing on his or her own accord. Since only Panag's pre-certification claims have been dismissed, no putative class member could have been prejudiced by the termination of this case. Not only is *IBEW v. Westinghouse* distinguishable on its facts, it also cannot be read to condone post-dismissal, pre-certification class wide discovery sought by Panag in this case.

Panag also cites to the *Goodman v. Schlesinger*, 584 F.2d 1325 (4<sup>th</sup> Cir. 1978), decision for the proposition that holding a matter open on the docket for a reasonable time to allow a proper plaintiff to step forward as a class representative is equivalent to an order subjecting defendants to class-wide discovery to identify and solicit individuals to join the lawsuit as plaintiffs. *See* Panag's Opening Brief, at 42-43. Notably, the *Goodman* court did not issue a discovery order granting the dismissed plaintiff access to defendants' business records to locate and solicit new party plaintiffs, as was ordered by the trial court in this case. Like the appellate court in *Goodman*, the trial court here initially ordered the matter held open on the docket for one week to permit counsel time to file an amended complaint on behalf of another plaintiff who desired to step forward as a class representative. CP 399-401. Panag's counsel could not locate another plaintiff and instead solicited a second order permitting class-wide discovery on behalf of unidentified members of the unrepresented,

putative class. CP 273-79. The *Goodman* case does not condone such a result.

The *Cox v. Babcock and Wilcox Co.*, 471 F.2d 13 (4<sup>th</sup> Cir. 1972) case, which was relied upon by the *Goodman* court, likewise does not condone the discovery sought by Panag in this case. The *Cox* court stated that a party who has been finally adjudged not to be a member of the class he seeks to represent is hardly a proper representative to present the claims of such class. *See id.* at 15. Notably, the *Cox* court only remanded the matter to permit any “party with standing” to prosecute the action. *See id.* at 16. Panag’s claims were finally adjudicated and no other party with standing was ever identified. Therefore, *Cox* supports CCS’s position that dismissal of the class claims is appropriate as Panag’s counsel have been given reasonable time and have failed to present proper parties with standing to prosecute the action.

The next group of decisions cited by Panag concern named plaintiffs who once held valid claims and now hold claims mooted by the passage of time, cessation of incarceration or similarly changed circumstances. None of these circumstances or anything analogous is presented here. These decisions were narrowly limited in their holdings wherein dismissed plaintiffs were permitted only to prosecute the denial of class certification motions, not to conduct class-wide discovery of

defendants' business records and at defendants' expense. The *U.S. Parole Commission v. Geraghty*,<sup>3</sup> *Alexander v. Gino's Inc.*,<sup>4</sup> *Deposit Guaranty Nat'l Bank Jackson, Miss. v. Roper*,<sup>5</sup> *Moore v. Matthews*<sup>7</sup> and *Jordan v. County of Los Angeles*<sup>8</sup> decisions fall into this inapposite category of cases. Unlike the named plaintiffs in these cases, Panag failed to come forward with the requisite evidence necessary to prosecute a valid CPA claim on her own behalf or on behalf of any class. Given that class certification was never sought, Panag has not appealed the denial of a motion for class certification. Further, she will not benefit from any proposed relief sought in the complaint.<sup>9</sup> In addition, Panag's claim was not rendered moot by the passage of time or changed circumstances. Rather, her claim from inception was beyond the scope of the CPA statute

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<sup>3</sup> 445 U.S. 388, 405 (1980) (issuing a limited holding that a named plaintiff with a previously meritorious claim may only pursue an appeal of the denial of a motion for class certification after the named plaintiff's personal claim becomes moot).

<sup>4</sup> 621 F.2d 71 (3d Cir. 1980).

<sup>5</sup> 445 U.S. 326, 100 S.Ct. 1166, 63 L. Ed. 2d 427 (1980).

<sup>6</sup> 445 U.S. 326, 100 S.Ct. 1166, 63 L.Ed.2d 427 (1980) (holding that entry of judgment in favor of named plaintiffs over their objections, following defendants' tender of damages to the court, did not moot plaintiffs' private case or controversy; and holding that a court of appeals has "jurisdiction to entertain an appeal of the trial court's denial of class certification motion only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy").

<sup>7</sup> 69 F.R.D. 406, 408-09 (D. Mass. 1975) (granting plaintiff's motion for class certification, despite his receipt of relief originally prayed for, because the claim was one capable of repetition, yet evading review).

<sup>8</sup> 669 F.2d 1311 (1982) (determining standing and mootness following settlement with the named plaintiff in the appeal of denial of a motion for class certification).

<sup>9</sup> Unless Panag intends to drive without proof of insurance, proximately cause another accident with Farmers' insured motorist, Mr. Hamilton, and avoid subrogation recovery efforts by Farmers, then any claim that Panag will benefit from relief sought is specious.

and unsupported by any evidence. Panag reasons that this Court should reward plaintiffs who lack standing or cognizable claims but employ the class action device to overcome adverse summary judgment rulings and continue discovery unabated. The cases cited by Panag are procedurally and factually distinguishable and cannot be read expansively to inoculate Panag from an adverse summary judgment ruling.

For the reasons discussed herein and in CCS's Opening Brief, all of the trial court's orders requiring CCS to produce discovery must be reversed.

## VI. CONCLUSION

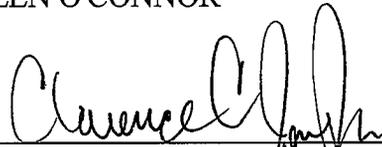
As discussed above, this is an unusual case in several respects. Panag's counsel has asserted unique theories of CPA liability as part of her effort to collect damages reserved for injury suffered by consumers arising out of her non-consumer, adversarial private dispute with CCS. Because established law does not support the application of the CPA to the facts of this case, this Court should affirm the trial court's summary dismissal of Panag's CPA claim. For the same reason (*i.e.*, lack of standing to sue under the CPA), this Court should reverse the trial court's orders that improperly extended CPA-related discovery rights to Panag.

Alternatively, this Court should affirm the trial court's dismissal of Panag's CPA claim because Panag failed to present sufficient evidence on

any one of the required five elements of the CPA. In addition, this Court should reverse those portions of the July 1, 2005 order that purported to impose discovery obligations on CCS after all claims had been dismissed.

DATED: March 2, 2006

COZEN O'CONNOR

By: 

John A. Granger, WSBA #6794  
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Attorneys for Credit Control Services, Inc.

**DECLARATION OF SERVICE**

Suzy A. Miller states:

I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of 21 years, I am not a party to this action, and I am competent to be a witness herein. On this 2nd day of March, 2006, I caused to be filed via U.S. Mail (first class postage prepaid) with the Court of Appeals of the State of Washington, Division I, the foregoing COMBINED RESPONSE/REPLY BRIEF OF APPELLANT/CROSS-RESPONDENT CREDIT CONTROL SERVICES, INC. I also served copies of said document on the following parties as indicated below:

<b>Parties Served</b>	<b>Manner of Service</b>
<b><i>Counsel for Plaintiff:</i></b> Matthew J. Ide Ide Law Offices 801 Second Avenue, Suite 1502 Seattle, WA 98104-1500	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail
<b><i>Counsel for Plaintiff:</i></b> Murray T. S. Lewis Lewis Law Firm 600 First Avenue, Suite 409 Seattle, WA 98104-2216	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail
<b><i>Counsel for Defendant Farmers:</i></b> Stevan David Phillips Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101	( ) Via Legal Messenger ( ) Via Overnight Courier ( ) Via Facsimile (X) Via U.S. Mail

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 STATE OF WASHINGTON  
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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.

Executed at Seattle, Washington, this 2<sup>nd</sup> day of March, 2006.

  
Suzy A. Miller

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# APPENDIX "A"

MANUAL FOR

COMPLEX  
LITIGATION

THIRD

FEDERAL JUDICIAL CENTER

WEST PUBLISHING

### 30.11 Timing

Fed. R. Civ. P. 23(c)(1) directs the court to determine "as soon as practicable" whether an action is to be maintained on behalf of or against a class (commonly called "certifying" the class, although Rule 23 does not use the term). Early certification or denial can be crucial, because it substantially affects such fundamental matters as:

- the structure and the stakes of the litigation;
- who the parties are;
- how discovery is conducted;
- the procedure for motion practice;
- the application of ADR procedures; and
- the approach to settlement negotiations.

Denial of class certification has the immediate effect of restarting the running of the statute of limitations against unnamed plaintiffs.<sup>664</sup>

When an action has been filed as a class action, the court must treat it as one until it has determined otherwise. It should therefore take up the matter at the initial scheduling conference, calling on the attorneys to address the issues bearing on certification and establishing a schedule for ruling on the motion for class certification. While the presumption should be in favor of an early resolution, the appropriate timing will vary with the circumstances of the case. Some district courts have local rules that specify a short period—typically thirty to ninety days—within which the plaintiff must file its motion.<sup>665</sup> Such rules, though consistent with Rule 23 in calling for an early class action decision, may not allow sufficient time to develop an adequate record, particularly in complex cases. Requests for modifying such time periods should be made at the initial conference or as soon thereafter as the need is known. Failure to comply with such a rule should not be treated as an absolute bar to certification, though it may be relevant to the determination of adequacy of representation under Rule 23(a)(4).<sup>666</sup>

The court's principal concern should be to develop a record adequate to enable it to decide whether the prerequisites of Rule 23 have been met. While determining numerosity and adequacy of representation may be relatively simple, determining whether common questions exist and predominate and whether the

664. For those excluded from the class, the statute of limitations, which was tolled by the filing of the class complaint, begins to run again when the election to be excluded is filed. See *Chardon v. Fumero Soto*, 462 U.S. 650 (1983); *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983); *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974). See *infra* § 30.213.

665. See, e.g., Local Rule 27 of the U.S. District Court for the Eastern District of Pennsylvania.

666. See *McGowan v. Faulkner Concrete Pipe Co.*, 659 F.2d 554 (5th Cir. 1981); *Castro v. Beecher*, 459 F.2d 725 (1st Cir. 1972).

class plaintiff's claims are typical of the class may require a more extensive examination. Of course, where a plaintiff's claim is plainly idiosyncratic, or where, on the other hand, the action challenges the legality of a statute or regulation applicable to a definable class, the determination may be sufficiently clear as not to require developing a record for decision. For the court to be able to decide issues of commonalty and typicality, it will generally need to have a clear understanding of the nature of the claims and defenses, and at least a general understanding of the relevant facts and applicable substantive law. Although the court should not at this stage assess the merits of the underlying claim(s),<sup>667</sup> these determinations cannot always be made on the bare allegations of the pleadings, and some discovery may be needed.<sup>668</sup> Moreover, in determining under Rule 23(b)(3) whether class action treatment "is superior to other available methods for the fair and efficient adjudication of the controversy," the court should consider alternatives, such as consolidation, intervention, and the use of test cases.<sup>669</sup>

The court may also need to consider whether to entertain motions to dismiss or for summary judgment pending class certification. Courts have been divided over whether an action may be dismissed on the merits before certification. The court should rarely postpone a ruling on subject-matter jurisdiction or jurisdiction of the parties. Similarly, defects in venue or service of process should ordinarily be raised so that they may be timely corrected before the case is permitted to proceed. A precertification ruling on the merits, however, raises concerns. While it binds only the individual parties,<sup>670</sup> it may have precedential effect on the putative class members. When it is clear that the action lacks merit, dismissal will avoid unnecessary expense for the parties and burdens for the court,<sup>671</sup> but the court should consider whether the interests of putative class members may be prejudiced.<sup>672</sup>

667. *Eisen v. Carlisle & Jackelin*, 417 U.S. 156 (1974) (reversing order requiring defendant to pay for class notice based on preliminary assessment of probabilities of plaintiff's success).

668. *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566 (2d Cir. 1982).

669. *See Katz v. Carte Blanche Corp.*, 496 F.2d 747 (3d Cir. 1974).

670. Dismissal before certification is *res judicata* only as to the class representatives, not class members. *Wright v. Schock*, 742 F.2d 541 (9th Cir. 1984).

671. *See, e.g., Roberts v. American Airlines, Inc.*, 526 F.2d 757 (7th Cir. 1975); *Jackson v. Lynn*, 506 F.2d 233 (D.C. Cir. 1974); *cf. Haas v. Pittsburgh Nat'l Bank*, 381 F. Supp. 801 (W.D. Pa. 1974), *rev'd on other grounds*, 526 F.2d 1083 (3d Cir. 1975). Courts occasionally have granted summary judgment in favor of a class representative before considering the question of class certification. This practice should usually be avoided. Post-judgment certification in favor of the class may not be possible. Moreover, the potential use of collateral estoppel may have inequitable consequences similar to those of one-way intervention, a practice that Fed. R. Civ. P. 23(c)(3) was intended to prevent.

672. *Compare Adamson v. Bowen*, 855 F.2d 668, 677 n.12 (10th Cir. 1988) and *Wright v. Schock*, 742 F.2d 541 (9th Cir. 1984) (upholding precertification rulings) with *Bieneman v. Chicago*,

Although Fed. R. Civ. P. 23(c)(1) permits entry of a "conditional" class determination order and amendment before the decision on the merits, that procedure should not be used to defer a final class ruling. Undesirable consequences may follow when an expansive class, formed on insufficient information, is later decertified or redefined. Substantial time and expense may be wasted on discovery with respect to matters affecting persons who are later excluded. Those eliminated from the litigation as a result of decertification or reduction in the size of a class may be confused at best or prejudiced at worst. If relief is obtained for a reduced class, those who were initially in the larger class may attempt to reverse the decision that excluded them from the class; such a reversal may be particularly troublesome if the relief was obtained by settlement.

### 30.12 Discovery

Precertification discovery should be structured to facilitate an early certification decision while furthering efficient and economical discovery on the merits. The determination whether the prerequisites of Rules 23(a) and (b) are satisfied can generally be made on the pleadings and declarations, with relatively little need for discovery. To the extent discovery is needed prior to the certification hearing, it should be directed at the named parties; only upon a demonstration of need—for example, where persons are identified as having information relevant to certification issues—should discovery of putative class members be permitted.<sup>673</sup> If discovery is needed, the court may want to (1) impose appropriate limitations on the number and scope of depositions and other discovery directed at class representatives, and (2) establish a limited time period within which to conduct specific class-related discovery.

Bifurcating class and merits discovery can at times be more efficient and economical (particularly when the merits discovery would not be used if certification were denied), but can result in duplication and unnecessary disputes among counsel over the scope of discovery. To avoid this, the court should call for a specific discovery plan from the parties, identifying the depositions and other discovery contemplated and the subject matter to be covered. Discovery relating to class issues may overlap substantially with merits discovery. A key question in class certification may be the similarity or dissimilarity between the claims of the representative parties and those of the class members—an inquiry that may re-

838 F.2d 962, 964 (7th Cir. 1988) (questioning the procedure since the class representative who has lost on the merits may then have a duty to oppose subsequent class certification).

673. See *Campbell v. AC Petersen Farms, Inc.*, 69 F.R.D. 457 (D. Conn. 1975); *Pearlman v. Gennaro*, 17 Fed. R. Serv. 2d 666 (S.D.N.Y. 1973).