

No. ~~71692-1~~
71792-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THE BASEBALL CLUB OF TACOMA, LLC,
a Washington limited liability company,
Plaintiff-Respondent,

v.

SDL BASEBALL PARTNERS, LLC, a Nevada Limited Liability
Company, ROBERT J. SCHLEGEL and ROBERT K. SCHLEGEL,
Defendants/Third-Party Plaintiffs- Appellants,
and
MIKAL THOMSEN and AARON ARTMAN,
Third-Party Defendants-Respondents.

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COURT OF APPEALS
STATE OF WASHINGTON


ANSWERING BRIEF OF RESPONDENT

Angela R. Jones, WSBA No. 38326
AJones@perkinscoie.com
Carrie M. Hobbs, WSBA No. 45487
CHobbs@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Plaintiff-Respondent
The Baseball Club of Tacoma and
Third-Party Defendants-Respondents
Mikal Thomsen and Aaron Artman

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. STATEMENT OF THE CASE.....	2
A. Factual Background	2
1. Defendants marketed the Tacoma Rainiers to The Baseball Club of Tacoma.	2
2. TBCOT purchased the Rainiers from Defendants.	3
3. TBCOT discovered significant accounting errors.	5
B. Procedural History	6
III. ARGUMENT	8
A. Washington’s New Anti-SLAPP Statute Protects the Right to Petition the Courts.....	8
B. The Trial Court Properly Found That the Gravamen of Defendants’ Claims Fall Within the Scope of RCW 4.24.525	10
1. Defendants’ counterclaims and third-party claims attack protected activity.....	10
2. Defendants cannot merely strike out portions of the complaint or voluntarily dismiss claims subject to an Anti-SLAPP motion.	17
3. Third-Party Defendants properly invoked the protections of the Anti-SLAPP statute.....	20
C. Defendants Waived Their Arguments and Cannot Establish by Clear and Convincing Evidence a Probability of Prevailing on their Claims	23
1. Defendants’ claims against third-party defendants are brought against the wrong defendants.	24

TABLE OF CONTENTS
(continued)

	Page
2. Defendants' fail to establish the elements of their fraudulent and negligent misrepresentations claims.	25
3. Defendants fail to establish the elements of their conversion and conspiracy claims.	31
4. Defendants' claims against TBCOT are also deficient.....	33
D. The Anti-SLAPP Statute's Penalties and Fee Award Are Mandatory	37
IV. ATTORNEYS' FEES ON APPEAL	38
V. CONCLUSION.....	39

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Akrie v. Grant</i> , 178 Wn. App. 506, 315 P.3d 567 (2013).....	38
<i>Alaska Structures, Inc. v. Hedlund</i> , ___ Wn. App. ___, 323 P.3d 1082 (2014).....	10, 16, 17
<i>Albergo v. Immunosyn Corp.</i> , 09CV2653 DMS AJB, 2011 WL 197580 (S.D. Cal. Jan. 20, 2011).....	14, 15
<i>All Star Gas, Inc. v. Bechard</i> , 100 Wn. App. 732, 998 P.2d 367 (2000).....	33
<i>Aronson v. Dog Eat Dog Films, Inc.</i> , 738 F. Supp. 2d 1104 (W.D. Wash. 2010).....	21
<i>Badgett v. Sec. State Bank</i> , 116 Wn.2d 563, 807 P.2d 356 (1991).....	29, 36
<i>Berryman v. Metcalf</i> , 177 Wn. App. 644, 312 P.3d 745 (2013).....	34
<i>Biggs v. Vail</i> , 119 Wn.2d 129, 830 P.2d 350 (1992).....	35
<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	34
<i>Chavez v. Mendoza</i> , 94 Cal. App. 4th 1083, 114 Cal. Rptr. 2d 825 (2001)	11
<i>Coggle v. Snow</i> , 56 Wn.App. 499, 784 P.2d 554 (1990).....	9
<i>Davis v. Cox</i> , ___ Wn. App. ___, 325 P.3d 255 (2014).....	11, 12, 16

<i>Dillon v. Seattle Deposition Reporters, LLC,</i> 179 Wn. App. 41, 316 P.3d 1119, rev. granted, 180 Wn.2d 1009, __ P.3d __ (2014).....	11
<i>Feldman v. 1100 Park Lane Associates,</i> 160 Cal. App. 4th 1467, 74 Cal. Rptr. 3d 1 (2008).....	14
<i>Fielder v. Sterling Park Homeowners Ass'n,</i> 914 F. Supp. 2d 1222 (W.D. Wash. 2012).....	9
<i>Fintland v. Luxury Marine Grp., LLC,</i> CV 09-4267 AHM(AGRX), 2010 WL 758543 (C.D. Cal. Mar. 1, 2010).....	11
<i>Hearst Commc'n, Inc. v. Seattle Times Co.,</i> 154 Wn.2d 493, 115 P.3d 262 (2005).....	27, 28
<i>Holman v. Coie,</i> 11 Wn. App. 195, 522 P.2d 515 (1974).....	33
<i>Jacobsen v. King Cnty. Med. Serv. Corp.,</i> 23 Wn.2d 324, 160 P.2d 1019 (1945).....	37
<i>Jeckle v. Crotty,</i> 120 Wn. App. 374, 85 P.3d 931 (2004).....	34, 35
<i>Judkins v. Sadler-MacNeil,</i> 61 Wn.2d 1, 376 P.2d 837 (1962).....	31, 32
<i>M.A. Mortenson Co., Inc. v. Timberline Software Corp.,</i> 140 Wn.2d 568, 998 P.2d 305 (2000).....	29
<i>Martinez v. Metabolife Int'l, Inc.,</i> 113 Cal. App. 4th 181, 6 Cal. Rptr. 3d 494 (2003).....	11
<i>Mauch v. Kissling,</i> 56 Wn. App. 312, 783 P.2d 601 (1989).....	21
<i>Meisel v. M & N Modern Hydraulic Press Co.,</i> 97 Wn.2d 403, 645 P.2d 689 (1982).....	25
<i>Michel v. Melgren,</i> 70 Wn. App. 373, 853 P.2d 940 (1993).....	32

<i>Micro Enhancement Int'l, Inc. v. Coopers & Lybrand, LLP,</i> 110 Wn. App. 412, 40 P.3d 1206 (2002).....	27
<i>Navellier v. Sletten,</i> 29 Cal. 4th 82, 52 P.3d 703 (2002).....	14
<i>Nyquist v. Foster,</i> 44 Wn.2d 465, 268 P.2d 442 (1954).....	26
<i>Oliver v. Flow Int'l Corp.,</i> 137 Wn. App. 655, 155 P.3d 140 (2006).....	29
<i>Raining Data Corp. v. Barrenechea,</i> 175 Cal. App. 4th 1363, 97 Cal. Rptr. 3d 196 (2009).....	22, 24
<i>Sharbono v. Universal Underwriters Ins. Co.,</i> 139 Wn. App. 383, 161 P.3d 406 (2007).....	39
<i>Simmons v. Allstate Ins. Co.,</i> 92 Cal. App. 4th 1068, 112 Cal. Rptr. 2d 397 (2001).....	19, 20
<i>Sorensen v. City of Bellingham,</i> 80 Wn.2d 547, 496 P.2d 512 (1972).....	37
<i>Spratt v. Toft,</i> ___ Wn. App. ___, 324 P.3d 707 (2014).....	11
<i>State v. Talley,</i> 122 Wn.2d 192, 858 P.2d 217 (1993).....	33
<i>Stiles v. Kearney,</i> 168 Wn. App. 250, 277 P.3d 9 (2012).....	35
<i>Stiley v. Block,</i> 130 Wn.2d 486, 925 P.2d 194 (1996).....	27
<i>Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.,</i> 122 Cal. App. 4th 1049, 18 Cal. Rptr. 3d 882 (2004).....	18
<i>Tiger Oil Corp. v. Dep't of Licensing,</i> 88 Wn. App. 925, 946 P.2d 1235 (1997).....	35

<i>United States v. Bailey</i> , 208 F. Supp. 2d 1261 (M.D. Fla. 2003).....	32
<i>Wash. Water Jet Workers Ass'n v. Yarbrough</i> , 151 Wn.2d 470, 90 P.3d 42 (2004).....	25
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	9
<i>Westview Investments, Ltd. v. U.S. Bank Nat. Ass'n</i> , 133 Wn. App. 835, 138 P.3d 638 (2006).....	32
<i>Yeats v. Estate of Yeats</i> , 90 Wn.2d 201, 580 P.2d 617 (1978).....	28

STATUTES

RCW 4.24.525	passim
RCW 4.84.185	34, 35, 36
RCW 25.15.060	25

OTHER AUTHORITIES

S.B. Rep. on H.B. 2699, 57th Leg., Reg. Sess. (Wash. 2002)	38
U.S. Const. amend. IV	4

I. INTRODUCTION

The Court should affirm the trial court's dismissal pursuant to Washington's Anti-SLAPP statute of the counterclaims and third-party claims asserted by Defendants-Appellants SDL Baseball Partners, LLC, Robert J. Schlegel ("Bob"), and Robert K. Schlegel ("Kirby") (collectively "Defendants"). The gravamen of Defendants' claims are that Plaintiff The Baseball Club of Tacoma, LLC ("TBCOT") and Third-Party Defendants Mikal Thomsen and Aaron Artman manufactured TBCOT's Complaint against Defendants in this lawsuit in order to avoid paying an earn-out related to Plaintiff's purchase of the Tacoma Rainiers baseball team from Defendants. Filing a lawsuit is protected activity within the scope of the Anti-SLAPP statute, and the statute provides a remedy of dismissal and statutory damages for claims that attack such protected activity.

Defendants offer a number of arguments as to why this Court should reverse the trial court's decision, but each must fail: First, Washington's Anti-SLAPP statute does not carve out so-called "private contractual disputes" from its protection; rather, the statute applies where, as here, the gravamen of the claims attack protected activity. Second, Defendants cannot now, only after TBCOT and Messrs. Thomsen and Artman moved to strike Defendants' claims, seek to amend and re-write those claims in an attempt to artfully plead around the Anti-SLAPP

statute. Third, the trial court properly awarded statutory damages to each moving party; Defendants cannot now seek to escape the consequences of attempting to bring claims against the principals of TBCOT for TBCOT's petitioning activity.

As found by the trial court, and as further confirmed below, TBCOT (and its principals) engaged in protected activity when TBCOT petitioned the courts for redress arising from Defendants' tortious conduct. The trial court also found, and Defendants do not dispute, that Defendants failed to meet their burden of establishing by clear and convincing evidence a probability of proving their counterclaims and third-party claims. Defendants do not assign error to this finding of the Court. Accordingly, because TBCOT and Messrs. Thomsen and Artman have properly met their burden of establishing that Defendants' counterclaims and third-party claims are based on protected activity, the Court should affirm the trial court's dismissal of those claims.

II. STATEMENT OF THE CASE

A. Factual Background

1. Defendants marketed the Tacoma Rainiers to The Baseball Club of Tacoma.

In or around September 2010, Defendants began marketing the sale of the Tacoma Rainiers (the "Rainiers"). CP 326 (Declaration of Mikal Thomsen ("Thomsen Decl.") ¶ 3). As part of the marketing materials,

Defendants represented that the Rainiers had a “year-over-year increase of 18%, and Earnings Before Interest, Taxes, Depreciation and Amortization (“EBITDA”) of nearly \$1.0 million each of the last two years.” CP 352-54 (Thomsen Decl. ¶ 4, Ex. A). EBITDA is an indicator of a company’s financial performance and is one factor investors use to determine purchase price and whether to purchase a company. CP 326 (Thomsen Decl. ¶ 4).

2. TBCOT purchased the Rainiers from Defendants.

After Defendants presented the Rainiers and its financials to TBCOT and Mr. Thomsen, the parties executed a Letter of Intent in December 2011, and the parties negotiated the terms of a Purchase and Sale Agreement (the “Agreement”) that was signed on January 31, 2011. CP 367-429 (Agreement). The Agreement set forth how TBCOT would pay the purchase price for the team. CP 377-80 (Agreement § 1.3(c)). Under the Agreement, TBCOT would provide a cash payment at closing. The remainder of the purchase price would be paid by TBCOT as a percentage of the Rainiers’ EBITDA—called an earn out—in the first four fiscal years, with the option to extend the earn-out period for an additional year. *See* CP 378 (Agreement § 1.3(c)(i) (“In the event the aggregate Earn-Out in respect of such first four fiscal years is less than [], before any adjustments or set-offs . . . Buyer may . . . pay the amount of the

shortfall” or extend the earn-out period by one year)). Ultimately, TBCOT paid Defendants millions of dollars for the Rainiers.

In the Fourth Amendment to the Purchase Agreement, entered into on March 31, 2011, and incorporated into the Agreement, the parties agreed that TBCOT *shall* rely upon the Defendants’ financial statements “which need not be audited.” CP 430, 509-29 (Declaration of Isaac Wells (“Wells Decl.”) Ex. B (“Neither such access or furnishing of information, nor any investigation by Buyer or its Representatives, shall in any way diminish or otherwise affect Buyer’s right to rely on any representation or warranty made in this Agreement.”)). The parties added this provision because there was no pre-sale audit performed. CP 431 (Wells Decl. ¶ 4).

Additionally, under the terms of the Agreement, SDL and the Schlegels represented the truth and accuracy of SDL’s financial statements and that those financial statements had been prepared in conformity with GAAP. *See* CP 409 (Agreement, Appendix A ¶ 5) (emphasis added); *see also* CP 418 (Agreement, Appendix A ¶ 23); CP 393 (Agreement §§ 6.1(a) and (d)).

The Agreement also provides that Defendants “will indemnify” and reimburse TBCOT for any damages “in connection with . . . any breach of any representation or warranty” made in the Agreement or

Seller's Disclosure Letter. CP 395-96 (Agreement § 7.2(a)); CP 432-508 (Wells Decl. Ex. B, Seller's Disclosure Letter).

The parties also agreed that Defendants could not interfere with how TBCOT operated the Rainiers. The Agreement specifically provides that the use of EBITDA "shall not restrict Buyer's business decisions . . . but instead is intended to cause Buyer to, in good faith, include in EBITDA the operating earnings of the Acquired Businesses earned by Buyer and its Affiliates." CP 378 (Agreement § 1.3(c)(ii)(C)). The sale closed on March 31, 2011, and TBCOT acquired the Rainiers.

3. TBCOT discovered significant accounting errors.

After TBCOT acquired the business, it retained several employees who had worked with SDL, including Mr. Artman. CP 356-57 (Declaration of Aaron Artman ("Artman Decl.") ¶¶ 2-3). Shortly after purchasing the team and hiring a new Controller, Brian Coombe, TBCOT discovered significant accounting errors and misstated financials. CP 321-24 (Declaration of Brian Coombe ("Coombe Decl.")). In the first few months of Mr. Coombe's employment, TBCOT discovered significant errors in the financial statements for the first six months of the 2011 fiscal year when the Schlegels still owned the business. CP 322 (Coombe Decl. ¶ 3). TBCOT discovered that when the Defendants owned the Rainiers, the financials were not prepared in conformity with GAAP as represented

in the Agreement. CP 322 (Coombe Decl. ¶ 3). TBCOT discovered additional errors in the financial statements and records for 2009 and 2010, errors which misstated the true financial performance of the business. CP 322 (Coombe Decl. ¶ 4).

B. Procedural History

Based on the Defendants' misrepresentations regarding the financials, TBCOT filed suit against Defendants on July 24, 2012, and brought claims for (1) breach of contract; (2) breach of implied duty of good faith and fair dealing; (3) fraud; and (4) negligent misrepresentation. CP 16-18 (Complaint ¶¶ 77-98). Defendants answered on August 28, 2012, and alleged two counterclaims against TBCOT, specifically (1) alleging that TBCOT's fraud claim was frivolous and (2) seeking declaratory judgment limiting TBCOT's remedy to the terms of the Purchase Agreement. CP 38-39 (Answer at pp. 12-13.) Defendants did not allege *any* facts in connection with its counterclaims at that time. *See id.* Defendants amended their answer on September 16, 2013. CP 103-23 (Amended Answer). In their Amended Answer, Defendants added Mr. Thomsen and Mr. Artman—both members and officers of TBCOT—as third-party defendants, added third-party claims against Mr. Thomsen and Mr. Artman, and amended their counterclaims against TBCOT. CP 115-22 (Amended Answer at pp. 13-21). Defendants accused Mr. Thomsen

and Mr. Artman of fraud, negligence, civil conspiracy and conversion. CP 131-22 (Amended Answer ¶¶ 30-40). Defendants also alleged that TBCOT breached an implied duty of good faith and fair dealing. CP 120 (Amended Answer ¶¶ 26-29).

Significantly, with their Amended Answer, Defendants for the first time set forth the alleged factual basis of their counterclaims and third-party claims. In support of their counterclaims and third-party claims, Defendants alleged that “Third Party Defendants have manufactured their complaints about the Team’s finances and value in order to avoid paying Defendants the earn-out as required by the Purchase Agreement. Third Party Defendants’ claims are part of a scheme orchestrated in order to set up Defendants and avoid paying the earn-out altogether.” CP 118 (Amended Answer ¶ 16); *see also* CP 119 (Amended Answer ¶ 19 (“Third Party Defendants want to use Defendants as scapegoats with their investors, and they made sure when they bought the Team that they structured the deal in a way that would allow them the opportunity and means to do just that.”)).

On February 14, 2014, TBCOT brought its Special Motion to Strike Pursuant to RCW 4.24.525. The Court heard oral argument of counsel on March 14, 2014, and granted TBCOT’s motion. Defendants filed a Notice of Appeal on April 3, 2014.

III. ARGUMENT

A. **Washington’s New Anti-SLAPP Statute Protects the Right to Petition the Courts**

In 2010, in order to combat “lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances,” the Washington legislature enacted a new statute to curb Strategic Lawsuits Against Public Participation (“SLAPP”). RCW 4.24.525. The new Anti-SLAPP statute not only broadened the scope of statutorily protected activity, but also created a procedure to swiftly curtail any litigation found to be targeted at persons lawfully addressing their grievances. *See* RCW 4.24.525; *see also* Laws of 2010, ch. 118, § 1(a) (“(1) The legislature finds and declares that: (a) it is concerned about lawsuits brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances.”). In 2010, the legislature expanded the definition of “persons” who can bring an Anti-SLAPP motion to include business entities. RCW 4.24.525(1)(e).

Under Washington’s expanded Anti-SLAPP law, “[a] party may bring a special motion to strike any claim that is based on an action involving public participation” as defined in the statute. RCW 4.24.525(4)(a). To invoke the Anti-SLAPP statute, the moving party has the initial burden “of showing by a preponderance of the evidence that the

claim is based on an action involving public participation and petition.”

RCW 4.24.525(4)(b).¹

Once the moving party meets its burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of proving the claim or claims. RCW 4.24.525(4)(b). A court may consider not only the pleadings, but supporting and opposing affidavits stating the facts on which the liability or defense is based. RCW 4.24.525(4)(c). Significantly, a moving party that prevails is entitled to a mandatory award of costs and reasonable attorneys’ fees and a further mandatory penalty of \$10,000 per moving party. RCW 4.24.525(6)(a).

Finally, and notably, in amending the Anti-SLAPP law in 2010, the legislature stated that “[t]his act shall be applied and construed

¹ RCW 4.24.525(5)(a) provides “[t]he special motion to strike may be filed within sixty days of the service of the most recent complaint or, in the court’s discretion, at any later time upon terms it deems proper.” RCW 4.24.525(5)(a). Defendants state that TBCOT, Mr. Thomsen, and Mr. Artman waited “some five months after the defendants filed their claims,” but they do not assign error to the trial court’s consideration of the Anti-SLAPP motion when filed by TBCOT, Mr. Thomsen, and Mr. Artman. Appellants’ Opening Brief at 12. In any event, matters left to the trial court’s discretion, as here, are reviewable only for manifest abuse of discretion. *See, e.g., Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054, 1075 (1993) (“The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is better positioned than another to decide the issue in question.”) (internal quotations and citation omitted). The “proper standard [in determining whether the trial court abused its discretion] is whether discretion is exercised on untenable grounds or for untenable reasons, considering the purposes of the trial court’s discretion.” *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554, 559 (1990). The trial court properly invoked its discretion to consider the Anti-SLAPP motion. *See, e.g., Fielder v. Sterling Park Homeowners Ass’n*, 914 F. Supp. 2d 1222, 1231 (W.D. Wash. 2012) (considering special motion filed five months after the complaint was filed and declining “to decide the motion on a purely procedural deficiency”).

liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.” Laws of 2010, ch. 118, § 3. A trial court’s ruling on a special motion to strike pursuant to RCW 4.24.525 is subject to de novo review. *Alaska Structures, Inc. v. Hedlund*, ___ Wn. App. ___, 323 P.3d 1082, 1085 (2014).

B. The Trial Court Properly Found That the Gravamen of Defendants’ Claims Fall Within the Scope of RCW 4.24.525

1. Defendants’ counterclaims and third-party claims attack protected activity.

An action involving public participation includes “any claim, however characterized,” that is based on “any oral statement made, or written statement or other document submitted, in a . . . judicial proceeding” RCW 4.24.525(2)(a); *see also* RCW 4.24.525(2)(b) (same). “It is well established that filing a lawsuit is an exercise of a party’s constitutional right of petition.” *Chavez v. Mendoza*, 94 Cal. App. 4th 1083, 1087, 114 Cal. Rptr. 2d 825, 828 (2001).²

Defendants’ counterclaims and third-party claims clearly fall within the scope of RCW 4.24.525.³ When evaluating whether the claims

²“Washington’s 2010 Anti-SLAPP statute was patterned after California’s Anti-SLAPP statute. Thus [Washington courts] can look to California for aid in interpreting the act.” *Spratt v. Toft*, ___ Wn. App. ___, 324 P.3d 707, 712 (2014).

³ A court need not find that all of Defendants’ counterclaims and third-party claims are subject to the Anti-SLAPP statute. *See, e.g., Fintland v. Luxury Marine Grp., LLC*, CV 09-4267 AHM(AGRX), 2010 WL 758543 (C.D. Cal. Mar. 1, 2010) (granting the motion to strike pursuant to the Anti-SLAPP statute in part). Of course here, each of

at issue are based on protected activity, courts look to the “*principal thrust or gravamen* of the [party’s] cause of action.” *Dillon v. Seattle Deposition Reporters, LLC*, 179 Wn. App. 41, 71, 316 P.3d 1119, *rev. granted*, 180 Wn.2d 1009, ___ P.3d ___ (2014) (quoting *Martinez v. Metabolife Int’l, Inc.*, 113 Cal. App. 4th 181, 187, 6 Cal. Rptr. 3d 494 (2003)) (emphases in original); *see also Davis v. Cox*, ___ Wn. App. ___, 325 P.3d 255, 261 (2014) (“To determine whether a pleaded cause of action falls within the ambit of Washington’s Anti-SLAPP statutes, the trial court must decide whether the claim targets activity involving public participation and petition. To properly do so, the trial court must focus on the principal thrust or gravamen of the claim.”).

Defendants’ counterclaims and third-party claims relate entirely to the fact that TBCOT filed a “complaint” alleging “claims” that Defendants misrepresented historical EBITDA in order to induce TBCOT to purchase the team. *See* CP 115-19. Significantly, Defendants do not identify a single “complaint” that pre-dates the filing of the Complaint. *Id.* The Declaration of Robert J. Schlegel, CP 200-04, does not identify any “complaint” other than the Complaint that TBCOT filed when it initiated this lawsuit. The complaint listed in Mr. Schlegel’s declaration is the same complaint listed in statement of facts contained in the Amended

Defendants’ counterclaims and third-party claims attack protected activity as demonstrated by the same factual allegations underpinning each claim.

Answer. *Compare* CP 115-19 *with* CP 200-04; *see also* CP at 203 (Schlegel Dec. ¶¶ 11-12). And this complaint can only be the Complaint filed by TBCOT in this case, given that Defendants fail to identify the date or any details regarding any other purported “complaints.” For example, Defendants allege that “[w]hen the Team did not make as much money as Third Party Defendants expected, they began to complain that they were misled about the Team’s finances.” CP 117 (Amended Answer ¶ 13). Defendants further allege that “[u]pon information and belief, Third Party Defendants have manufactured their complaints about the Team’s finances and value in order to avoid paying Defendants the earn-out as required by the Purchase Agreement. Third Party Defendants’ claims are part of a scheme orchestrated in order to set up Defendants and avoid paying the earn-out altogether. . . . Third Party Defendants want to use Defendants as scapegoats with their investors, and they made sure when they bought the team that they structured the deal in a way that would allow them the opportunity and means to do just that.” CP 118-19 (Amended Answer ¶¶ 16, 19 (emphases added)). These allegations point only to TBCOT’s filing of the Complaint.

The nature of Defendants’ claims, which include a claim that TBCOT’s fraud-based claims are frivolous, further demonstrates that Defendants are seeking to punish TBCOT—and its members—for filing

this lawsuit against Defendants in the first place. This is precisely the type of conduct that goes to the heart of Washington’s Anti-SLAPP law, which protects a party’s right to “petition for the redress of grievances.” Laws of 2010, ch. 118 § (a); *see also* RCW 4.24.525(2) (prohibiting any claim “that is based on an action involving public participation and petition”). It does not matter whether Defendants assert claims that may be independent claims in some other context where, as here, the gravamen of Defendants’ complaint demonstrates that the claims attack protected activity. To hold otherwise would elevate form over substance, looking only to whether Defendants may have stated a claim as opposed to whether that claim attacks protected activity. The Anti-SLAPP statute requires more.

Finally, Defendants’ attempt to characterize this lawsuit as a “private contractual dispute” must fail. The plain language of the statute demonstrates the fallacy of Defendants’ argument: an action involving public participation includes “any claim, however characterized.” RCW 4.24.525(2)(a). Private contractual disputes are not carved out of the protections of the statute.

As an initial matter, it is well established that “conduct alleged to constitute a breach of contract may also come within the statutory protections for protected speech or petitioning.” *Feldman v. 1100 Park Lane Associates*, 160 Cal. App. 4th 1467, 1483-84, 74 Cal. Rptr. 3d 1, 14

(2008). Courts focus “not on the label of the cause of action, but on . . . [the] *activities* challenged in the cross-complaint.” *Id.* at 1484 (emphasis in original). “[T]he critical consideration is whether the cause of action is *based* on the defendant’s protected free speech or petitioning activity.” *Id.* at 1478 (emphasis in original); *see also Navellier v. Sletten*, 29 Cal. 4th 82, 89, 52 P.3d 703, 709 (2002) (holding that a breach of contract claim was based on prior petitioning activity and finding that the claim fell under the Anti-SLAPP statute).

Defendants’ allegations are similar to the allegations in *Albergo v. Immunosyn Corp.*, 09CV2653 DMS AJB, 2011 WL 197580 (S.D. Cal. Jan. 20, 2011), which attacked conduct the district court held to be protected by California’s similar Anti-SLAPP law. In *Albergo*, Plaintiffs, who were induced to enter into the contracts, filed suit for, among other things, fraud and fraud in the inducement. *Id.* at *1. Defendants filed counterclaims against Plaintiffs for fraud and breach of contract. *Id.* Plaintiffs filed a motion to strike under California’s Anti-SLAPP statute. *Id.* The court held that Defendants’ fraud and breach of contract counterclaims were based on protected activity. *Id.* at *3, 5. As to the fraud claim, the court recognized that the only “false claims” asserted in the counterclaims included “those made ‘to support [Plaintiffs’] efforts to enforce the agreement to purchase . . . stock including, but not limited to,

the following: [Plaintiffs] omitted any mention of the Rescission Agreements they signed, [and Plaintiffs'] false claim that there was no consideration for the [contracts]." *Id.* at *4. The Court reasoned that "it is clear that these allegations concern activities protected under the Anti-SLAPP statute, and Defendants have not offered evidence establishing their probability of prevailing on their fraud counterclaim based upon these allegations." *Id.* Notably, the court found that "even assuming Defendants' fraud counterclaim is in fact based upon the representations contained in the Second Argyll Contracts, as Defendants assert in their opposition . . . such counterclaim is nonetheless subject to the Anti-SLAPP statute." *Id.*

Defendants' reliance on *Davis v. Cox*, __ Wn. App. __, 325 P.3d 255, 264 (2014) is misplaced. In *Davis*, the Court noted that in that case the desired remedy, injunctive relief, was to make the protected activity cease. *Id.* at 264. However, the Court was not suggesting that the Anti-SLAPP statute is limited to injunctive relief or specific performance. Simply because Defendants seek monetary damages does not mean that their claims do not fall under the SLAPP statute. To hold otherwise would permit Defendants to disguise the vexatious nature of their lawsuit through requesting monetary damages rather than injunctive relief. This result would defeat the clear purpose of the anti-SLAPP statute to be "construed

liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts.” Laws of 2010, ch. 118, § 3.

Defendants reliance on *Alaska Structures, Inc. v. Hedlund*, __ Wn. App. __, 323 P.3d 1082 (2014) is similarly misplaced. In *Hedlund*, the defendant violated a confidentiality agreement by posting about the plaintiff’s security measures on a public forum. *Id.* at 1084. Although the defendant argued that his speech was protected activity, the appellate court determined that the speech was not protected because “the legislature did not grant a party immunity from liability for the consequences of speech that is otherwise unlawful or unprotected.” *Id.* at 1085. The defendant’s speech was not protected because “the complaint alleges [the defendant] voluntarily limited his right to speak freely by signing a confidentiality agreement.” *Id.* at 1087. Here, no agreement is present that limits TBCOT’s right to petition the courts.

In sum, the false claims that Defendants allege as the basis for their counterclaims and third-party claims are “manufactured complaints” that are part of a “scheme orchestrated” against Defendants. That “scheme” and those “complaints” necessarily include the filing of this instant lawsuit. Perhaps that is best illustrated by Defendants’ first cause of action, which alleges that TBCOT has filed a “frivolous lawsuit.”

Defendants' counterclaims and third-party claims are "based on" protected conduct (i.e., the filing of a lawsuit to enforce contractual and other rights) and thus subject to Washington's Anti-SLAPP law.

2. Defendants cannot merely strike out portions of the complaint or voluntarily dismiss claims subject to an Anti-SLAPP motion.

As set forth above, the gravamen of Defendants' counterclaims and third-party claims is the filing of TBCOT's complaint. To avoid this conclusion, Defendants maintain that they have voluntarily dismissed their counterclaim for frivolous lawsuit and that the Court can simply strike certain of their factual allegations such that the Anti-SLAPP statute does not apply. *See* Appellants' Opening Brief, Appendix A (striking portions of CP 118) and 19 n.5 (citing CP 190 at n.2). But Defendants cannot simply strike a few sentences from their allegations or dismiss a cause of action to avoid the application of the Anti-SLAPP statute.

The law is well "settled that a plaintiff may not avoid liability for attorney fees and costs by voluntarily dismissing a cause of action to which a SLAPP motion is directed." *Sylmar Air Conditioning v. Pueblo Contracting Servs., Inc.*, 122 Cal. App. 4th 1049, 1054, 18 Cal. Rptr. 3d 882, 885-86 (2004). Defendants' attempts to do so underscore that Defendants' claims, when read as initially alleged, attack protected activity. Defendants argue that the Court can simply strike so-called the

“collateral allusions” to “manufactured . . . complaints” and “orchestrated scheme” in paragraph 16 of the Amended Answer and thereby avoid application of the Anti-SLAPP statute, but Defendants fail to acknowledge that the remainder of their allegations rely on and reference the “manufactured complaints” and “orchestrated schemes.” *See* Appellants’ Opening Brief at 23. For example, Defendants allege in Paragraph 17 that Messrs. Thomsen and Artman “could have required that the Team’s financials be audited prior to the purchase, but they elected not to do so as *part of their scheme* to shift liability for any discrepancies to Defendants.” CP 118 (Amended Answer ¶ 17) (emphasis added); *compare* CP 118 (Amended Answer ¶ 18) (“Third Party Defendants never really ever intended to pay the earn-out.”) *with* CP 118 (Amended Answer ¶ 16) (alleging that they “manufactured their complaints . . . in order to avoid paying Defendants the earn-out”); *see also* CP 119 (Amended Answer ¶ 19) (“Third Party Defendants want to use Defendants as scapegoats with their investors, and they made sure when they bought the Team that they structured the deal in a way that would allow them the opportunity and means to do just that.”).

In short, Defendants’ purported amendments demonstrate that their references to “manufactured complaints” and “orchestrated schemes” are not collateral allusions but rather the factual basis of each of Defendants’

claims. In any event, Defendants cannot simply amend their claims to avoid liability under an Anti-SLAPP statute. To do so would undermine the purpose of the Anti-SLAPP statute:

Allowing a SLAPP plaintiff leave to amend the complaint once the court finds the prima facie showing has been met would completely undermine the statute by providing the pleader a ready escape from [the Anti-SLAPP statute's] quick dismissal remedy. Instead of having to show a probability of success on the merits, the SLAPP plaintiff would be able to go back to the drawing board ***with a second opportunity to disguise the vexatious nature of the suit through more artful pleading.*** This would trigger a second round of pleadings, a fresh motion to strike, and inevitably another request for leave to amend.

Simmons v. Allstate Ins. Co., 92 Cal. App. 4th 1068, 1073, 112 Cal. Rptr. 2d 397, 401 (2001) (emphasis added). “By the time the moving party would be able to dig out of this procedural quagmire, the SLAPP plaintiff will have succeeded in his goal of delay and distraction and running up the costs of his opponent.” *Id.* at 1074.

In short, Defendants’ attempt to rewrite their claims is too little, too late. Too little, because Defendants’ amendments do not remove Defendants’ claims from the scope of the Anti-SLAPP statute (moreover, Defendants have not actually amended their counterclaims or third-party claims; rather, they have alluded to potential amendments only in briefing before this Court and the trial court). And too late, because Defendants

purportedly amended their allegations only after TBCOT and Messrs. Thomsen and Artman filed their special motion to strike under the Anti-SLAPP statute. Allowing Defendants to simply strike out portions of the allegations in their amended complaint would give Defendants an opportunity to disguise the vexatious nature of their suit through more artful pleading. Defendants cannot rewrite their allegations in this way.

3. Third-Party Defendants properly invoked the protections of the Anti-SLAPP statute.

Finally, Messrs. Thomsen and Artman properly invoked the protections of the Anti-SLAPP statute. Defendants take the position that Defendants should not have to pay statutory damages to each of Messrs. Thomsen and Artman in addition to TBCOT. *See* Appellants' Opening Brief at 24-25. This argument must fail.

That Messrs. Thomsen and Artman properly invoked the Anti-SLAPP statute is supported by the statute itself. In enacting the Anti-SLAPP statute in 2010, the Washington legislature amended the definition of a "person" who can bring an Anti-SLAPP motion to include a corporation, a limited liability company, or any other legal entity. RCW 4.24.525(1)(e) ("Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, or any other legal or commercial entity."). The legislature

specifically found that “[t]he costs associated with defending such suits can deter individuals and *entities* from fully exercising their constitutional rights to petition the government.” Laws of 2010, ch. 118, § 1(c) (emphasis added). Nothing in the statute prohibits a corporate party from bringing a special motion to strike. *See Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1111 (W.D. Wash. 2010) (noting that a corporate defendant can bring an Anti-SLAPP statute).

And of course, “[a] corporation can act only through its agents, and when its agents act within the scope of their authority, their actions are the actions of the corporation itself.” *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601, 604 (1989). Thus, to initiate litigation, a plaintiff would *necessarily* have to act through its agents and officers.⁴ Here, those officers include Messrs. Thomsen and Artman. *See* CP 326 (Thomsen Decl. ¶ 2 (noting that Thomsen is the CEO of TBCOT)); CP 357 (Artman Decl. ¶ 2 (noting that Artman is the President of the Tacoma Rainiers)).

Defendants’ allegations conflate the obligations of TBCOT with Mr. Thomsen and Mr. Artman’s actions. For example, as noted above, Defendants allege that “[u]pon information and belief, Third Party

⁴ In at least one case in which a defendant brought a counterclaim against the plaintiff and added the chief executive officer of the plaintiff-company as a third-party defendant, the court did not even address whether the officer could assert protection under the Anti-SLAPP statute. Rather, the court treated the CEO and plaintiff as one and applied the statute to both without conducting a separate analysis. *See Raining Data Corp. v. Barrenechea*, 175 Cal. App. 4th 1363, 1369, 97 Cal. Rptr. 3d 196, 200 (2009).

Defendants have *manufactured their complaints* about the Team's finances and value in order to avoid paying Defendants the earn-out as required by the Purchase Agreement. Third Party Defendants' *claims are part of a scheme orchestrated* in order to set up Defendants an avoid paying the earn-out altogether. . . . Third Party Defendants *want to use Defendants as scapegoats with their investors*, and they made sure when they bought the team that they structured the deal in a way that would allow them the opportunity and means to do just that." CP 118-19 (Amended Answer ¶¶ 16, 19) (emphases added). There can be no question, then, that Defendants' counterclaims and third-party claims relate entirely to the fact that Mr. Thomsen and Mr. Artman engaged in protected activity and filed a complaint on behalf of TBCOT alleging "claims" that Defendants misrepresented historical EBITDA in order to induce TBCOT to purchase the team. *See id.*

Thus, where, as here, each of Defendants' third-party claims attack the conduct of TBCOT and not Messrs. Thomsen and Artman individually, *see* § III.C.1, *infra* (Defendants' third-party claims are based on conduct of TBCOT, not Messrs. Thomsen and Artman individually, and are precluded by the corporate veil), Mr. Thomsen and Mr. Artman can appropriately invoke the protections of the Anti-SLAPP statute. To hold otherwise would again elevate form over substance, permitting

parties to artfully plead around the Anti-SLAPP statute by alleging claims against the corporate plaintiff's officers rather than properly against the corporation. This result would defeat the clear purpose of the Anti-SLAPP statute to be "construed liberally to effectuate its general purpose of protecting participants in public controversies from an abusive use of the courts." Laws of 2010, ch. 118, § 3.

Finally, and to directly address Defendants' argument, because Messrs. Thomsen and Artman properly invoked the Anti-SLAPP statute to dismiss claims against them, the trial court properly awarded them statutory damages. Messrs. Thomsen and Artman are protected from liability by the corporate veil, and Defendants' claims relate to conduct by TBCOT, but Defendants' chose to name Messrs. Thomsen and Artman individually as third-party defendants. Defendants must now live with the consequences of that choice.

C. Defendants Waived Their Arguments and Cannot Establish by Clear and Convincing Evidence a Probability of Prevailing on their Claims

Given that TBCOT, Mr. Thomsen, and Mr. Artman have met their burden under RCW 4.24.525(4)(a), Defendants must establish a probability of prevailing on their claims. Defendants do not dispute that they failed to meet this burden, and Defendants have thus waived their argument that they can establish by clear and convincing evidence the

probability of prevailing on their claims. *See Raining Data Corp.*, 175 Cal. App. 4th at 1372 (noting that the defendant did not attempt to establish the probability of prevailing on the merits for the second prong of the Anti-SLAPP analysis, and “[i]f an appellant fails to raise a point in an appellate brief, we may treat the issue as waived; we do so here.”) Regardless, Defendants cannot establish a probability of prevailing on the merits of their claims for the reasons set forth below.

1. Defendants’ claims against third-party defendants are brought against the wrong defendants.

As an initial matter, Defendants’ third-party claims against Mr. Thomsen and Mr. Artman must fail for the simple reason that Defendants’ claims arise from alleged conduct of *TBCOT* and any alleged liability cannot pierce the corporate veil to Mr. Thomsen and Mr. Artman. *See* RCW 25.15.060 (members of limited liability companies are shielded from liability to the same extent that shareholders of a Washington business corporation would be in analogous circumstances). Here, Defendants’ claims arise from the *TBCOT*’s filing of the lawsuit. CP 118 (Amended Answer ¶ 16). And Defendants’ specific allegations against Mr. Thomsen and Mr. Artman relate to alleged conduct or failure to act by *TBCOT*, not Mr. Thomsen and Mr. Artman—conduct that is addressed in the Purchase Agreement signed by the Defendants and *TBCOT*, *not* by

Mr. Thomsen or Mr. Artman individually. CP 118-19 (Amended Answer ¶¶ 18-19 (alleging that Mr. Thomsen and Mr. Artman are avoiding paying the earn-out, a contractual requirement placed on *TBCOT*; that they are not running *TBCOT* in a manner desired by the Defendants; and that they decreased *TBCOT*'s marketing budget)). Defendants have not alleged—and cannot demonstrate—that (1) the corporate form was used to violate or evade a duty and (2) the corporate veil must be disregarded in order to prevent loss to an innocent party; accordingly, they cannot sustain their claims against Mr. Thomsen and Mr. Artman individually. *See Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 503 (2004); *Meisel v. M & N Modern Hydraulic Press Co.*, 97 Wn.2d 403, 410, 645 P.2d 689 (1982). But even assuming Defendants can sustain their claims against Mr. Thomsen and Mr. Artman individually, those claims fail for the reasons set forth below.

2. Defendants' fail to establish the elements of their fraudulent and negligent misrepresentations claims.

Defendants claim that, as part of a scheme orchestrated to avoid paying an earn-out, Mr. Thomsen and Mr. Artman “manufactured” *TBCOT*'s claims against Defendants, *see* CP 118-19 (Amended Answer ¶¶ 16, 19), and, in order to do so, Mr. Thomsen and Mr. Artman fraudulently and negligently (1) misrepresented *TBCOT*'s intent to pay an

earn-out as set forth in the Purchase Agreement, CP 118 (Amended Answer ¶ 18); (2) misrepresented how TBCOT was going to run the team following the purchase, CP 118-19 (Amended Answer ¶ 18); and (3) misrepresented how TBCOT would establish its marketing budget, CP 119 (Amended Answer ¶ 18). But these claims fail as a matter of law because the alleged misrepresentations do not concern *existing* facts: “Where the fulfillment or satisfaction of the thing represented depends upon a promised performance of a future act, or upon the occurrence of a future event, or upon a particular future use, or future requirements of the representee, then the representation is not of an existing fact.” *Nyquist v. Foster*, 44 Wn.2d 465, 471, 268 P.2d 442, 445 (1954). And a prerequisite of both fraudulent misrepresentation and negligent misrepresentation is existing fact. *See Stiley v. Block*, 130 Wn.2d 486, 505 (1996) (fraud requires the representation of a material existing fact that is false); *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 436, 40 P.3d 1206, 1219 (2002) (a prerequisite to a negligent misrepresentation claim is a false representation of a presently existing fact).

Moreover, Defendants’ allegations are belied by the facts. As an initial matter, it is black-letter law that the parties’ subjective intent is generally irrelevant if courts can determine their intent from the actual

words used in the contract. *See Hearst Commc 'n, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503–04, 115 P.3d 262, 267 (2005) (noting that Washington courts “follow the objective manifestation theory of contracts [and] [u]nder this approach, we attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.”). Defendants allege that Mr. Thomsen and Mr. Artman misrepresented TBCOT’s intent to pay an earn-out as set forth in the Purchase Agreement. But there is no dispute that TBCOT *contractually agreed* to pay Defendants an earn-out equal to a certain percentage of EBITDA as additional consideration for the purchase of the Team. *See* CP 377-80 (Agreement § 1.3(c)) (section entitled “Additional Consideration - EBITDA Earn-Out”). In other words, TBCOT agreed to pay an earn-out pursuant to the terms agreed to by the parties and set forth in the Purchase Agreement. *See id.* Quite simply, Mr. Thomsen and Mr. Artman are not parties to the Purchase Agreement, and TBCOT, not Mr. Thomsen and Mr. Artman, promised to pay the earn-out to Defendants. But regardless, the plain language of the contract controls over any alleged subjective intent of non-parties to the contract regarding payment of the earn-out. *See Hearst*, 154 Wn.2d at 504 (“[w]e do not interpret what was intended to be written but what was written.”).

Likewise, Defendants claim that Mr. Thomsen and Mr. Artman misrepresented how TBCOT was going to run the team following the purchase. But the Purchase Agreement deals with this issue, too. And the express language in the Purchase Agreement between Defendants and TBCOT is susceptible to only one interpretation: TBCOT has the clear and unambiguous contractual right to manage the Rainiers as it sees fit and establishes that TBCOT need not operate the business in a certain way. *See Hearst*, 154 Wn.2d at 503 (upholding summary judgment declaring meaning of contract language as a matter of law because contract language subject to only one reasonable interpretation and noting: “We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.”); *see also Yeats v. Estate of Yeats*, 90 Wn.2d 201, 204 (1978) (“Absent disputed facts, the construction or legal effect of a contract is determined by the court as a matter of law.”). The contract clearly and unambiguously provides that the agreement “shall not restrict [TBCOT’s] business decisions, for example, whether to use an Affiliate or a third party concession provider” CP 377-80 (Agreement § 1.3(c)(ii)(C)). Not only does this language expressly permit TBCOT to run the business as it sees fit, but as further evidence of TBCOT’s business discretion, there is no “best efforts” clause in the contract. *See Oliver v. Flow Int’l Corp.*,

137 Wn. App. 655, 660-61, 155 P.3d 140 (2006) (refusing to inject implied “reasonable efforts” clause into contract); *see also Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356, 360 (1991) (courts will not inject “substantive terms” into a contract). And whatever Defendants now claim that the Third Party Defendants said about the future operation of the team, the contract controls and supersedes any prior alleged agreement. *See* CP 401 (Agreement § 9.2) (“This Agreement . . . constitutes the entire agreement among the Parties with respect to the subject matter hereof and, except as otherwise provided herein, supersedes any prior understandings, agreements, or representations by or among the Parties.”); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 579-80, 998 P.2d 305, 311 (2000) (“The presence of an integration clause strongly supports a conclusion that the parties’ agreement was fully integrated.”) (internal quotations and citation omitted).

Finally, Defendants claim that they “relied on Third Party Defendants’ representations that they would market the Team in order to promote ticket sales, but instead Third Party Defendants reduced the Team’s marketing budget and efforts.” CP 119 (Amended Answer ¶ 19). Not only is this allegation belied by the express language in the contract, which invests business discretion in TBCOT as discussed above, but

further, this allegation reflects a fundamental misunderstanding of the team's financial statements. The apparent reduction in the team's marketing budget reflected in those statements is a result not of any reduction in marketing efforts but of the reduction in the head count in the marketing department by one. *See* CP 323 (Coombe Decl. ¶¶ 8-9) (“The Rainiers spend more on marketing now than when SDL owned the team”). In the first month of the 2012 fiscal year, one of the team's two dedicated marketing personnel decided to take a position with another company. CP 323 (Coombe Decl. ¶ 9). Because the team still had one full-time dedicated marketing person in the marketing department in addition to three other marketing personnel on staff (that were spread between different departments), a decision was made to allocate the job functions associated with employee who left the team between the four people who remained with the team. *Id.* This resulted in a decrease in salary for the marketing department and, significantly, the decrease between the marketing budget in 2011 and 2012 is related only to the reduction in staffing for this department that was absorbed internally between four other staff members. CP 232-24 (Coombe Decl. ¶¶ 9-12).

3. Defendants fail to establish the elements of their conversion and conspiracy claims.

Defendants' claims of conversion and conspiracy against Mr. Thomsen and Mr. Artman are similarly deficient. Washington courts define conversion as "the act of willfully interfering with any chattel, without lawful justification, whereby any person entitled thereto is deprived of the possession of it." *Judkins v. Sadler-MacNeil*, 61 Wn.2d 1, 3, 376 P.2d 837, 838 (1962). Defendants cannot claim conversion in the face of the Purchase Agreement which specifically sets forth not only the computation of the EBITDA earn-out but also any adjustments to and the time of determination of the EBITDA earn-out. *See* CP 377-80 (Agreement § 1.3(c)(ii)-(vi)). Indeed, the Purchase Agreement sets forth a procedure for Defendants to follow if they disagree with TBCOT's earn-out calculation, a procedure which ultimately results in a binding determination of the EBITDA earn-out by the parties' accountants. CP 377-80 (Agreement § 1.3(c)(iv)). Defendants do not—and cannot—allege that TBCOT has failed to account for its calculation of EBITDA and any adjustments and set-offs thereto or that the Defendants were not able to avail themselves of the dispute resolution procedure required by contract if they objected to TBCOT's EBITDA calculation. *See id.* Put simply, there is no conversion because conversion cannot be established when the

conduct allegedly constituting conversion is permitted under a contract or the conversion claim rests on an alleged violation of an obligation imposed by contract. *Judkins v.* 61 Wn.2d at 3 (conversion requires willful interference “without lawful justification”). Moreover, Defendants cannot establish a present possessory right to any EBITDA earn-out; rather, as set forth in the Purchase Agreement, Defendants’ EBITDA earn-out is subject to a calculation to be determined at specific times as well as potential adjustments and set-offs. *See* CP 377-80 (Agreement § 1.3(c)). But a property interest must be a present—not contingent—ownership interest to be subject to a claim of conversion. *Michel v. Melgren*, 70 Wn. App. 373, 376, 853 P.2d 940, 943 (1993) (“A conversion action requires plaintiffs to prove that they have some property interest in the goods allegedly converted.”); *Westview Investments, Ltd. v. U.S. Bank Nat. Ass’n*, 133 Wn. App. 835, 852 (2006) (noting that “there can be no conversion of money unless it was wrongfully received by the party charged with conversion, or unless such party was under obligation to return the specific money to the party claiming it.”); *see also United States v. Bailey*, 208 F. Supp. 2d 1261, 1273 (M.D. Fla. 2003) (“While many courts have extended conversion to cover vested future interests, few, if any, have countenanced conversion actions based upon the mere possibility of future possession.”). And it is clear that Defendants’

ownership interest is contingent on the terms of the Purchase Agreement, and subject to adjustments and set-offs, and thus not subject to a claim of conversion.

As to conspiracy, because Defendants cannot establish their allegations of substantive wrongdoing, the “conspiracy count must likewise fail.” *See Holman v. Coie*, 11 Wn. App. 195, 215-16, 522 P.2d 515, 527 (1974) (“Since we have found plaintiffs failed to produce substantial evidence to support their other allegations, the conspiracy count must likewise fail.”). In other words, evidence of unlawful conduct is required because courts do not punish thought crimes. *See, e.g., State v. Talley*, 122 Wn.2d 192, 206 (1993) (noting that state punishes discriminatory *conduct* not the discriminatory *thought*) (emphasis added).⁵

In short, Defendants cannot demonstrate by clear and convincing evidence *any* likelihood of success on their third-party claims, much less a *probability* of succeeding on the merits of their claims.

4. Defendants’ claims against TBCOT are also deficient.

Defendants’ counterclaims against TBCOT must also fail.

Defendants claim that TBCOT’s fraud and fraud in the inducement claims

⁵ To establish a common law claim for civil conspiracy, the claimant must “prove by clear, cogent, and convincing evidence that (1) two or more people combined to accomplish an unlawful purpose, or combined to accomplish a lawful purpose by unlawful means; and (2) the conspirators entered into an agreement to accomplish the conspiracy.” *All Star Gas, Inc. v. Bechard*, 100 Wn. App. 732, 740, 998 P.2d 367, 372 (2000). “Mere suspicion or commonality of interests is insufficient to prove a conspiracy.” *Id.*

against Defendants are frivolous pursuant to RCW 4.84.185 and that TBCOT breached the implied duty of good faith and fair dealing by “operating the business in a manner that effectively denies any additional earn-out consideration.” CP 120 (Amended Answer ¶¶ 24-29).

Defendants also seek declaratory judgment limiting TBCOT’s remedy to the terms of the Purchase Agreement. CP 119 (Amended Answer ¶¶ 20-23). Defendants cannot demonstrate any probability of success on the merits as to any of these claims.

First, RCW 4.84.185 does not give rise to an independent cause of action, and thus a “counterclaim” for violation of RCW 4.84.185 is improper. *Cf. Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448, 452 (1994) (*Biggs II*) (“[A] CR 11 motion is not a ‘cause of action.’”). Rather, RCW 4.84.185 is parallel to CR 11 and provides statutory grounds for a court to award fees as a *sanction*—not as damages—against frivolous actions. *See, e.g., Berryman v. Metcalf*, 177 Wn. App. 644, 312 P.3d 745, 7620 (2013) (finding that “the trial court can impose appropriate sanctions under CR 11 or RCW 4.84.185” for frivolous actions or defense); *see also Jeckle v. Crotty*, 120 Wn. App. 374, 387, 85 P.3d 931, 938 (2004) (“The decision to award attorney fees as a sanction for a frivolous action is left to the discretion of the trial court”).

An action is frivolous only if it is “advanced without reasonable cause” and “when it cannot be supported by any rational argument on the law or the facts.” RCW 4.84.185; *see also Stiles v. Kearney*, 168 Wn. App. 250, 260 (2012) (“A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.”) (citations omitted). The Washington Supreme Court has held that “[t]he lawsuit . . . in its entirety, must be determined to be frivolous and to be advanced without reasonable cause before an award of attorneys’ fees may be made pursuant to the frivolous lawsuit statute, RCW 4.84.185.” *Biggs v. Vail*, 119 Wn.2d 129, 133, 830 P.2d 350, 352 (1992) (*Biggs I*). Moreover, the legislature intended for the statute to “apply to actions which, *as a whole*, were spite, nuisance, or harassment suits.” *Id.* at 135 (emphasis in original). If any claim in a lawsuit has potential merit, the action may not be deemed frivolous. *Tiger Oil Corp. v. Dep’t of Licensing*, 88 Wn. App. 925, 938 (1997) (affirming denial of RCW 4.84.185 sanctions because at least one claim had potential merit); *see also Jeckle*, 120 Wn. App. at 387 (“Under RCW 4.84.185, a court cannot pick and choose among those aspects of an action that are frivolous and those that are not. . . . The action must be viewed in its entirety and only if it is frivolous as a whole will an award of fees be appropriate.”). Because Defendants have not alleged—and cannot allege—that TBCOT’s lawsuit in its entirety is frivolous, Defendants not

only concede that TBCOT's other claims have "potential merit," but significantly, Defendants' allegations cannot support a claim under RCW 4.84.185 and must fail for that reason alone.

Second, and likewise, Defendants' claim for breach of the implied duty of good faith and fair dealing must fail. As set forth above, this claim is belied by the plain language in the Purchase Agreement itself. Quite simply, the agreement to pay an EBITDA earn-out pursuant to the Purchase Agreement does not "restrict Buyer's business decisions." CP 377-80 (Agreement § 1.3(c)(ii)(C)). Further, the Purchase Agreement does not contain any "best efforts" clause. *See* § C.2, *supra*. Although Washington law recognizes an implied duty of good faith and fair duty, this implied duty arises only in connection with express contract terms agreed to by the parties; a court will not inject substantive terms into a contract. *See Badgett*, 116 Wn.2d at 569. Here, nothing in Purchase Agreement requires TBCOT to operate the business in a specific manner in order to increase and otherwise impact any potential EBITDA earn-out to be paid to Defendants (in fact, the Purchase Agreement expressly says otherwise), and accordingly, no implied duty to do so attaches.

Finally, although Washington permits a party to seek declaratory relief where there is a justiciable controversy, the "declaratory judgment statute may not be invoked where . . . an alleged breach of contract ha[s]

occurred, as the rights of the parties [are] then fixed.” *Jacobsen v. King Cnty. Med. Serv. Corp.*, 23 Wn.2d 324, 327, 160 P.2d 1019, 1021 (1945); *see also Sorensen v. City of Bellingham*, 80 Wn.2d 547, 559, 496 P.2d 512 (1972) (“a plaintiff is not entitled to relief by way of declaratory judgment if, otherwise, he has a completely adequate remedy available to him.”) (citation omitted).⁶ Here, TBCOT has alleged that Defendants have breached the parties’ contract. *See* CP 16-17 (Complaint ¶¶ 77-87). Accordingly, Defendants cannot seek declaratory judgment.

In short, as with their third-party claims, Defendants cannot demonstrate by clear and convincing evidence *any* likelihood of success on their counterclaims, much less a *probability* of succeeding on the merits of counterclaims. Accordingly, all counterclaims and third-party claims should be dismissed pursuant to RCW 4.24.525.

D. The Anti-SLAPP Statute’s Penalties and Fee Award Are Mandatory

“The court shall award to a moving party who prevails, in part or in whole, on a special motion to strike” the moving party’s “[c]osts of litigation and any reasonable attorneys’ fees incurred in connection with” the special motion to strike and “[a]n amount of ten thousand dollars” in

⁶ In any event, TBCOT does not seek any remedy not permitted under the Purchase Agreement, which expressly provides that TBCOT’s damages for Defendants’ fraud are not limited to any limits otherwise imposed by the Purchase Agreement. *See* CP (Agreement § 7.3).

addition to the reasonable attorneys' fees and costs. RCW 4.24.525(6)(a)(i)-(ii). "[A]ll persons who prevail on an Anti-SLAPP motion filed on their behalf are entitled to the statutory damage award." *Akrie v. Grant*, 178 Wn. App. 506, 513, 315 P.3d 567, 571 (2013) (awarding mandatory \$10,000 award to each of five defendants who collectively filed a successful Anti-SLAPP motion dismissing plaintiff's claims against them); *see also* S.B. Rep. on H.B. 2699, 57th Leg., Reg. Sess. (Wash. 2002) ("The award of costs, reasonable attorneys' fees, and expenses can prevent voices from being silenced.").

Defendants did not dispute the reasonableness of the fees awarded. Accordingly, they have waived any arguments related to the trial court's decision on the amount of the fees.

IV. ATTORNEYS' FEES ON APPEAL

Because the Anti-SLAPP statute awards mandatory fees and costs "incurred in connection with each [Anti-SLAPP] motion on which the moving party prevailed," RCW 4.24.525(6), TBCOT is entitled to its fees on appeal if the Court affirms the trial court's decisions. *See Sharbono v. Universal Underwriters Ins. Co.*, 139 Wn. App. 383, 423, 161 P.3d 406 (2007) ("[W]here a prevailing party is entitled to attorney fees below, they are entitled to attorney fees if they prevail on appeal.")

No. ~~71692-1~~
71792-8

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

**THE BASEBALL CLUB OF TACOMA, LLC, a Washington limited
liability company,**

Petitioner,

v.

**SDL BASEBALL PARTNERS, LLC, a Nevada Limited Liability
Company, ROBERT J. SCHLEGEL and ROBERT K. SCHLEGEL,**

Defendants/Third-Party Plaintiffs- Appellants,

and

MIKAL THOMSEN and AARON ARTMAN,

Third-Party Defendants-Respondents.

CERTIFICATE OF SERVICE

Jose A. Lopez (*admitted pro hac vice*)
JLopez@perkinscoie.com
PERKINS COIE LLP
131 South Dearborn Street, Suite 1700
Chicago, IL 60603-5559
Telephone: 312.324.8400
Facsimile: 312.324.9400

Angela R. Jones, WSBA No. 38326
AJones@perkinscoie.com
Carrie M. Hobbs, WSBA No. 45487
CHobbs@perkinscoie.com
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Petitioner
The Baseball Club of Tacoma

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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee of Perkins Coie LLP, over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused true and correct copies of the *ANSWERING BRIEF OF RESPONDENT* to be served on the below-listed attorney(s) of record by the method(s) indicated:

- Email and first-class United States mail, postage prepaid, to the following:

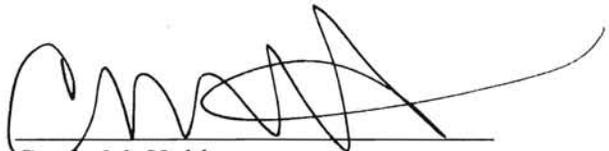
Stephen J. Kennedy
sjk@aterwynne.com
Ater Wynne LLP
601 Union St., Ste. 1501
Seattle, WA 98101-3981

Lawrence J. Friedman (admitted pro hac vice)
LFriedman@fflawoffice.com
Melissa R. Kingston (admitted pro hac vice)
MKingston@fflawoffice.com
Friedman & Feiger, LLP
5301 Spring Valley Road, Suite 200
Dallas, TX 75254

Michael King
king@carneylaw.com
Carney Badley Spellman, P.S.
701 Fifth Avenue, Suite 3600
Seattle, Washington 98104-7010

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: July 30, 2014.


Carrie M. Hobbs