74511-5

NO. 74511-5I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ALLYIS, INC.,

Plaintiff/Appellant,

v.

SIMPLICITY CONSULTING INC.,

Defendant/Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE HOLLIS HILL

BRIEF OF RESPONDENT

SEBRIS BUSTO JAMES

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I. INTRODUCTION

Angry at having lost a long-term employee, Appellants Allyis, Inc. ("Allyis") and Matthew Davis ("Davis"), Allyis' counsel, started a lawsuit against plaintiffs Joseph Schroder and his wife Nicole. To add pressure, and coerce a monetary settlement, they also sued Simplicity Consulting Inc. ("Simplicity"), Joseph Schroder's ("Schroder") new employer. The claims were frivolous and asserted in violation of CR 11.

Through the ensuing course of litigation, Allyis and Davis contemptuously and repeatedly refused to produce any evidence to support Allyis' asserted claims and threatened to further abuse the legal process if Simplicity would not agree to disregard previously entered orders sanctioning Allyis and awarding Simplicity its reasonably incurred fees. When Simplicity refused to capitulate, Allyis attempted to make good on its threat, but the trial court refused to allow Allyis to continue using "litigation blackmail" against Simplicity and dismissed Allyis' entire lawsuit against Simplicity and the Schroders with prejudice. It additionally found that the claims asserted against Simplicity were frivolous and awarded Simplicity its attorney's fees and costs pursuant to RCW 4.84.185 and CR 11. As the discussion below and the record before this Court shows, the trial court did not abuse its discretion in doing so.

In September 2014, Allyis initiated its underlying action against the Schroders and Simplicity. Against Simplicity it asserted four claims based upon alleged non-competition and confidentiality agreements between Allyis and Schroder. Each of the purported "agreements," however, were indisputably contained solely within the Enterprise Web Design ("EWD") Employee Handbook,[1] which included a clear disclaimer that nothing contained therein constituted a contractual agreement. Additionally, Schroder signed the purported "agreements" more than two months after his employment with EWD commenced, and they were not supported by any legal consideration. In addition, Allyis and Simplicity did not even compete in the same industry, and Schroder played no role whatsoever in attempting to recruit any Allyis employees to join Simplicity. Allyis' claims were, therefore, bizarre, off base, and in a word, frivolous.

After Simplicity repeatedly advised Allyis as much, Allyis withdrew its original four claims and asserted a new claim for unjust enrichment. Thereafter, Allyis refused to respond to Simplicity's written discovery. The trial court ordered Allyis to respond and ordered Allyis and Davis to pay sanctions under CR 37. Allyis, however, made no attempt to comply with

[1] Allyis claimed EWD changed its name to Allyis, Inc. but provided no evidence of the circumstances surrounding the alleged change.

the court's order, which resulted in both Allyis and Davis subsequently being held in contempt of court.

Simplicity also sought to depose Allyis' two main witnesses—its Chief Executive Officer and Chief Financial Officer—but Davis and the witnesses failed to appear for the noted depositions. Again, the court ordered Allyis and Davis to pay monetary sanctions for their discovery abuse. Finally, after receiving no discovery from Allyis, Simplicity moved for summary judgment. Allyis chose not to oppose the motion and instead offered to dismiss with prejudice its claims against Simplicty *and* the Schroders if Simplicity would agree to disregard the court's previously ordered sanction awards. If Simplicity did not so agree, Allyis threatened to voluntarily dismiss its unjust enrichment claim without prejudice only to refile the claim later and note up the depositions of Simplicity's clients. By so threatening, Allyis sought to exploit the Civil Rules to avoid the long-past discovery cutoff and its failure to oppose Simplicity's summary judgment motion.[2]

Having seen enough of Allyis' and Davis' litigation tactics, the trial court exercised its discretion by dismissing Allyis' remaining claim against Simplicity, and its claims against the Schroders, *with* prejudice, concluding

[2] Simplicity and/or Davis also likely sought to obtain a different judge, having twice been held in contempt by Judge Hill.

that Davis and Allyis had engaged in "litigation blackmail." Simplicity then moved the court for an award of its attorney's fees under RCW 4.84.185 and/or CR 11 incurred in defense of Allyis' frivolous action. The trial court granted Simplicity's petition, reasonably concluding that none of Allyis' asserted claims had any basis in fact and were filed for an improper purpose based on Davis' and Allyis' misconduct throughout the litigation.

The trial court additionally found that Davis had not performed a reasonable inquiry before filing the claims – or else he would have realized that Allyis had no evidence to produce in discovery – and that he had filed the claims for an improper purpose. Consequently, the court made Davis jointly and severally liable for Simplicity's awarded fees.

Allyis moved for reconsideration of the trial court's order, which the court denied and issued an amended order granting Simplicity's fee petition. In the amended order, the trial court set forth specific factual findings underlying its reasoning for granting Simplicity's petition.

In this appeal, Davis and Allyis do not challenge the trial court's dismissal with prejudice of the claims against Simplicity and the Schroders, implicitly conceding that they were, in fact, frivolous. All that they challenge is the award of attorney fees to Simplicity.

The trial court did not abuse its discretion awarding Simplicity its fees under RCW 4.84.185 and CR 11. The record evidence, as well as

Allyis' and Davis' egregious litigation tactics throughout the case, support a finding that the claims were not well founded in fact or law or advanced for any legitimate or proper purpose. Indeed, where a party refuses to produce any evidence in support of its claims—in repeated defiance of multiple court orders and resulting in contempt of court—the only reasonable conclusions is that it has no evidence to produce. This Court should affirm.

II. RESTATEMENT OF ISSUES

1. Did the trial court abuse its discretion in awarding Simplicity attorney fees and costs under RCW 4.84.185 where Allyis refused to produce any evidence to support its asserted claims despite being ordered to do so by the court and threatened to continue abusing the legal process to elicit a settlement payment from Simplicity? No.

2. Did the trial court abuse its discretion when it ordered CR 11 sanctions against Davis and Allyis where the court reasonably inferred that Davis and Allyis had initiated a frivolous action against Simplicity for the improper purpose of eliciting a settlement payment from Simplicity? No.

III. RESTATEMENT OF THE CASE

A. Schroder's Purported "Agreements" with Allyis Are Unenforceable as a Matter of Law.

EWD[3] hired Joseph Schroder ("Schroder") on May 10, 2002. (Clerk's Papers ("CP") 2) Two and a half months later, Schroder signed several pages of EWD's Employee Handbook entitled "Noncompetition Agreement" and "Confidentiality Agreement." (CP 457-461) Notably, EWD's Employee Handbook in which the purported agreements were contained also contained an express disclaimer that the contents of the handbook "do[] not establish any . . . contract with, employees." (CP 459)

In addition to this unequivocal disclaimer, at no time during the underlying litigation did Allyis produce any evidence that EWD provided Schroder any consideration at the time he signed the handbook documents. Rather, Allyis asserted only that at some vague time "*[a]fter* executing the [handbook]," Schroder was provided access to unspecified confidential information and "repeatedly promoted." (CP 4 (emphasis added)). Allyis, however, never alleged or produced evidence that Schroder's access to confidential information was made contingent on his signing the EWD

[3] Allyis states EWD changed its name to Allyis, Inc. and is the same legal entity as Allyis. Apart from a statement in the Verified Complaint (CP 1), and the Declaration of of Chanbir Mann (CP 450-454) no evidence was produced to show when, or how, the name change occurred. Mann himself states that he "was part of a group that purchased the corporation in a stock purchase in August 2013," so he obviously lacks personal knowledge. *Id.* Allyis blocked Simplicity's attempts to conduct discovery on this point, as discussed below.

Employee Handbook or that it promised any of the alleged promotions to Schroder in exchange for his signing the handbook.[4]

The only "evidence" Allyis ever produced in over 10 months of litigation was the Verified Complaint it filed on September 22, 2014. The statements in that Verified Complaint were based on hearsay, opinion, and were largely inaccurate. When Simplicity attempted to expose those statements for what they were by deposing Allyis' CEO and CFO, both men failed to appear. Even after being held in contempt, subjected to monetary sanctions, and being challenged in Simplicity's Motion for Summary Judgment, Allyis' CEO and CFO failed to step forward and submit a declaration explaining the basis for their asserted claims.[5]

B. Schroder Begins Working for Simplicity after Voluntarily Terminating his Employment with Allyis.

While employed with Allyis, Schroder reached out to Simplicity in April 2014 to express his interest in working for Simplicity. (CP 185) Simplicity interviewed Schroder and offered him an Account Manager position, which Schroder accepted. (CP 186-187) As an Account Manager,

[4] In fact, as described in greater detail below, when Simplicity brought the lack of consideration to Allyis' attention early in the litigation, Allyis responded only that "[u]nder a decade of employment and promotions, the agreement is enforceable" without citing to any legal authority supporting its position. (CP 337)

[5] Because the issue in this appeal is whether Allyis and Davis filed frivolous claims against Simplicity, that they did not make legal arguments or present certain evidence is a matter of fact in this appeal, not a legal argument.

Schroder was given a number of Simplicity accounts and was responsible for managing and growing those accounts. (CP 188-189) He was not responsible for developing new business or recruiting persons to join Simplicity—those of Allyis or otherwise—nor was his compensation linked in any way to recruiting employees.[6] (CP 189-190)

When Schroder began working at Simplicity, he signed an agreement representing that he would not use any confidential or proprietary information of any former employer. (CP 194-204) After receiving a demand letter from Allyis' counsel, Simplicity required Schroder to sign a second document certifying that he was not subject to any restrictive covenants; that he did not possess any of Allyis' confidential or proprietary information; and that he would not utilize any confidential information he was exposed to at Allyis. (CP 194-196, 205-206)

[6] Simplicity's CR 30(b)(6) representative, Annie Gleason, testified that one of Simplicity's clients told Schroder that it needed a worker with specific skills and that Schroder, in turn, referred the client to one of his former colleagues at Allyis whom he believed would be a good fit for the position and whom he knew was looking for a new job as her position at Allyis was scheduled to end. (CP 469-470) There is no evidence, however, that Simplicity hired the employee or that, if hired, she continued performing the same work for the same client that she had at Allyis. (CP 468-470) Notably, despite scheduling the deposition to last "most of the day," Davis questioned Gleason for only 45 minutes before announcing: "That's all my questions. Appreciate it." (CP 191-192)

Notably, Simplicity and Allyis are not competitors.[7] (CP 466) Simplicity has never done business with Allyis or had any contact with Allyis, other than as a result of this lawsuit. (CP 194) Allyis has never conferred any benefit on Simplicity, directly or indirectly, and Simplicity has never accepted any benefit from Allyis. *Id.*

C. Allyis Files its Lawsuit Against Simplicity Asserting Four Frivolous Claims; It Then Withdraws Those Claims And Asserts a Sole Claim for Unjust Enrichment.

On September 22, 2014, Allyis, through Davis, filed its Verified Complaint against Jeremy and Nicole Schroder and Simplicity. It asserted four claims against Simplicity: (1) tortious interference with a contract; (2) violation of the Washington State Consumer Protection Act ("CPA"); (2) injurious falsehood; and (4) misappropriation of trade secrets in violation of the Uniform Trade Secrets Act ("UTSA").[8] (CP 1-11) On numerous occasions, Simplicity attempted to explain to Allyis in detail why Allyis' claims against it had no basis in fact or law and suggested that it focus on pursuing its claims against Simplicity's then-former employer Schroder.

[7] Simplicity is a consulting firm that provides marketing talent to a wide range of successful companies in the technology, retail, insurance, and financial industries, among others. (CP 147) In contrast, Allyis is an Information Technology ("IT") consulting firm that primarily provides software-engineering, content-management, and business-intelligence services to its clients. *Id.*

[8] It asserted these same claims against the Schroders, plus a claim for breach of contract. (CP 1-11)

(*See e.g.*, CP 336-37) Eventually, on March 10, 2015, Allyis withdrew all of its asserted claims except the breach of contract claim asserted against the Schroders but added a new claim for unjust enrichment against Simplicity.[9] (CP 31-37)

D. Allyis Consistently Fails to Comply with Its Discovery Obligations.

1. Allyis Refuses to Respond to Simplicity's Discovery Requests.

On March 16, 2015, Simplicity served its first discovery requests on Allyis. (CP 55-68) Allyis' responses to Simplicity's discovery were due on April 15, 2015.[10] *See id.* On May 4, 2015, after Simplicity had received no discovery responses from Allyis, Jeffrey James ("James"), undersigned counsel for Simplicity, reminded Davis that Allyis' discovery responses were long overdue and asked whether Allyis intended to respond. (CP 84) James also notified Davis that Simplicity planned to move for summary judgment and offered to forego its right to seek fees and costs if Allyis withdrew its solely asserted unjust enrichment claim. *See id.*

On May 11, 2015, nearly four weeks after its discovery responses had been due to Simplicity, Davis responded to James that Allyis was "just

[9] Based on Allyis' dismissal of its original claims, it is reasonable infer that Allyis believed those claims had little or no merit, or at a minimum, were weaker than its subsequently asserted unjust enrichment claim.

[10] *See* CR 33 and CR 34.

finishing up the discovery responses and w[ould] have them to [Simplicity] soon." (CP 82) Despite Davis' assurances, ten days later—on May 21, 2016—Allyis still had not served its discovery responses on Simplicity. (CP 357) That day, James informed Davis that if Allyis did not provide meaningful discovery responses in 10 days, Simplicity would file a motion to compel and seek sanctions. (CP 357)

James had also been attempting to hold a discovery conference with Davis regarding Allyis' outstanding discovery responses since April 14, 2015. (*See e.g.*, CP 52, 79, 82) Finally, on June 22, 2015—68 days after Allyis' responses were due—James successfully reached Davis on his cell phone, during which time Davis cursed at James and stated that he was unwilling to engage in a discovery conference. (CP 88) James followed up with Davis by email, stating that if Allyis did not produce discovery by July 6, 2015, Simplicity would file a motion to compel. *See id.*

2. The Trial Court Orders Allyis to Produce Discovery And To Pay Simplicity's Fees and Costs Incurred in Bringing A Motion to Compel Discovery.

On July 9, 2015, after Allyis failed to produce any discovery responses, Simplicity filed a motion to compel discovery. (CP 44-50) Allyis did not respond to Simplicity's motion and made no attempt to otherwise fulfill its obligation to produce discovery. (CP 90-92) As a result, on July 17, 2015, the trial court granted Simplicity's motion and entered an

order: (1) requiring Allyis to respond fully to Simplicity's discovery requests by July 23; and (2) awarding Simplicity $4,041.50 in reasonable attorney's fees Simplicity incurred in bringing the motion to compel, for which Allyis and Davis were jointly and severally liable and required to pay to Simplicity by July 24.[11] (CP 93-94)

3. Allyis' CEO and CFO Fail to Appear for their Properly Noticed Depositions.

On June 22, 2015, Simplicity served two deposition notices on Allyis. (CP 116) The deposition notices were for Allyis' CEO, Chanbir Mann, and CFO, Rakesh Garg, both of whom had been identified by Allyis as having "knowledge of all aspects of plaintiff's claim." *See id.* The depositions were noticed to take place on July 23, 2015. *See id.*

On July 23, 2015, James, Simplicity's CEO Lisa Hufford, and a court reporter waited for Davis, Mann, and Garg to appear for the noticed depositions. (CP 117) After waiting for roughly half an hour, James called Davis and asked why Davis and his clients were not at their noticed depositions. *See id.* Davis responded that neither deposition was going to take place and promised to contact James again by phone at 2:00 p.m. to provide additional details for Mann's and Garg's failure to appear. *Id.*

[11] The trial court also ordered Allyis to pay interest on the sanction amount at 12% per year. *See id.*

Davis, however, did not contact James at 2:00 p.m. as he had promised. *Id.* He subsequently explained to James in an email that he had "received the [deposition] notice, but because of a vacation and a few other things, it just did not get scheduled. And for that I apologize." (CP 132) Davis did not offer to make the deponents available at another time or offer to pay Simplicity's fees and costs.

Davis would later change his story when arguing to the trial court (and to this Court), claiming that he "simply did not notice the [deposition] notices at the end of [James'] letter" (CP 212), and that Davis and Allyis' representatives had failed to appear for the depositions as a result of a "scheduling error." *See* Appellant's Brief, at 10. In a declaration submitted with the trial court, Davis even "question[ed] the manner in which [the deposition notices] were delivered," insinuating that they were hidden at the end of an ambiguous letter. (CP 212) Davis' representation to the trial court in this regard was odd given that James' letter, to which Davis referred, was just two short paragraphs long, the second of which stated clearly:

> Enclosed are deposition notices for Chanbir Mann and Rakesh Garg. We will proceed with the depositions if we do not receive back the signed Stipulation by July 6, 2015.

(CP 223) Davis had responded immediately to James' letter, calling James' approach "bombastic" and asking whether it had ever worked.[12] (CP 235)

4. Allyis Refuses to Comply with the Court's July 17, 2015 Order Compelling Discovery and Imposing Sanctions.

Allyis failed to comply in any way with the trial court's July 17 order compelling discovery responses and imposing sanctions payable to Simplicity by the July 23 and July 24 court ordered deadlines. (*See*, *e.g.*, CP 118) On August 6, 2015, Simplicity filed a motion to hold Allyis and Davis in contempt of the court's order and to recover its fees associated with the depositions that Davis, Mann and Garg failed to attend. (CP 110-115)

On August 14, 2015, the trial court granted Simplicity's motion, holding Allyis and Davis in contempt of its July 17, 2015 order. (CP 236-237) The trial court also awarded Simplicity $5,932.49 as its reasonable fees and costs incurred in preparing for the depositions for which Davis,

[12] Notably, this was not the only occasion on which Davis attempted to shift the blame for his scheduling errors. For example, after missing the deadline to serve Allyis' initial witness disclosures, Davis blamed his "staff." (CP 173) This was a blatant misrepresentation, however, as Davis had argued elsewhere that was "not yet well enough established to have a support staff." (CP 474)

Mann and Garg failed to appear and in bringing the motion for sanctions, holding Davis and Allyis jointly and severally liable for the award. *Id.*

E. After Simplicity Moves for Summary Judgment Allyis Engages in "Litigation Blackmail."

In late July 2015, James asked Davis for Allyis to voluntarily dismiss its frivolous unjust enrichment claim to allow both parties to avoid the expense of a summary judgment motion. (CP 378-79) Davis did not respond to James' inquiry. (CP 330)

Simplicity moved for summary judgment on August 7, 2015. (CP 146-155) Allyis did not file an opposition to Simplicity's motion, prompting the trial court to cancel oral argument on the motion. (CP 262) Three days before the unopposed motion was to be decided, Davis emailed counsel for the Schroders and Simplicity. (CP 388) In his email, he offered to voluntarily dismiss all of Allyis' claims asserted against both parties with prejudice *if* Simplicity would agree to not collect the awarded sanction amounts previously entered by the trial court in its July 17, 2015 and August 14, 2015 orders. (CP 388; *see also* CP 93-94, 236-237) In the alternative, Davis threatened that Allyis would voluntarily dismiss its solely pending unjust enrichment claim *without* prejudice and "in all probability refile [its claims] when [his] client ha[d] more time to focus on them." *Id.* Davis also threatened that if Simplicity did not agree to waive the court ordered fee

awards, Allyis would subpoena Simplicity's clients at Microsoft for depositions in any future action. *Id.* This threat was particularly galling because Allyis had refused to provide the most basic discovery, including contemptuously ignoring the court's order to produce discovery. (CP 118)

Simplicity did not accept Allyis' blackmail offer and awaited the trial court's ruling on its then pending (and unopposed) summary judgment motion. (CP 331)

F. The Trial Court Dismisses Allyis' Unjust Enrichment Claim With Prejudice Based on Davis' and Allyis' Conduct Throughout the Case.

On September 3, 2015—the day before the trial court was scheduled to decide Simplicity's unopposed summary judgment motion—Allyis sought to put its threatened plan into action by filing a motion for voluntary nonsuit. (CP 261) Recognizing that Allyis was entitled to dismissal despite having missed the deadline to oppose Simplicity's summary judgment motion, Simplicity filed a motion asking the trial court to dismiss Allyis' claims with prejudice. (CP 262-270)

The trial court granted both Allyis' motion for nonsuit and Simplicity's motion for dismissal with prejudice. (CP 316-318) In so doing, it found that Allyis and Davis were in contempt of both of its earlier July 17, 2015 and August 14, 2015 orders sanctioning Allyis and Davis and ordering Allyis to respond to Simplicity's discovery requests. (CP 316)

The trial court also found that Allyis had engaged in "'litigation blackmail' to try to avoid complying with the Court's [prior] order[s]." (CP 317) Accordingly, the Court concluded that the "extraordinary sanction of dismissal [was] appropriate in this case because of Allyis' and Davis' extreme discovery abuse and willful contempt of [the trial] court's orders." (CP 317)

G. The Trial Court Finds that Allyis' Asserted Action Was Frivolous and Advanced for an Improper Purpose.

After the trial court dismissed Allyis' action with prejudice, Simplicity filed a petition seeking to recover its fees and costs (the "Fee Petition") incurred in defending against Allyis' frivolous action. (CP 319-326) It additionally moved for sanctions under CR 11. *Id.* On October 16, 2015, the trial court granted Simplicity's Fee Petition and ordered Allyis and Davis, jointly and severally, to pay all of Simplicity's attorney's fees and costs incurred in defending against Allyis' action in the total amount of $58,758.95. (CP 481) For judicial economy, the trial court included its July 17, 2015 and August 14, 2015 sanction awards in the October 16, 2015 order, ruling that the new order superseded the prior sanction orders. *Id.*

Allyis and Davis moved for reconsideration of the trial court's ruling, arguing that the trial court's order failed to make the necessary findings to support an attorney's-fees award under RCW 4.84.185 and CR

11. (CP 491-493) They also argued that the court used an incorrect legal standard when evaluating Allyis' unjust enrichment claim.[13] (CP 485-490)

The trial court accepted Allyis' invitation to re-consider its prior order and on November 19, 2015, entered an amended order denying Davis' and Allyis' motion for reconsideration and granting Simplicity's petition for fees in costs incurred in opposing Allyis' frivolous action. (CP 518-524) (the "Amended Order"). In the Amended Order, the trial court awarded Simplicity an additional $4,214.50 for fees incurred in responding to Allyis' motion for reconsideration—for a total of award of $62,973.45. It additionally set forth specific factual findings underlying its reasoning for granting Simplicity's request for attorney's fees and costs incurred in defending against Allyis' frivolous action. (CP 518-524)

In the Amended Order, the trial court explicitly considered Allyis and Davis' arguments regarding the asserted unjust enrichment claim and the basis for the trial court's rejection of Allyis' and Davis' position that the claim was not frivolous. (CP 520) The trial court found that Allyis presented no evidence to show that it conferred any benefit on Simplicity and presented no evidence or persuasive argument for why Simplicity was

[13] Simplicity responded in opposition to Allyis' motion at the trial court's request, arguing that the trial court's order awarding Simplicity reasonable attorney's fees and costs under RCW 4.84.185 and CR 11 was properly made. (CP 498-511)

nonetheless unjustly enriched at Allyis' expense. *Id.* The trial court also made clear that Allyis' and Davis' conduct throughout the lawsuit—including their refusal to engage in discovery, their contempt of court and their threat to exploit voluntary dismissal as a weapon to continue harassing Simplicity—was evidence from which the court could infer both that there was no evidence to support the unjust-enrichment claim and that Allyis and Davis filed the claim for an improper purpose. (CP 520-21, 523) Allyis and Davis again moved for reconsideration, this time of the trial Court's Amended Order, which was denied. (CP 525, 541)

Allyis and Davis then appealed to this court. (CP 542-544) Notably, they do not challenge the dismissal of Allyis' claims against Simplicity and the Schroders with prejudice. *See id.* Instead, they assign error only to the trial court's October 16, 2015 ruling granting Simplicity's Fee Petition and subsequent order denying Allyis' motion for reconsideration and Amended Order. (CP 542-544) In other words, there is no dispute that the "extraordinary sanction of dismissal [was] appropriate in this case because of Allyis' and Davis' extreme discovery abuse and willful contempt of [the trial] court's orders." (CP 317) All that remains is whether the trial court abused its discretion in finding that there was no reasonable basis for asserting the underlying claims. As will be shown below, the trial court did not abuse its discretion. The Amended Order should be affirmed.

IV. LEGAL ARGUMENT

A. Standard of Review.

Under RCW 4.84.185, "[i]n any civil action, a court may award attorney fees if the action was 'frivolous and advanced without reasonable cause.'" ***In re Recall Charges Against Lindquist***, 172 Wn.2d 120, 136, 258 P.3d 9 (2011) (quoting RCW 4.84.185). "The purpose of RCW 4.84.185 is to discourage abuse of the legal system by providing for award of expenses and legal fees to any party forced to defend itself against meritless claims asserted for the purposes of harassment, delay, nuisance, or spite." ***Ahmad v. Town of Springdale***, 178 Wn. App. 333, 343, 314 P.3d 729, 733 (2013).

Under CR 11, any party or attorney who signs a pleading certifies that the pleading is: (1) well grounded in fact; (2) warranted by law; and (3) not interposed for any improper purpose "to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances." CR 11(a). The court may impose sanctions, including payment of the reasonable attorney's fees incurred due to the filing upon any party or attorney who signs a pleading in violation of this rule. *Id.* As with RCW 4.84.185, the purpose of sanctions under CR 11 "is to deter baseless filings and to curb abuses of the judicial system." ***Biggs v. Vail***, 124 Wn.2d 193, 197, 876 P.2d 448, 451 (1994).

The Court reviews an award of attorney's fees under RCW 4.84.185 and/or CR 11 for an abuse of discretion.[14] ***State ex rel. Quick-Ruben v. Verharen***, 136 Wn.2d 888, 903, 969 P.2d 64, 70 (1998) ("[T]he appropriate standard of review regarding sanctions under the statute or rule is abuse of discretion."). The trial court does not abuse its discretion unless "its exercise is manifestly unreasonable or based on untenable grounds or reasons." ***Ermine v. Spokane***, 143 Wn.2d 636, 641, 23 P.3d 492, 494-95 (2001). A decision is based "'on untenable grounds'" or made "'for untenable reasons'" if it rests on facts unsupported in the record or if it was reached by applying the wrong legal standard. ***State v. Dixon***, 159 Wn.2d 65, 76, 147 P.3d 991 (2006) (quoting ***State v. Rohrich***, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)). Reversal is not appropriate unless no judge acting

[14] Allyis concedes that abuse of discretion is the appropriate standard of review with regard to sanction awards under RCW 4.84.185 and CR 11, yet it erroneously asserts that this Court should apply a *de novo* standard of review to the trial court's legal conclusions upon which it bases such awards. *See* Appellant's Brief, at 21. Notably, none of the cases upon which Allyis relies for this proposition concern sanction awards under RCW 4.84.185 or CR 11. *See id.* (citing ***Kelley v. Centennial Contractors Enterprises, Inc.***, 169 Wn.2d 381, 386, 236 P.3d 197, 199 (2010) ("An order granting summary judgment is reviewed *de novo*"); ***Gildon v. Simon Prop. Grp., Inc.***, 158 Wn.2d 483, 493, 145 P.3d 1196, 1201 (2006) (legal conclusions in order granting motion to dismiss under CR 12(b)(7) for failure to join an indispensable party under CR 19 are reviewed *de novo*). Instead, it is well established under Washington law that this Court reviews an award of attorney's fees under RCW 4.84.185 and/or CR 11 for an abuse of discretion. *See, e.g.*, ***Verharen,*** 136 Wn.2d at 903.

reasonably would have reached the same conclusion. ***Sofie v. Fibreboard Corp.***, 112 Wn.2d 636, 667, 771 P.2d 711 (1989).

A frivolous action is "one that cannot be supported by any rational argument on the law or the facts." ***Clarke v. Equinox Holdings***, 56 Wn. App. 125, 132, 783 P.2d 82, 86 (1989). An action involving multiple parties may be frivolous as to one party, but not frivolous as to another**.** ***Eller v. E. Sprague Motors & R.V.'s, Inc***., 159 Wn. App. 180, 194, 244 P.3d 447, 454 (2010).

B. The Trial Court Did Not Abuse its Discretion in Awarding Simplicity its Fees and Costs under RCW 4.84.185 and CR 11.

Allyis fails to show that the trial court's decision to award attorney's fees to Simplicity under either RCW 4.84.185 or CR 11 was "manifestly unreasonable or based on untenable grounds or reasons." ***Ermine***, 143 Wn.2d at 641. The record before this Court clearly reflects that Allyis' asserted claims had no basis in fact and were not supported by existing law. The trial court's written findings in support of its ruling—as set forth in the Amended Order—are well supported by record evidence and reasonable inferences therefrom, including Davis' and Allyis' egregious conduct and litigation tactics throughout the case.[15]

[15] *See, e.g.*, CP 554 ("In light of the facts and circumstances of the entire case, the claims asserted by Allyis were frivolous and not advanced with reasonable cause.")

Thus, the trial court did not abuse its discretion in granting Simplicity's Fee Petition and in awarding Simplicity its fees reasonably incurred in defending against Allyis' frivolous claims.

1. Allyis' Asserted Claims Against Simplicity Are Not Supported by Fact or Existing Law.

a. Allyis' Initial Four Claims Asserted in the Verified Complaint.

As described above, Allyis initially asserted four claims against Simplicity for: (1) tortious interference with a contractual relationship; (2) violation of the Washington CPA; (3) injurious falsehood; and (4) violation of the UTSA. (CP 1-11) All of Allyis' asserted claims relied upon the existence of a legally binding noncompetition and/or confidentiality agreement between Allyis and Schroder.[16]

Each of the purported "agreements," however, were contained solely within the EWD Employee Handbook, which clearly disclaimed that anything within the handbook constituted a contract between EWD and any of its employees. (CP 457-461) Further, there is no evidence that Simplicity, through Schroder, solicited Allyis' clients and/or utilized Allyis' confidential propriety information to benefit Simplicity. As an initial matter, Simplicity and Allyis are not competitors. (CP 466) Although

[16] CP 5-6 (alleging that Schroder and Simplicity solicited Allyis' clients and utilized Allyis' confidential information to benefit Simplicity)

Schroder was not responsible for developing new business or recruiting persons to join Simplicity, Simplicity nonetheless required Schroder to sign agreement representing that he did not possess any confidential or proprietary information belonging to Allyis, and that he would not utilize any confidential information he was exposed to while employed by Allyis. (CP 194-196, 205-206) Notably, Allyis neither alleged nor produced any evidence suggesting that Schroder had done so.[17]

Based on the above, James repeatedly advised Davis that the asserted claims were frivolous (*See, e.g.,* CP 334-340) Allyis ultimately withdrew all four claims, implicitly conceding that they lacked merit—as James had repeatedly explained—and were not advanced in good faith, as the trial court reasonably concluded. *See infra.*

b. Allyis' Unjust Enrichment Claim.

To state a claim for unjust enrichment, a party must prove three elements: (1) a benefit conferred upon the defendant by the plaintiff; (2) knowledge by the defendant of the benefit; and (3) acceptance or retention of the benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without payment of its value. ***Young v.***

[17] As discussed below, Davis and Allyis argue that the deposition excerpt is evidence that Schroder engaged in misconduct. They are wrong, but additionally, Allyis did not have that testimony at the time it asserted the original four claims and, thus, either relied on different evidence or no evidence at all.

Young, 164 Wn.2d 477, 484, 191 P.3d 1258 (2007). Though Allyis focuses its argument here on the first element, Allyis failed to produce evidence to support a rational argument that it could meet *any* of the three elements.

i. Washington Law Requires Allyis to Prove that it Conferred a Benefit Upon Simplicity, Either Directly or Indirectly.

While Allyis argues that ***Young*** does not establish that a benefit must be conferred upon the defendant *by the plaintiff*, opinions by the Court of Appeals of the State of Washington have clarified this element in the time since ***Young*** was decided.[18] In ***Nat'l Sur. Corp. v. Immunex Corp.***, 162 Wn. App. 762, 256 P.3d 439 (2011), this Division of the Washington State Court of Appeals cited ***Young*** for the proposition that "[t]o establish a theory of unjust enrichment, a party must show a benefit conferred upon the defendant *by the plaintiff*." ***Immunex Corp.,*** 162 Wn. App. at 778 n.11

[18] Courts in other jurisdictions similarly require a plaintiff conferred benefit. *See, e.g.,* ***Men Women NY Model Mgt., Inc. v. Ford Models, Inc***., 938 N.Y.S.2d 228, 228 (N.Y. Sup. Ct. 2011) (dismissing unjust enrichment claim predicated on hiring competitor's employees because "plaintiff must allege that it conferred a benefit upon defendant"); ***Pixler v. Huff***, 2011 U.S. Dist. LEXIS 133185, at *31 (W.D. Ky. Nov. 16, 2011) ("Kentucky courts have consistently found that the first element [of an unjust enrichment claim] not only requires a benefit be conferred upon the defendant, but also that the plaintiff be the party conferring that benefit."); ***Johnson v. Microsoft Corp***., 106 Ohio St. 3d 278, 286, 834 N.E.2d 791, 799 (Ohio 2005) (affirming dismissal of unjust enrichment claim where lack of evidence of a relationship between plaintiff and defendant was insufficient to state claim for unjust enrichment because plaintiff must demonstrate "a benefit conferred by plaintiff upon a defendant"). Copies of these cited opinions are attached hereto as Appendix A.

(emphasis added). An opinion issued by Division II of the Court of Appeals likewise cites ***Young*** for the proposition that the first element of an unjust enrichment claim is "*a plaintiff conferred* a benefit upon the defendant." ***Austin v. Ettl***, 171 Wn. App. 82, 92, 286 P.3d 85 (2012) (emphasis added). Contrary to Allyis' contention, these are not mere restatements of a dictionary definition.[19] That the plaintiff must confer the unjustly retained benefit is Washington law, as affirmed by ***Immunex Corp.*** and ***Austin***.

Allyis' description of ***Bailie Commc'ns., Ltd. v. Trend Bus. Sys., Inc***., 53 Wn. App. 77, 765 P.2d 339 (1988) is inaccurate. In that case the plaintiff *did* confer a benefit on the defendant and thus ***Bailie*** supports Simplicity here. In ***Bailie,*** the defendant corporation's sole shareholder, Wosepka, fraudulently induced the plaintiffs to cosign a mortgage by promising to pay the plaintiffs $175,000 from the mortgage proceeds. *Id.* at 78-79. Wosepka then "infused" the plaintiff's portion of the proceeds into the defendant corporation, resulting in a finding by the court that the defendant had been unjustly enriched. *Id.* at 79, 85. Thus, the facts are inapposite to Allyis' assertion here where the plaintiffs in ***Bailie*** conferred the benefit upon both Wosepka and the defendant by *cosigning the loan*. That the plaintiffs did not intend to confer the benefit upon either Wosepka

[19] See Appellant's Brief, at 25-26.

or the defendant was not material. It was the plaintiffs' act of cosigning the loan that conferred the benefit. *Id.*

Likewise, Allyis' reliance on ***Keithly v. Intelius Inc.***, 764 F. Supp. 2d 1257 (W.D. Wash. 2011), is misplaced, again because Allyis inaccurately describes the opinion.[20] In ***Intelius***, the defendant—an online information service that provided identity-related services—had provided services to plaintiffs as its customers. *Id.* at 1262-63. After plaintiffs purchased services from the defendant and entered their payment information into defendant's website, the defendant gave them the option to try a free "Family Safety Report" trial membership. *Id.* at 1264-65. A third party, Adaptive Marketing, provided the "Family Safety Report" service, but the defendant did not identify Adaptive Marketing in its offer. *Id.* For each customer who accepted the free trial membership, the defendant received revenue from Adaptive Marketing. *Id.* at 1265. The class action plaintiffs alleged that they unknowingly enrolled in the free trial period, were charged for the "Family Safety Report" when they did not cancel the free trial period, and were then unable to obtain refunds from either the defendant or Adaptive Marketing. *Id.*

[20] *See* Appellant's Brief, at 26-27.

The plaintiffs further alleged that the defendant obtained revenue "*either directly* through the plaintiffs: or indirectly through Adaptive Marketing." *Id.* at 1271 (emphasis added). In either scenario, however, *it was plaintiffs who conferred the benefit by signing up for the free trial membership*, albeit unintentionally. Significantly, the plaintiffs interacted only with the defendant in signing up for the free trial membership, and the defendant benefited as a result. *See id.*, at 1263-65. Contrary to Allyis' assertion, the district court did not hold that the plaintiff need not confer the benefit in order to succeed on an unjust enrichment claim. *See* Appellant's Brief, at 27. Rather, the Court opined, in dictum, that the benefit need not be "directly" conferred by the plaintiff. [21] *Id.* at 1271 n.11.

Regardless, Allyis' argument is a red herring: Allyis presented no evidence in more than 10 months of litigation to show that it conferred *any* benefit upon Simplicity, directly or indirectly.[22] Even in its brief to this

[21] The district court's description of ***Young*** in footnote 14 is confusing at best when it states: "The Supreme Court's own statement of the elements of an unjust enrichment claim does not include reference to 'by the plaintiff.'" *Id.*, at 1272, n. 14 (citing ***Young,*** 164 Wn. 2d at 484-85). The only time the Court in ***Young*** expressly cites the elements of a claim based on unjust enrichment is when it quotes from ***Bailie***. It then goes on to quote "the elements of a contract implied in law," which is a slightly different formulation of elements. *See* ***Young***, 164 Wn. 2d at 484-85. Significantly, this Court has repeatedly cited to the portion of ***Young*** quoting ***Baille*** when reciting the elements of an unjust enrichment claim. *See supra*.

[22] Notably, Simplicity never argued that a plaintiff must directly confer the benefit at issue, and Allyis never produced any evidence that it conferred any benefit on Simplicity, directly or indirectly.

Court, Allyis argues over the correct reading of ***Young*** but fails to point to any evidence in the record whatsoever to support a claim under its theory.

ii. Allyis Failed to Produce any Evidence That Simplicity Had Knowledge of or Retained any Benefit Under Unjust Circumstances.

Allyis also failed to produce any evidence that Simplicity had any knowledge of or retained any benefit under such circumstances that it would be inequitable for the defendant to retain the benefit without payment of its value.[23] *See* ***Young***, 164 Wn.2d at 484. Simplicity was free to hire any person it chose to hire, and there is nothing in the record, nor any law cited by Allyis, suggesting otherwise.

Allyis appears to argue that by the mere fact that a former Allyis employee (Schroder) worked for Simplicity, Simplicity's profits should be shared with Allyis if Simplicity hires former Allyis employees.[24] To suggest that a company cannot conduct its business by employing those who have previously worked for other non-competitor employers is patently frivolous. There is no competent evidence in the record to suggest that Simplicity even hired any Allyis employee who had been solicited by

[23] Simplicity addresses both the second and third element of a successful unjust enrichment claim under ***Young*** simultaneously as they are closely intertwined.

[24] Though Allyis never specifically identified the benefit that it claimed Simplicity unjustly received, that alleged benefit is presumably in the form of profits from Simplicity's contracts at Microsoft. (*See* CP 36) Yet Allyis never produced any evidence to show that it had a non-frivolous basis for claiming that any of Simplicity's profits were unjustly obtained.

Schroder.[25] Contrary to Allyis' assertion, that the Complaint was "verified" by the Mann Declaration provides no evidentiary support whatsoever for Allyis' claims where both the Complaint itself, as well as the Mann Declaration, contain only conclusory allegations, not any competent evidence, and Mann failed to appear for a properly noted deposition where his conclusions would have been exposed as mere speculation. (CP 1-11) Likewise, the deposition citation that Allyis provided does not establish that Simplicity hired the person referred to by Schroeder during his conversation with Gleason, or that Simplicity would have done anything wrong by hiring that person *after her contract ended.*

Based on this complete lack of evidence, as well as the trial court's consideration of the case as a whole, the trial court correctly concluded that Allyis' claim was not supported by facts or existing law and was not advanced in good faith. *See infra.*

2. The Trial Court Did Not Abuse Its Discretion in Awarding Simplicity Fees under RCW 4.84.185.

Under RCW 4.84.185 a court may require a party to pay the prevailing party reasonable attorney's fees and expenses incurred in a frivolous action advanced without reasonable cause, as supported by a trial court's written findings. Here, the trial court did not abuse its discretion in

[25] *See note* 6, *supra.* Further, even if it had, this would not have been unlawful.

finding that Allyis' claims were frivolous and advanced without reasonable cause based on all the facts and circumstances of the case. (CP 554)

Allyis itself describes this action as one "to enforce a noncompete and nonsolicitation agreement." *See* Appellant's Brief, at 1. This statement alone illustrates the frivolity of Allyis' claims against Simplicity where Simplicity was never a party to any such agreement and no enforceable agreement existed between Allyis and Schroder. After Simplicity's counsel explained why the original four claims asserted against Simplicity were frivolous, Allyis withdrew them, thereby conceding their frivolousness.

In their place, however, Allyis asserted an equally frivolous claim for unjust enrichment, which Allyis could not support under Washington law where, *inter alia*, there was no competent evidence to suggest that Allyis conferred a benefit on Simplicity or that Simplicity received any benefit whatsoever from Allyis. Allyis' improper motive for asserting the claim became clear, however, after Allyis: (1) failed to provide any evidence in support of its claim by responding to Simplicity's discovery requests or to appear for properly noticed depositions; (2) refused to dismiss its frivolous claim, thereby forcing Simplicity to incur additional fees in defending against the action by moving for summary judgment, to which Allyis failed to respond; and (3) threatened Simplicity with further abuse of the litigation process to avoid having to pay the court-ordered sanctions. In

sum, as the trial court reasonably found, Allyis and Davis engaged in egregious litigation tactics tantamount to "blackmail" throughout the course of this litigation.

Under these circumstances, it was reasonable to hold Allyis and Davis accountable under RCW 4.84.185 for the fees Simplicity reasonably incurred in defending against Allyis' frivolous claims. The trial court's findings in this regard are substantially supported by the record. The trial court did not abuse its discretion by awarding sanctions under RCW 4.84.185, and this Court should affirm.

3. The Trial Court Did Not Abuse Its Discretion in Awarding Simplicity Fees under CR 11.

In imposing CR 11 sanctions, the trial court "must make a finding that either the claim is not grounded in fact or law and the attorney or party failed to make a reasonable inquiry into the law or facts, or the paper was filed for an improper purpose." ***Biggs v. Vail***, 124 Wn.2d 193, 201 876 P.2d 448, 451 (1994) (emphasis in original). The trial court reasonably concluded that both were the case with regard to Davis and Allyis.

Specifically, the trial court reasonably concluded that none of Allyis' asserted claims were well grounded in fact or law, and that Allyis and Davis would have reached the same conclusion had they made a reasonable inquiry into the claims before asserting them—including a lack

of any enforceable contractual agreement or competent evidence reflecting that Simplicity had done anything unlawful.

Further, the trial court reasonably concluded from the facts and circumstances of the entire case—including Davis' and Allyis' "blackmail" litigation tactics— that Davis and Allyis filed the pleadings in this lawsuit for the improper purpose of harassing Simplicity to obtain a settlement. (CP 553) Though Allyis never produced any evidence to justify its filing any of the five claims, it attempted to extort Simplicity first into paying a settlement and then into foregoing payment of court-ordered sanctions. (CP 388) In the context of Allyis' and Davis' overall misconduct throughout the case, the trial court reasonably inferred that the threat was indicative of Allyis' and Davis' improper motive for bringing Simplicity into the lawsuit.

Under these circumstances, it was reasonable to hold Allyis and Davis accountable under CR 11 for the fees Simplicity reasonably incurred in defending against Allyis' frivolous action. The trial court's findings in this regard are substantially supported by the record. The trial court did not abuse its discretion by awarding sanctions under CR 11, and this Court should affirm.

4. The Trial Court's Findings Are Supported by The Record Evidence and Reasonable Inferences Therefrom.

Allyis assigns error to the trial court's Findings Fact Numbers 4, 7, 8, 9, 10, 22, 23, 24, 25, 26, 27, 28, 29, 31, and 33, asserting that the findings are not supported by substantial record evidence. *See* Appellant's Brief, at 3, 37-42. Allyis is wrong on every count.

a. Amended Order: Finding of Fact No. 4.

Finding Number 4 concludes that Simplicity expressed to Allyis "that its action against Simplicity was frivolous and advanced without reasonable cause on multiple occasions." (CP 519) This finding is supported by multiple email communications between James and Davis in which James explains that Allyis' asserted claims had no merit under well-established Washington law. (CP 328-329, 334-341) The trial court reasonably concluded from these communications, along with Allyis' and Davis' egregious conduct throughout the litigation, that Allyis and Davis knew—or should have known—that the claims were not well grounded in fact or warranted by existing law and, thus, frivolous.[26]

[26] Notably, the evidence additionally reflects that Simplicity and James—unlike Allyis and Davis—sought to minimize the expense to both it and Allyis by informing Allyis early on that it could not prevail on its claims. Simplicity sought sanctions and attorney's fees only after Allyis' repeated abuses of the litigation process forced it to incur substantial fees to defend against Allyis' frivolous claims.

b. Amended Order: Finding of Fact. No. 7.

Finding Number 7 concludes that:

> Allyis' unjust enrichment claim was advanced without reasonable cause because Allyis has had no interaction with Simplicity at all, other than this lawsuit . . . nor did plaintiff present compelling or persuasive argument suggesting that the law as articulated in ***Young*** and its progeny did not apply here.

(CP 520) This finding is supported by evidence attested to by Hufford, Simplicity's CEO, that "Simplicity has never done business with Allyis or had any contact with Allyis other than this lawsuit . . . has never conferred any benefit on Simplicity and Simplicity has never accepted any benefit from Allyis." (CP 194) More importantly, the trial court found that Allyis never reasonably argued, despite the lack of a direct connection between Simplicity and Allyis, that Simplicity had received or retained a benefit that rightfully belonged to Allyis. (CP 550-556)

c. Amended Order: Finding of Fact Nos. 8, 10 and 27.

Finding Number 8 concludes that:

> If Mr. Davis had performed a reasonable inquiry, he would have known that Allyis' claim was not well grounded in fact or warranted by existing law . . . In addition, Mr. Davis' conduct throughout this lawsuit has not been consistent with a claim filed in good faith. The Court therefore infers that Allyis' counsel did not perform a reasonable inquiry before filing Allyis' First Amended Complaint.

(CP 552-553) Finding Numbers 10 and 27 similarly concludes that Davis should have known, or would have discovered through a reasonably inquiry

before asserting Allyis' claims, that the claims were not well grounded in fact or existing law. (CP 521)

These findings reflect the trial court's reasonable inference from Allyis' complete failure to produce *any* competent evidence to support its claims that the claims were not well grounded in fact or by existing law.[27] The trial court understandably—and reasonably—inferred that if Davis had required Allyis to produce evidence of its claims before filing them, he would have learned that Allyis had no such evidence and that its claims were thus not well grounded in fact. Additionally, Allyis and Davis: (1) refused to respond to Simplicity's discovery requests as required by the Civil Rules (*see e.g.,* CP 93-94); (2) were in contempt of the trial court's orders requiring them to respond to Simplicity's discovery requests (*see e.g.,* CP 236-37); (3) forced Simplicity to incur the expense of filing a summary-judgment motion only to voluntarily dismiss their claim on the eve of the hearing (*see e.g*., CP 147, 261); and (4) threatened to withdraw its claim and later refile if Simplicity would not agree to waive the previously entered fee awards.[28] (CP 38)

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[27] *See e.g.*, ***In re Welfare of Kier***, 21 Wn. App. 836, 840, 587 P.2d 592, 594 (1978) ("A fact finder "may draw all inferences fairly deducible from the evidence.").

[28] Shockingly, Davis sought to explain his and Allyis' misconduct throughout the litigation by stating that Allyis would refile its claim "when [Allyis] has more time to focus on them," clearly implying that Allyis simply could not be bothered to participate in the litigation that

Under these circumstances, it was reasonable for the trial court to infer from the facts and circumstances of the case that Davis did not perform a reasonable inquiry before filing Allyis' initial Verified Complaint and, thereafter, its Amended Complaint. It cannot reasonably be disputed that Allyis and Davis refused to produce any evidence whatsoever to justify filing the claims in either the Verified Complaint or the Amended Complaint. The trial court reasonably inferred that they refused to produce any evidence because none existed. Allyis and Davis had multiple opportunities to educate the court about their reasonable inquiry, and they chose not to—or could not—do so.[29]

d. Amended Order: Finding of Fact Nos. 9 and 28.

Finding Number 9 concludes as follows:

> The Court also finds that Allyis' original claims against Simplicity . . . were frivolous and advanced without reasonable cause. Based on Allyis' and Mr. Davis' conduct throughout this lawsuit the Court infers that Allyis filed its claims against Simplicity only because it believed Simplicity would pay it a settlement, not because it reasonably believed that its claims against Simplicity had merit. Allyis has never presented competent evidence to support its filing of these claims.

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it initiated—presumably because the claims lacked any merit whatsoever. *Id.* Consistent with this attitude, Allyis has not even appealed the dismissal of its claims with prejudice.

[29] For example, Allyis and Davis had the opportunity to explain their "reasonable inquiry" in their briefs in response to Simplicity's fee petition as well as in Allyis' motion for reconsideration of the trial court's order granting Simplicity's petition. If the trial court was unaware of what Allyis' and Davis' reasonably inquiry entailed, it was because Allyis and Davis did not inform the court.

(CP 553). Finding Number 28 similarly concludes that "Allyis and Mr. Davis filed [its claims] . . .for the improper purpose of bringing, and keeping, Simplicity's presumably deep pockets into the litigation." (CP 523)

Notably, Allyis concedes that the findings are accurate with regard to its failure to provide competent evidence supporting its claims, yet oddly asserts that "[it] has never had a reason to present that evidence." *See* Appellant's Brief, at 40. That Allyis filed a Complaint against Simplicity asserting legal claims based on a legally unenforceable non-competition "agreement" between EWD and Schroder in and of itself provides a "reason" for Allyis to present evidence in support of its claims. Instead, it admits it has never done so, underscoring the reasonableness of the trial court's conclusion that those claims were frivolous.

Additionally, Allyis' and Davis' misconduct is undisputed, which gave rise to orders holding them in contempt of court and the trial court's finding that they had engaged in "litigation blackmail." *See supra.* Based on this cumulative misconduct, the trial court reasonably inferred that Allyis and Davis brought its action against Simplicity not because they believed that Allyis had been legally harmed by Simplicity but because they intended to extort a settlement agreement from Simplicity's "deep pockets." Litigants rarely explicitly state their intent to extort a settlement, but given

Davis' and Allyis' behavior and threatened action here, it was reasonable for the court to infer that this was their precise intention.[30]

f. Amended Order: Finding of Fact No. 22.

Finding Number 22 concludes that, "[i]n light of the facts and circumstances of the entire case, the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW 4.84.185." (CP 522) In this finding, the trial court relies on the extreme pattern of misconduct by Allyis and Davis throughout this lawsuit, including Allyis' refusal to respond to Simplicity's discovery requests by producing evidence in support of its claims, for which the trial court sanctioned Davis and Allyis and held them in contempt of court. (*See, e.g.*, CP 93-94, 236-37)

g. Amended Order: Finding of Fact Nos. 23 and 24.

Finding Number 23 concludes that "[t]he four claims against Simplicity in the Verified Complaint were not well grounded in fact." (CP 522) Relatedly, finding Number 24 concludes that "[t]he four claims against Simplicity . . . were not warranted by existing law, nor did Allyis

[30] In contrast, it is abundantly clear that their intention was *not* to engage in discovery, obey the trial court's orders or contest Simplicity's summary-judgment motion on the merits.

present evidence or argument suggesting that it was attempting in good faith to modify existing law."

As with Finding Number 9 (described above), Allyis concedes that it presented no competent evidence whatsoever to support the filing of its claims. *See* Appellant's Brief, at 40. Rather than doing so, Allyis withdrew all four claims, giving rise to the reasonable inference that they were frivolous and improperly asserted. It is axiomatic that, without sufficient facts to support a legal claim, there is no basis in law for its assertion.

i. Amended Order: Finding of Fact Nos. 25 and 26.

Finding Number 25 concludes that "Allyis' unjust enrichment claim against Simplicity pled in its First Amended Complaint was not well grounded in fact." (CP 555) Relatedly, Finding Number 26 relatedly concludes that: "Allyis' unjust enrichment claim against Simplicity was not warranted by existing law, nor did Allyis present evidence or argument suggesting it was attempting in good faith to modify existing law." (CP 523)

It cannot be disputed that Allyis and Davis never produced any competent evidence to support their filing of the unjust-enrichment claim. Indeed, they disregarded their discovery obligations under the Civil Rules, as well as court orders requiring them to comply with such obligations, and never produced any evidence that, *inter alia,* Allyis conferred any benefit

on Simplicity, as is required for a successful unjust enrichment claim under Washington law.[31] *See supra.* The trial court correctly found that Allyis did not argue for the *modification* of existing law and, instead, relied upon a *misinterpretation* of existing law under ***Young*** and its progeny. (*See* generally, CP 425-434, 550-556). Where there is no evidence to support an unjust enrichment claim under well-established legal standards, it is reasonable to conclude—as the trial court concluded here—that the claim is not warranted by existing law.

m. Amended Order: Finding of Fact No. 29.

Finding Number 29 concludes that "Allyis and Mr. Davis violated CR 11 by pursuing the claims against Simplicity."[32] (CP 523) This is a conclusion of law is well supported by the substantial evidence from which the trial court reasonably inferred that Allyis' and Davis' motivation for initiating the underlying action against Simplicity was not advanced for a reasonable cause. *See supra.*

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[31] Allyis and Davis appear to argue that because they never produced any evidence whatsoever in support of their claim, the trial court was not reasonably able to find that their claims were not well grounded in fact. *See* Respondent's Brief, at 41. Allyis' and Davis' approach would allow plaintiffs to file frivolous claims, hoping to extort a quick settlement, and then avoid the consequences of their actions by simply refusing to produce any evidence to support their claims. Such a blatant abuse of the litigation process should not allow litigants and their attorneys—including Allyis and Davis—to escape liability.

[32] Any person who signs a pleading is bound by the requirements of CR 11. Here, both Allyis (through its agent Rakesh Garg), and Davis signed the Verified Complaint, thus initiating this lawsuit against Simplicity. (CP 1-11)

n. Amended Order: Finding of Fact Nos. 31 and 33.

Finding Number 31 concludes that "[t]here is evidence and reasonable inference from the evidence to justify the Court's October 16, 2015 Order awarding fees and costs to Simplicity." (CP 523) Relatedly, Finding Number 33 concludes:

> Based on Allyis' and its counsel's conduct throughout this litigation, including its filing of frivolous claims and its abuse of the legal process, the Court's October 16, 2015 Order did substantial justice in compensating Simplicity for having to defend a frivolous action and in discouraging future frivolous actions.

(CP 52)

Each finding is a conclusion of law under CR 59(a)(7), upon which Allyis' and Davis' relied in their motion for reconsideration.[33] (CR 413-419, 498-511) Despite the disrespectful attack throughout Allyis' opening brief on Judge Hollis Hill, the trial court judge presiding over this matter below who issued all the rulings at issue on this appeal, imposing sanctions is well within the trial court's discretion. Judge Hill did not exercise this discretion lightly, but did so after witnessing Allyis' and Davis' manipulation and abuse the litigation throughout the underlying case. Based on this conduct, the trial court rightly and reasonably concluded that

[33] The same evidence that supports the trial court's award of fees and costs to Simplicity supports this finding and conclusion that Allyis and Davis were not entitled to reconsideration under CR 59(a)(7). *See id.*

awarding additional sanctions against Allyis and Davis was the only way to effect substantial justice.

C. Simplicity Should be Awarded its Fees Incurred in Responding to Allyis' Appeal.

Pursuant to RAP 18.1(a) and RAP 18.9(a), Simplicity requests an award of the attorney's fees incurred in this appeal. Under RAP 18.1(a), a party may seek the recovery of attorney fees and expenses on appeal where applicable law grants them the right to do so. ***State v. Mankin***, 158 Wn. App. 111, 125, 241 P.3d 421 (2010). "Under RAP 18.9(a), the appellate court may award a respondent attorney fees when a petitioner files a frivolous appeal or files an appeal merely to delay the outcome of underlying proceedings." ***Skinner v. Holgate***, 141 Wn. App. 840, 858, 173 P.3d 300 (2007). A party need not recover its entire claim to be considered the prevailing party for purposes of awarding attorney's fees. ***Silverdale Hotel Assocs. v. Lomas & Nettleton Co***., 36 Wn. App. 762, 677 P.2d 773, *rev. denied*, 101 Wn.2d 1021 (1984).

The trial court's Amended Order expressly provides that: "Simplicity shall be entitled to an award of attorney fees and costs incurred in collecting payment from Allyis and Davis." (CP 556) Thus, an award of Simplicity's fees and costs incurred in this appeal is appropriate under RAP 18.1(1) where granted by applicable court order and where Simplicity

has incurred fees in this appeal as a necessary component in its efforts to collect the $62,973.45 fee award from Allyis. *See id.*

Additionally, as with its underlying action against Simplicity, Allyis' appeal "presents no debatable issues or legitimate arguments for an extension of the law and is frivolous." *See* ***Westar Funding, Inc. v. Sorrels***, 157 Wn. App. 777, 787, 239 P.3d 1109 (2010). Thus, an award of Simplicity's fees and costs incurred in this appeal is appropriate under RAP 18.9(a). *See* ***Sorrels***, 157 Wn. App. at 787 (award of fees and costs under RAP 18.9(a) appropriate where appellant present no debatable issues or viable legal arguments).

D. The Court Should Remand This Case if it Reverses Any Portion Of the Trial Court's Order.

Allyis' opening brief is fraught with disrespect for the trial court and Judge Hill individually, which this Court should disregard. There exists no evidence whatsoever that Judge Hill would be unable to fairly make factual findings and legal conclusions on remand. A judge is presumed to perform her functions without bias or prejudice. ***Jones v. Halvorson-Berg***, 69 Wn. App. 117, 127, 847 P.2d 945, 951 (1993). It is Allyis' burden to overcome that presumption by providing specific facts establishing bias. ***In re Pers. Restraint of Davis***, 152 Wn.2d 647, 692, 101 P.3d 1, 26 (2004). Judicial rulings alone almost never constitute a valid basis for finding a trial judge

is biased. ***Liteky v. United States***, 510 U.S. 540, 555 (1994). With no evidence that the trial court is biased against Allyis or Davis, this Court should not allow Davis' insinuations to prevent the case from being remanded if this Court determines further factual development is needed.

E. The Trial Court's Prior Sanction Orders Should be Upheld in Any Event.

Allyis seeks to have its proverbial cake and eat it too by asking this Court to overturn the Amended Order yet simultaneously asserting that once overturned, the Amended Order will continue supersede the trial court's prior fee awards.[34] This notion is offensive. If this Court were to overturn the Amended Order, justice requires that it reinstate the trial court's prior fee awards included in the Amended Order for judicial economy. (CP 523-524)

V. CONCLUSION

The trial court acted well within its discretion in concluding from the facts and circumstances of the entire case—including Allyis' and Davis' egregious "litigation blackmail" tactics—that the claims asserted by Allyis were frivolous and not advanced with reasonable cause in violation of RCW 4.84.185 and CR 11 and awarding Simplicity its fees in defendant against the action. This Court should affirm and award fees on appeal to Simplicity.

[34] *See* Appellant's Brief, at 43.

Dated this 1st day of July, 2016.

SEBRIS BUSTO JAMES

By: _____

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CERTIFICATE OF SERVICE

I, Holly Holman, certify under penalty of perjury under the laws of the United States and of the State of Washington that on July 1, 2016, I caused to be served the document to which this is attached to the parties listed below in the manner shown next to their names:

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/s/ Holly Holman
Holly Holman

Appendix A

JOHNSON, APPELLANT, v.MICROSOFT CORPORATION, APPELLEE.

No. 2004-0304

SUPREME COURT OF OHIO

106 Ohio St. 3d 278*; *2005-Ohio-4985*; *834 N.E.2d 791*; *2005 Ohio LEXIS 2088*; *2005-2 Trade Cas. (CCH) P74,954

February 15, 2005, Submitted
October 5, 2005, Decided

PRIOR HISTORY: APPEAL from the Court of Appeals for Hamilton County, No. C-020564, *155 Ohio App.3d 626, 2003 Ohio 7153, 802 N.E.2d 712*.
Johnson v. Microsoft Corp., 155 Ohio App. 3d 626, 2003 Ohio 7153, 802 N.E.2d 712, 2003 Ohio App. LEXIS 6470 (Ohio Ct. App., Hamilton County, 2003)

DISPOSITION: Judgment affirmed.

HEADNOTES

Antitrust law -- Ohio Valentine Act, R.C. Chapter 1331 -- Indirect purchaser may not file Valentine Act claim for violations of antitrust law -- Federal law applicable to Ohio antitrust actions -- Ohio Consumer Sales Practices Act, R.C. Chapter 1345, not applicable to actions alleging monopolistic or anticompetitive practices -- Third-party purchaser has no claim for restitution when he or she has not engaged in any transaction with defendant.

SYLLABUS

[*279] [***793] **SYLLABUS OF THE COURT**

Consistent with long-standing Ohio jurisprudence in following federal law regarding antitrust cases, an indirect purchaser of goods may not file a Valentine Act claim for violations of Ohio antitrust law. (*Illinois Brick v. Illinois (1977), 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707*, followed.)

COUNSEL: Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Paul M. De Marco, and Robert Heuck II; Barrett & Weber, L.P.A., and Michael R. Barrett; Markovits & Greiwe Co., L.P.A., and W.B. Markovits, for appellant.

Dinsmore & Shohl, L.L.P., Gregory Harrison, and John Luken; Sullivan & Cromwell, L.L.P., David P. Tulchin, and Richard C. Pepperman II, for appellee.

Bricker & Eckler, L.L.P., Kurtis A. Tunnell, Edward A. Matto, and Anne Marie Sferra; Taft, Stettinius & Hollister, L.L.P., R. Joseph Parker, William J. Seitz, and Jeanne M. Bruns, urging affirmance for amici curiae Ohio Manufacturers' Association, Ohio Chapter of National Federation of Independent Business, Ohio Chemistry Technology Council, and Ohio Chamber of Commerce.

Jim Petro, Attorney General, Douglas R. Cole, State Solicitor, Stephen P. Carney, Senior Deputy Solicitor, and Jennifer L. Pratt, Assistant Attorney General, urging reversal for amicus curiae Attorney General of Ohio.

Weinstein, Kitchenoff, Scarlato, Karon & Goldman Ltd. and Daniel R. Karon, urging reversal for amici curiae National Consumers League, Consumer Action, and Organization for Competitive Markets.

Norman Hawker and Albert A. Foer; Benesch, Friedlander, Coplan & Aronoff, L.L.P., and Mark D. Tucker, urging reversal for amicus curiae American Antitrust Institute.

JUDGES: O'DONNELL, J. RESNICK, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur. MOYER, C.J., and BRYANT, J., dissent. PEGGY BRYANT, J., of the Tenth Appellate District, sitting for PFEIFER, J.

OPINION BY: O'DONNELL

OPINION

O'DONNELL, J.

[**P1] The principal issue for our consideration on this appeal concerns whether plaintiff-appellant, Maria Johnson, who purchased a computer from Gateway, Inc., containing a Microsoft Windows 98 operating system, may file a class action lawsuit against Microsoft Corporation for monopolistic pricing of its software in violation of the Ohio Valentine Act. After careful consideration, we have concluded that Johnson, as an indirect purchaser of Microsoft's operating system, may not assert a Valentine Act claim for alleged violations of state antitrust law.

Factual Background and Procedural History

[**P2] The record before us reveals that in April 1999, Maria Johnson purchased a computer from Gateway, Inc., a retailer, with a preinstalled Microsoft Windows 98 operating system. Microsoft develops and licenses operating systems, which allow the components of a personal computer to function with each other and to execute other software applications. It then distributes these operating systems to retailers such as IBM, Gateway, and Dell, where the software is installed and then sold with the computers to consumers.

[**P3] On May 25, 2000, Johnson filed an amended class action lawsuit in Hamilton County Common Pleas Court, alleging that Microsoft violated the Ohio Valentine Act, Ohio common law, and the Ohio Consumer Sales Practices Act ("CSPA") by engaging in monopolistic pricing practices with respect to its operating systems. Microsoft moved to dismiss the complaint, asserting [***794] that Johnson, as an indirect purchaser of Microsoft's operating system, could not state a claim, and the trial court granted that motion.

[**P4] [*280] The court of appeals affirmed the trial court's dismissal, concluding that Ohio follows federal antitrust law, and because *Illinois Brick Co. v. Illinois (1977), 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707*, prohibits indirect purchasers from bringing federal antitrust actions, Johnson could not assert a Valentine Act claim against Microsoft. In addition, the court held that Johnson lacked standing to bring any common-law restitution or unjust-enrichment claims because she never conferred any direct benefit upon Microsoft. And it ruled that Johnson could not maintain a CSPA claim based on monopolistic pricing practices because the Valentine Act, not the Consumer Sales Practices Act, provides the exclusive remedy for such conduct.

[**P5] The cause is now before this court upon the acceptance of a discretionary appeal.

Standard of Review

[**P6] When reviewing an order dismissing a complaint for failure to state a claim for relief, an appellate court must accept the material allegations of the complaint as true and make all reasonable inferences in favor of the plaintiff. *Maitland v. Ford Motor Co., 103 Ohio St.3d 463, 2004 Ohio 5717, 816 N.E.2d 1061, P11*. For the moving defendant to prevail, it must appear from the face of the complaint that the plaintiff can prove no set of facts that would justify a court in granting relief. *Vail v. Plain Dealer Publishing Co. (1995), 72 Ohio St.3d 279, 280, 1995 Ohio 187, 649 N.E.2d 182*; *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs. (1992), 65 Ohio St.3d 545, 548, 1992 Ohio 73, 605 N.E.2d 378*. Therefore, we review the applicable law for each cause of action before us to determine whether the facts Johnson alleges in her complaint entitle her to relief. *Maitland, 103 Ohio St.3d 463, 2004 Ohio 5717, 816 N.E.2d 1061, P12*.

The Valentine Act

[**P7] Johnson argues that the Valentine Act, *R.C. 1331.01 et seq.*, permits an indirect purchaser to maintain an antitrust claim in Ohio and that even if the Act bars such a claim, she became a direct purchaser by entering into an end-user licensing agreement with Microsoft. Microsoft argues that since Ohio follows federal antitrust law, and since *Illinois Brick, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707*, prohibits indirect purchasers from asserting federal antitrust claims, Johnson--who never purchased any product directly from Microsoft--should not be able to maintain an Ohio Valentine Act claim. In addition, Microsoft urges that a consumer does not become a direct purchaser under the *Illinois* Brick rule by executing a software licensing agreement because the immediate economic transaction constituting the purchase occurs between the consumer and the retailer--in this case, between Johnson and Gateway, and not between Johnson and Microsoft.

[*281] *A. Indirect Purchaser*

[**P8] Regarding the issue of whether the Valentine Act allows indirect purchasers to maintain antitrust claims in Ohio, we recognize that the Ohio General Assembly patterned Ohio's antitrust provisions in accordance with federal antitrust provisions. Compare and contrast, for example, *R.C. 1331.08*, which governs the status of those who may bring a state-law antitrust action, with Section 4 of the Clayton Act, codified at *Section 15, Title 15, U.S.Code*. [1] [***795] Due to the similarity of these provisions, Ohio has long followed federal law in interpreting the Valentine Act. See *C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp. (1980), 63 Ohio St.2d 201,*

204, 17 O.O.3d 124, 407 N.E.2d 507, where we considered the application of *R.C. 1331.01 to 1331.14* in connection with a liquor-permit dispute and held that "[t]hese statutes, known as the Valentine Act, were patterned after the Sherman Antitrust Act, and as a consequence this court has interpreted the statutory language in light of federal judicial construction" of the federal antitrust statutes. Accordingly, we will review the status of federal law with respect to who may properly assert an antitrust action.

1 Pa [**Pa] *R.C. 1331.08* provides:

Pb "In addition to the civil and criminal penalties provided in *sections 1331.01 to 1331.14 of the Revised Code*, the person injured in the person's business or property by another person by reason of anything forbidden or declared to be unlawful in those sections, may sue therefor in any court having jurisdiction and venue thereof, without respect to the amount in controversy, and recover treble the damages sustained by the person and the person's costs of suit."

Pc [**Pc] Section 4 of the Clayton Act, found at *Section 15, Title 15, U.S.Code*, provides:

Pd"(a) * * * [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[**P9] The United States Supreme Court has interpreted federal antitrust statutes as prohibiting an indirect purchaser of goods or services from bringing a private action against a seller engaged in allegedly monopolistic practices in the sale of those goods or services. See *Illinois Brick, 431 U.S. at 746-747, 97 S.Ct. 2061, 52 L.Ed.2d 707*. In that case, the state of Illinois and 700 local government entities sued several concrete-block manufacturers for price fixing--a practice prohibited by Section 1 of the Sherman Act, codified at *Section 1, Title 15, U.S.Code*, and for which a remedy is provided in Section 4 of the Clayton Act, *Section 15, Title 15, U.S.Code*. Although they did not directly purchase the concrete blocks from the manufacturers, the governmental entities alleged that the manufacturers passed on the cost of the overcharge to indirect purchasers such as themselves. The Supreme Court concluded that only the overcharged direct purchasers, not others in the chain of distribution, are considered injured parties under the Clayton Act, regardless of any amount those direct purchasers [*282] may have passed on to their customers. Accordingly, the court held that only direct purchasers may assert federal antitrust claims. *Illinois Brick, 431 U.S. at 729, 97 S.Ct. 2061, 52 L.Ed.2d 707*.

[**P10] In reaching its decision, the court relied on its decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp. (1968), 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231*. There, Hanover Shoe, the retailer, asserted an antitrust claim against United Shoe Machinery Corporation, the manufacturer. United Shoe Machinery claimed that because Hanover Shoe passed on overcharges to its ultimate consumers, Hanover Shoe itself suffered no injuries from the allegedly monopolistic pricing practice. The court rejected United Shoe Machinery's defense, holding that the right to assert the claim belonged to Hanover Shoe, the retailer who paid the overcharge, regardless of whether Hanover Shoe passed the cost of the overcharge to its customers. The court's position in *Hanover Shoe* is consistent with its holding in *Illinois Brick* because in both cases the [***796] court determined that the right to assert a federal antitrust claim belonged to the injured party--the retailer who contracted directly with the manufacturer and paid the overcharge.

[**P11] Our research indicates that courts in at least 15 states have incorporated *Illinois* Brick's direct-purchaser requirement into their antitrust decisions either by relying on statutes directing courts to follow federal case law or by adopting the rationale of the *Illinois Brick* decision. [2] By way of contrast, some 18 states [*283] and the District of Columbia have enacted statutes explicitly rejecting *Illinois* Brick and permitting indirect purchasers to bring state-law antitrust actions. [3]

2 *See, e.g., Vacco v. Microsoft Corp. (Conn.2002), 260 Conn. 59, 793 A.2d 1048* (*Conn.Gen.Stat. 35-44b*: "It is the intent of the General Assembly that in construing sections 35-24 to 35-46, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes"); *Minuteman, LLC v. Microsoft Corp. (N.H.2002), 147 N.H. 634, 637, 795 A.2d 833* ("By including [N.H.Rev.Stat.Ann.] 356:14 in the statute, the legislature expressly encouraged a uniform construction with federal antitrust law"); *Siena v. Microsoft Corp. (R.I.2002), 796 A.2d 461* (Rhode Island's Antitrust Act, *R.I.Gen.Laws 6-36-2(b)*: "This chapter shall be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable"); *O'Connell v. Microsoft Corp. (Mass.Super.2001), 13 Mass.L.Rptr. 435* (*Mass.Gen.Laws Ann. Ch. 93, Section 1*: The Massachusetts Antitrust Act "shall

be construed in harmony with judicial interpretations of comparable federal antitrust statutes insofar as practicable"); *Abbott Laboratories, Inc. v. Segura (Tex.1995), 907 S.W.2d 503, 38 Tex. Sup. Ct. J. 961* (*Tex.Bus. & Com.Code 15.04*: "The provisions of this Act shall be construed to accomplish this purpose [to promote competition] and shall be construed in harmony with federal judicial interpretations of comparable federal antitrust statutes to the extent consistent with" that purpose); *Davidson v. Microsoft Corp. (2002), 143 Md.App. 43, 792 A.2d 336* (Md.Com. Law Code Ann. 11-202(a)(2): "courts [are to] be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters"); *Pomerantz v. Microsoft Corp. (Colo.App.2002), 50 P.3d 929* (*Colo.Rev.Stat. 6-4-119*: "It is the intent of the general assembly that, in construing this article, the courts shall use as a guide interpretations given by the federal courts to comparable federal antitrust laws"); *Major v. Microsoft Corp. (Okla.Civ.App.2002), 2002 OK CIV APP 120, 60 P.3d 511* (*79 Okla.Stat.Ann. 212*: "The provisions of this act shall be interpreted in a manner consistent with Federal Antitrust Law * * * and the case law applicable thereto"); *Duvall v. Silvers, Asher, Sher & McLaren, M.D.'s, Neurology, P.C. (Mo.App.1999), 998 S.W.2d 821, 824, 826-827* (*Mo.Rev.Stat. 416.141*: Missouri's antitrust statutes "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes"); *Daraee v. Microsoft Corp*. (June 27, 2000), Or.Cir. No. 0004 03311; *In re Wiring Device Antitrust Litigation (D.C.N.Y.1980), 498 F.Supp. 79, 86-88* (South Carolina requires interpretation consistent with federal precedent); and *Blewett v. Abbott Laboratories, Inc. (Wash. App.1997), 86 Wn. App. 782, 938 P.2d 842, 846* (Wash.Rev.Code Ann. 19.86.920: "It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts").

Pb [**Pb] See, also, *Berghausen v. Microsoft Corp. (Ind.App.2002), 765 N.E.2d 592, 594*; *Arnold v. Microsoft Corp. (Nov. 21, 2001), Ky. App. No. 2000-CA-002144-MR, 2001 Ky. App. LEXIS 1311*; and *Free v. Abbott Laboratories, Inc. (C.A.5, 1999), 176 F.3d 298, 299* (applying Louisiana law), which all adopted and followed *Illinois Brick* where, like Ohio, their states' antitrust statutes did not contain provisions requiring parallel federal-state construction.

3 See, e.g., Alabama, *Ala.Code 6-5-60(a)*; California, *Cal.Bus.Prof.Code 16750(a)*; District of Columbia, *D.C.Code Ann. 28-4509*; Hawaii, *Hawaii Rev.Stat. 480-3*; Illinois, *740 Ill.Comp.Stat.Ann. 10/7(2)*; Kansas, *Kan.Stat.Ann. 50-161(b)*; Maine, *10 Me.Rev.Stat.Ann. 1104(1)*; Maryland, Md.Com.Law Code Ann. 209(b)(2)(ii); Michigan, *Mich.Comp.Laws Ann. 445.778(2)*; Minnesota, *Minn.Stat.Ann. 325D.57*; Mississippi, *Miss.Code Ann. 75-21-9*; Nebraska, *Neb.Rev.Stat. 59-821*; Nevada, *Nev.Rev.Stat. 598A.210(2)*; New Mexico, *N.M.Stat.Ann. 57-1-3(A)*; New York, *N.Y.Gen.Bus.Law 340(6)*; North Dakota, *N.D.Cent.Code 51-08.1-08(3)*; South Dakota, *S.D.Codified Laws 37-1-33*; Vermont, *9 Vt.Stat.Ann. 2465(b)*; Wisconsin, *Wis.Stat.Ann. 133.18(1)(a)*.

[**P12] [***797] The Ohio General Assembly has amended the Valentine Act several times since the announcement of the *Illinois Brick* decision, including several changes specifically designed to bring the Act into conformity with federal antitrust statutes; [4] however, it has never amended the law with respect to the *Illinois Brick* direct-purchaser requirement. We believe that this inaction on the part of the General Assembly reflects legislative satisfaction with the direction taken by this court in signaling our intent to follow federal law. See, e.g., *Spitzer v. Stillings (1924), 109 Ohio St. 297, 2 Ohio Law Abs. 100, 2 Ohio Law Abs. 119, 142 N.E. 365*, paragraph four of the syllabus, where the court held that "[w]here a statute is construed by a court of last resort having jurisdiction, and such statute is thereafter amended in certain particulars, but remains unchanged so far as the same has been construed and defined by the court, it will be presumed that the Legislature was familiar with such interpretation at the time of such amendment, and that such interpretation was intended to [*284] be adopted by such amendment as a part of the law, unless express provision is made for a different construction."

4 See, e.g., *R.C. 1331.021* (petroleum products competition provision adopted in 1981, 139 Ohio Laws, Part II, 2894); *R.C. 1331.08* (augmenting available damages from double to treble in 2002 in an apparent attempt to conform with federal antitrust law, 149 Ohio Laws, Part IV, 6455); *R.C. 1331.12* (statute of limitations amended in 1994 and 2002 to "more closely conform the statute of limitations for private actions under the Ohio antitrust law to those of the federal and most other state antitrust laws," 145 Ohio Laws, Part IV, 6591, and 149 Ohio Laws, Part IV, 6455); and *R.C. 1331.16* (investigative demand-and-discovery provisions added in 1978, 137 Ohio Laws, Part II, 2624, and amended in

1981, 138 Ohio Laws, Part II, 3623, and 1996, 146 Ohio Laws, Part VI, 10785).

[**P13] Johnson contends that if the Valentine Act is to be interpreted in accordance with federal law, we should follow the federal law in effect at the time Ohio adopted the statute, not any federal case law determined after adoption. Ohio courts, however, have consistently interpreted the Valentine Act in accordance with federal judicial construction of the federal antitrust laws--without regard to when the federal court announced the case law. We decline to abandon that precedent here. *See, e.g., C.K. & J.K., 63 Ohio St.2d at 204, 17 O.O.3d 124, 407 N.E.2d 507*, where we relied on federal case law from as late as 1962 to interpret an 1898 provision of the Ohio Valentine Act; and *List v. Burley Tobacco Growers' Co-op Assn. (1926), 114 Ohio St. 361, 4 Ohio Law Abs. 194, 151 N.E. 471*, applying subsequent federal case law to an 1898 provision of the Ohio Valentine Act. See, also, *Acme Wrecking Co., Inc. v. O'Rourke Constr. Co. (Mar. 1, 1995), 1st Dist. No. C-930856, 1995 Ohio App. LEXIS 745, 1995 WL 84188*; *Lee v. United Church Homes, Inc. (1996), 115 Ohio App.3d 705, 708-709, 686 N.E.2d 288 (Third Appellate District)*; *Pacific Great Lakes Corp. v. Bessemer & Lake Erie RR. (1998), 130 Ohio App.3d 477, 491, 720 N.E.2d 551, fn. 7 (Eighth Appellate District)*; *Schweizer v. Riverside Methodist Hosps. (1996), 108 Ohio App.3d 539, 542, 671 N.E.2d 312 (Tenth Appellate District)*.

[**P14] The Ohio General Assembly, and not this court, is the proper body to resolve public policy issues. In *State v. Smorgala (1990), 50 Ohio St.3d 222, 223, 553 N.E.2d 672*, we noted that "the General Assembly should be the final arbiter of public policy." See, also, [***798] *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Information Network, Inc. v. Dupuis, 98 Ohio St.3d 126, 2002 Ohio 7041, 781 N.E.2d 163, P21* (same). Indeed, the overwhelming majority of states that have addressed the issue of whether indirect purchasers may assert state antitrust claims have done so through legislative enactments, i.e., statutes explicitly rejecting *Illinois Brick*, rather than judicial declaration. Accordingly, as numerous other state legislatures have done, the Ohio General Assembly may enact a statute rejecting *Illinois Brick* if it so chooses.

[**P15] Accordingly, consistent with long-standing Ohio jurisprudence, which has followed federal law in antitrust matters, we adopt and follow *Illinois Brick's* direct-purchaser requirement and hold that an indirect purchaser of goods may not assert a Valentine Act claim for alleged violations of Ohio antitrust law.

B. *The End-User Licensee Agreement*

[**P16] Johnson also asserts that her end-user licensing agreement ("EULA") with Microsoft makes her a direct purchaser for the purposes of *Illinois Brick*. This position, however, is not well taken.

[**P17] [*285] Other courts that have considered this argument have reached similar conclusions. In *Vacco v. Microsoft Corp. (2002), 260 Conn. 59, 83-84, 793 A.2d 1048*, the Connecticut Supreme Court noted, "This argument fundamentally misunderstands the import of the court's holding in *Illinois Brick*, [which focused] on the underlying economic transaction between the direct purchaser and the antitrust defendant and not, as the plaintiff contends, whether the plaintiff and the defendant were in contractual privity by virtue of a licensing agreement." Similarly, in *In re Microsoft Corp. Antitrust Litigation (D.Md.2001), 127 F.Supp.2d 702, 709*, the court found that "[a]lthough the EULA may establish a direct relationship between Microsoft and the consumer, that relationship is not sufficient to make the consumer a 'direct purchaser' within the meaning of *Illinois Brick*." Like Johnson, the plaintiffs in the federal litigation never alleged that they purchased either the software or the EULAs directly from Microsoft.Id. The court concluded, therefore, that "the immediate economic transaction constituting the purchase" occurs between the consumer and the retailer--not the consumer and Microsoft, and, as a result, the federal plaintiffs could not be considered direct purchasers under *Illinois Brick*. Id.

[**P18] In this case, Johnson has never alleged that she "was required to pay [Microsoft] for the acquisition of the licensing rights to use Windows 98." *Vacco, 260 Conn. at 84, 793 A.2d 1048*. Accordingly, because we agree with the analysis offered by other jurisdictions that have considered this issue, we hold that while acceptance of a EULA creates a legal relationship between the consumer and Microsoft, that relationship does not transform the consumer into a "direct purchaser" within the meaning of *Illinois Brick*. [5]

5 See, also, *Minuteman, LLC v. Microsoft Corp. (2002), 147 N.H. 634, 640-641, 795 A.2d 833*, in which the New Hampshire Supreme Court held that plaintiffs' decision to accept a Microsoft EULA does not change the fact that they never purchased a product directly from Microsoft and therefore "cannot be considered a direct purchaser for purposes of *Illinois Brick"; Siena v. Microsoft Corp. (R.I.2002), 796 A.2d 461, 465*, where the Rhode Island Supreme Court concluded that a EULA and a consumer warranty do not "vest plaintiffs with standing to sue as direct purchasers. The licensing agreement is simply an agreement between the parties that the user will not infringe on Microsoft's copyright; it does not

place the parties in direct purchaser privity with each other"; *Davidson v. Microsoft Corp. (2002), 143 Md.App. 43, 792 A.2d 336* (adopting rationale of *In re Microsoft Corp. Antitrust Litigation, 127 F. Supp.2d at 709*, and holding that consumers/end users as licensees are not direct purchasers); *Sherwood v. Microsoft Corp., 2003 Tenn. App. LEXIS 539, (July 31, 2003), Tenn.App. No. M2000-01850-COA-R9-CV*, holding that the EULA, "a method used to protect copyrights, does not transform indirect purchasers into direct purchasers"; *Pomerantz v. Microsoft Corp. (Colo.App.2002), 50 P.3d 929, 934-935*, where the court concluded that the EULA has "no bearing on whether the consumer is a direct purchaser under *Illinois Brick*."

[***799] [**P19] Since Johnson has not established a direct-purchaser relationship with Microsoft, we need not address Johnson's remaining arguments regarding her ability to assert a Valentine Act claim. [6]

6 Johnson also avers that the Valentine Act is not limited to intrastate conduct; and that it does not require proof of a combination, contract or conspiracy to assert a claim for unlawful monopolization.

[*286] *Restitution & Unjust Enrichment*

[**P20] Johnson also asserts a common-law restitution claim on the theory that Microsoft benefited from unjust enrichment due to its monopolistic pricing practices. Unjust enrichment occurs when a person "has and retains money or benefits which in justice and equity belong to another," *Hummel v. Hummel (1938), 133 Ohio St. 520, 528, 11 O.O. 221, 14 N.E.2d 923*, while restitution is the "common-law remedy designed to prevent one from retaining property to which he is not justly entitled," *Keco Industries, Inc. v. Cincinnati & Suburban Bell Tel. Co. (1957), 166 Ohio St. 254, 256, 2 O.O.2d 85, 141 N.E.2d 465*. To establish a claim for restitution, therefore, a party must demonstrate "(1) a benefit conferred by a plaintiff upon a defendant; (2) knowledge by the defendant of the benefit; and (3) retention of the benefit by the defendant under circumstances where it would be unjust to do so without payment ('unjust enrichment')." *Hambleton v. R.G. Barry Corp. (1984), 12 Ohio St.3d 179, 183, 12 OBR 246, 465 N.E.2d 1298*.

[**P21] As this court has stated, the purpose of such claims "is not to compensate the plaintiff for any loss or damage suffered by him but to compensate him for the benefit he has conferred on the defendant." *Hughes v. Oberholtzer (1954), 162 Ohio St. 330, 335, 55 O.O. 199, 123 N.E.2d 393*. In addition, we are mindful of the court's concerns expressed in the case of *In re Terazosin Hydrochloride Antitrust Litigation (S.D.Fla.2001), 160 F. Supp. 2d 1365*, where the court noted that "[s]tate legislatures and courts that adopted the *Illinois Brick* rule against indirect purchaser antitrust suits did not intend to allow 'an end run around the policies allowing only direct purchasers to recover.' " *Id. at 1380*, quoting *Segura, 907 S.W.2d at 506*.

[**P22] The rule of law is that an indirect purchaser cannot assert a common-law claim for restitution and unjust enrichment against a defendant without establishing that a benefit had been conferred upon that defendant by the purchaser. The facts in this case demonstrate that no economic transaction occurred between Johnson and Microsoft, and, therefore, Johnson cannot establish that Microsoft retained any benefit "to which it is not justly entitled." *Keco Industries, 166 Ohio St. at 256, 2 O.O.2d 85, 141 N.E.2d 465*. Therefore, we affirm the court of appeals' determination that the trial court properly dismissed Johnson's common-law claims.

The Ohio Consumer Sales Practices Act

[**P23] Johnson predicated an Ohio Consumer Sales Practices Act claim on Microsoft's [***800] monopolistic pricing practices, arguing that the CSPA applies in cases where consumers are injured due to anticompetitive conduct. Microsoft contends that Johnson failed to establish the elements necessary to maintain this claim as a class action, that the CSPA does not apply to anticompetitive conduct, and that [*287] she failed to demonstrate Microsoft's connection to a consumer transaction in Ohio.

[**P24] The Consumer Sales Practices Act, R.C. Chapter 1345, prohibits suppliers from committing either unfair or deceptive consumer sales practices or unconscionable acts or practices as catalogued in *R.C. 1345.02* and *1345.03*. In general, the CSPA defines "unfair or deceptive consumer sales practices" as those that mislead consumers about the nature of the product they are receiving, while "unconscionable acts or practices" relate to a supplier manipulating a consumer's understanding of the nature of the transaction at issue. [7] Neither of [*288] these practices, however, encompasses the type of conduct that [***801] Johnson alleged against Microsoft--manipulating market forces to thwart competition.

7 Compare *R.C. 1345.02* with *R.C. 1345.03*:

R.C. 1345.02(B):

"Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

"(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

"(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

"(3) That the subject of a consumer transaction is new, or unused, if it is not;

"(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

"(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

"(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

"(7) That replacement or repair is needed, if it is not;

"(8) That a specific price advantage exists, if it does not;

"(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

"(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false."

R.C. 1345.03(B):

"In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:

"(1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect his interests because of his physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

"(2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;

"(3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

"(4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;

"(5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;

"(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to his detriment;

"(7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy."

[**P25] We agree with the analysis offered by the appellate court that the legislature created separate statutory schemes for antitrust issues and for consumer sales practices. See, also, *Kieffer v. Mylan Laboratories, Inc.* (Sept. 9, 1999), N.J.Super. No. BER-L-365-99-EM, 1999-2 Trade Cas. (CCH) P 72,673, where the court noted that "[i]t is most significant that there is no case law construing the [Consumer Fraud Act] in a way that would include defendants' anticompetitive and monopolistic actions in the lexicon of unconscionable commercial practices. * * * [T]here is nothing inherently misleading or fraudulent in the defendants' acts of controlling the supply and overcharging for [certain drugs]. The defendants' attempt to control the supply and to charge excessive prices for the prescription drugs * * * is typical anticompetitive conduct, for which a remedy is provided in the antitrust statutes." [8]

8 Several other jurisdictions have concluded that indirect purchasers cannot assert state consumer-protection claims based on alleged violations of antitrust law. See, e.g., *Vacco, 260 Conn. 59, 793 A.2d 1048*; *Sherwood v. Microsoft Corp. (2003), 2003 Tenn. App. LEXIS 539, Tenn. App. No. M2000-01850-COA-R9-CV*; *Gaebler v. New Mexico Potash Corp. (1996), 285 Ill.App.3d 542, 544, 676 N.E.2d 228, 221 Ill. Dec. 707*; *Blewett v. Abbott Laboratories, Inc. (Wash.App.1997), 86 Wn. App. 782, 938 P.2d 842, 847*; *Kieffer v. Mylan Laboratories, Inc.* (Sept. 9, 1999),

N.J.Super. No. BER-L-365-99-EM; *Segura, 907 S.W.2d at 505-506*.

[**P26] Thus, a complaint that alleges a violation of the Ohio Consumer Sales Practices Act predicated upon monopolistic pricing practices does not state a claim upon which relief can be granted because the Valentine Act, not the CSPA, provides the exclusive remedy for engaging in such conduct.

Conclusion

[**P27] With respect to the major issues presented in this appeal, we conclude that consistent with long-standing Ohio jurisprudence in following federal law regarding antitrust cases, an indirect purchaser [***802] of goods may not file a Valentine Act claim for violations of Ohio antitrust law. Moreover, to establish a claim for restitution, a plaintiff must demonstrate that he or she conferred a benefit on a defendant without compensation, and since Johnson has not engaged in any transaction with Microsoft, she cannot establish such a claim. Finally, the Valentine Act, not the CSPA, provides the exclusive remedy for engaging in [*289] monopolistic pricing practices in Ohio, and a party who fails to establish a consumer transaction with a supplier lacks standing to assert a CSPA claim.

[**P28] Accordingly, the judgment of the court of appeals is affirmed.

Judgment affirmed.

RESNICK, LUNDBERG STRATTON, O'CONNOR and LANZINGER, JJ., concur.

MOYER, C.J., and BRYANT, J., dissent.

PEGGY BRYANT, J., of the Tenth Appellate District, sitting for PFEIFER, J.

DISSENT BY: BRYANT

DISSENT

BRYANT, J., dissenting.

[**P29] Being unable to agree with the majority opinion, I respectfully dissent. The majority holds in the syllabus that "[c]onsistent with long-standing Ohio jurisprudence in following federal law regarding antitrust cases, an indirect purchaser of goods may not file a Valentine Act claim for violations of Ohio antitrust law. (*Illinois Brick v. Illinois (1977), 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707*, followed.)" To the contrary, Ohio's Valentine Act permits indirect purchasers to file claims for violations of Ohio antitrust law.

[**P30] The Ohio Valentine Act includes *R.C. 1331.08*, which provides that "the person injured * * * by reason of anything forbidden or declared to be unlawful in [*R.C. 1331.01 to 1331.14*] may sue * * * and recover treble the damages * * *." The statute on its face does not require that a person be directly injured in order to recover. Rather, it is broadly worded to include any person injured by reason of a violation of the Valentine Act.

[**P31] Relying on *List v. Burley Tobacco Growers' Co-op. Assn. (1926), 114 Ohio St. 361, 4 Ohio Law Abs. 194, 151 N.E. 471*, and *C.K. & J.K., Inc. v. Fairview Shopping Ctr. Corp. (1980), 63 Ohio St.2d 201, 17 O.O.3d 124, 407 N.E.2d 507*, the majority observes that, historically, Ohio courts have considered federal case law in construing the Act's provisions. Based on that precedent, the majority concludes that in construing *R.C. 1331.08*, it should consider *Illinois Brick*, a decision issued a year after the statute was last enacted or amended. Noting that "some 18 states and the District of Columbia have enacted statutes explicitly rejecting *Illinois Brick* and permitting indirect purchasers to bring state-law antitrust actions," the majority further concludes that indirect purchasers may seek redress for antitrust injury only if the General Assembly legislatively "repeals" the *Illinois Brick* doctrine.

[**P32] *List* does not dictate the majority's conclusion, but instead supports allowing indirect purchasers to bring actions under the Valentine Act. *List* looked at the trend of antitrust case law, including not only federal court decisions, but also decisions from courts in other states. [*290] *List, 114 Ohio St. at 392-394, 151 N.E. 471*. The reality is that the majority of states now permit indirect-purchaser actions. See *Comes v. Microsoft Corp. (Iowa 2002), 646 N.W.2d 440, 448* ("In total, thirty-six states and the District of Columbia recognize a cause of action for indirect purchasers"). Even if we look to the status of the law when most sections of the Valentine Act were last amended (1976), the trend of the federal decisions at the time favored permitting indirect purchasers to sue those who violate antitrust provisions. *Id. at 447*.

[**P33] Similarly, the majority's reliance on *C.K. & J.K., Inc., 63 Ohio St.2d 201, 17 O.O.3d 124, 407 N.E.2d 507*, is not persuasive. Citing *C.K. & J.K.* for the proposition that "Ohio has long followed federal law in interpreting the Valentine Act," the majority states that in accordance with this practice, "we shall review the status of federal law with respect to who may properly assert an antitrust action." Indeed, Ohio and other states have looked to the federal courts for guidance in substantive law, such as setting uniform standards of conduct prohibited under the antitrust acts. *Comes v. Microsoft Corp., 646 N.W.2d at 446* ("The purpose behind both state and federal antitrust law is to apply a uniform standard of conduct so that businesses will know what is acceptable conduct and what is not acceptable conduct").

[**P34] Ohio and other states, however, have not relied on federal law in matters of practice and procedure, including the issue of standing. In fact, the United States Supreme Court has declared that uniformity in state and federal law on the issue of who may sue for recovery is unnecessary, as "nothing in *Illinois Brick* suggests that it would be contrary to congressional purposes for States to allow indirect purchasers to recover under their own antitrust [***803] laws." *California v. ARC Am. Corp. (1989), 490 U.S. 93, 103, 109 S.Ct. 1661, 104 L.Ed.2d 86*. Rather, "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." *Id. at 102, 109 S.Ct. 1661, 104 L.Ed.2d 86*. See, also, *Bunker's Glass Co. v. Pilkington, PLC (2003), 206 Ariz. 9, 16, 75 P.3d 99* (noting that Arizona courts have not followed federal law on "the threshold issue of who may bring a state-law-based claim in a state court"); *Comes, supra, 646 N.W.2d at 446* (observing that states may set their own rules for who may sue in state courts without impairing the desired national uniformity and predictability in substantive standards of conduct). Indeed, to conclude that *C.K. & J.K., Inc*. or List precludes indirect purchasers from suing under the Valentine Act would defeat one of the purposes of that Act: to provide a remedy to those injured by reason of violations of the Act.

[**P35] The majority nonetheless relies on the legislature's failure, since *Illinois Brick*, to amend the Act to specifically allow indirect purchasers to sue under *R.C. 1331.01 et seq.* From that inaction, the majority concludes that the legislature embraces the *Illinois Brick* doctrine. The legislature, however, would [*291] have no reason to include indirect-purchaser language in *R.C. 1331.08*, as this court has never stated that it would rigidly adhere to each decision that the federal courts issued under the federal antitrust laws. To foist onto the General Assembly the obligation to override *Illinois Brick*, or any other decision of the federal courts that it does not support, places on the legislature the unenviable burden of monitoring, and responding to, each federal judicial gloss on the federal antitrust laws, even though this court has never adopted that gloss on Ohio's antitrust laws. See *Hyde v. Abbott Labs., Inc. (1996), 123 N.C. App. 572, 582, 473 S.E.2d 680* (noting in an antitrust case that "the intent of the General Assembly may only be discerned by its actions, and not its failure to act").

[**P36] Rather than apply any and all federal limitations to the Valentine Act, this court should defer to the legislature to create exceptions to the broad language of *R.C. 1331.08* that permits any person injured to bring an action under *R.C. 1331.08*. See *Bunker's Glass Co., 206 Ariz. at 17, 75 P.3d 99*. Unless the legislature amends *R.C. 1331.08* to preclude indirect-purchaser actions, this court should address the statute and apply its unambiguous language that allows all purchasers to redress antitrust injury under Ohio's antitrust laws.

[**P37] Ohio would not be alone in doing so. Not only do the majority of states now allow consumers, as indirect purchasers, to seek redress under their antitrust laws, see *Comes, 646 N.W.2d at 448*, but at least five of those states allow indirect purchasers to pursue antitrust claims even though, like Ohio, (1) their states have not enacted "repealer" statutes, (2) the states have antitrust statutes with language very similar to Ohio's, and (3) the states, either judicially or by statute, are guided by federal antitrust decisions in construing their state antitrust laws. See *Arthur v. Microsoft Corp. (2004), 267 Neb. 586, 676 N.W.2d 29*; *Comes v. Microsoft Corp., supra; Bunker's Glass Co. v. Pilkington, 206 Ariz. 9, 75 P.3d 99*; *Hyde v. Abbott Labs., Inc., 123 N.C.App. 572, 473 S.E.2d 680*; *Sherwood v. Microsoft Corp. (July 31, 2003), 2003 Tenn. App. LEXIS 539, Tenn.App. No. M2000-01850-COA-R9-CV, 2003 WL 21780975*.

[**P38] Microsoft already has been adjudicated to be in violation of antitrust laws. *United States v. Microsoft Corp. (D.D.C.2000), 87 F.Supp.2d 30*, reversed in part on other grounds *(C.A.D.C.2001), 346 U.S. App. D.C. 330, 253 F.3d 34*. See, also, [***804] *New York v. Microsoft Corp. (D.D.C.2002), 209 F.Supp.2d 132*, in which the state of Ohio was not a party but filed an amicus brief. *Id. at 136, fn. 2*.

[**P39] The indirect purchaser is often the only "person" with an actual injury and resulting inducement to rectify the antitrust violations of a monopolistic corporation. Because federal law is clear that indirect purchasers may not bring antitrust claims in federal court, redress of such claims is left to state courts. Yet the majority's holding would deny any remedy to Ohio's citizens for their injury, contrary to *Section 16, Article I, Ohio Constitution* (stating that "[a]ll [*292] courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay").

[**P40] Other laws in Ohio make clear that the legislature intends that consumers, the ultimate purchasers who are often the only persons who suffer any real injury, be provided a remedy for injury, including higher prices, sustained due to a corporation's unlawful or anticompetitive conduct. See Ohio's Consumer Sales Protection Act, *R.C. 1345.01 et seq.*, and Ohio's Pattern of Corrupt Activity Act, *R.C. 2923.32 et seq.*, especially *R.C. 2923.34(F)*. Similar circumstances support application of the unambiguous language of *R.C. 1331.08*.

[**P41] In the final analysis, to deny indirect purchasers redress in Ohio courts in this case benefits only the party who already has been determined to have

unlawfully restrained trade in Ohio. At the same time, it would deny recovery to persons actually injured as a result of that conduct, who are the persons who have a reason to bring antitrust claims: the consumers who purchase the goods and pay the overcharges that the direct purchasers can pass on to them. The purpose of the Valentine Act is to protect Ohio's public from anticompetitive conduct. The majority's holding defeats that purpose, and so I dissent.

MOYER, C.J., concurs in the foregoing dissenting opinion.

Men Women NY Model Management, Inc., Plaintiff, against Ford Models, Inc., ALTPOINT CAPITAL PARTNERS LLC f/k/a STONE TOWER EQUITY PARTNERS LLC, PAUL A. ROWLAND, MOHAMMED FAJAR, and MARIA COGNATA, Defendants.

601144/10

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

32 Misc. 3d 1236(A)*; *938 N.Y.S.2d 228*; *2011 N.Y. Misc. LEXIS 4132*; *2011 NY Slip Op 51595(U)

August 15, 2011, Decided

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

PUBLISHED IN TABLE FORMAT IN THE NEW YORK SUPPLEMENT.

HEADNOTES

[**228] [*1236A] Trademarks, Trade Names and Unfair Competition--Unfair Competition--Misappropriation. Contracts--Employment Contracts.

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For Ford Models, Inc., Altpoint Capital Partners LLC f/k/a Stone Tower Equity Partners LLC and Maria Cognata, Defendants: Bernice K. Leber and Jennifer L. Bougher, Esqs., Arent Fox LLP, New York, New York.

JUDGES: BARBARA R. KAPNICK, J.S.C.

OPINION BY: BARBARA R. KAPNICK

OPINION

Barbara R. Kapnick, J.

Plaintiff Men Women NY Model Management, Inc. ("Women"), allegedly a leading model management company in the United States which represents some of the top female modeling talent, brings this action against defendants for their alleged past and ongoing wrongful conduct in raiding talent from its successful modeling divisions, "Supreme" and "Women Direct", and in breaching fiduciary and contractual obligations owed to Women.

Background

Defendant Ford Models, Inc. ("Ford") is a direct competitor of Women. Defendant Altpoint Capital Partners LLC ("Altpoint") f/k/a Stone Tower Equity Partners LLC ("Stone Tower") is Ford's [***2] private equity investor.

Defendant Paul A. Rowland ("Rowland") is the founder and a shareholder of Women and was a member of Women's Board of Directors during the period when many of the events complained of occurred. He was formerly employed by Women as President and head of Supreme. Rowland is currently employed by Ford as head of its women's division.

Defendant Mohammed Fajar ("Fajar"), a former Supreme board director, was employed by Women as a modeling agent/booker, and is currently employed by Ford as an agent/booker.

Defendant Maria J. Cognata ("Cognata"), a former Women Direct board director was employed by Women as an agent/booker and is currently employed by Ford as a booker.

According to the Complaint, Ford expressed interest in investing in and/or purchasing some or all of Women's model management business as early as 2007.

On December 14, 2007, for the purpose of evaluating a potential transaction with Women, Ford entered into a confidentiality agreement with Women which granted Ford access to confidential and sensitive business information about the agency, including financial data, compensation paid to key employees, and payments to bookers. Stone Tower also signed a confidentiality [***3] agreement on July 21, 2008 granting it similar access.

Ford and Stone Tower subsequently made an offer to acquire Women's business, in or about September 2008, but Women rejected the offer as inadequate.

Plaintiff claims that Ford and Stone Tower thereafter sought to exploit their unrestricted access to Women's confidential information, and attempted to poach' Rowland and Fajar, but that Rowland and Fajar declined and reported the solicitation attempt to others at Women. Plaintiff Women allegedly communicated to Ford that its conduct in approaching Rowland and Fajar was highly inappropriate.

In February 2010, Ford and Stone Tower (now known as Altpoint) again allegedly approached Rowland, this time offering to dramatically increase Rowland's compensation if he were to leave Women and bring key employees (such as Fajar) and their business to Ford. Plaintiff claims that at Ford and Altpoint's behest, Rowland then began to work clandestinely with Fajar and others to plan their departure.

Plaintiff claims that when Women's CEO, Sergio Leccese, left New York to spend two weeks in Europe to attend the Milan and Paris fashion shows between February 25, 2010 and March 5, 2010, Rowland, Fajar and [***4] others packed up and removed entire boxes of Supreme documents and other Women property, printed documents and other information from Women's computer system, and deleted numerous files. Fajar was also allegedly observed repeatedly using a paper shredder.

Rowland and Fajar allegedly announced their resignation and decision to join Ford upon Lecceses's return to the office on March 8, 2010. Rowland also told Leccese on that date that Cognata was likewise resigning Women and joining Ford.

Plaintiff claims that despite assurances to the contrary, defendants recruited other key employees of Supreme and Women Direct to join them at Ford, but requested that they delay their departures and stay behind at Women for a short period of time, thereby further encouraging the diversion of Women's modeling relationships and business opportunities to Ford.

The Complaint seeks to recover compensatory and punitive damages: (i) against all the defendants for unfair competition (first cause of action); (ii) against Rowland, Fajar and Cognata for breach of fiduciary duty and duty of loyalty (second cause of action); (iii) against all the defendants for participation in and/or aiding and abetting breach of [***5] fiduciary duty (third cause of action); (iv) against all the defendants for tortious interference with advantageous business relationships (fourth cause of action); (v) against Ford and Altpoint/Stone Tower for breach of Confidentiality Agreement (fifth cause of action); (vi) against Ford and Altpoint/Stone Tower for unjust enrichment (sixth cause of action); (vii) against Rowland for breach of contract, i.e., an agreement' by which Rowland allegedly borrowed in excess of $866,904.08 to pay for personal expenditures and agreed to fully repay Women (seventh cause of action); (viii) against Rowland for promissory estoppel (eighth cause of action); (ix) against Rowland for unjust enrichment (ninth cause of action); and (x) against Fajar for breach of contract, based on Fajar's alleged failure to re-pay in excess of $101,384.10 in outstanding loans (tenth cause of action).

Defendants Ford, Altpoint and Cognata now move, under motion sequence number 003, for an order pursuant to *CPLR 3211 (a)(1)* and *(7)*, *3013* and *3016(b)*, dismissing the Complaint against them.

Defendants Rowland and Fajar move, under motion sequence number 004, for an order pursuant to *CPLR 3211*, dismissing the Complaint [***6] against them.

Motion sequence numbers 003 and 004 are consolidated for disposition herein.

Discussion

First Cause of Action - Unfair Competition as to all Defendants

The common-law tort of unfair competition embraces two theories, to wit, palming off, that is the sale of one's goods or services, as though they were the goods or services of the plaintiff, which is not at issue here, and misappropriation, which "usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." *ITC Ltd. v Punchgini, Inc., 9 NY3d 467, 478, 880 N.E.2d 852, 850 N.Y.S.2d 366 (2007)* (citation and internal quotation marks omitted). A claim of unfair competition requires more than a showing of "commercial unfairness" (*Ruder & Finn v Seaboard Sur. Co. (52 NY2d 663, 671, 422 N.E.2d 518, 439 N.Y.S.2d 858 [1981])*; it requires a showing of " bad faith misappropriation' of plaintiff's skill, labor, and expenditures (citations omitted)." *Krinos*

Foods, Inc. v Vintage Food Corp., 30 AD3d 332, 334, 818 N.Y.S.2d 67 (1st Dept 2006).

The Complaint makes the following allegations in the first cause of action:

> 45. Ford and Altpoint/Stone Tower's actions willfully inducing Rowland, Fajar and Cognata to breach their fiduciary duties to Women, misappropriate [***7] Women's competitive advantage, interfere with Women's business relationships with its employees and models, and misappropriate the business and goodwill in Women's operations constitute unfair competition . . ..
>
> 46. Rowland, Fajar and Cognata's actions willfully inducing Supreme and Women Direct employees to leave Women for a competing agency, to divert business opportunities to Ford, to remove Women property and delete documents and other information, also constitute unfair competition.

Plaintiff alleges that the defendants thereby "acted in bad faith in secretly orchestrating their activities in a way that they knew or should have known would inflict significant competitive injury upon Women" (Complaint, ¶¶ 45-46).

However, "the mere inducement of an at-will employee to join a competitor [is not] actionable, unless dishonest means are employed, or the solicitation is part of a scheme designed solely to produce damage (citations omitted)." *Headquarters Buick-Nissan v Michael Oldsmobile, 149 AD2d 302, 304, 539 N.Y.S.2d 355 (1st Dept 1989)*; *see also Metal & Salvage Assn. v Siegel, 121 AD2d 200, 503 N.Y.S.2d 26 (1st Dept 1986).*

Plaintiff alleges that defendants - or at least Rowland - used dishonest means by diverting potential [***8] new models away from Women and asking certain key Women employees to delay their departures and stay behind at Women for a short period of time so they could provide defendants "with business information concerning Supreme and Women Direct models (such as upcoming jobs and options) in an attempt to divert Supreme and Women Direct modeling relationships and business opportunities to Ford" (Complaint, ¶ 26). Sergio Leccese states in his affidavit that

> [he] learned that a few days before Rowland left Women to join Ford, he spoke with the Director of an agency called Ossygeno Model Management. Ossygeno is a very important agency to Women and has been a significant source of new models for Women. Rowland told the Director of his intention to leave Women and expressly asked Ossygeno not to introduce a particular model who Rowland really liked to Women's Director of Scouting. . . .

(Leccese Aff., ¶ 28).

Plaintiff has also alleged that defendant Ford was attempting to "take" what it could not "buy" by poaching plaintiff's top executives and inducing them to breach their fiduciary duties to Women by encouraging other employees to leave Women; a total of nine employees resigned to join Ford out [***9] of approximately 35 employees, who accounted for a substantial amount of Supreme and Women Direct's revenue.

> [In] the context of a motion to dismiss pursuant to *CPLR 3211*, a court must "liberally construe the complaint . . . and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 152, 773 N.E.2d 496, 746 N.Y.S.2d 131 [2002]*; *see also Sokoloff v Harriman Estates Dev. Corp., 96 NY2d 409, 414, 754 N.E.2d 184, 729 N.Y.S.2d 425 [2001]*; *Leon v Martinez, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]*). The court must also "accord [the] plaintiff[] the benefit of every possible favorable inference" (*511 W. 232nd Owners Corp., 98 NY2d at 152*). "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (id., quoting *Polonetsky v Better Homes Depot, 97 NY2d 46, 54, 760 N.E.2d 1274, 735 N.Y.S.2d 479 [2001]*.

*USA United Holding, Inc. v Tse-Peo, Inc., 23 Misc. 3d 1114[A], 886 N.Y.S.2d 69, 2009 NY Slip Op 50775[U] at *12 (Sup. Ct., Kings Co., 2009).*

Plaintiff here alleges that, while still employed by plaintiff, the individual defendants dropped a certain highly successful model. The first cause of action further alleges that Rowland and Fajar were [***10] observed

moving boxes of plaintiff's documents and other property, including printed documents and other information from Women's computer system, out of the office.

The Complaint also alleges that, in the weeks prior to leaving plaintiff's employ, Rowland and Fajar were observed printing certain computer files and deleting others, and that Fajar was observed repeatedly using a paper shredder.

Defendants Rowland and Fajar argue that to the extent the plaintiff claims there was a violation of the confidentiality agreements entered into between Ford and Altpoint and plaintiff, that has nothing to do with them, since they were not parties to those agreements, and thus could not have misappropriated any information that may have been transmitted pursuant to them.

However, as to Ford, the same "financial information", "historical contract data", and "compensation agreements" that Ford characterized in an affirmation in support of its motion for a protective order as data that "helps it maintain its preeminent position in the model industry", "largely constitutes the good will of the company," and is "secret and [] not generally available to the public" is the information plaintiff alleges [***11] Ford misappropriated from Women and is using to harm Women's business.

As for the employees that temporarily remained behind, Mr. Leccese states in his affidavit that nonparty Michael I. Bruno, while on a trip to Paris, arranged meetings with certain models in order to convince them to switch from plaintiff to Ford. Finally, Mr. Leccese states that, shortly after the resignations of the named defendants, Peter Cedeno, another of the purported "moles," refused several "options" on one of plaintiff's models.

In sum, the plaintiff has set forth sufficient allegations to sustain a cause of action for unfair competition as against defendants Rowland, Fajar and Ford.

However, there are no specific allegations of wrongdoing asserted against either Cognata or Altpoint, and this cause of action must be dismissed as against them.

Second Cause of Action - Breach of Fiduciary Duty and Duty of Loyalty as to the Individual Defendants

The second cause of action must be dismissed as against defendants Fajar and Cognata, because, although they owed plaintiff a duty of loyalty while they were still employed by plaintiff, neither the Complaint, nor Mr. Leccese's affidavit, make any factual allegation that [***12] either Fajar or Cognata breached that duty.

Rowland, as the founder and a shareholder of Women, a member of plaintiff's Board of Directors during the period when many of the events complained of occurred, and as its President certainly owed plaintiff a fiduciary duty.

The Complaint alleges that, prior to his resignation, Rowland took part in persuading six key employees of plaintiff, other than Fajar and Cognata, to resign and to join him at Ford. While the evidence at trial may show that Rowland did no more than inform those employees that they might have better paying jobs at Ford, at this stage of the action the second cause of action as against Rowland will not be dismissed. An inference that may be drawn from the facts alleged in the Complaint is that, in his contacts with the six employees, Rowland was acting in Ford's interest, at the direct expense of plaintiff. *See Foley v D'Agostino, 21 AD2d 60, 248 N.Y.S.2d 121 (1st Dept 1964)* (director who works on behalf of competitor of his company breaches his fiduciary duty).

Third Cause of Action - Aiding and Abetting Breach of Fiduciary Duty as to all Defendants

The elements of a claim for aiding and abetting a breach of fiduciary duty are "(1) a breach [***13] by a fiduciary of obligations to another, (2) that the defendant knowingly induced or participated in the breach, and (3) that plaintiff suffered damages as a result of the breach." *Kaufman v Cohen, 307 AD2d 113, 125, 760 N.Y.S.2d 157 (1st Dep't 2003).*

The third cause of action will be dismissed as to all the defendants, other than Ford, because the Complaint alleges no facts from which it can be inferred that those defendants offered "substantial assistance" to Rowland's alleged recruitment of plaintiff's employees. The Complaint does allege, however, and it can reasonably be inferred that Ford and Rowland acted in concert in recruiting and soliciting plaintiff's employees to join Ford.

Fourth Cause of Action - Tortious Interference with Advantageous Business Relationships as to all Defendants

> In New York, for Plaintiff to state a claim for tortious interference with advantageous business relations, it must allege that: "(1) it had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice, or used dishonest, unfair, or improper means; and (4) the defendant's interference caused injury to the [***14] relationship." *Kirch v Lib-*

> *erty Media Corp., 449 F.3d 388, 400 (2nd Cir. 2006)*. Further, where a defendant is alleged to have interfered with "prospective contracts or other non-binding economic relations," rather than with existing contract rights, a plaintiff must show, "as a general rule, [that] defendant's conduct ... amount[s] to a crime or an independent tort" or that defendant engaged in its conduct "for the *sole* purpose of inflicting intentional harm on plaintiffs." *Carvel Corp. v Noonan, 3 NY3d 182, 190, 818 N.E.2d 1100, 785 N.Y.S.2d 359 (NY 2004)* (emphasis added).

*MMC Energy, Inc. v Miller, 2009 U.S. Dist. LEXIS 83777, 2009 WL 2981914 at *7 (SDNY).*

Plaintiff's fourth cause of action alleges that defendants, as an undifferentiated group, "intentionally, maliciously and improperly interfered with Women's relationships with its senior personnel and models by, among other things, their efforts to induce such employees and models to sever their relationships with Women and to become associated with a competing agency [i.e., Ford]" (Complaint, ¶ 13). A plaintiff alleging tortious interference with noncontractual economic relations must allege that it would have entered into a specified economic relationship, but for the defendant's wrongful conduct. [***15] *Algomod Tech. Corp. v Price, 65 AD3d 974, 886 N.Y.S.2d 120 (1st Dept 2009)*; *Learning Annex Holdings, LLC v Gittelman, 48 AD3d 211, 850 N.Y.S.2d 422 (1st Dept 2008).* Plaintiff alleges no such specified prospective economic relationship. Moreover, while plaintiff has alleged the use of "wrongful means," the Complaint suggests that defendants engaged in the alleged acts out of a desire to benefit themselves, and did not act solely out of malice nor to specifically injure the plaintiff. Accordingly, this cause of action must be dismissed.

Fifth Cause of Action - Breach of Confidentiality Agreement as to Defendants Ford and Altpoint

Plaintiff's fifth cause of action alleges that Ford and Altpoint entered into confidentiality agreements with plaintiff when Ford was looking into the possibility of purchasing plaintiff, and that Ford and Altpoint breached those agreements by using confidential information that they had gathered pursuant to the agreements, "to solicit Rowland and raid Women's business." (Complaint, ¶ 69). The only factual allegation supporting this claim is that Ford used confidential information in formulating the job offers that it made to Rowland and Fajar. The claim founders on plaintiff's acknowledgment that [***16] both Rowland and Fajar declined Ford's initial offers in 2008 and, indeed, reported them to Mr. Leccese. Even if Ford and/or Altpoint had used any confidential information obtained to make those initial offers, Women took no affirmative action against Ford or Altpoint at that time to terminate their access to the alleged confidential information. Ford's subsequent offers in 2010 could only have been based on negotiations between Ford and Rowland and Fajar, rather than on the information that Ford may have used in formulating its first, rejected, offers two years earlier. Accordingly, the fifth cause of action is dismissed.

Sixth Cause of Action - Unjust Enrichment as to Defendants Ford and Altpoint

"To state a cause of action for unjust enrichment, a plaintiff must allege that it conferred a benefit upon the defendant, and that the defendant will obtain such benefit without adequately compensating plaintiff therefor.'" *Smith v Chase Manhattan Bank, USA, 293 AD2d 598, 600, 741 N.Y.S.2d 100 (2d Dept 2002)* quoting *Nakamura v Fujii, 253 AD2d 387, 390, 677 N.Y.S.2d 113 (1st Dept 1998)*; *accord Aymes v Gateway Demolition Inc., 30 AD3d 196, 817 N.Y.S.2d 233 (1st Dept 2006)*; *Korff v Corbett, 18 AD3d 248, 794 N.Y.S.2d 374 (1st Dept 2005).* "[T]he receipt of a benefit [***17] alone ... is insufficient to establish a cause of action for unjust enrichment." *Wiener v Lazard Freres & Co., 241 AD2d 114, 120, 672 N.Y.S.2d 8 (1st Dept 1998)* (citation omitted).

The sixth cause of action alleges that Ford and Altpoint have been unjustly enriched in that they have received the benefits of employing the named defendants and those of plaintiff's other employees who joined Ford, and benefitted from their knowledge, without having compensated plaintiff (Complaint, ¶ 73). Those benefits, however, were not conferred by plaintiff. A company that hires employees away from a competitor by offering them higher salaries is not unjustly enriched thereby. As plaintiff acknowledges, Ford succeeded in recruiting the named defendants by offering Rowland a starting salary of over $1 million a year, and offering Fajar and Cognata starting salaries of $400,000 a year. Accordingly, the sixth cause of action is dismissed.

Seventh, Eighth and Ninth Causes of Action for Breach of Contract, Promissory Estoppel and Unjust Enrichment as to Defendant Rowland

The seventh, eighth, and ninth causes of action allege that Rowland charged large sums of money for personal expenses to his company credit card, that he [***18] periodically repaid plaintiff for portions of those charges, and that he promised to repay them all but has not done so.

The seventh cause of action, alleging breach of contract, must be dismissed because neither the Complaint, nor the affidavit of Mr. Leccese, describes the terms of any alleged agreement, nor the terms upon which Rowland allegedly agreed to repay the charges at issue. *See Sheridan v Trustees of Columbia Univ. in City of NY, 296 AD2d 314, 745 N.Y.S.2d 18 (1st Dept 2002)*; *Matter of Sud v Sud, 211 AD2d 423, 621 N.Y.S.2d 37 (1st Dept 1995)*.

The eighth cause of action, alleging promissory estoppel, must also be dismissed, because plaintiff does not allege "'a clear and unambiguous promise, reasonable and foreseeable reliance by the party to whom the promise is made, and an injury sustained in reliance on that promise." *Braddock v Braddock, 60 AD3d 84, 95, 871 N.Y.S.2d 68 (1st Dept 2009)*, quoting *Williams v Eason, 49 AD3d 866, 868, 854 N.Y.S.2d 477 (2d Dept 2008)*. The Complaint alleges that, upon his departure, Rowland "offered to pay $400,000 up front, and work out a payment plan with Women on the remainder." (Complaint, ¶ 38). Even assuming that to be an unambiguous promise, which it is not, plaintiff does not suggest in what manner it may [***19] have reasonably relied upon this promise.

The Complaint also alleges that "[f]or years, Rowland borrowed money from Women ... and agreed to repay Women for any and all personal expenditures" (Complaint, ¶ 35). The Complaint further recites that, each month, Rowland repaid a portion of the personal charges that he had placed on the credit card, and that at the end of each year his bonus would be applied to repaying a portion of those expenditures, "with any amount still outstanding remaining payable to Women as reflected on Women's ledger." (*Id.*) These allegations raise an inference that plaintiff allowed Rowland to continue to charge personal expenses to his corporate card, in reliance upon his repeated partial payments of those charges. However, they raise no inference that Rowland unambiguously promised to repay all the personal charges, especially inasmuch as plaintiff alleges that Rowland's post-resignation debt for those charges amounts to almost $867,000.00, exclusive of interest.

With regard to the ninth cause of action, see the discussion of unjust enrichment, *supra* at 14. The Complaint clearly alleges that plaintiff conferred a benefit upon Rowland by permitting him to charge [***20] personal expenses to his corporate credit card, without requiring him ever to repay those charges in full. Whether Rowland adequately compensated plaintiff for that benefit by the work that he performed for plaintiff is a question of fact which cannot be resolved at this stage of the litigation. Accordingly, this cause of action will not be dismissed.

Tenth Cause of Action - Breach of Contract as to Defendant Fajar

The tenth cause of action alleges that plaintiff lent Fajar certain sums of money on several occasions, which Fajar agreed to repay, but which he has failed to repay in full. Specifically, the Complaint alleges; (a) a loan of $58,000 on January 8, 2008, which Fajar agreed to repay in semimonthly installments of $1,000 at an interest rate of 3.15% and Fajar's failure to make the payments that were due from March 15, 2010 through May 15, 2010, leaving a balance of $8270.65 (Complaint ¶ 40); (b) a $100,000 loan on October 19, 2009, which Fajar agreed to repay in semi-monthly payments of $3,500 at an interest rate of 0.75%; and (c) an $8,700 loan on November 20, 2009, and a $15,000 loan on February 3, 2010, both of which Fajar agreed to have added to the principal due on the $100,000 [***21] loan. The Complaint alleges that Fajar has failed to make the payments on the $100,000 loan, as augmented by the two later loans, that were due on March 15, 2010 through May 15, 2010. Finally, the Complaint alleges that, on November 19, 2009, plaintiff agreed to advance payments for Fajar's immigrant visa application, and that the sum of $650 remains outstanding on that advance (Complaint, ¶ 42).

Fajar's sole argument for dismissing this cause of action is that it is barred by the statute of frauds. Fajar signed an Installment Note, dated October 19, 2009, which memorialized the terms of the $100,000 loan (*See* Leccese Aff., Exh. M). He argues that such a writing was required by General Obligations Law ("GOL") *§ 5-701 (a) (1)*, because it provided for repayment of the loan over a 14-month period, and that, because the terms of the November 20, 2009, and February 3, 2010 loans modified the terms of the $100,000 loan but were not reduced to writing, the statute of frauds bars plaintiff from recovering the balance owed on all three of those loans.

GOL § 5-701 (a) (1) provides that any agreement which "[b]y its terms is not to be performed within one year from the making thereof ..." is void [***22] unless it is in writing and signed by the person making the promise. It has long been the law that this provision bars "only those contracts which, by their terms, 'have absolutely no possibility in fact and law of full performance within one year.'" *Cron v Hargro Fabrics, Inc., 91 NY2d 362, 366, 694 N.E.2d 56, 670 N.Y.S.2d 973 (1998)*, quoting *D & N Boening v Kirsch Beverages, 63 N.Y.2d 449, 454, 472 N.E.2d 992, 483 N.Y.S.2d 164 (1984)*; *see also North Shore Bottling Co. v Schmidt & Sons, 22 NY2d 171, 239 N.E.2d 189, 292 N.Y.S.2d 86 (1968)*. The October 19, 2009 note that Fajar signed does not, by its terms, bar him from prepaying the entire amount owed within one year. Accordingly, it is outside the statute of frauds. *Moon v Moon, 6 AD3d 796, 776 N.Y.S.2d 324 (3d*

Dept 2004); *Cabrini Med. Ctr. v KM Ins. Brokers, 142 AD2d 529, 531 N.Y.S.2d 1 (1st Dept 1988)*; *app. dism. 73 N.Y.2d 785, 533 N.E.2d 674, 536 N.Y.S.2d 744 (1988)*.

The subsequent oral modifications, however, are unenforceable, although they have no effect on the validity of the note. *See Lincolnshire Mgt. v Les Gantiers Holdings, 303 A.D.2d 180, 755 N.Y.S.2d 391 (1st Dept 2003)*; *Ber v Johnson, 163 AD2d 817, 558 N.Y.S.2d 350 (4th Dept 1990)*.

Punitive Damages

Punitive damages are allowable in tort cases such as for breach of fiduciary duty or unfair competition "so long as the very high threshold of moral culpability is satisfied (citations [***23] omitted)." *Giblin v Murphy, 73 NY2d 769, 772, 532 N.E.2d 1282, 536 N.Y.S.2d 54 (1988)*. While plaintiff has alleged misconduct on the part of the defendants in this Complaint, the allegations of wrongdoing do not rise to the level of such high moral culpability or "such conscious disregard of the rights of another that [they can be] deemed willful and wanton." *Swersky v Dreyer & Traub, 219 AD2d 321, 328, 643 N.Y.S.2d 33 (1st Dep't 1996)*.

Accordingly, plaintiff's demand for punitive damages in its Prayer for Relief is dismissed.

The motions are denied to the following extent:

1) the first cause of action is sustained against defendants Ford, Rowland and Fajar;

2) the second cause of action is sustained as against defendant Rowland;

3) the third cause of action is sustained as against defendant Ford;

4) the ninth cause of action is sustained against defendant Rowland; and

5) the tenth cause of action is sustained against defendant Fajar.

The motions are otherwise granted.

The remaining causes of action are severed and continued.

Defendants Ford, Rowland and Fajar are directed to serve Answers to the remaining causes of action against them within 30 days of notice of the e-filing of this decision.

The parties shall then appear for a preliminary conference, [***24] after meeting and conferring as to their discovery requests in IA Part 39, 60 Centre Street, Room 208 on October 19, 2011 at 10:00 a.m.

This constitutes the decision and order of this Court.

Dated: August 15, 2011

BARBARA R. KAPNICK

J.S.C.

ROXANN PIXLER, PLAINTIFF v. ANTHONY HUFF, et. al., DEFENDANTS

CIVIL ACTION NO. 3:11-CV-00207-JHM

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY, LOUISVILLE DIVISION

2011 U.S. Dist. LEXIS 133185

November 16, 2011, Decided
November 17, 2011, Filed

SUBSEQUENT HISTORY: Motion granted by, in part, Motion denied by, in part *Pixler v. Huff, 2012 U.S. Dist. LEXIS 106492 (W.D. Ky., July 30, 2012)*

PRIOR HISTORY: *Kingsley Capital Mgmt., LLC v. Sly, 820 F. Supp. 2d 1011, 2011 U.S. Dist. LEXIS 120555 (D. Ariz., 2011)*

COUNSEL: [*1] For Roxann Pixler, Plaintiff: Gregory D. Simms, Gruner & Simms, PLLC, Louisville, KY; Steven R. Romines, Romines Weis & Young, PSC, Louisville, KY.

For Anthony Huff, The Huff Grandchildren Trust, W.A. Huff, LLC, SDH Realty, Inc., River Falls Equities, LLC, Oxygen Unlimited, LLC, RiverFalls Investments, LLC, formerly known as Oxygen Unlimited II, LLC, Anthony Russo, Sheri Huff, Michele Brown, Defendants: Judson B. Wagenseller, LEAD ATTORNEY, Louisville, KY.

For Brian Sly, Defendant: Daniel T. Bernhard, Freeland, Cooper & Foreman LLP, San Francisco, CA; Scott P. Zoppoth, Scott P. Zoppoth, PLLC, Louisville, KY.

For Thomas Bean, Defendant: J. Denis Ogburn, LEAD ATTORNEY, Pence & Ogburn, PLLC, Louisville, KY.

For Huff Farm (Horsebranch), Inc., Defendant: Judson B. Wagenseller, Louisville, KY.

JUDGES: Joseph H. McKinley, Jr., Chief United States District Judge.

OPINION BY: Joseph H. McKinley, Jr.

OPINION

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Defendant Brian N. Sly's Motion to Dismiss [DN 10]; Defendants A. Huff, S. Huff, Michele Brown, Anthony Russo, River Falls Investments, LLC, Oxygen Unlimited, LLC, River Falls Equities, LLC, SDH Realty, Inc., W.A. Huff, LLC, and The Huff Grandchildren Trust's [*2] Motion for More Definite Statement [DN 12]; Defendant Thomas Bean's Motion to Dismiss [DN 30]; Defendant Huff Farm (Horsebranch) Inc.'s Motion to Dismiss [DN 34]; and Plaintiff Roxann Pixler's Motion to Strike [DN 33] and Motion for Extension of Time [DN 36]. Fully briefed, these matters are ripe for decision.

I. BACKGROUND

This case centers around the creation and operation of Midwest Merger Management, LLC ("MMM"). In 2001, Plaintiff Roxann Pixler's husband, Danny Pixler, and Anthony Huff ("A. Huff") formed MMM. (Amend. Compl. at ¶ 18.) For reasons that are not entirely clear to the Court, Pixler and A. Huff placed their shares in the company in their respective wives' names. (Id.) On July 20, 2001, MMM filed its Articles of Organization, which listed two members, Plaintiff and Sheri Huff ("S. Huff"). (Id. at ¶ 19.) It appears that MMM was run entirely by Pixler and A. Huff, and that Plaintiff had no involvement with the operations of the company. At some point, Michele Brown became the secretary and personal assistant to A. Huff and became involved with MMM. (Id. at ¶ 21.) In MMM's 2002 Annual Report, Brown was listed as a member or manager of MMM, along with Plaintiff and S. Huff. [*3] (Id. at ¶ 20.) When MMM was ini-

tially created, Brian N. Sly, a California business man, loaned the business approximately $3.9 million dollars. (Id. at ¶ 43.)

MMM was established as a "risk manager." (Id. at ¶ 23.) In this line of work, MMM would collect premiums and fees from clients and would in turn pay premiums to insurance carriers that provided workers' compensation insurance coverage. (Id. at ¶ 24.) MMM also provided consulting services to various entities. (Id. at ¶ 25.)

In 2004, MMM acquired Certified Services, Inc., which itself owned several subsidiaries. (Id. at ¶ 27.) Beginning in 2005, A. Huff established several companies including, Oxygen Unlimited, LLC; Oxygen II, LLC (later renamed River Falls Investments, LLC); O2 HR, LLC; O2 HR Safety & Claims, LLC (later renamed W. Anthony Huff, LLC and renamed again River Falls Equities, LLC); W.A. Huff, LLC; and SDH Realty, Inc. (Id. at ¶¶ 29-32, 41, 42.) Thomas Bean, helped A. Huff establish and manage River Falls Investments, LLC and River Falls Equities, LLC. (Id. at ¶44.) In her Amended Complaint, Plaintiff alleges that A. Huff used at least two of these entities, SDH Realty, Inc. and W.A. Huff, LLC, to funnel money from MMM [*4] for illegal purposes. (Id. at ¶¶ 41-42.)

In 2006, Plaintiff was told that her share in MMM was virtually worthless. (Id. at ¶ 35.) However, A. Huff expressed interest in purchasing her share and paid Plaintiff $170,000 as a partial buy-out. (Id.) Plaintiff eventually became suspicious of A. Huff and began to investigate the business dealings of MMM. She was able to obtain a copy of the MMM books in 2008 and discovered what she believed to be "accounting discrepancies that could not be reconciled." (Id. at ¶ 39.) Plaintiff filed suit against A. Huff and many other parties in April 2011.

II. DISCUSSION

A. Brian Sly

Defendant Sly has challenged Plaintiff's Complaint on a number of grounds. Defendant Sly has moved for dismissal under *Fed. R. Civ. P. 12(b)(2)* for lack of personal jurisdiction, under *Fed. R. Civ. P. 9(b)* for failure to plead fraud with particularity, and under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted.

i. Lack of Personal Jurisdiction

The Supreme Court has held that personal jurisdiction "is an essential element of the jurisdiction of a district . . . court,' without which the court is 'powerless to proceed to an adjudication.'" *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 584, 119 S. Ct. 1563, 143 L. Ed. 2d 760 (1999)* [*5] (quoting *Emp'rs Reinsurance Corp. v. Bryant, 299 U.S. 374, 382, 57 S. Ct. 273, 81 L. Ed. 289 (1937)*; see also *Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)* ("The requirement that jurisdiction be established as a threshold matter spring[s] from the nature and limits of the judicial power of the United States and is inflexible and without exception.") (internal quotation marks omitted). Furthermore, if a court "can readily determine that it lacks jurisdiction over the cause or the defendant, the proper course would be to dismiss on that ground." *Sinochem Intern. Co. Ltd. v. Malaysia Intern. Shipping Corp., 549 U.S. 422, 436, 127 S. Ct. 1184, 167 L. Ed. 2d 15 (2007)*. Accordingly, the Court will address its jurisdiction over the defendant before addressing the merits of Plaintiff's individual claims.

When addressing a motion to dismiss for lack of personal jurisdiction, "there is no statutory direction . . ., [therefore,] the mode of its determination is left to the trial court." *Gibbs v. Buck, 307 U.S. 66, 71-72, 59 S. Ct. 725, 83 L. Ed. 1111 (1939)*. However,

> case law establishes a settled procedural scheme to guide trial courts in the exercise of this discretion. If it decides that the motion can be ruled on before trial, the court "may determine the motion [*6] on the basis of affidavits alone; or it may permit discovery in aid of the motion; or it may conduct an evidentiary hearing on the merits of the motion." *Marine Midland Bank, N.A. v. Miller, 664 F.2d 899, 904 (2d Cir. 1981)*. However the court handles the motion, the plaintiff always bears the burden of establishing that jurisdiction exists.

Serras v. First Tennessee Bank Nat'l Ass'n, 875 F.2d 1212, 1214 (6th Cir. 1989). If the court determines the jurisdictional issue on written submissions only, the plaintiff "need only make a prima facie showing of jurisdiction." *Compuserve, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 1996)*. When making such a determination without an evidentiary hearing, "the court must consider the pleadings and affidavits in a light most favorable to the plaintiff." Id. Furthermore, the court must "not consider facts proffered by the defendant that conflict with those offered by the plaintiff." *Neogen Corp. v. Neo Gen Screening, Inc., 282 F.3d 883, 887 (6th Cir. 2002)*.

In a diversity case, a federal court determines whether personal jurisdiction exists over a non-resident defendant by applying the law of the state in which it sits. *Third Nat'l Bank v. WEDGE Group Inc., 882 F.2d*

1087, 1089 (6th Cir. 1989). [*7] The Court applies a two-step inquiry to determine whether it may exercise personal jurisdiction over a non-resident defendant: "(1) whether the law of the state in which the district court sits authorizes jurisdiction, and (2) whether the exercise of jurisdiction comports with the *Due Process Clause*." *Brunner v. Hampson, 441 F.3d 457, 463 (6th Cir. 2006)*. The district court's exercise of jurisdiction over an out-of-state defendant must be consistent with both the forum state's long-arm statute and the constitutional requirements of due process. Id.; *CompuServe, Inc. v. Patterson, 89 F.3d 1257, 1262 (6th Cir. 2007)*; *Appriss Inc. v. Information Strategies, Inc., 2011 U.S. Dist. LEXIS 91407, 2011 WL 3585890, at *2 (W.D. Ky. Aug. 16, 2011)*. Furthermore, "[p]ersonal jurisdiction must be established with respect to each cause of action." *Morris Aviation, LLC v. Diamond Aircraft Indus., Inc., 730 F. Supp. 2d 683, 694 (W.D. Ky. 2010)*.

Until recently, the Kentucky long-arm statute, *K.R.S. § 454.210*, had been interpreted "to reach to the full constitutional limits of due process in entertaining jurisdiction over non-resident defendants." *Wilson v. Case, 85 S.W.3d 589, 592 (Ky. 2002)*. In *Caesars Riverboat Casino, LLC v. Beach, 336 S.W.3d 51 (Ky. 2011)*, [*8] the Kentucky Supreme Court expressly overruled Wilson and held that the Kentucky long-arm statute does not extend to the full limit of due process and requires its own separate analysis. *Caesars, 336 S.W.3d at 57*.

Kentucky's long-arm statute requires a two-prong showing before a court can exercise personal jurisdiction over a non-resident. First, the court must find that a non-resident's conduct or activities fall within one of nine enumerated provisions in *K.R.S. § 454.210*. Only three of those provisions are applicable to the facts underlying the present motion against Defendant Sly; *K.R.S. § 454.210(2)(a)(1), (3)*, and *(4)*.[1] If this first prong is satisfied then the second prong requires the Court to determine if the plaintiff's claim arises from the defendant's actions. See *K.R.S. § 454.210(2)(b)* ("When jurisdiction over a person is based solely upon this section, only a claim arising from acts enumerated in this section may be asserted against him.") Accordingly, "even when the defendant's conduct and activities fall within one of the enumerated categories, the plaintiff's claim still must 'arise' from that conduct or activity before long-arm jurisdiction exists." *Caesars, 336 S.W.3d at 56*. [*9] The court in Caesars conceded that "[t]he phrase 'arising from' may reasonably be subject to various interpretations." *Id. at 58*. In evaluating the meaning of that phrase, the Kentucky Supreme Court found that "[i]f there is a reasonable and direct nexus between the wrongful acts alleged in the complaint and the statutory predicate for long-arm jurisdiction, then jurisdiction is properly exercised." *Id. at 59*. The court went on to say that "the analysis must necessarily be undertaken on a case by case basis" and that "[t]rial courts will ultimately have to depend upon a common sense analysis, giving the benefit of the doubt in favor of jurisdiction." Id.

1 The long-arm statute states in pertinent part that

> (2)(a) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's:
>
> 1. Transacting any business in this Commonwealth;
>
> . . .
>
> 3. Causing tortious injury by an act or omission in this Commonwealth;
>
> 4. Causing tortious injury in this Commonwealth by an act or omission outside this Commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from [*10] goods used or consumed or services rendered in this Commonwealth, provided that the tortious injury occurring in this Commonwealth arises out of the doing or soliciting of business or a persistent course of conduct or derivation of substantial revenue within the Commonwealth[.]

K.R.S. § 454.210(2)(a).

In the instant case, Plaintiff has alleged two claims against Defendant Sly, breach of fiduciary duty and unjust enrichment. The following factual allegations related to Defendant Sly are contained within the Amended Complaint: (1) Defendant Brian Sly is a citizen of the State of California, (Amend. Compl. ¶ 11); (2) Defendant Sly loaned approximately $3.9 million dollars to A. Huff, however, he was re-paid $5.3 million with funds from MMM, (Id. at ¶ 43); and (3) Plaintiff relied on representations of Sly that the company was being operated lawfully (Id. at ¶ 46). In support of Count III, Breach of Fiduciary Duty, Plaintiff alleges that she reposed trust and confidence in Sly who therefore had a duty of utmost good faith, trust, confidence and candor to the Plaintiff, and that Sly breached that duty and caused damage to the Plaintiff. (Id. at ¶ 62-62.) In support of Count VI, Unjust Enrichment, [*11] Plaintiff alleges that Sly received benefits from the Plaintiff's participation in MMM for which the Plaintiff has not been adequately compensated, which benefits were to the detriment of Plaintiff. (Id. at ¶¶ 75-76.)

Both Plaintiff and Defendant Sly have submitted two declarations, sworn to under penalty of perjury, in an attempt to demonstrate or dispel the notion that the Court has personal jurisdiction over Defendant Sly. While the Federal Rules of Civil Procedure specifically address the use of affidavits and declarations to support or oppose a motion for summary judgment, the Rules are silent regarding their use to support or oppose a motion to dismiss under *Rule 12(b)*. Compare *Fed. R. Civ. P. 56(c)*, with *Fed. R. Civ. P. 12(b)*. "Because there are no specific procedures or rules governing evidentiary rulings in connection with a motion to dismiss, courts consistently look to *Rule 56* for guidance." *Foshee v. Forethought Fed. Sav. Bank, 2010 U.S. Dist. LEXIS 51296 at *8, 2010 WL 2158454, at *3 (W.D. Tenn. May 7, 2010)*; see also *Ohio Nat'l Life Ins. Co. v. United States, 922 F.2d 320, 327 (6th Cir. 1990)* (finding that "[a]lthough the district court has considerable discretion in devising procedures for resolving questions [*12] going to subject matter jurisdiction, courts frequently look to *Rule 56* for guidance in ruling upon evidentiary matters under *12(b)(1)*.").

Under *Rule 56(c)*, "[a]n affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." *Fed. R. Civ. P. 56(c)*. The Court sees no reason why an affidavit or declaration submitted in connection with a motion to dismiss under *Rule 12(b)(2)* should be treated any differently. Therefore, to the extent any affidavit or declaration submitted by the parties is not based upon personal knowledge or contains inadmissible evidence, the Court will not consider such portions in determining the issue of personal jurisdiction. See *United Tech. Corp. v. Mazer, 556 F.3d 1260, 1277 (11th Cir. 2009)* (finding that when a court is determining a Rule (12)(b)(2) motion to dismiss that it should "consider[] 'only those portions of the [affidavit] that set forth specific factual declarations within the affiant's personal knowledge.'"); *Cooper v. McDermott Int'l, Inc., 62 F.3d 395, at *5 (5th Cir. 1995)* (unpublished) [*13] (holding that "[h]earsay is not properly included in an affidavit" submitted with a *Rule 12(b)(2)* motion.).

In support of his motion to dismiss, Defendant Sly has submitted two sworn declarations wherein he states that he is a resident of California who has never lived, owned real property, owned any other assets or personal property, maintained any bank or other accounts, maintained any regular business activities, paid taxes, or maintained any employees, contractors or agents in the Commonwealth of Kentucky. (Sly's Decl. in Support of Mot. to Dismiss ¶¶ 2-3 [DN 10].) Defendant Sly further maintains that he never spoke to Plaintiff regarding business while either of them were in Kentucky, rather, all of his contacts with Plaintiff in Kentucky were of a social nature. (Id. at ¶¶ 4-7.)

Sly does admit that he was in Kentucky to attend a regular business meeting involving Oxygen Unlimited II, LLC in May 2006, but that Plaintiff was not at that business meeting. (Id. at ¶ 5.) Sly further declares that he did, in fact, loan MMM approximately $3,924,808.00 in 2001, an action that he considered and executed from his California home. (Sly's Supp. Decl. ¶ 2 [DN 39].) Sly states that he has only [*14] received $2,708,029.03 as a return on his loan, and that he has lost approximately $1,216,779, which he does not expect to recover. (Id. at ¶¶ 4-5.) The payments that he did receive from MMM were all received by Sly at his home in California and deposited in his California bank accounts by him. (Id. at ¶ 4.) The last of these repayments was received in 2005. (Id.) Defendant Sly further states that he does not recall ever speaking with Plaintiff regarding MMM, until approximately 2009 when Plaintiff threatened to sue him. (Id. at ¶ 3.)

Plaintiff also filed two declarations opposing Defendant Sly's motion to dismiss. Plaintiff's declarations are prefaced with the statement that "[t]he following facts are within my own personal knowledge, and if called upon I could and would testify competently to these facts, except as to those matters stated herein upon information and belief, and as to those matter [sic] I have a good faith and reasonable basis to believe that they are true." (Pl.'s Decl. in Supp. Pl.'s Resp. to Def. Brian Sly's

Mot. to Dismiss ¶ 2 [DN 23].) Plaintiff states that she was a partial owner of MMM beginning from its inception in 2001, and that she owned a significant portion [*15] of the company during the time relevant to her Complaint. (Id. at ¶ 5.) The remaining statements contained in her declaration are not made from personal knowledge but are made based on Plaintiff's "knowledge and belief." (Id. at ¶¶ 6-13.) Plaintiff states that it is her "knowledge and belief" that Defendant Sly has had "systematic and continuous" contacts with the state of Kentucky since 1990, (Id. at ¶ 6), including being a business affiliate of A. Huff since the early 1990's, (Id. at ¶ 8). Plaintiff also states that is her "knowledge and belief" that Defendant Sly invested at least $4,000,000 in MMM between 2001 and the present. (Id. at ¶ 10.)

In her Supplemental Declaration filed approximately six weeks after her initial declaration, Plaintiff again makes a number of statements based upon her "knowledge and belief." (See Pl.'s Decl. in Supp. Pl.'s Supp. Resp. to Def. Brian Sly's Mot. to Dismiss [DN 37].) In this second declaration, Plaintiff states that it is her "knowledge and belief" that Defendant Sly held and sold an "equity position" in MMM, back to MMM for over $ 15 million dollars in 2002. (Id. at ¶ 13.) Using the same "knowledge and belief" preface, Plaintiff further states [*16] that Defendant Sly was part of a large fraudulent scheme that included soliciting investments for MMM and Oxygen Unlimited, LLC, and agreeing to make large transfers of funds for "investment" purposes in these entities, which never resulted in business uses. (See id. at ¶¶ 9-15.) Plaintiff claims that Defendant A. Huff purposely acted to perpetrate fraud against MMM by engaging in circular accounting practices, that benefitted Defendant Sly, and that Defendant Sly was aware of such fraudulent practices. (Id. at ¶¶ 16-17, 22.)

These "factual allegations" made by Plaintiff do not appear to be based upon personal knowledge, rather, they appear to be based upon conjecture, speculation, and belief. Although Plaintiff intentionally prefaced the majority of her statements with the phrase "knowledge and belief" instead of "information and belief," the use of such wording is insufficient to satisfy the requirement of personal knowledge. These statements made upon "knowledge and belief" stand in stark contrast to the other statements made by Plaintiff based upon personal knowledge, which do not contain such a preface. (See e.g. id. at 6.) Statements not made upon personal knowledge are not to [*17] be considered by courts in determining a motion for summary judgement under *Rule 56* and such statements should not be considered in a motion to dismiss under *Rule 12(b)(2)*. See *Totman v. Louisville Jefferson Cnty. Metro Gov't, 391 F. App'x 454, 464 (6th Cir. 2010)* (finding that statements made to the best of a party's knowledge and belief go beyond personal knowledge and do not meet the evidentiary standard set forth in *Rule 56*); *Plaskolite, Inc. v. Zhejiang Taizhou Eagle Mach. Co., Ltd., 2008 U.S. Dist. LEXIS 99395, 2008 WL 5190049, at *5 (S.D. Ohio Dec. 9, 2008)* (addressing a *Rule 12(b)(2)* motion to dismiss and refusing to consider portions of an affidavit based upon the belief of the affiant); *Doe I v. Al Maktoum, 2008 U.S. Dist. LEXIS 93758, 2008 WL 4965169, at *5 (E.D. Ky. Nov. 18, 2008)* (finding an affidavit based upon news stories and websites was not based upon personal knowledge and was insufficient to defeat a motion to dismiss under *Rule 12(b)(2)*; *Neewra, Inc. v. Manakh Al Khaleeg Gen. Trading and Contracting Co., 2004 U.S. Dist. LEXIS 13556, 2004 WL 1620874, at *2 n.3 (S.D.N.Y. July 20, 2004)* (finding an affidavit based upon information and belief was not based upon personal knowledge and was not to be considered in the determination of the *Rule 12(b)(2)* [*18] motion to dismiss).

Disregarding those "factual assertions" made upon Plaintiff's knowledge and belief, the Court finds that there are few facts connecting Defendant Sly to the Commonwealth of Kentucky for purposes of Plaintiff's claims of breach of fiduciary duty and unjust enrichment. While the Court must draw all reasonable inferences in favor of Plaintiff, it need not disregard statements and facts made by the Defendant that are not contradicted. Plaintiff's claim for breach of fiduciary duty is premised upon Defendant Sly allegedly misrepresenting to her the legality of MMM's operation. Plaintiff has produced no evidence demonstrating when, where or how this misrepresentation was made. She has failed to produce evidence that it was made while either she or Defendant Sly was in the Commonwealth of Kentucky. Defendant Sly has submitted a declaration stating that he has never spoken to Plaintiff over the phone when either he or she was in the Commonwealth of Kentucky. (Def. Sly's Decl. ¶ 7.) He further states that the one time that he interacted with Plaintiff in Kentucky was in May 2006 when he saw her at a social function following a business meeting involving Oxygen Unlimited II, [*19] LLC. (Id. at ¶ 5.) Defendant Sly states that this contact with Plaintiff was purely a social one.[2]

> 2 Noticeably, Defendant Sly does not go so far in his declaration as to state that he has never discussed MMM with Plaintiff, only that such communication never took place while either of them was in the Commonwealth of Kentucky.

Looking first to Plaintiff's breach of fiduciary duty claim, the Court can quickly eliminate *K.R.S. § 454.210(2)(a)(3)* and *(4)* as creating jurisdiction. Plaintiff has failed to demonstrate that the misrepresentation occurred in the Commonwealth, therefore jurisdiction cannot be found under *subsection (2)(a)(3)*. As for subsec-

tion 2(a)(4), assuming that the misrepresentation in some way affected Plaintiff in Kentucky, the Court finds that Plaintiff has failed to demonstrate that Defendant Sly "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this Commonwealth[.]" *K.R.S. § 454.210(2)(a)(4)*. Furthermore, Plaintiff has not demonstrated that Defendant Sly's alleged misrepresentation arose "out of the doing or soliciting of business or a persistent [*20] course of conduct or derivation of substantial revenue within the Commonwealth." Id. Therefore, jurisdiction cannot be found under *subsection (2)(a)(4)*.

Nor does *K.R.S. § 454.210(2)(a)(1)*, transacting any business in the Commonwealth, provide the Court with the necessary jurisdiction. As the Kentucky Supreme Court only recently stated that Kentucky's long-arm statute must be analyzed separately from due process, there is little precedent by Kentucky courts analyzing the phrase "transacting any business" in *K.R.S. § 454.210(2)(a)(1)*. Under Kentucky law, statutes are to be "liberally construed with a view to promote their objects and carry out the intent of the legislature . . . ." *K.R.S. § 446.080(1)*. Furthermore, "words and phrases are to 'be construed according to the common and approved usage of language' unless a word has a certain technical meaning." *Workforce Dev. Cabinet v. Gaines, 276 S.W.3d 789, 792 (Ky. 2008)* (quoting *K.R.S. § 446.080(4)*).

The term "transact" is defined as "to carry on or conduct (business, negotiations, activities, etc.) to a conclusion or settlement." Random House Unabridged Dictionary 2008 (2d ed. 1993). In the instant case, the Amended Complaint alleges [*21] that Defendant Sly made a loan to A. Huff. (Amend. Compl. ¶ 43.) Defendant Sly's Supplemental Declaration states that the loan was actually issued to MMM, a Kentucky corporate entity. (Def. Sly's Supp. Discl. ¶ 2.) Regardless of who initially received the funds, A. Huff or MMM, it is clear from the declarations that the money was intended to be a loan to MMM. Defendant Sly's declaration states that this decision and the actual transfer of funds took place from his home in California. Regardless of where the loan was considered or executed, Defendant Sly placed $3.9 million dollars into Kentucky corporation. The Court is satisfied that the loan at issue constitutes transacting business in the Commonwealth.

However, it is not enough that a defendant transact business in the Commonwealth, a plaintiff must also demonstrate that her claim arises from such a transaction. See *K.R.S. § 454.210(2)(b)*; *Caesars, 336 S.W.3d at 56*. Plaintiff has not done so in the instant case. There are no factual allegations that support an inference that Defendant Sly's alleged breach of a fiduciary duty is connected to his transacting business by issuing MMM a loan. The Court is unable to find a reasonable nexus [*22] between Defendant Sly's loan and the Plaintiff's claim. A fiduciary duty is not imposed upon a lender by the simple act of making a loan. Furthermore, there are no facts alleged that suggest that the misrepresentation that MMM was being operated lawfully is connected whatsoever to Defendant Sly's loan. Without facts demonstrating how her claim for breach of a fiduciary duty arises from Defendant Sly's making of a loan, the Court finds that personal jurisdiction over this claim cannot be exercised under *K.R.S. § 454.210(2)(a)(1)*. Accordingly, the Court finds that Plaintiff has failed to demonstrate a prima facie case of personal jurisdiction over Defendant Sly for the breach of fiduciary duty claim.

Defendant Sly also challenges the Court's personal jurisdiction regarding Plaintiff's unjust enrichment claim. The Amended Complaint states that Defendant Sly made a loan of approximately $3.9 million dollars to Defendant A. Huff, but was repaid $5.3 million dollars from MMM. (Amend. Compl. ¶ 43.) Thirty-two paragraphs later, the Complaint states in conclusory terms that the "Defendants [including Sly] received benefits from the Plaintiff's participation in 'MMM' for which the Plaintiff has [*23] not been adequately compensated." (Id. at ¶ 75.)

Plaintiff contends that the Court has jurisdiction over Defendant Sly for purposes of the unjust enrichment claim under the transacting business provision in *K.R.S. § 454.210(2)(a)(1)*. As discussed above, Defendant Sly's loan to a Kentucky company through A. Huff, is sufficient at this prima facie stage to constitute transacting business in the Commonwealth. However, there still must be a reasonable and direct nexus between the claim that Defendant Sly was unjustly enriched and his loan to MMM. The Kentucky Supreme Court has found that the determination of this prong "will ultimately depend upon a common sense analysis, giving the benefit of the doubt in favor of jurisdiction." *Caesars, 336 S.W.3d at 59*. With these instructions in mind, the Court finds that there is a sufficient nexus for the Court to exercise personal jurisdiction under the Kentucky long-arm statute. While the Amended Complaint is rather bare, it appears that the unjust enrichment claim is directly related to the business Sly transacted in Kentucky. The Court finds that this demonstrates enough of a nexus between Plaintiff's claim of unjust enrichment and Defendant Sly's [*24] loan to exercise personal jurisdiction.

Having found that the Kentucky long-arm statute applies, the Court must also find that the exercise of personal jurisdiction conforms with due process. "The relevant inquiry is whether the facts of the case demonstrate that the nonresident defendant possesses such minimum contacts with the forum state that the exercise

of jurisdiction would comport with 'traditional notions of fair play and substantial justice.'" *Theunissen, 935 F.2d 1454, 1459 (6th Cir. 1991)* (quoting *Int'l Shoe Co. v. State of Washington, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945))*. The Sixth Circuit has identified three criteria for determining whether specific in personam jurisdiction may be exercised.

> First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Southern Mach. Co. v. Mohasco Indus., Inc., 401 F.2d 374, 381 (6th Cir. 1968). [*25] See also *Theunissen, 930 F.2d at 1460*; *Franklin Roofing, Inc. v. Eagle Roofing and Sheet Metal, Inc., 61 S.W. 3d 239, 240 (Ky. Ct. App. 2001)*.

In order to determine whether personal jurisdiction over Defendant Sly would be appropriate in this forum, the Court must examine his contacts in terms of the three criteria outlined in Mohasco. "The three prong test is intended to be a framework for analysis and is not susceptible to mechanical application." *Info-Med, Inc. v. Nat'l Healthcare, Inc., 669 F.Supp. 793, 796* (citing *Welsh v. Gibbs, 631 F.2d 436, 440 (6th Cir. 1980))*. "Furthermore, the first and second prongs may be considered as one due to their inter-relatedness." Id. These prongs may be satisfied if a substantial business contract is present. Id.

Jurisdiction is proper under the purposeful availment requirement where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state. *Burger King Corp. v. Rudzewicz, 471 U.S. 462, 475, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)*. Moreover, the defendant's conduct and connection with the forum must be of a character that he or she should reasonably anticipate being haled into court there. *Id. at 474*. This purposeful [*26] availment requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. *Id. at 475*.

"A defendant may be said to have purposefully availed himself of the benefits of the forum state if he has either 'deliberately' engaged in significant activities within a state or created 'continuing obligations' between himself and the citizens of a forum." *Info-Med, 669 F. Supp. at 796* (quoting *Burger King, 471 U.S. at 475-76*). "[P]arties who 'reach out beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other State for the consequences of their activities." *LAK, Inc. v. Deer Creek Enters., 885 F.2d 1293, 1300 (6th Cir. 1989)* (quoting *Burger King, 471 U.S. at 473*). "[J]urisdiction may not be avoided merely because the defendant did not physically enter the forum state, so long as a commercial actor's efforts are purposefully directed toward residents of another state." *Info-Med, 669 F. Supp. at 796*.

The first prong of the Mohasco test requires the Court to determine if Defendant Sly purposely availed himself of the privilege [*27] of acting within Kentucky. Taking all reasonable inferences in favor of Plaintiff, the Court finds that Defendant Sly reached out beyond the state of California and loaned $3.9 million dollars to a Kentucky company. This action created continuing obligations between himself and a Kentucky citizen. This was not a "random," "fortuitous," or "attenuated" contact, but was instead a purposefully direct and deliberate action on Defendant Sly's part. As such, Sly should have reasonably anticipated being haled into a Kentucky court in a matter related to that loan. See *McGee v. Int'l Life Ins. Co., 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223 (1957)* (finding the issuance of a single life insurance policy to by a non-resident was sufficient purposeful availment). As discussed above, the Court has already found that Plaintiff's claim for unjust enrichment arises from this contact, thus satisfying the second prong of the Mohasco test. As for the final prong, the Court finds that infusing nearly $4 million dollars into the state of Kentucky demonstrates sufficient effects within Kentucky to make the exercise of personal jurisdiction over Defendant Sly reasonable.

The Court notes that its finding of personal jurisdiction [*28] is based only on Plaintiff's ability to demonstrate a prima facie case. The finding of personal jurisdiction at this stage of the litigation does not preclude Defendant Sly from raising the defense again at trial. See *Serras v. First Tenn. Bank Nat'l Assoc., 875 F.2d 1212, 1214-15 (6th Cir. 1989)* ("A threshold determination that personal jurisdiction exists 'does not relieve [the plaintiff] . . . at the trial of the case-in-chief from proving the facts upon which jurisdiction is based by a preponderance of the evidence.'")

ii. Failure to State a Claim

Having found that it has personal jurisdiction over Defendant Sly for purposes of the unjust enrichment claim, the Court will now address the merits of Plaintiff's claim. Defendant Sly contends that Plaintiff has failed to

state a claim upon which relief can be granted, and has moved to dismiss this claim under *Fed. R. Civ. P. 12(b)(6)*.

Upon a motion to dismiss for failure to state a claim pursuant to *Fed. R. Civ. P. 12(b)(6)*, a court "must construe the complaint in the light most favorable to plaintiff," *League of United Latin Am. Citizens v. Bredesen, 500 F.3d 523, 527 (6th Cir. 2007)* (citation omitted), "accept all well-pled factual allegations [*29] as true[,]" id., and determine whether the "complaint states a plausible claim for relief[,]" *Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009)*. Under this standard, the plaintiff must provide the grounds for its entitlement to relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*. A plaintiff satisfies this standard only when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S.Ct. at 1949*. A complaint falls short if it pleads facts "merely consistent with a defendant's liability" or if the alleged facts do not "permit the court to infer more than the mere possibility of misconduct." *Id. at 1949, 1950*. Instead, the allegations must "'show[ ] that the pleader is entitled to relief.'" *Id. at 1950* (quoting *Fed. R. Civ. P. 8(a)(2)*).

While the Court considered evidence outside of the pleadings, in the form of declarations, for purposes of Defendant Sly's *Fed. R. Civ. P. 12(b)(2)* challenge, such consideration was limited to that analysis, and does not convert this motion [*30] to dismiss into one for summary judgment. See *Wilson-Cook Med., Inc. v. Wilson, 942 F.2d 247, 251-52 (4th Cir. 1991)* (finding that trial court's consideration of affidavits for purposes of 12(b)(2) motion did not convert a 12(b)(6) motion into one for summary judgment); *Kerns v. Caterpillar, Inc., 583 F. Supp. 2d 885, 891 n.1 (M.D. Tenn. 2008)* (finding the consideration of external evidence in support of a 12(b)(2) motion does not require conversion to summary judgment). The Court will not consider such evidence for purposes of this analysis, but will instead look solely to the pleadings. See *Kerns, 583 F. Supp. 2d at 891, 895* (considering pleadings and affidavits for purposes of 12(b)(2) motion, but only considering pleadings for purposes of 12(b)(6) motion).

Defendant Sly contends that Plaintiff has failed to allege sufficient facts to establish a claim for unjust enrichment under Kentucky law. For a plaintiff to succeed on her unjust enrichment claim she must prove three elements: "(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit without payment for its value." *Guerin v. Fulkerson, 354 S.W.3d 161, 2011 Ky. App. LEXIS 189, 2011 WL 4633090, at *3 (Ky. Ct. App. Oct. 7, 2011)*.

In [*31] application, Kentucky courts have consistently found that the first element not only requires a benefit be conferred upon the defendant, but also that the plaintiff be the party conferring that benefit. See *Jones v. Sparks, 297 S.W.3d 73, 78 (Ky. Ct. App. 2009)* (affirming trial court's dismissal of unjust enrichment claim because the court found that plaintiff did not confer a benefit upon the defendant or his property); *JP White, LLC v. Poe Co., LLC, 2011 Ky. App. Unpub. LEXIS 392, 2011 WL 1706751, at *5 (Ky. Ct. App. May 6, 2011)* (affirming directed verdict because plaintiff failed to demonstrate that it conferred a benefit on defendant); *Mattingly v. Primerica Life Ins. Co., 2007 U.S. Dist. LEXIS 70301, 2007 WL 2792197, at *7 (W.D. Ky. Sept. 21, 2007)* (stating that the first element of an unjust enrichment claim requires "a benefit conferred on the defendant *by the plaintiff*." (emphasis added)); see also *66 Am. Jur. 2d Restitution and Implied Contracts § 12* (2011) (Under the section titled "requirement of benefit at the expense of another," stating that "[a]n essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant *from the plaintiff* that would be inequitable to retain without paying [*32] for its value." (emphasis added)) .

In *Dixie Fuel Company v. Straight Creek, LLC, 2011 U.S. Dist. LEXIS 23321, 2011 WL 845828 (E.D. Ky. Mar. 8, 2011)*, the court conducted a detailed analysis of the first element in an unjust enrichment claim under Kentucky law. The court found that "[a]lthough not always expressly stated by courts, the requirement that the benefit be conferred on the defendant *by the claimant* seems to always be a requirement in practice." *2011 U.S. Dist. LEXIS 23321, [WL] at *4*. The court cited Jones v. Sparks and several other state and federal cases that analyzed the first prong as requiring that the plaintiff be the party who conferred the benefit. See id. (collecting cases). The Dixie Fuel court found that the term "confer" means "to bestow from or as if from a position of superiority or to give[,]" and that the plaintiff had not bestowed or given anything to the defendant. *2011 U.S. Dist. LEXIS 23321, [WL] at *5* (internal quotation marks omitted). Therefore, the court in Dixie Fuel dismissed the plaintiff's claim. Having reviewed those cases and sources, the Court agrees with the analysis in Dixie Fuel and finds that under Kentucky law, a claim for unjust enrichment requires that a plaintiff prove that she conferred a benefit upon the defendant.

In [*33] the instant case, the Court finds that Plaintiff has failed to allege sufficient facts to demonstrate that she is entitled to relief for a claim of unjust enrichment against Defendant Sly. The factual allegations established in the Amended Complaint are as follows: (1)

Plaintiff held at least a 49% interest in MMM from its formation in July 2001 to 2006, when she was partially bought out, (Amend. Compl. ¶¶ 22, 35); and (2) that Defendant Sly loaned $3.9 million dollars to A. Huff and was repaid $5.3 million dollars from MMM funds, (Id. at ¶ 43). Plaintiff then groups nine defendants together under Count VI, Unjust Enrichment, and states the following "the Defendants received benefits from the Plaintiff's participation in 'MMM' for which the Plaintiff has not been adequately compensated" and "the Defendants benefitted from Plaintiff's involvement in 'MMM', to the detriment of the Plaintiff." (Id. at ¶¶ 75-76.)

These factual allegations taken together fall far short of demonstrating that Plaintiff is entitled to relief for unjust enrichment from Defendant Sly. Formulaic recitation of the elements is not sufficient to state a claim, however, Plaintiff's pleadings fail to even properly [*34] state the necessary elements. Furthermore, there are insufficient facts demonstrating that Defendant Sly was conferred a benefit at the expense of Plaintiff, let alone that Plaintiff was the party who conferred that benefit. Plaintiff claims that Defendant Sly was repaid $5.3 million dollars in exchange for a loan made in the amount of $3.9 million dollars. There are no facts indicating when the loan was made, when it was repaid, or what the terms of the loan were that made repayment of $5.3 million dollars unjust. Nor has Plaintiff pled facts indicating whether or how she was entitled to any of the funds that were repaid. These pleadings fail to demonstrate, in any meaningful way, that Defendant Sly was unjustly enriched by a benefit conferred by the Plaintiff. Accordingly, the Court finds that Plaintiff's claim for unjust enrichment fails to state a claim upon which relief can be granted. Therefore, the Court **GRANTS** Defendant Sly's Motion to Dismiss.

B. Thomas Bean

Plaintiff has alleged one claim of unjust enrichment against Defendant Bean. Defendant Bean has moved for dismissal of that claim under *Fed. R. Civ. P. 12(b)(2)* for lack of personal jurisdiction, under *Fed. R. Civ. P. 9(b)* [*35] for failure to plead fraud with particularity, and under *Fed. R. Civ. P. 12(b)(6)* for failure to state a claim upon which relief can be granted.

i. Personal Jurisdiction

Because the Court is making the determination of personal jurisdiction on written submissions alone, Plaintiff's burden for demonstrating personal jurisdiction is only a prima facie showing. *Compuserve, 89 F.3d at 1262*. Plaintiff contends that Defendant Bean's actions in creating and managing two corporate entities in Kentucky sufficiently demonstrate that Defendant Bean transacted business in Kentucky, as required by *K.R.S. § 454.210(2)(a)(1)*. In support of her argument, Plaintiff has submitted a declaration. However, much like the declaration submitted against Defendant Sly, Plaintiff's declaration against Defendant Bean consists mostly of statements made upon "knowledge and belief." As the Court has ruled above, such statements do not meet the threshold requirements of personal knowledge to be considered by the Court. See supra Part III.A.i; *Totman v. Louisville Jefferson Cnty. Metro Gov't, 391 F. App'x 454, 464 (6th Cir. 2010)*. Defendant Bean, in his Reply, discusses and references his own sworn declaration. However, [*36] the Court is unable to find any such declaration attached to the filing or in the Record.

Therefore, the only information that the Court can use to analyze this issue are the pleadings within the Amended Complaint and the few statements contained in Plaintiff's sworn declaration that are made with sufficient personal knowledge. Considering that evidence and taking all inferences in favor of Plaintiff the Court finds that it does not have personal jurisdiction over Defendant Bean for purposes of Plaintiff's unjust enrichment claim. Plaintiff has alleged that Defendant Bean helped establish and manage two Kentucky corporate entities that operated in Kentucky. Assuming without deciding that this limited allegation is sufficient to demonstrate transacting business, the Court finds that Plaintiff has failed to demonstrate that there is a reasonable and direct nexus between this activity and her unjust enrichment claim.

The allegations found in the Amended Complaint against Defendant Bean are (1) that he acted with Defendant A. Huff to establish and manage River Falls Investment, LLC and River Falls Equities, LLC, (Amend. Compl. ¶ 44); (2) that Defendant Bean received benefits from the Plaintiff's [*37] participation in MMM for which the Plaintiff has not been adequately compensated (Id. at ¶ 75); and (3) that Defendant Bean benefitted from Plaintiff's involvement in MMM, to the detriment of Plaintiff, (Id. at ¶ 76). As for Plaintiff's declaration, the Court finds that the only allegation of any importance that is based upon sufficient personal knowledge is that Plaintiff owned a 50% interest in MMM during the times relevant to the Complaint. (See Plaintiff's Decl. Against Def. Bean ¶ 5 [DN 38].)

Those factual allegations are insufficient to demonstrate a reasonable nexus between a claim for unjust enrichment and Defendant Bean's status as a manager of two Kentucky corporate entities. Plaintiff argues that these companies were used to funnel money from MMM to Defendant Bean's personal use, however, such allegations are nowhere within the Amended Complaint. The Amended Complaint states that SDH Realty, Inc., and W.A. Huff, LLC were used to funnel money from MMM. (See Amend. Compl. ¶¶ 41-42.) Neither of those entities are or were ever named River Falls Investments,

LLC or River Falls Equities, LLC.[3] Nor is Defendant Bean alleged to have been involved with those two entities. Quite simply, [*38] there are no allegations based upon personal knowledge contained either within the Amended Complaint or Plaintiff's sworn declaration that link Defendant Bean's management of River Falls Investments, LLC or River Falls Equities, LLC to Plaintiff's claim for unjust enrichment. The bare assertions that Plaintiff attempts to link together are insufficient to demonstrate that the Court has personal jurisdiction over Defendant Bean.

> 3 Plaintiff's Amended Complaint states that River Falls Equities, LLC was at one time titled W. Anthony Huff, LLC. (Amend. Compl. ¶ 32.) However, Plaintiff alleges that money was funneled through W.A. Huff, LLC, not through W. Anthony Huff, LLC. (See Amend. Compl. ¶ 42.) These are two separate entities.

ii. Failure to State a Claim

Notwithstanding the Court's lack of personal jurisdiction, the Court finds that the bare assertions contained within the Amended Complaint fail to state a claim upon which relief may be granted. As discussed above, a claim for unjust enrichment requires a plaintiff to demonstrate a "(1) benefit conferred upon defendant at plaintiff's expense; (2) a resulting appreciation of benefit by defendant; and (3) inequitable retention of benefit [*39] without payment for its value." *Guerin v. Fulkerson, S.W.3d , 2011 Ky. App. LEXIS 189, 2011 WL 4633090, at *3 (Ky. Ct. App. Oct. 7, 2011).*

The factual allegations alleged against Defendant Bean are that he acted with Defendant A. Huff to establish and manage River Falls Investment, LLC and River Falls Equities, LLC and that he received benefits from Plaintiff's participation in MMM. These allegations do not demonstrate sufficient facts upon which the Court could find that Plaintiff is entitled to relief for unjust enrichment. Plaintiff's memorandum opposing Defendant Bean's motion attempts to lump Defendant Bean's actions together with allegations against Defendant A. Huff, and to then cite the portions of the Amended Complaint that speak of "Defendants" actions in a general manner. However, the Court is not persuaded by Plaintiff's attempt to piggy-back claims using Defendant A. Huff, or to use generalities to imply that every Defendant engaged in a specific action. Therefore, the Court finds that the Amended Complaint fails to state a claim upon which relief can be granted. Accordingly, the Court **GRANTS** Defendant Bean's Motion to Dismiss.

C. Huff Farm (Horsebranch) Inc.

Defendant Huff Farm has moved [*40] to dismiss Plaintiff's claims of fraud and unjust enrichment. Defendant Huff Farm contends that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted. Plaintiff's Amended Complaint contains the following allegations against Defendant Huff Farm: (1) Defendant Huff Farm made representations of material fact to Plaintiff with the knowledge that they were false and the intent that Plaintiff would rely upon them, which the Plaintiff reasonably did, (Amend. Compl. ¶ 65); and (2) Defendant Huff Farm received benefits from the Plaintiff's participation in MMM for which the Plaintiff was not adequately compensated, which was to Plaintiff's detriment, (Id. at ¶¶ 75-76).

There are no factual allegations that describe Defendant Huff Farm's involvement in either of these claims. Rather Defendant Huff Farm is included in general recitations of claims against multiple defendants. As discussed above, the plaintiff must provide the grounds for its entitlement to relief, which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).* A plaintiff satisfies this standard [*41] only when it "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal, 129 S.Ct. at 1949.* Plaintiff's Amended Complaint is woefully inadequate regarding allegations against Defendant Huff Farm and her claims cannot survive a motion to dismiss.

In her Response to Defendant Huff Farm's motion, as well as the other Defendants' motions, Plaintiff argues that the lack of factual content supporting her claims should not be fatal to her Amended Complaint because her claims fall within the exclusive control doctrine. In support of her argument, Plaintiff cites this Court's opinion in *Union Underwear Company, Inc v. Wilson, 2005 U.S. Dist. LEXIS 31183, 2005 WL 3307098 (W.D. Ky. Dec. 1, 2005).* In Union Underwear, the Court found that

> [A]n exception to the particularity requirement of *Fed. R. Civ. P. 9(b)* exists when the relevant facts "lie exclusively within the knowledge and control of the opposing party." *United States ex rel. Wilkins v. State of Ohio, 885 F. Supp. 1055, 1061 (S.D. Ohio 1995).* In such a case, pleading upon information and belief is permissible, although the plaintiff must still plead a statement of facts upon which the [*42] belief is based. *Craighead v. E.F. Hutton & Co., 899 F.2d 485, 489 (6th Cir. 1990).* A court should hesitate to dismiss an action when the

> facts underlying the claim are within the defendant's control, especially when no discovery has been conducted. *Michaels Bldg. Co., 848 F.2d at 680*.

*2005 U.S. Dist. LEXIS 31183, [WL] at *4* (quoting *Beard v. Worldwide Mortg. Corp., 354 F. Supp. 2d 789, 799 (W.D. Tenn. 2005)*.[4] In discussing the exclusive control exception to *Fed. R. Civ. P. 9(b)*, the Sixth Circuit stated that it is "reluctant to amputate [a] plaintiff['s] claim as long as there is a reasonable basis upon which to make out a cause of action from the events narrated in the complaint." *Michaels Bldg. Co. v. Ameritrust Co., N.A., 848 F.2d 674, 680 (6th Cir. 1988)*.

> 4 It should be noted that this Court in Union Underwear found the exclusive control exception did not apply.

In the instant case, the Court finds that the exclusive control exception does not apply. This exception is intended to save a claim from dismissal under the heightened pleading standard of *Rule 9(b)*. However, as discussed above, Plaintiff's fraud claim against Defendant Huff Farm does not even meet the initial pleading threshold of *Rule 8(a)*. Plaintiff's [*43] claim of fraud against Defendant Huff Farm does not make out a cause of action, it simply uses generalities and a formulaic recitation of elements. There is no reasonable basis upon which to make out a cause of action from anything articulated in the Amended Complaint. There are no events narrated in the Amended Complaint that indicate that there is a reasonable claim against Defendant Huff Farm. Furthermore, the Court finds that Plaintiff has failed to demonstrate that the information necessary to cure her claims is in the exclusive control of the Defendants.

The exclusive control exception was intended to save those claims that appear to have a reasonable basis, but lack the necessary factual support required by *Rule 9(b)*. Plaintiff's fraud claim against Defendant Huff Farm is not such a claim. Therefore, the Court finds that the exclusive control exception does not apply in this case.

Considering the total lack of factual allegations against Defendant Huff Farm contained within the Amended Complaint and the bare formulaic assertion of the elements constituting her causes of action, the Court finds that Plaintiff's claims for fraud and unjust enrichment against Defendant Huff Farms [*44] fail to state claims upon which relief can be granted. Therefore, the Court **GRANTS** Defendant Huff Farm's Motion to Dismiss.

D. Leave to Amend

In each of her responsive motions, Plaintiff requests that in lieu of the dismissal of her claims against Defendants Sly, Bean, and Huff Farm, that she be granted leave to amend her complaint. Under *Fed. R. Civ. P. 15(a)(1)(B)*, a plaintiff may amend her pleading once as a matter of course within 21 days after service of a motion under *Rule 12(b)*. "In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." *Fed. R. Civ. P. 15(a)(2)*. However, a district court may deny a motion to amend where there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc." *Foman v. Davis, 371 U.S. 178, 182, 83 S. Ct. 227, 9 L. Ed. 2d 222 (1962)*.

In the instant case, the Court notes that Defendant Sly's Motion to Dismiss, based upon *Rule 12(b)* was filed on June 7, 2011. On June 24, 2011, [*45] Plaintiff Amended her Complaint as a matter of course, as permitted under *Rule 15(a)*. However, rather than address the severe deficiencies in her Complaint, which were identified in Defendant Sly's motion to dismiss, Plaintiff made only minor changes in correctly identifying Defendant Huff Farm, LLC's principal place of business. Notwithstanding, the Court finds that justice requires that Plaintiff be granted leave to amend her Amended Complaint one more time. As Plaintiff failed to tender a Second Amended Complaint to the Court in conjunction with her request, the Court orders her to submit a Second Amended Complaint **NO LATER THAN 20 DAYS** from the entry of this order.

E. Motion for More Definite Statement

Defendants A. Huff, S. Huff, Michele Brown, Anthony Russo, River Falls Investments, LLC, Oxygen Unlimited, LLC, River Falls Equities, LLC, SDH Realty, Inc., W.A. Huff, LLC, and The Huff Grandchildren Trust have moved under *Fed. R. Civ. P. 12(e)* for a more definite statement. These Defendants contend that the Amended Complaint fails to comply with the pleading standards of *Fed. R. Civ. P. 8(a)*, and that clarification is required so that they may assert good faith responses and mandatory [*46] affirmative defenses.

Rule 12(e) states that a motion for more definite statement is proper only if "a pleading to which a responsive pleading is allowed [] is so vague or ambiguous that the party cannot reasonably prepare a response." *F.R.C.P. 12(e)*. A motion for a more definite statement must state the defects in the pleading and the details desired. Id. A party, however, may not use a *Rule 12(e)* motion as a substitute for discovery. *Mitchell v. E-Z Way*

Towers, Inc., 269 F.2d 126, 132 (5th Cir. 1959). Given the liberal pleading standard set forth in *Rule 8*, *Rule 12(e)* motions are disfavored. See id. At the same time, the Supreme Court has noted that "if a pleading fails to specify the allegations in a manner that provides sufficient notice," then a *Rule 12(e)* motion may be appropriate. *Swierkiewicz v. Sorema, N.A., 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)*.

The Court finds that the Amended Complaint is too vague on all counts for the Defendants to properly form a responsive pleading. The Defendants have identified the many defects contained within the Amended Complaint and the details desired so that they may formulate a worthwhile response. Therefore, the Court grants the Defendants' motion and orders [*47] Plaintiff to address the issues identified by these Defendants in her Second Amended Complaint, which is to be filed no later than 20 days from entry of this order.

F. Motion to Strike

Plaintiff has moved to strike the Defendants Reply to Plaintiff's Response to Defendants' Motion for More Definite Statement. *Fed. R. Civ. P. 12(f)* provides that upon a motion made by a party, "[t]he court may strike from a pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." "Because striking a portion of a pleading is a drastic remedy, such motions are generally viewed with disfavor and are rarely granted." *Watkins & Son Pet Supplies v. Iams Co., 107 F. Supp. 2d 883, 887 (S.D. Ohio 1999)*. "The application of this rule, which is in the discretion of the trial judge, should be resorted to only where the pleading contains such allegations that are obviously false and clearly injurious to a party to the action because of the kind of language used or that the allegations are unmistakably unrelated to the subject matter." *Pessin v. Keeneland Ass'n, 45 F.R.D. 10, 13 (E.D. Ky.1968)*.

Plaintiff contends that substantial portions of the Reply contain improper introduction [*48] of new arguments, evidence and issues by the Defendants and that the information is irrelevant and prejudicial. Defendants contend that the portions of the Reply identified by Plaintiff are relevant to rebut Plaintiff's argument that the exclusive control doctrine applies to this case and that Plaintiff has failed to demonstrate any prejudice. The Court agrees with Defendants that the information is relevant and that there is an insufficient showing of prejudice to strike the Reply. Therefore, Plaintiff's Motion to Strike is **DENIED.**

III. CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that Defendant Brian N. Sly's Motion to Dismiss [DN 10] is **GRANTED,** without prejudice.

IT IS FURTHER ORDERED that Defendants A. Huff, S. Huff, Michele Brown, Anthony Russo, River Falls Investments, LLC, Oxygen Unlimited, LLC, River Falls Equities, LLC, SDH Realty, Inc., W.A. Huff, LLC, and The Huff Grandchildren Trust's Motion for More Definite Statement [DN 12] is **GRANTED.**

FURTHER that Defendant Thomas Bean's Motion to Dismiss [DN 30] is **GRANTED,** without prejudice.

FURTHER that Defendant Huff Farm (Horsebranch) Inc.'s Motion to Dismiss [DN 34] is **GRANTED,** without prejudice.

FURTHER that Plaintiff [*49] Roxann Pixler's Motion to Strike [DN 33] is **DENIED.**

FURTHER that Plaintiff Roxann Pixler's Motion for Extension of Time [DN 36] is **GRANTED.**

FURTHER that Plaintiff file her Second Amended Complaint **NO LATER THAN 20 DAYS** from the entry of this Order.

/s/ Joseph H. McKinley, Jr.

Joseph H. McKinley, Jr., Chief Judge

United States District Court

November 16, 2011