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NO. 67278-9

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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NORTHWEST PRODUCT DESIGN GROUP, LLC, a Washington limited liability corporation; TODD D. ANDERSEN, an individual; MAC CAMERON, an individual; JERRY CHAMBERS, an individual; and ELLIS MASSEY, an individual,

Appellants/Cross-Respondents

v.

HOMAX PRODUCTS, INC., a Delaware corporation; RANDAL W. HANSON and JANE DOE HANSON, husband and wife, and the marital community thereof; ROSS CLAWSON and JANE DOE CLAWSON, husband and wife, and the marital community thereof; LESTER GREER, JR. and Jane Doe Greer, husband and wife, and the marital community thereof; and WILFRED HOFFMANN and Jane Doe Hoffmann, husband and wife, and the marital community thereof,

Respondents/Cross-Appellants.

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APPELLANTS' BRIEF

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERRORS.....2

III. STATEMENT OF THE CASE.....4

    A. Background Facts.....4

    B. The Parties Met to Discuss the Products on Many Occasions.....5

    C. The ‘071 Patent.....6

    D. Robert Cameron’s Clip Development Background.....7

IV. ARGUMENT.....9

    A. ARGUMENT ON ASSIGNMENT OF ERROR NO. 1.....9

        1. Additional Facts Relevant to CPA, Fraud, and  
           Misrepresentation Claims.....9

        2. Procedural History of Motion to Dismiss.....10

        3. Grant of Motion to Dismiss is Reviewed De Novo.....11

        4. NPDG’s CPA Claim is Supported by the Facts as Alleged.....12

        5. NPDG’s Fraud and Misrepresentation Claims are Supported by  
           the Alleged Facts.....17

    B. ARGUMENT ON ASSIGNMENT OF ERROR NO. 2.....20

        1. Facts Relevant to CPA Claim.....20

        2. Procedural History of Motion to Amend.....22

        3. The Denial of a Motion to Amend is Reviewed for Abuse of  
           Discretion.....22

        4. A Request to Amend Should be Liberally Granted.....23

        5. The Trial Court Abused its Discretion by Denying the Motion  
           to  
           Amend.....24

        6. The Request to Amend Was not Unduly Delayed.....24

7. The Amendment Does Not Prejudice Homax.....	25
8. The Amendment Was Not Futile.....	26
C. ARGUMENT ON ASSIGNMENT OF ERROR NO. 3.....	27
1. Procedural History.....	27
2. Factual Background.....	28
3. Standard of Review.....	28
4. NPDG Would Have Presented Reliable Non-Speculative Evidence of Lost Profits.....	29
D. ARGUMENT ON ASSIGNMENT OF ERROR NO. 4.....	35
1. Procedural History.....	36
2. Standard of Review.....	36
3. Robert Cameron was Qualified to Testify as an Expert.....	37
E. ARGUMENT ON ASSIGNMENT OF ERROR NO. 5-7, 9.....	41
1. Procedural History.....	41
2. Standard of Review.....	41
3. The Jury Should Have Awarded Damages Upon Finding The Jaws Clip Trade Secret Was Misappropriated.....	42
F. ARGUMENT ON ASSIGNMENT OF ERROR NO. 8.....	45
1. Facts Relevant to Rule 11 Sanctions.....	45
2. Procedural History of Motion for CR 11 Sanctions.....	46
3. Grant of Rule 11 Sanctions is Reviewed for Abuse of Discretion.....	47
4. Requests for CR 11 Sanctions Should be Granted Sparingly.....	48
5. The Trial Court Abused its Discretion by Awarding Sanctions....	48
G. NPDG, as the Prevailing Party on Appeal, is Entitled to Her Reasonable Attorneys Fees.....	49

V. CONCLUSION.....50

**TABLE OF AUTHORITIES**

**Cases**

Adams v. King County, 164 Wn.2d 640, 662, 192 P.3d 891 (2008)  
(internal citations omitted)..... 17

Ameriquest Mortgage Co. v. State Attorney General, 148 Wn. App. 145,  
156, 199 P.3d 468 (Div. II, 2009)..... 27

Appliance Buyers Credit Corp. v. Upton, 65 Wn.2d 793, 800, 399 P.2d  
587 (1965)..... 23

Bank of America NT & SA v. Hubert, 153 Wn.2d 102, 122, 101 P.3d 409  
(2004)..... 22, 23

Beckendorf v. Beckendorf, 76 Wn.2d 457, 462-63, 457 P.2d 603 (1969)  
..... 18, 19

Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 49, 738 P.2d 665 (1987)  
..... 43

Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668  
P.2d 571 (1983)..... 36

Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220-21, 829 P.2d 1099  
(1992)..... 47

Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116  
P.3d 381 (2005) (quoting Bingaman v. Grays Harbor Cmty. Hosp., 103  
Wn.2d 831, 835, 699 P.2d 1230 (1985))..... 42

Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005)..... 11, 12

City of Olympia v. Drebeck, 156 Wn.2d 289, 295, 126 P.3d 802 (2006),  
cert. denied, 549 U.S. 988, 127 S.Ct. 436, 166 L.Ed.2d 330 (2006) .... 43

Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 R.2d 216  
(1994). ... ..... 11

Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 76, 684 P.2d 692 (1984)  
..... 36

Douglass v. Freeman, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991)..... 29

<u>Dwyer v. J.I. Kislak Mortgage Corp.</u> , 103 Wn. App. 542, 548, 13 P.3d 240 (Div. I 2000).....	16
<u>Eagle Group, Inc. v. Pullen</u> 114 Wn. App. 409, 58 P.3d 292 (2002), <i>review denied</i> , 149 Wn.2d 1034, 75 P.3d 968.....	30
<u>Ed Nowogroski Ins., Inc. v. Rucker</u> , 137 Wn.2d 427, 437, 971 P.2d 936 (1999), <i>reconsideration denied</i> .....	42, 43
<u>Eifler v. Shurgard Capital Mgmt. Corp.</u> , 71 Wn. App. 684, 697, 861 P.2d 1071 (Div. II, 1993) .....	13, 14
<u>Foman v. Davis</u> , 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).....	23
<u>Gammon v. Clark Equip. Co.</u> , 38 Wn. App. 274, 286, 686 P.2d 1102 (1984).....	28
<u>Goodyear Tire &amp; Rubber Co. v. Whiteman Tire, Inc.</u> , 86 Wn. App. 732, 744-745, 935 P.2d 628 (Div. III, 1997) .....	13, 14
<u>Green v. Hooper</u> , 149 Wn. App. 627, 636, 205 P.3d 134 Div. III, 2009.....	23, 24
<u>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</u> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	12, 13, 14
<u>Henery v. Robinson</u> , 67 Wn. App. 277, 291, 834 P.2d 1091 (Div. II, 1992) .....	15
<u>Hiner v. Bridgestone/Firestone, Inc.</u> , 91 Wn. App. 722, 734-35, 959 P.2d 1158 (1998) (citing <u>Queen City Farms, Inc. v. Central Nat'l Ins. Co.</u> , 126 Wash.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994)).....	37
<u>Hoffer v. State</u> , 110 Wn.2d 415, 421, 755 P.2d 781 (1988).....	11
<u>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</u> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	12
<u>Ingersol v. Seattle-First Nat'l Bank</u> , 63 Wn.2d 354, 387 P.2d 538 (1963).....	40
<u>Ino Ino, Inc. v. City of Bellevue</u> , 132 Wn.2d 103, 142, 937 P.2d 154 (1997).....	23
<u>Keegan v. Grant County Pub. Util. Dist. No. 2</u> , 34 Wn. App. 274, 283, 661 P.2d 146 (1983).....	39

<u>Kritzer v. Moffat</u> , 136 Wash. 410, 423, 240 P. 355 (1925) .....	18
<u>Larsen v. Walton Plywood Co.</u> , 65 Wn.2d 1, 390 R.2d 677.....	30, 32, 33
<u>Lewis River Golf, Inc. v. O.M. Scott &amp; Sons</u> , 120 Wn.2d 712, 717, 845 P.2d 987 (1993).....	32
<u>Long v. T-H Trucking Co.</u> , 4 Wn. App. 922, 927, 486 P.2d 300 (1971).....	32
<u>Lovell v. Dotson</u> , 128 Wash. 669, 673, 223 P. 1061 (1924).....	18
<u>Lundgren v. Whitney's, Inc.</u> , 94 Wn.2d 91,97-98,614 P.2d 1272 (1980) (citing <u>Larsen</u> , 65 Wn.2d at 16) .....	32
<u>Markov v. ABC Transfer &amp; Storage Company</u> , 76 Wn.2d 388, 396, 457 P.2d 535 (1969).....	18, 19
<u>Michael v. Mosquera-Lacy</u> , 165 Wn.2d 595, 602, 200 P.3d 695 (2009) .	12
<u>Molinaro v. Burnbaum</u> , 201 U.S.P.Q. (BNA) 150, 1978 U.S. Dist. LEXIS 14201, (D. Mass. Dec. 14, 1978) (citing, <i>inter alia</i> , <u>Engelhard Indus., Inc. v. Research Instrumental Corp.</u> , 324 F.2d 347, 139 U.S.P.Q. 179 (9th Cir. 1963)) .....	31
<u>Nepstad v. Beasley</u> , 77 Wn. App. 459, 468, 892 P.2d 110 (Div. II, 1995) .....	22, 24
<u>No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc.</u> , 71 Wn. App. 844, 850, 863 P.2d 79 (1993).....	31, 32, 33
<u>Nyquist v. Foster</u> , 44 Wn.2d 465, 470, 268 P.2d 442 (1954) .....	19
<u>Oliveri v. Thompson</u> , 803 F.2d 1265, 1275 (2 <sup>nd</sup> Cir. 1986) .....	48
<u>Pagnotta v. Beall Trailers of Oregon, Inc.</u> , 99 Wn. App. 28, 34, 991 P.2d 728 (2000).....	40
<u>Reese v. Stroh</u> , 128 Wn.2d 300, 305, 907 P.2d 282 (1995).....	37
<u>Reese</u> , 128 Wn.2d at 308 (citing <u>State v. Ciskie</u> , 110 Wn.2d 263, 279, 751 P.2d 1165 (1988)) (citing <u>State v. Ciskie</u> , 110 Wn.2d 263, 279, 751 P.2d 1165 (1988)).....	38
<u>Roeber v. Dowty Aerospace Yakima</u> , 116 Wn. App. 127, 141-42, 64 P.3d 691 (Div. III 2003).....	47

<u>Sargent Fletcher, Inc. v. Able Corp.</u> , 110 Cal.App.4th 1658, 1668, 3 Cal.Rptr.3d 279 (2003).....	43
<u>Shook v. H.F. Scott</u> , 56 Wn.2d 351, 362, 353 P.2d 431 (1960) .....	19, 20
<u>Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.</u> , 64 Wn. App. 553, 825 P.2d 714 (Div. I, 1992) .....	14, 15
<u>Skimming v. Boxer</u> , 119 Wn. App. 748, 754, 82 P.3d 707 (Div. III 2004) .....	47, 48, 49
<u>State v. Ellis</u> , 136 Wn.2d 498, 533, 963 P.2d 843 (1998).....	39
<u>State v. Greene</u> , 92 Wn. App. 80, 96, 960 P.2d 980 (1998) .....	37
<u>State v. Janes</u> , 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993).....	37
<u>State v. Jones</u> , 59 Wn. App. 744, 750, 801 P.2d 263 (1990) (citing <u>State v. Cunningham</u> , 23 Wn. App. 826, 854, 598 P.2d 756 (1979), rev'd on other grounds, 93 Wn.2d 823, 613 P.2d 1139 (1980)) .....	39
<u>State v. Ortiz</u> , 119 Wn.2d 294, 310, 831 P.2d 1060 (1992).....	37
<u>Stephens v. Omni Insurance Company</u> , 138 Wn. App. 151, 170, 159 P.3d 10 (2007).....	16
<u>Sunnyside Valley Irrigation 15 Dist. v. Dickie</u> , 149 Wn.2d 873, 880, 73 P.3d 369 (2003).....	42
<u>Tenore v. AT&amp;T Wireless Servs.</u> , 136 Wn.2d 322, 330, 962 P.2d 104 (1998).....	12
<u>Travis v. Wash. Horse Breeders Ass'n</u> , 111 Wn.2d 396, 408-09, 759 P.2d 418 (1988).....	16
<u>Trohimovich v. Dep't of Labor and Indus.</u> , 73 Wn. App. 314, 319, 869 P.2d 95 (Div. II, 1994) .....	22
<u>Univ. Computing Co. v. Lykes-Youngstown Corp.</u> , 504 F.2d 518, 538-39 (5th Cir.1974).....	29
<u>Wallace v. Lewis County</u> , 134 Wn. App. 1, 25, 137 P.3d 101 (Div. II, 2006) .....	25
<u>Waples v. Yi</u> , 169 Wn.2d 152,159-60, 234 P.3d 187 (2010).....	49
<u>Wash. State Physicians Ins. Exch. &amp; Ass'n v. Fisons Corp.</u> , 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).....	29

<u>Wicklund v. Allraum</u> , 122 Wash. 546, 211 P. 760 (1922) .....	40
<u>Wilson v. Horsley</u> , 137 Wn.2d 500, 506, 974 P.2d 316 (1999).....	23, 27

**Statutes**

RCW 19.108.010 .....	43
RCW 19.108.010(4).....	42
RCW 19.108.010(4)(a) .....	42
RCW 19.108.030 .....	29
RCW 19.108.040 .....	49
RCW 19.86.020 .....	1, 2
RCW 19.86.920 .....	15

**Rules**

CR 11 .....	46, 48, 49
CR 12(b)(6).....	1, 11
CR 15(a).....	22, 23
ER 102 .....	37
ER 602 .....	40
ER 701 .....	39, 40
ER 702 .....	37, 39
RAP 18.1.....	49

**Treatises**

Rest. Torts §§ 525 & 530.....	20
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## I. INTRODUCTION

Northwest Product Design Group, LLC, and individuals Todd Andersen, Mac Cameron, Jerry Chambers and Ellis Massey, (collectively “NPDG”) submit the following Opening Brief of Appellants in support of their appeal regarding the proceedings and trial against Respondent Homax Inc. NPDG are a small group of inventors and investors in certain clip products that are the subject of this appeal.

During trial, a jury determined that Homax misappropriated trade secrets from NPDG. This appeal arises, in part, from the trial court’s erroneous decision that while Homax misappropriated NPDG’s trade secret, NPDG were not damaged by the misappropriation. Before trial began, the court ruled that NPDG could not present any evidence of lost profits. The trial court committed this and several other prejudicial errors over NPDG’s clear objections during pre-trial motions and the trial itself.<sup>1</sup>

In addition to alleging trade-secret misappropriation, NPDG initially brought several other claims, including fraud, negligent misrepresentation and a violation of the Consumer Protection Act (“CPA”), RCW 19.86.020. Despite properly pleading these causes of action, the trial court improperly dismissed these claims under a 12(b)(6)

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<sup>1</sup> The Honorable Charles R. Snyder presided over this case from the time of filing and until days prior to trial. The Honorable Steven J. Mura presided over this case for the motions in limine and during trial.

motion. What is more, in discovery, NPDG learned of additional facts that further supported its claim under the CPA and for misrepresentation. Accordingly, in the early stages of litigation, NPDG brought a Motion to Amend the Complaint to assert a CPA claim. Despite providing evidence that the public interest requirement of the CPA had been met, the trial court entered an order denying the Motion to Amend.

NPDG thus asks the Court to reverse and remand on the grounds identified below.

## **II. ASSIGNMENTS OF ERROR**

### **Assignment of Error No. 1**

The trial court erred in entering an order on March 16, 2007, that granted, in part, Homax's Motion to Dismiss, thereby dismissing NPDG's claims for violation of the Consumer Protection Act, RCW 19.86.020, and common law fraud and negligent misrepresentation.

### **Assignment of Error No. 2**

The trial court erred in entering an order on June 27, 2008, that denied NPDG's Motion for Leave to File Second Amended Complaint.

### **Assignment of Error No. 3**

The trial court erred in granting Homax's Motion in Limine regarding whether NPDG could demonstrate lost profits for the Jaws Clip.

### **Assignment of Error No. 4**

The Court erred by ruling during trial that Robert Cameron could not testify as an expert or lay person regarding NPDG's lost future profits.

**Assignment of Error No. 5**

The jury entered an improper special verdict form on February 22, 2011, stating that Homax misappropriated NPDG's Jaws Clip trade secret but that NPDG were not damaged by Homax's misappropriation of the Jaws Clip trade secret.

**Assignment of Error No. 6**

The trial court erred in entering a directed verdict stating that there were no damages for equitable conversion of the Jaws Clip because there were no damages for Homax's Jaws Clip trade secrets violation.

**Assignment of Error No. 7**

The trial court erred in entering a directed verdict that there were no damages for equitable unjust enrichment relating to the use of the Jaws Clip because there were no damages for Homax's trade secrets violation.

**Assignment of Error No. 8**

The trial court erred in entering a May 13, 2011, order Granting Homax's Motion for Fees from Plaintiffs or Plaintiffs' Attorneys.

**Assignment of Error No. 9**

The trial court erred in entering a judgment based on the erroneous verdicts.

### III. STATEMENT OF THE CASE

NPDG submits the following facts, which are relevant to the issues presented to this Court for review. Certain procedural facts that are relevant to a particular Assignment of Error appear in the argument section for that Assignment.

#### A. Background Facts

Robert Cameron is a principal of Northwest Product Design Group, LLC and he has prior business dealings with Homax as its representative as well as the former principal of Cameron Group Acquisition Corporation (“CGAC”). In 1995, Mr. Cameron obtained a patent for a clip known as the “Crocodile Clip.”<sup>2</sup> In 2000, Homax entered into a licensing agreement with CGAC to distribute the Crocodile Clip to the home improvement industry. CP 1695-1710. Recognizing the value in the product, Homax not only sold the Crocodile Clip, but it also reverse engineered the Crocodile Clip, modifying the slide mechanism to create its own clip. CP 1727-1751. Once Homax’s clip was patented, it then sold its version of the clip as the Cinch Tight Clip. CP 1198-1203.

In the late 1990’s Todd Anderson and Mac Cameron, with the assistance of Mr. Cameron, began designing additional clip products that came to be known as the Rhino Clip and Jaws Clip. CP 1764. In about

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<sup>2</sup> The Crocodile Clip is not part of this lawsuit and simply is included as background information.

2000, Homax and two of its corporate officers Randy Hanson and Ross Clawson learned of the work taking place on these new devices and encouraged Mr. Cameron to work with Homax in developing, licensing, and marketing these products. CP 922-923, 1764-1765.

**B. The Parties Met to Discuss the Products on Many Occasions.**

Beginning in 2000, a number of meetings, telephone conversations and communications occurred among and between Mr. Cameron and Mr. Hanson and Mr. Clawson. CP 922-923, 1765. At these meetings, Mr. Cameron answered Mr. Hanson and Mr. Clawson's numerous questions about the design of the Rhino and Jaws Clips, and future improvements. *Id.* Mr. Cameron left drawings, blister packs, designs, and prototypes of the products with Homax at its request. *Id.*

While soliciting Mr. Cameron for information related to these clips, Mr. Hanson precluded Mr. Cameron from contacting any other company that might serve as a distributor and/or licensee of the clips noting that doing so would harm the market and if done, Homax would no longer have an interest in working with NPDG's clip products. CP 923, 1765. In an internal email from Mr. Hanson to Mr. Clawson on March 8, 2001, Mr. Hanson reveals the following:

I spoke to Bob [Cameron] more about the Rhino Clip. He dropped off a few more samples. I said the \$100K advance was too much and we needed to be careful not

to affect croc clip sales. I will work on a positioning strategy for this new clip. *I told Bob not to take it to any other company – which he assured me he would not do.*

CP 1717 (emphasis added). NPDG thus lost critical time and business opportunities during the period of negotiation between NPDG and Homax. Mr. Cameron believed the representations and assurances provided by Mr. Hanson and Mr. Clawson, with whom he had prior dealings in regards to the Crocodile Clip. CP 1765. Accordingly, NPDG made no efforts to seek other licensees or distributors in regards to its clips. *Id.*

During the period of early 2001 through August 2003, Mr. Cameron was involved in litigation with former business partners regarding his rights to his CGAC stock. CP 1765-1766. Homax informed NPDG that while it was excited to move forward with licensing the new clips, it wanted to wait for the litigation to settle before entering into any new agreements. *Id.* After the litigation was settled in 2003, Mr. Cameron contacted Mr. Hanson and Mr. Clawson to finalize and close the transactions with Homax. CP 1766. At that time, Homax advised Mr. Cameron that it was in the process of being acquired and that it was necessary to wait until the acquisition closed. *Id.* When Homax's acquisition closed, Mr. Cameron attempted to contact Homax; however, all of his efforts to do so were unsuccessful. *Id.*

**C. The '071 Patent.**

In 2004, Mr. Cameron learned that Homax and certain of its employees, including Mr. Hanson, had obtained U.S. Patent No. 6,698,071 (“‘071 Patent”) which included disclosures of numerous clip designs for which they did not seek claims. CP 1727-1751. One such clip design has an identical locking mechanism to NPDG’s Jaws Clip. *Id.* NPDG maintained complete control over the Jaws Clip invention which was never readily ascertainable to anyone until this patent was published. CP 1768. At Homax’s request, Mr. Cameron gave Homax a prototype, artwork and blister-packs of the Jaws Clip in 2001-2002. CP 1768. Mr. Cameron was assured by Homax that any information disclosed regarding the Jaws Clip would remain confidential. *Id.*

**D. Robert Cameron’s Clip Development Background**

Since the early 1990s Mr. Cameron’s vocation has been that of a product designer, developer and inventor. CP 142. He has approximately 100 inventions and about 20 patents have been granted to him by the U.S. Patent and Trademark Office. CP 142. Mr. Cameron’s research, design and marketing of clips over the years has involved the Crocodile, the Rhino Clip, the Jaws Clip, the Turtle Clip, the Pitbull Clip and the Grizzly Clip. CP 144. Mr. Cameron not only participated in the invention of these clips, but was also heavily involved in the design, packaging, manufacturing and marketing efforts. CP 144.

In addition to being the inventor of the Crocodile Clip Mr. Cameron was heavily involved in the development, advertising and marketing of this clip. CP 142. He came up with the name, designed and drafted art work for its marketing, and put together a general plan for the sale and marketing. CP 142. Mr. Cameron participated in a number of trade industry shows and exhibits, met and worked with many vendors, and worked closely with manufacturing entities to include determination of materials to be used and the building of molds for the manufacturing process. CP 143. Mr. Cameron also met and worked with many buyers and marketing personnel of clips of retail stores and chains. CP 143.

Initially, CGAC sold the Crocodile Clip to smaller companies, but later shifted its focus to sales to larger companies such as Homax.. CP 142. In 1999, when Homax expressed a serious interest in this clip, Mr. Cameron negotiated an arrangement that eventually led to Homax becoming a licensee-distributor. CP 143. Mr. Cameron continued to work with Homax as it began to market the Crocodile Clip to even larger retail companies, including Home Depot, Ace Hardware, and Lowe's. CP 143.

Mr. Cameron's research efforts for the various clips also included consulting with hundreds of buyers, users and potential users of clips in various industries and areas including recreation and sporting, trucking, agriculture, automotive, construction, marine and home improvement. CP

144. His efforts towards designing and marketing different clips were based on providing various users with a variety of clips with diverse uses and applications. CP 145. Indeed, Mr. Cameron testified that if the marketplace offered clips of different sizes, shapes, uses, and even colors, more clips would be sold at various establishments. CP 145. Mr. Cameron further testified, based on his extensive experience in the clip market, that if the Rhino and Jaws Clips had been allowed to compete with the Homax Clips (the Crocodile and Cinchtite Clips), the Rhino and Jaws Clips would have displaced Homax's clip sales by at least fifty percent. CP 145.

#### **IV. ARGUMENT**

##### **A. ARGUMENT ON ASSIGNMENT OF ERROR NO. 1**

###### **1. Additional Facts Relevant to CPA, Fraud, and Misrepresentation Claims**

Homax's business centers on soliciting and acquiring ideas, trade secrets, and patent rights from individuals and entities. CP 1281 ¶ 16. When Homax learned of the work taking place on NPDG's gripping clips, it represented to NPDG that it was interested in developing, licensing, and marketing NPDG's products and encouraged Mr. Cameron to work with them. Homax discouraged NPDG from contacting other distributor/licensee companies to obtain design and manufacturing

information and executed a confidentiality agreement with respect to the Crocodile Clip. CP 1281-1282 ¶¶ 16-20.

NPDG had a trusting relationship with Homax and felt they could justifiably rely on Homax's representation of interest in developing NPDG's products and thus kept their ideas off the market to pursue development solely with Homax. CP 1283 ¶¶24. Homax lulled NPDG into foregoing other opportunities based on their demonstrations of interest in the trade secrets. CP 1283 ¶¶24-25. At the meetings that took place from 1999 through 2003, NPDG answered Homax's questions about the design future improvements of the clips. CP 1281 ¶¶19. Notably, this extended period of time greatly exceeds the 60 to 90 day period normally used by Homax when evaluating a product. Partial VRP February 14, 2011, p. 54-58. In addition, NPDG left drawings, designs, schematics, samples, and prototypes of the products with Homax at their request. CP 1281 ¶¶19.

Moreover, Homax's representations prolonged development of the clips which allowed it to acquire important information on the clips. CP 1281 ¶¶16-18. This information permitted Homax to incorporate elements of NPDG's gripping clips into its own Cinch-Tite Clip. CP 1257.

## **2. Procedural History of Motion to Dismiss**

Before the parties conducted discovery, Homax filed a Motion to Dismiss. CP 1262-1277. In response, the trial court dismissed NPDG's

claims under the CPA and for fraud and misrepresentation. CP 1236-1238. The court's basis for dismissing the CPA claim was that NPDG failed to satisfy the public interest requirement and that the conduct at issue constituted legitimate business practices. VRP March 16, 2007, p. 23-24. The court dismissed the fraud and misrepresentation claims because NPDG's complaint did not allege specific misrepresentation. VRP March 16, 2007, p. 24- 25.

### **3. Grant of Motion to Dismiss is Reviewed De Novo**

The Court of Appeals reviews a grant or denial of a motion to dismiss de novo because the holding is a question of law. Burton v. Lehman, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005); Hoffer v. State, 110 Wn.2d 415, 421, 755 P.2d 781 (1988). Dismissal is only appropriate under Superior Court Civil Rule 12(b)(6) if it appears beyond a reasonable doubt that no set of facts exist that would justify recovery. Burton v. 153 Wn.2d at 422. Here, the Trial Court Erred by Dismissing NPDG's CPA and Fraud and Misrepresentation Claims

Motions to dismiss should "be granted sparingly and with care and only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." Cutler v. Phillips Petroleum Co., 124 Wn.2d 749, 755, 881 R.2d 216 (1994). In analyzing such a motion, the court presumes that the plaintiff's

allegations are true and considers hypothetical facts not included in the record. Burton, 153 Wn.2d at 422. Here, the set of facts, described above, justify recovery under the CPA and for fraud and misrepresentation.

Thus, these claims should not have been dismissed. *See* Tenore v. AT&T Wireless Servs., 136 Wn.2d 322, 330, 962 P.2d 104 (1998).

#### **4. NPDG's CPA Claim is Supported by the Facts as Alleged**

The CPA is intended to protect the public and should be liberally construed. Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 170 P.3d 10 (2007). In a private right of action under the CPA, a plaintiff must establish that the defendant's act or practice (1) is unfair and deceptive, (2) occurs in the conduct of trade or commerce, (3) affects the public interest, (4) injury to a person's business or property, and (5) the injury is causally linked to the unfair or deceptive act. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 602, 200 P.3d 695 (2009), citing Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986). The first, second, fourth, and fifth elements of NPDG's CPA claim are not at issue. VRP March 16, 2007, p. 23-24.

NPDG's allegations in the proposed Amended Complaint were legally sufficient to establish that Homax's acts or practices affect the public interest. In order to establish the public interest element, there must be a likelihood that additional persons have been or will be injured in the

same fashion as the plaintiff. Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc., 86 Wn. App. 732, 744-745, 935 P.2d 628 (Div. III, 1997) citing Hangman Ridge, 105 Wn.2d at 790, 719 P.2d 531. The test is whether “(1) it is part of a pattern or generalized course of conduct, and (2) there is a real and substantial potential for repetition of defendant's conduct after the act involving plaintiff.” Eifler v. Shurgard Capital Mgmt. Corp., 71 Wn. App. 684, 697, 861 P.2d 1071 (Div. II, 1993).

An analysis of the factors relevant to a finding of a public interest impact reveals that Homax’s acts affect the public interest. The first factor, “whether the acts were committed in the course of the defendant's business,” is met because the acts complained of are part and parcel of Homax’s business. The second and third factors, “whether the defendant advertised to the public” and “whether the defendant actively solicited the plaintiff, thereby indicating other similar solicitations took place; and whether the parties occupied unequal bargaining positions” are met. Mr. Hanson and Mr. Clawson encouraged Mr. Cameron to work with Homax to develop and market NPDG’s gripping clips. CP 1281 ¶ 16. Moreover, after the dismissal of their CPA claim, NPDG learned Homax solicited inventions from the general public since at least March 2000. CP 1217.

Lastly, Homax occupied a stronger bargaining position based on its experience, industry position, and expertise, whereas NPDG were a

handful of investors and inventors hoping to bring their products to market. CP 1280-1281, CP 1218. There was a significant disparity in these entities' respective size and power: Homax had a multitude of patents, millions of dollars in sales, and tremendous growth. Partial VRP February 16, 2011, p. 144:5-15. In contrast, Mr. Cameron was an individual, "just a serial inventor," as he was labeled by Homax. CP 1462:8. Even the trial court acknowledged that Mr. Cameron was unsophisticated when compared to Homax. Partial VRP February 23, 2011, p. 23:15-16; 24:21. Whiteman Tire, Inc., 86 Wn. App. at 745(citing Hangman Ridge, 105 Wn.2d at 790-91).

However, "no one [of these] factor[s] is dispositive, nor is it necessary that all be present." Stephens v. Omni Ins. Co., 138 Wn. App. 151, 166, 159 P.3d 10 (2007) (citing Hangman Ridge, 105 Wn.2d at 791). In this case, each of the factors that is present militates in favor of finding a public interest impact. For instance, in Eifler, the court found that the defendant's act or practice affected the public interest where the defendant "disseminated to the entire public its company name, its yellow pages advertisement, and its fliers. All were part of a generalized course of conduct, and all were capable of repetition with respect to numerous members of the public." Eifler, 71 Wn. App. at 697. Similarly, in Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., the court found that the

defendant's acts or practices impacted the public interest where its agent actively solicited the plaintiff and the defendant routinely solicited other businesses. Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc., 64 Wn. App. 553, 825 P.2d 714 (Div. I, 1992).

Just as the plaintiffs in Eifler and Sign-O-Lite Signs, Inc. established the public interest impact element, here NPDG's allegations establish this element. Homax was and is in the business of acquiring ideas, trade secrets, and patents and solicited NPDG regarding the same. Although Homax's statements were directed to NPDG, they reflected the business strategy of Homax and thus its capacity to deceive a substantial portion of the public. *See* Henery v. Robinson, 67 Wn. App. 277, 291, 834 P.2d 1091 (Div. II, 1992). Moreover, there are a large number of individuals and entities, both inventors and others, like NPDG who likely have been or may be targets of Homax's practice. Their protection is in the public interest. The trial court thus erred in finding that Homax's conduct did not affect the public interest. NPDG therefore urges this Court to reverse the trial court's decision in that regard.

Further, the trial court also incorrectly applied the "reasonableness" defense<sup>3</sup>, thereby concluding that Homax's conduct

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<sup>3</sup> This defense precludes "acts or practices which are reasonable in relation to the development and preservation of business or which are not injurious to the public interest" from liability under the CPA. RCW 19.86.920.

constituted a legitimate business practice. However, the reasonableness test “is not a factor used in deciding whether a practice is deceptive.” Stephens v. Omni Insurance Company, 138 Wn. App. 151, 170, 159 P.3d 10 (2007). Indeed, if there are material issues of fact regarding this defense, such issues should be submitted as a jury question. Stephens, 138 Wn. App. at 170 (citing Travis v. Wash. Horse Breeders Ass'n, 111 Wn.2d 396, 408–09, 759 P.2d 418 (1988)).

The trial court applied the “reasonableness” defense based on the fact that this case involves “activity between two active businesses,” which the court stated is “not the sort of thing that the Consumer Protection Act envisions.” VRP March 16, 2007, p. 24. However, CPA claims have been supported with private transactions as well as the consumer transactions. Indeed, the conduct at issue is not Homax’s delay of the negotiations for so many years, but rather Homax’s representations of its interest when such interest was not actually present. *See* Dwyer v. J.I. Kislak Mortgage Corp., 103 Wn. App. 542, 548, 13 P.3d 240 (Div. I 2000). The trial court thus improperly applied the “reasonableness” defense and the Appellants urge this Court to reverse that decision.

Because the allegations in the Amended Complaint support a CPA claim, the trial court erred in dismissing this claim. The Appellants therefore urge this Court, upon de novo review, to reverse that decision.

## **5. NPDG's Fraud and Misrepresentation Claims are Supported by the Alleged Facts.**

In dismissing the fraud and misrepresentation claims, the trial court described NPDG's case as one where "somebody just doesn't do what they say they're going to do in the future," and found NPDG's Amended Complaint did not allege a specific misrepresentation. VRP March 16, 2007, p. 24-25. However, NPDG's claims are supported by the allegations.

One must establish the following to bring claims for fraud and misrepresentation "(1) representation of an existing fact; (2) materiality; (3) falsity; (4) the speaker's knowledge of its falsity; (5) intent of the speaker that it should be acted upon by the plaintiff; (6) plaintiff's ignorance of its falsity; (7) plaintiff's reliance on the truth of the representation; (8) plaintiff's right to rely upon it; and (9) damages suffered by the plaintiff." Adams v. King County, 164 Wn.2d 640, 662, 192 P.3d 891 (2008) (internal citations omitted). The only element in dispute is whether "an existing fact was misrepresented." CP 1270.

Generally, fraud cannot be predicated upon an unfulfilled promise to do something in the future. However, "a promise made with no intention of keeping it is a 'misrepresentation of an existing fact'—the speaker's state of mind—and may be the basis of an action in fraud if the

other elements are present.” Beckendorf v. Beckendorf, 76 Wn.2d 457, 462-63, 457 P.2d 603 (1969); *see also* Kritzer v. Moffat, 136 Wash. 410, 423, 240 P. 355 (1925); Lovell v. Dotson, 128 Wash. 669, 673, 223 P. 1061 (1924).

In particular, “If the [defendant] made false statements and promises which he did not intend to keep, and thereby lulled the plaintiffs into the forbearance of a legal right to their injury, it was a fraud for which an action at law will lie.” Kritzer v. Moffat, 136 Wn. 410, 422, 240 P. 355 (1925). Moreover, “if the promise is made without care or concern whether it will be kept, and the promisor knows or under the circumstances should know that the promisee will be induced to act or refrain from acting to his detriment, the promise will likewise support an action by the promisee.” Markov v. ABC Transfer & Storage Company, 76 Wn.2d 388, 396, 457 P.2d 535 (1969).

For instance, in Beckendorf, a promise to operate a ranch and pay all of the expenses out of one half of the gross income was made without a present intention of keeping it. Beckendorf, 76 Wn.2d at 463. Thus, the Beckendorf court found that the first element necessary to establish fraud was shown. *Id.* Similarly, in Markov, the court found that the defendant partnership made fraudulent representations to the plaintiffs that it would renew a lease for a term of three years while it negotiated, unknown to the

plaintiffs, the sale of the leased premises. Markov, 76 Wn.2d at 396-97.

The Markov court also noted the “obvious benefit to the partnership during negotiations to sell the premises that they occupied.” Id. at 397.

Much like the defendant in Markov, while Homax was making misrepresentations to NPDG, it was also actively misappropriating NPDG’s trade secrets. CP 1284-1285 ¶¶ 38-39, CP 1257.

Just as the plaintiffs in Beckendorf and Markov, NPDG alleged in their Amended Complaint that Homax misrepresented an existing fact when its expressed an interest in developing, marketing, and/or licensing NPDG’s products, but warned NPDG that it would not be interested in doing business with NPDG if NPDG contacted another distributor or licensee. CP 1281 ¶¶ 16 – 17. Indeed, several meetings and exchanges of correspondence took place between the parties, during which the business relationship was further discussed, including the execution of a confidentiality agreement, CP 1281-1282 ¶20.

Homax’s state of mind when negotiating and dealing with NPDG, even though it pertained to the future, was a presently existing fact and was accepted by NPDG as a representation of fact. Shook v. H.F. Scott, 56 Wn.2d 351, 362, 353 P.2d 431 (1960). Moreover, Homax’s representations regarding its intentions are, by their nature, capable of being true or false when they were made. *See* Nyquist v. Foster, 44 Wn.2d

465, 470, 268 P.2d 442 (1954). Indeed, Homax's fraudulent misrepresentation of their intentions to induce NPDG to refrain from contacting other companies creates liability. Shook, 56 Wn.2d at 353 (Foster, J., dissenting) (citing Rest. Torts §§ 525 & 530). Homax's representations regarding its intentions constituted existing facts for purposes of NPDG's claims of fraud and misrepresentation.

NPDG therefore urges this Court to reverse the trial court's order granting Homax's Motion to Dismiss as it relates to the dismissal of NPDG's CPA and fraud and misrepresentation claims.

## **B. ARGUMENT ON ASSIGNMENT OF ERROR NO. 2**

### **1. Additional Facts Relevant to CPA Claim**

In addition to the facts known at the time of the filing of the Amended Complaint, NPDG uncovered more evidence through the discovery process that supported a CPA claim in their proposed Second Amended Complaint.

For instance, Homax entered into an Exclusive Distributorship Agreement ("the Agreement") in March 2000 with the CGAC regarding distribution of the Crocodile Clip. CP 1171-86. In negotiating the Agreement, Homax urged Mr. Cameron to also enter into a non-competition agreement to protect against a "design around."

The Crocodile Clip was a very successful product for Homax; in fact, Mr. Hanson noted that it was the fastest growing product in Homax's 20 year history. CP 1190. Despite this fact, soon after the parties entered into the Agreement, Homax started to design around the Crocodile Clip patent. CP 1192-96. For example, in January 2001, Randy Hanson suggested that Homax "proto," meaning prototype, Mr. Cameron's ideas regarding modifications to improve the holding power of Homax's existing clips. CP 1164.

To protect itself from exactly these types of actions, NPDG procured a signed non-disclosure agreement from Mr. Hanson; Mr. Cameron was further assured that he would receive a fully executed copy of the agreement with Mr. Clawson's signature at a later date. However, Mr. Cameron never received a copy of the agreement. CP 1162. Instead, NPDG were asked to rely on promises of confidentiality and exclusivity to keep them from shopping the Rhino and/or Jaws clips to competitors while Homax determined how to position these products to avoid losses in sales of its other products. CP 1152. However, Homax stated under oath that they saw little or no value in the Rhino clip, yet it asked NPDG to not take the product to any other company, see id., included it on a list of possible entries for the New Product Expo, CP 1158, and referenced the Rhino clip in its inventor log notes. CP 1160. Although Homax continued

to solicit inventions from Mr. Cameron into late 2003, CP 1166-67, by February 2004 Homax had decided either to “remove” the Rhino Clip or modify it to aid development of Homax's own larger clip. CP 1169.

## **2. Procedural History of Motion to Amend**

On June 6, 2008, NPDG filed a Motion for Leave to File a Second Amended Complaint, CP 1216-27, which was denied on June 27, 2008, CP 945-47. In this Motion, NPDG sought to bring a CPA claim based upon the newly discovered facts mentioned above. CP 1217. Despite the newly discovered evidence, Homax argued, and the court agreed, that the new evidence did not create a set of facts under which a CPA claim could be brought. CP 1066-80; VRP June 27, 2008, p. 12-15.

## **3. The Denial of a Motion to Amend is Reviewed for Abuse of Discretion.**

The Court of Appeals reviews a grant or denial of a motion for leave to amend under CR 15(a) for abuse of discretion. Bank of America NT & SA v. Hubert, 153 Wn.2d 102, 122, 101 P.3d 409 (2004); *see also* Trohimovich v. Dep't of Labor and Indus., 73 Wn. App. 314, 319, 869 P.2d 95 (Div. II, 1994). “A trial court abuses its discretion when discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court's discretion.” Nepstad v. Beasley, 77 Wn. App. 459, 468, 892 P.2d 110 (Div. II, 1995). An

untenable reason is one that is based on an incorrect standard, or if the facts presented to the court do not fulfill the requirements of the correct standard. Green v. Hooper, 149 Wn. App. 627, 636, 205 P.3d 134 (Div. III, 2009).

#### **4. A Request to Amend Should be Liberally Granted.**

The denial of a request for leave to amend is reviewed in light of the strong policy permitting amendment. Appliance Buyers Credit Corp. v. Upton, 65 Wn.2d 793, 800, 399 P.2d 587 (1965). The trial court should “freely give...” leave to amend a complaint “when justice so requires.” CR 15(a); *see also* Hubert, 153 Wn.2d at 122. Moreover, “[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits.” Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962).

To balance the liberal policy regarding motions to amend, the court also considers potential prejudice to the non-moving party. The trial court may also consider whether pursuit of the new claim would be futile<sup>4</sup>, would cause delay that results in hardship or prejudice on the opposing party<sup>5</sup>, or would cause jury confusion.<sup>6</sup>

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<sup>4</sup> Ino Ino, Inc. v. City of Bellevue, 132 Wn.2d 103, 142, 937 P.2d 154 (1997).

<sup>5</sup> Hubert, 153 Wn.2d at 122-23.

<sup>6</sup> Wilson v. Horsley, 137 Wn.2d 500, 506, 974 P.2d 316 (1999).

**5. The Trial Court Abused its Discretion by Denying the Motion to Amend.**

The trial court abused its discretion when it denied NPDG leave to amend its complaint because it exercised its discretion on untenable grounds and for untenable reasons. Beasley, 77 Wn. App. at 468. The court's basis for rejecting NPDG's second amended complaint was that "there's really nothing significantly new here that changes my perception of this case." VRP June 27, 2008, p.15:12-14. However, this reason is based on an incorrect standard; i.e., a standard other than that applied to a motion to amend. Green, 149 Wn. App. at 636. Indeed, the proposed amended claim (1) was not unduly delayed and would not have confused the jury and (2) was not futile and would not have prejudiced Homax. Thus, the trial court's reasons for denial of NPDG's motion were untenable and this Court should reverse the trial court's denial of NPDG's request for leave to amend their complaint to assert a CPA claim.

**6. The Request to Amend Was Not Unduly Delayed.**

NPDG's original complaint was filed on January 5, 2007. CP 1299-1308. NPDG's CPA claim was dismissed on March 16, 2007. CP 1237. Through discovery over the course of the following year, NPDG uncovered numerous facts which supported a new and specific CPA claim. CP 1217. For that reason, NPDG filed their motion for leave to file a

second amended complaint on June 6, 2008, CP 1216-27, a year and a half after the case was filed and nearly *two and half years* before the trial began.

The simple passage of time does not necessitate the denial of NPDG's motion to amend. Rather, "[t]he trial court may deny a motion to amend because of undue delay only where such delay imposes undue hardship or prejudice on the opposing party." Wallace v. Lewis County, 134 Wn. App. 1, 25, 137 P.3d 101 (Div. II, 2006) (internal cites omitted). As discussed below, Homax was not subjected to undue hardship or prejudice by the amendments, especially with respect to the timing of NPDG's motion. The trial court abused its discretion to the extent it based its decision to deny NPDG leave to amend their complaint upon undue delay.

#### **7. The Amendment Does Not Prejudice Homax.**

The trial court did not analyze the issue of prejudice to Homax in its denial of NPDG's motion to amend to assert a CPA claim, VRP June 27, 2008, p. 15:12-14, which is an indication that the trial court abused its discretion. *See, e.g., Wallace v. Lewis County*, 134 Wn. App. 1, 25, 137 P.3d 101 (Div. II, 2006) ("Refusing to grant leave to amend without stated reasons or where the reasons are not readily apparent may be an abuse of discretion.").

NPDG's second amended complaint sought to assert a claim that was previously asserted in NPDG's original complaint. CP 1278-98. Although the claim was dismissed by the court a few months after the original complaint was filed, CP 1237, Homax, by its participation in the discovery process, was aware of the mounting evidence in support of a new CPA claim. To the extent the trial court based its decision to deny NPDG leave to amend their complaint upon prejudice, it abused its discretion.

#### **8. The Amendment Was Not Futile.**

NPDG's CPA claim was not futile. The analysis of futility with respect to a motion for leave to amend a complaint is not the same as that conducted for a motion to dismiss; rather, the futility factor imposes a low bar for the sufficiency of the proposed amended claim.

The court assessed futility by re-applying the standard it applied in its consideration of Homax's motion to dismiss. The court stated that "I feel that what I have today doesn't change the circumstances as I saw them last time [at the hearing regarding the motion to dismiss]...I don't think that this is sufficiently different from when we were here with the first time around for the Court to say now that you've convinced me that the Consumer Protection Act applies." VRP June 27, 2008, p. 15.

Thus, the trial court erred by conflating the analysis used for a motion to dismiss and that for a motion to amend. Although a trial court may take into account events that occurred prior to the motion to amend, it should not adopt its prior analysis of a motion to dismiss for its analysis of a motion to amend. *See* Wilson v. Horsley, 137 Wn.2d 500, 974 P.2d 316 (1999) (holding the trial court did not err in considering the previously completed mandatory arbitration); *see also* Ameriquist Mortgage Co. v. State Attorney General, 148 Wn. App. 145, 156, 199 P.3d 468 (Div. II, 2009) (trial court erred by using wrong standard of proof when it conflated the preliminary injunction hearing with a full hearing on the merits).

Here, to the extent the trial court based its decision to deny NPDG leave to amend their complaint upon futility, it abused its discretion. In light of the strong policy of permitting requests to amend and the lower court's abuse of discretion, this Court should reverse the trial court's ruling and permit NPDG complaint to add a CPA claim.

### **C. ARGUMENT ON ASSIGNMENT OF ERROR NO. 3**

#### **1. Procedural History**

In anticipation of trial, the court made several rulings on motions in limine on February 8, 2011. VRP February 8, 2011. In particular, the trial court ruled in favor of Homax by limiting the testimony of Mr. Cameron and Michael Ruble, NPDG's expert, regarding whether NPDG

could demonstrate lost profits for the Jaws Clip. VRP February 8, 2011, p. 17:25. Moreover, the trial court excluded evidence of lost profits for the Jaws Clip in NPDG's damages charts and exhibits. VRP February 8, 2011, p. 32:15.

## **2. Factual Background**

To complement Mr. Cameron's testimony about (1) the nature of the gripping clip industry, (2) the nature of NPDG's clips, (3) the fact that NPDG lost potential sales and profits as a result of Homax's actions, and (4) the fact that Homax's profits increased as a result of preventing NPDG from entering the market, Mr. Ruble would have quantified NPDG's loss as an expert in the field of damages calculation. CP 166. Homax did not challenge Mr. Ruble's qualification as a damages expert or his methodology in calculating NPDG's damages. CP 166. NPDG's damages charts and exhibits were authenticable by Mr. Cameron and Mr. Ruble and based on Homax's own data. CP 169.

## **3. Standard of Review**

"The granting or denial of a motion in limine is within the discretion of the trial court." Gammon v. Clark Equip. Co., 38 Wn. App. 274, 286, 686 P.2d 1102 (1984). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds."

Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

Here, the trial court abused its discretion by “pre-screening” NPDG’s damages claims. Although a court can exclude evidence on a motion in limine, it may do so only if the evidence is described with particularity and the court can determine that the evidence is clearly inadmissible. Douglass v. Freeman, 117 Wn.2d 242, 255, 814 P.2d 1160 (1991). The trial court rejected out of hand NPDG’s arguments that (1) all proximately caused damages should be presented to the jury and (2) Homax’s claim that certain damages were too “speculative” went to the weight of the evidence, not its admissibility.

**4. NPDG Would Have Presented Reliable Non-Speculative Evidence of Lost Profits.**

The damages section of Washington’s Trade Secrets Act (the “Act”), RCW 19.108.030, provides an expansive, flexible approach to damages, including “actual loss,” “unjust enrichment,” or a combination of both. The notion is that “every [trade secret misappropriation] case requires a flexible and imaginative approach to the problem of damages” and “the plaintiff should be afforded every opportunity to prove damages once the misappropriation is shown.” Univ. Computing Co. v. Lykes-Youngstown Corp., 504 F.2d 518, 538-39 (5th Cir.1974).

Damages for “actual losses” caused by the misappropriation of trade secrets include the reasonable value of business opportunities with reasonable probability to be lost in the future. Eagle Group, Inc. v. Pullen 114 Wn. App. 409, 58 P.3d 292 (2002), *review denied*, 149 Wn.2d 1034, 75 P.3d 968.

Lost profits evidence should not be excluded if a business is “new,” so long as factual data can provide a basis for the losses claimed. Such factual evidence and computations were available here, and the trial court erroneously ruled this evidence was inadmissible. For instance, in Larsen v. Walton Plywood Co., 65 Wn.2d 1, 17, 390 R.2d 677 (1964) (internal citations omitted) the Washington Supreme Court held that “[l]ost profits will not be denied merely because business is new if factual data is available to furnish a basis for computation of probable losses.” In fact, lost profits may be awarded based on expert testimony alone so long as it is based upon tangible evidence. *Id.* at 17, 19. The weight to be given that testimony is for the trier of fact to determine. *Id.* at 18. Moreover, “[w]here the fact is well established that profit would have been made and the difficulty in proving their amount is *directly caused by the defendant's breach*, a greater liberality is permitted in making estimates and drawing inferences.” *Id.* at 17 (citations omitted) (emphasis supplied).

Here, NPDG is entitled to a damages award that compensates it for the head start that Homax obtained through its misappropriation of NPDG's Jaws Clip trade secret. This head start amounted to a preemption of the entire market and prevented NPDG from licensing to others, as well as making entry into the market by the NPDG impossible. Molinaro v. Burnbaum, 201 U.S.P.Q. (BNA) 150, 1978 U.S. Dist. LEXIS 14201, (D. Mass. Dec. 14, 1978) (citing, *inter alia*, Engelhard Indus., Inc. v. Research Instrumental Corp., 324 F.2d 347, 139 U.S.P.Q. 179 (9th Cir. 1963)).

To support its claim for damages, including lost profits, NPDG would have provided expert testimony regarding the clip sales of other clips designed by Mr. Cameron, as well as Homax's Cinch Tite clip sales. Although Homax argued that such testimony would have been too speculative because, unlike Homax, NPDG "were not a business that was situated to sell" to large retailers, VRP February 8, 2011, p. 7, lost profits evidence may be admitted even where there is no such comparable business.

For instance, No Ka Oi Corp. v. Nat'l 60 Minute Tune, Inc., 71 Wn. App. 844, 850, 863 P.2d 79 (1993), the plaintiff's expert testified about the plaintiff's lost profits, but did not base his opinion on an analysis of similar businesses in the vicinity, referred to as "local comparables." The defendant then sought to exclude this expert testimony

based on the same argument that Homax employed in this case, namely that there were no local comparables. However, the No Ka Oi Corp. soundly rejected such an argument:

Unwavering adherence to [the "local comparables" rule], regardless of the facts and circumstances actually proved, would be anomalous. Indeed, the *Larsen* court held that the plaintiff had sufficiently proved that profits would have been realized even though there was no comparable business from whose history of profits the damages figure could have been entirely drawn, for there were no comparables. . . .

Id. (citing Larsen, 65 Wn.2d at 19).

Thus, if the available evidence is sufficient to permit the court to estimate damages with reasonable certainty, the plaintiff is not denied a recovery because the exact amount of damage cannot be ascertained. *See also* Lundgren v. Whitney's, Inc., 94 Wn.2d 91,97-98,614 P.2d 1272 (1980) (citing Larsen, 65 Wn.2d at 16). Indeed, the certainty requirement focuses more on the fact of damage than the amount of damage. Lewis River Golf, Inc. v. O.M. Scott & Sons, 120 Wn.2d 712, 717, 845 P.2d 987 (1993).

In situations such as this one, where the "amount of damages... is difficult to prove with exactness," the trial court should have allowed some liberality because NPDG would have presented the best available evidence. *See* Long v. T-H Trucking Co., 4 Wn. App. 922, 927, 486 P.2d 300 (1971). Instead, the trial court limited NPDG's presentation of

prospective damages entirely; ignoring that such an issue was for the jury to decide. As a result, substantial evidence on which to base NPDG's lost profits was erroneously ruled inadmissible by the trial court. In fact, the evidence at trial demonstrated that due to Homax's misappropriation of NPDG's Jaws Clip trade secret, NPDG could not enter the marketplace at all. By precluding testimony related to lost profits of the Jaws Clip, NPDG were not able to testify about the impact of the market preemption.

This preemption was the result of Homax's affirmative steps to ensure that the NPDG would not be able to market or license clips to large retailers. These actions had the perverse effect of increasing the difficulty of proving damages while putting more money into Homax's pocket. Homax should not be rewarded for its malfeasance through the exclusion of evidence of the damages they caused to the NPDG.

Indeed, the trial court stated that evidence of lost profits was "too speculative without any evidence of marketability or sales." Partial VRP February 10, 2011, p. 17. The trial court's reasoning is not supported by the findings in Larson and No Ka Oi Corp. Robert Cameron would have testified about the marketability of the Jaws Clip based on his knowledge and experience in the locking clip industry. He would have further testified that the Jaws Clips would have displaced the clips sold by Homax due to its superior design.

What is more, the Jaws Clip was still in development when it was misappropriated by Homax. In fact, it was developed around the time that Mr. Cameron's Crocodile Clip, the first clip of its kind, was introduced to the market. Mr. Cameron would have thus testified about the improvements of the Jaws Clip in relationship to both the Crocodile Clip and Homax's replacement clip, the Cinch Tite Clip.

Further, while NPDG and Homax are not identical companies on a large scale, Homax is a valid comparable for lost profits regarding clip products: Mr. Cameron invented the Crocodile Clip and licensed it to Homax; NPDG's next generation of locking clips, which included the Jaws Clip, were the closest comparable products to Homax's clip products and Homax's clip sales would have thus provided the best available evidence to determine NPDG's lost profits.

If allowed to testify, Mr. Cameron would have also provided the nexus between the value of the Jaws Clip and how it would have affected Homax's clip sales. Mr. Cameron, as the co-developer of this particular product, with years and years of experience in the clip market, was the most qualified person at trial to testify about the value of his product. By excluding his testimony on that subject, the trier of fact was deprived of the opportunity to determine the reliability of Mr. Cameron's evidence.

Mr. Cameron also testified that he had contacts in the marine market and he was ready to market the Jaws Clip in that market—the same contacts that he had used to sell the Crocodile Clip and the Rhino Clip in the marine market. Test. of R. Cameron VRP February 14, 2011, p 172.

However, despite this extensive experience, when Mr. Cameron was asked whether he had an estimate regarding how many Jaws Clips he would have sold in the marine market, Homax objected and the Court sustained the objection. Test. of R. Cameron VRP February 14, 2011, p. 174. In that instance, Mr. Cameron would have testified about his prior experience in the marine market and used those figures as a baseline to calculate future lost profits of the Jaws Clip.

Preventing plaintiffs from adducing evidence of potential lost profits in this way will lead to further situations in which a party acquires a trade secret by representing that it will provide a known business opportunity to another party, but then deliberately misappropriates the trade secret because the other party could not prove damages. That is exactly what Homax attempts to do here, and the trial court abused its discretion by improperly denying lost profits damages evidence, the reliability of which is the province of the jury, and thus this Court should reverse the decision.

#### **D. ARGUMENT ON ASSIGNMENT OF ERROR NO. 4**

## **1. Procedural History**

The trial in this case took place from February 9 through February 17, 2011. During trial, the court made a variety of evidentiary rulings that precluded NPDG from offering evidence of lost future profits. Partial VRP February 10, 2011, p. 3-31. Previously, the trial court had denied Homax's motion in limine to exclude expert testimony from Mr. Cameron. VRP February 8, 2011, p. 40:22—41:1-6. However, on the second day of trial, the trial court ruled that Mr. Cameron could not testify as either an expert or lay person regarding lost future profits. Partial VRP February 10, 2011, p. 31:3-7, 9-12.

## **2. Standard of Review**

The admissibility of evidence lies within the discretion of the trial court, which is reviewable under an abuse of discretion standard. Davis v. Globe Mach. Mfg. Co., 102 Wn.2d 68, 76, 684 P.2d 692 (1984). A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. Id. at 77. If the trial court makes an erroneous evidentiary ruling, the issue becomes whether the error was prejudicial, which is grounds for reversal. Brown v. Spokane County Fire Prot. Dist. No. 1, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Error is prejudicial if it affects, or presumptively affects, the outcome of the trial. Id.

### 3. Robert Cameron was Qualified to Testify as an Expert.

Courts must interpret evidence rules mindful of their purpose: “that the truth may be ascertained and proceedings justly determined.” ER 102. The admissibility of expert testimony in Washington is governed by ER 702; *see also* Reese v. Stroh, 128 Wn.2d 300, 305, 907 P.2d 282 (1995). Expert testimony is generally admitted under ER 702 if it will be helpful to the jury in understanding matters outside the competence of ordinary laypersons. Reese, 128 Wn.2d at 308 (citing State v. Ciskie, 110 Wn.2d 263, 279, 751 P.2d 1165 (1988)) (citing State v. Ciskie, 110 Wn.2d 263, 279, 751 P.2d 1165 (1988)). “Expert testimony on scientific, technical or specialized knowledge is admissible under ER 702 if it will assist the trier of fact to understand the evidence or a fact in issue.” Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. 722, 734-35, 959 P.2d 1158 (1998) (citing Queen City Farms, Inc. v. Central Nat'l Ins. Co., 126 Wash.2d 50, 102, 882 P.2d 703, 891 P.2d 718 (1994)). ER 702 requires the trial court to make two inquiries: “(i) does the proffered witness qualify as an expert; and (ii) would the proposed testimony be helpful to the trier of fact.” State v. Greene, 92 Wn. App. 80, 96, 960 P.2d 980 (1998); State v. Janes, 121 Wn.2d 220, 235-36, 850 P.2d 495 (1993). “Practical experience is sufficient to qualify a witness as an expert.” State v. Ortiz, 119 Wn.2d 294, 310, 831 P.2d 1060 (1992).

Here, Mr. Cameron was qualified to testify as an expert on marketability and displacement of products in the clip market: Mr. Cameron has over twelve years of inventing, marketing, sourcing, and pricing locking clip products; he invented and helped bring to market the first successful product of its kind, the Crocodile Clip, which Homax stated was its fastest growing product *ever*; he was heavily involved with the development, advertising and marketing of this clip, CP 142; he came up with the name of the Crocodile Clip, designed and drafted the art work for its marketing, and put together a general plan for its sale and marketing, *Id.*; he has promoted clip products at trade shows and worked with vendors and buyers of retail stores and chains; he worked alongside Homax as it marketed the Crocodile Clip to the larger retail establishments in the country; and he brought other clip products to market without the assistance of Homax.

Mr. Cameron clearly has the requisite expertise to place a value on this type of product. Although Homax argues that Mr. Cameron has no experience, education, or training in marketing products to the big box stores, such an argument ignores Mr. Cameron's vast experience in this field. And in fact, the reason that Mr. Cameron could not testify specifically about marketing the Jaws Clip to the big box stores was because that opportunity was foreclosed by Homax's own malfeasance.

Mr. Cameron's testimony would also be helpful to the jury. *See State v. Ellis*, 136 Wn.2d 498, 533, 963 P.2d 843 (1998). "Generally, expert evidence is helpful and appropriate when the testimony concerns matters beyond the common knowledge of the average layperson, and does not mislead the jury to the prejudice of the opposing party." *State v. Jones*, 59 Wn. App. 744, 750, 801 P.2d 263 (1990) (citing *State v. Cunningham*, 23 Wn. App. 826, 854, 598 P.2d 756 (1979), rev'd on other grounds, 93 Wn.2d 823, 613 P.2d 1139 (1980)).

Here, a lay jury, relying upon its common experience and without the aid of an expert, would not have been capable of determining the amount of NPDG's lost profits. Mr. Cameron's testimony was thus properly admissible under ER 702 and the trial court's ruling should have gone to weight to be afforded his testimony, rather than its admissibility. *See Keegan v. Grant County Pub. Util. Dist. No. 2*, 34 Wn. App. 274, 283, 661 P.2d 146 (1983) ("Once the basic requisite qualifications are established, any deficiencies in an expert's qualifications go to weight rather than the admissibility...").

Alternatively, Mr. Cameron's opinion was admissible lay testimony under ER 701. A lay witness may give "those opinions or inferences which are (a) rationally based on the perception of the witness

and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.” ER 701.

For instance, the owner of a chattel may offer this type of testimony as to the chattel’s market value without being qualified as an expert. *See Wicklund v. Allraum*, 122 Wash. 546, 211 P. 760 (1922); *see also Ingersol v. Seattle-First Nat’l Bank*, 63 Wn.2d 354, 387 P.2d 538 (1963). What is more, “[a] lay witness may testify as to his or her opinion under circumstances of personal knowledge based upon rational perceptions when it would help the jury understand the witnesses' testimony or a fact in issue.” *Pagnotta v. Beall Trailers of Oregon, Inc.*, 99 Wn. App. 28, 34, 991 P.2d 728 (2000). Of course, such testimony must still comport with the ER 602 requirement that a witness testify on the basis of facts or events that the witness has personally observed.

Here, Mr. Cameron was a principal of NPDG and was closely involved in the clip products at issue. His testimony would have offered evidence regarding inventing and developing the subject clip products and evidence of negotiations regarding pricing and sales of clip products. Mr. Cameron’s testimony referenced above demonstrates that NPDG’s theory on marketability and product displacement should have been presented to the jury.

Accordingly, the trial court's failure to allow Mr. Cameron to testify on these issues amounted to a finding by the court that there was no market value of the subject clip products, thus usurping the province of the jury. Homax's objections relating to Mr. Cameron's qualifications merely go to the weight, not the admissibility, of his opinion evidence.

Accordingly, the trial court's determination regarding the admissibility of the evidence to be presented by NPDG was an abuse of discretion. NPDG therefore urges this Court to reverse that decision.

#### **E. ARGUMENT ON ASSIGNMENT OF ERROR NO. 5-7, 9**

##### **1. Procedural History**

Entering the verdict on a special verdict form, the jury found that (1) the NPDG had a trade secret in the Jaws Clip; (2) Homax misappropriated the Jaws Clip trade secret; but (3) NPDG was not damaged by Homax's misappropriation of the Jaws Clip trade secret. CP 1677. Similarly, because the jury found there were no damages for the Jaws Clip trade secrets violation, the trial court entered a directed verdict that there could be no damages for equitable conversion or unjust enrichment related to the Jaws Clip. CP 1680.

##### **2. Standard Of Review**

An appellate court will not disturb a jury's damages award "unless it is outside the range of substantial evidence in the record, or shocks the

conscience of the court, or appears to have been arrived at as the result of passion or prejudice” after viewing the evidence in the light most favorable to the party for whom the verdict was entered. Bunch v. King County Dep't of Youth Servs., 155 Wn.2d 165, 179, 116 P.3d 381 (2005) (quoting Bingaman v. Grays Harbor Cmty. Hosp., 103 Wn.2d 831, 835, 699 P.2d 1230 (1985)). Questions and conclusions of law are reviewed de novo. Sunnyside Valley Irrigation 15 Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

**3. The Jury Should Have Awarded Damages Upon Finding The Jaws Clip Trade Secret Was Misappropriated.**

In order for information to qualify as a trade secret, the information must derive “independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.” RCW 19.108.010(4)(a). To determine whether information has “independent economic value” under the UTSA, the courts look to whether the information confers a “competitive advantage” upon the plaintiff. *See* Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 437, 971 P.2d 936 (1999), *reconsideration denied*.

In related contexts, courts interpreting RCW 19.108.010(4) (definition of trade secret) have also emphasized the importance of the

competitive advantage that arises from knowledge of a trade secret. For example, in Ed Nowogroski Ins., the court noted that “[w]here [a] former employee seeks to use the trade secrets of the former employer in order to obtain a competitive advantage, then competitive activity can be enjoined or result in an award of damages.” Ed Nowogroski Ins., 137 Wn.2d at 437.

It is well established that “[a] plaintiff seeking to establish a trade secrets claim under the uniform act has the burden of proving that legally protectable secrets exist.” Boeing Co. v. Sierracin Corp., 108 Wash.2d 38, 49, 738 P.2d 665 (1987). Likewise, it is the burden of the party seeking relief under the Uniform Trade Secrets Act (“UTSA”) to demonstrate that such a secret has actually been misappropriated in order to have a right to any damage award. *See, e.g.*, Sargent Fletcher, Inc. v. Able Corp., 110 Cal.App.4th 1658, 1668, 3 Cal.Rptr.3d 279 (2003).

Here, NPDG established it held a legally protectable secret existed in the Jaws Clip. Additionally, NPDG met its burden in proving that the Jaws Clip trade secret was misappropriated. By definition under RCW 19.108.010, a trade secret has value. Where the meaning of statutory language is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. City of Olympia v. Drebeck, 156 Wn.2d 289, 295, 126 P.3d 802 (2006), cert. denied, 549 U.S. 988, 127 S.Ct. 436, 166 L.Ed.2d 330 (2006). Because the jury found that

the Jaws Clip had an independent value from not being generally known, it should have awarded damages for this value.

Here, a damages calculation was difficult because Homax preempted NPDG from entering the market. Additionally, Homax never sold the Jaws Clip trade secret as its own product. However, NPDG introduced Homax's sales charts relating to the Cinch Tite clip. Partial VRP February 14, 2011, p. 112-113. Mr. Hanson testified about the number of units sold, the average cost per unit and the gross sales from 2005-2008. *Id.* Additionally, Mr. Cameron incurred expenses in developing the Jaws Clip. In fact, he testified that it cost \$3,500- \$4,000 to create a prototype of the Jaws Clip. Partial VRP February 10, 2011, p. 40. Mr. Cameron also testified that conservatively, the Jaws Clip was valued at around \$450,000. Test. of R. Cameron VRP February 14, 2011, p. 173.

While the trial court precluded Mr. Cameron from testifying about the Jaws Clips' future displacement of Homax's clip sales, he was able to testify that NPDG sold approximately 200,000-250,000 Rhino Clips. Test. of R. Cameron VRP February 14, 2011, p. 66. Accordingly, there was information in the record regarding clip sales of comparable

businesses.<sup>7</sup> At a minimum, the jury should have taken into account the Rhino Clip sales as a comparable business model to evaluate the lost business opportunities in addition to considering the costs associated with developing the Jaws Clip. The jury's conclusion that NPDG were not damaged by Homax's misappropriation of the Jaws Clip trade secret contradicts its finding the Jaws Clip trade secret had an independent economic value.

Based on the foregoing, the evidence does not support the jury's verdict that NPDG were not damaged by Homax's violation of the UTSA. Using the same analysis above, the court erred in entering a directed verdict that because there was no damage for misappropriating the Jaws Clip trade secret, there can be no damage for equitable conversion and an equitable unjust enrichment relating to use of the Jaws Clip. Accordingly, NPDG urges this Court to reverse these rulings.

## **F. ARGUMENT ON ASSIGNMENT OF ERROR NO. 8**

### **1. Facts Relevant to Rule 11 Sanctions**

In its Amended Complaint, NPDG stated a claim against Homax for violation of the UTSA. This claim was based on the misappropriation of trade secrets associated with the Rhino Clip. CP 1284. In March 2007, the trial court dismissed several claims, CP 1237, but stated that the facts

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<sup>7</sup> NPDG hereby incorporates by reference its argument under Revision of Error No. 4 relating to valuation of new businesses by comparing profits of similar businesses.

alleged in the complaint supported the existence of a trade secret violation. VRP March 16, 2007, p. 24:12-14; 25:4-8. NPDG's trade secrets claim was therefore permitted to proceed.

In its response to Homax's motion for summary judgment, NPDG completed a comprehensive review of the information gathered through the discovery process and decided not to pursue the trade secrets claim with respect to the Rhino Clip. Notice was given to Homax upon NPDG's decision to drop the claim. Consequently, the court dismissed this claim on May 26, 2009. CP 1330.

## **2. Procedural History of Motion for CR 11 Sanctions**

On March 14, 2011, Homax filed a memorandum of law in support of a motion for fees from NPDG and NPDG's attorneys. CP 88-94. In support of the motion, Mark J. Lee filed an affidavit on his personal knowledge and belief. CP 95-100. However, Steven P. Fallon, not Mr. Lee, was the attorney of record at the time of the filing of the motion for summary judgment and NPDG's decision not to pursue the Rhino Clip trade secrets claim. CP 1330. No affidavit was submitted by Mr. Fallon, the attorney with personal knowledge, in support of Homax's motion. This reflects Homax's casual nature in asserting Rule 11 sanctions.

On May 13, 2011, the court ordered sanctions in the amount of \$4,500 against NPDG under CR 11 due to NPDG's failure to dismiss its

trade secret claim with respect to the Rhino Clip prior to filing its response to Homax's motion for summary judgment. CP 8-11.

**3. Grant of Rule 11 Sanctions is Reviewed for Abuse of Discretion.**

The appellate court reviews a trial court's decision regarding CR 11 for abuse of discretion. Roeber v. Dowty Aerospace Yakima, 116 Wn. App. 127, 141, 64 P.3d 691 (Div. III 2003). "Sanctions may be imposed only if the complaint lacks a factual or legal basis and if the attorney failed to conduct a reasonable inquiry." Roeber v. Dowty Aerospace Yakima, 116 Wn. App. 127, 141-42, 64 P.3d 691 (Div. III 2003). An attorney's inquiry is evaluated by an objective standard: whether a reasonable attorney in a like circumstance could believe his or her actions to be factually and legally justified. Skimming v. Boxer, 119 Wn. App. 748, 754, 82 P.3d 707 (Div. III 2004).

Factors which are relevant in examining the attorney's inquiry include "the time that was available to the signer, the extent of the attorney's reliance upon the client for factual support, whether a signing attorney accepted a case from another member of the bar or forwarding attorney, the complexity of the factual and legal issues, and the need for discovery to develop factual circumstances underlying a claim." Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 220-21, 829 P.2d 1099 (1992). Any

doubts should be resolved in favor of the signer. Oliveri v. Thompson, 803 F.2d 1265, 1275 (2<sup>nd</sup> Cir. 1986).

#### **4. Requests for CR 11 Sanctions Should be Granted Sparingly**

The threshold for imposing CR 11 sanctions is high. Skimming, 119 Wn. App. at 755. In order to serve the purpose of CR 11 and avoid the potential chilling effect of the rule, the trial court should impose sanctions “only when it is patently clear that a claim has absolutely no chance of success.” Id. A filing is baseless if “it is not well grounded in fact, or not warranted by existing law or a good faith argument for altering existing law.” Id. at 754. Moreover, “[t]he fact that a complaint does not prevail on its merits is not enough.” Id. at 755.

#### **5. The Trial Court Abused its Discretion by Awarding Sanctions**

The trial court abused its discretion by granting Homax’s motion for sanctions regarding a claim that NPDG voluntarily conceded two years prior. Indeed, the information available at the time of the filing of the Amended Complaint and the information gathered during the discovery process revealed a relatively complex case with regard to the facts, the parties’ respective conduct, and the applicable law. CP 0054.

The Amended Complaint was based on what a reasonable attorney would file based on the information available to him or her. Skimming,

119 Wn. App. at 754. At the time the Amended Complaint was filed, it was not “patently clear” that the trade secrets claim “absolutely had no chance of success.” *Id.* Thus, NPDG’s inclusion of this claim in the Amended Complaint did not warrant the imposition of CR 11 sanctions.

NPDG’s reasonable evaluation of the trade secrets claim at the summary judgment stage led to the NPDG’s voluntary concession of the claim, but the pursuit of discovery regarding the trade secrets claim was reasonable. *See Waples v. Yi*, 169 Wn.2d 152,159-60, 234 P.3d 187 (2010). Moreover, the fact that NPDG concluded that the claim would not prevail on its merits is an insufficient basis for CR 11 sanctions. *See Roeber v. Dowty Aerospace Yakima*, 116 Wn. App. 127, 141-42, 64 P.3d 691 (Div. III 2003). Indeed, none of the conduct at issue rose to the level of an abuse of the judicial system. *See Skimming*, 119 Wn. App. at 754. Thus, the trial court abused its discretion in awarding CR 11 sanctions and NPDG urges this Court to reverse this ruling.

**G. NPDG, as the Prevailing Party on Appeal, is Entitled to Her Reasonable Attorneys Fees.**

If NPDG is successful in this appeal, they are also entitled to attorneys fees under RAP 18.1 and RCW 19.108.040. If successful on this appeal, a properly documented request for reasonable fees will be submitted at the conclusion of the appeal.

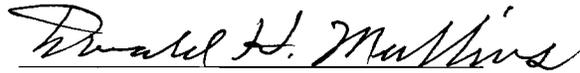
## V. CONCLUSION

Based on the forgoing, NPDG respectfully requests that this Court (1) vacate the trial court's March 16, 2007 order to the extent that it dismissed NPDG's claims for fraud, negligent misrepresentation and violation of the CPA, (2) vacate the trial court's June 27, 2008 Order Denying NPDG's Motion for Leave to File Second Amended Complaint, and order that the Amendment be allowed, (3) reverse the trial court's February 8, 2011 in limine rulings regarding whether NGDG could testify about lost profits for the Jaws Clip, (4) reverse the trial court's rulings precluding Robert Cameron from testifying as an expert or lay person regarding lost future profits of the Jaws Clip, (5) vacate and remand the verdict that NPDG was not damaged by Homax's misappropriation of the Jaws Clip trade secret to the trial court for further consideration, (6) vacate and remand to the trial court for further consideration, the verdicts that because there was no damage for the Jaws Clip trade secrets violation that there was no damage for an equitable conversion and unjust enrichment of the Jaws Clip, (7) vacate the trial court's May 13, 2011, Order granting Homax's motion for Fees and (8) vacate the superior Court's final judgment entered on May 13, 2011.

Dated this 27<sup>th</sup> day of December, 2011.

Respectfully submitted,

BADGLEY MULLINS LAW GROUP PLLC

A handwritten signature in cursive script that reads "Donald H. Mullins".

Donald H. Mullins, WSBA #4966

Allyssa J. Hale, WSBA #38429

Attorneys for Appellants/Cross-Respondents .

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION I

NORTHWEST PRODUCT DESIGN )  
GROUP, LLC, a Washington limited )  
liability corporation; TODD D. )  
ANDERSEN, an individual; MAC )  
CAMERON, an individual; JERRY )  
CHAMBERS, an individual; and )  
ELLIS MASSEY, an individual, )

Court of Appeal No. 67278-9

PROOF OF SERVICE

Appellants/Cross-Respondents, )

v. )

HOMAX PRODUCTS, INC., a )  
Delaware corporation; RANDAL W. )  
HANSON and JANE DOE )  
HANSON, husband and wife, and )  
the marital community thereof; )  
ROSS CLAWSON and JANE DOE )  
CLAWSON, husband and wife, and )  
the marital community thereof; )  
LESTER GREER, JR. and Jane Doe )  
Greer, husband and wife, and the )  
marital community thereof; and )  
WILFRED HOFFMANN and Jane )  
Doe Hoffmann, husband and wife, )  
and the marital community thereof, )

Respondents/Cross-Appellants. )

I, Christina Limon, paralegal for BADGLEY~MULLINS LAW GROUP, attorneys for Appellants/Cross-Respondents in the above entitled action, hereby certify under penalty of perjury that I am over the age of eighteen (18), and am competent to testify to the facts contained herein. On the 27<sup>th</sup> day of December, 2011, I served by sending a true and correct copy in the manner indicated below of the following documents:

1. Appellants' Brief; and
2. Proof of Service.

Upon the attorney of record herein, as follows, to wit:

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*via email and U.S. Mail*

DATED this 27<sup>th</sup> day of December, 2011 in Seattle, WA.

  
Christina Limon, Paralegal