

67032-8

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No. 67032-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

DAVID N. BROWN, INC.,

Appellant,

v.

ACT NOW PLUMBING, LLC,

Respondent.

BRIEF OF APPELLANT DAVID N. BROWN, INC.

APPEAL FROM KING COUNTY SUPERIOR COURT CASE
NO. 09-2-37499-6, THE HONORABLE JUDGE WESLEY
SAINT CLAIR

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I. INTRODUCTION

For more than forty-five years, FOX PLUMBING & HEATING has been recognized as a source of quality plumbing and heating services in the greater Puget Sound region. Appellant David N. Brown, Inc. dba Fox Plumbing and Heating (“Fox”), its employees, and the families who depend on them have invested hundreds of thousands of hours and dollars promoting the brand and the goodwill associated with it.

In late 2008, Respondent Act Now Plumbing, LLC d/b/a Gary Fox Plumbing & Heating (“ANP”), through its willful, unlawful and deceptive acts, hijacked the name and began using the substantially identical GARY FOX PLUMBING & HEATING mark in direct competition with Fox for the same services and in the same geographic area and channels of trade, sowing confusion in the marketplace, devaluing Fox’s brand and damaging its business.

After unsuccessfully demanding that ANP cease its infringing use, Fox commenced litigation to enforce its legal rights in October 2009, and sought partial summary judgment on the issue of trademark infringement. Fox’s motion was denied on July 19, 2010 due to the existence of genuine issues of material fact. Notwithstanding its prior ruling, inexplicably, the same trial court granted summary judgment in favor of ANP less than eight months later, now taking the position that as a matter of law there is no reasonable likelihood of confusion between:

FOX PLUMBING & HEATING

and

GARY FOX PLUMBING & HEATING

for the same services and in the same geographic area and channels of trade.

Fox respectfully submits that the trial court erred in granting summary judgment in favor of ANP on the asserted claims of (1) common law trademark infringement, (2) unfair competition and Consumer Protection Act (RCW 19.86) violation, and (3) tortious interference with business expectancies and relations, and urges this Court to reverse the trial court's summary judgment.

II. ASSIGNMENT OF ERRORS

The error assigned to the trial court actions are as follows:

The trial court erred in entering summary judgment in favor of ANP on the asserted claims of (1) common law trademark infringement, (2) unfair competition and Consumer Protection Act (RCW 19.86) violation, and (3) tortious interference with business expectancies and relations on March 24, 2011, as further clarified by the trial court's April 14, 2011 order.

III. STATEMENT OF ISSUES

The issues on appeal are as follows:

A. TRADEMARK LIKELIHOOD OF CONFUSION

Do genuine issues of material fact preclude summary judgment in favor of ANP on the issue of trademark infringement as between the word and design marks for:

FOX PLUMBING & HEATING

versus

GARY FOX PLUMBING & HEATING

where the trial court expressly found genuine issues of material fact regarding the controlling *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979) factors and where applying the *Sleekcraft* factors (1) the marks are substantially similar, including the identical distinctive term FOX and PLUMBING & HEATING; (2) the services provided by Fox and ANP are identical; (3) the marketing channels used by Fox and ANP are identical; (4) there exists substantial evidence of actual confusion; (5) the FOX PLUMBING & HEATING mark is strong after more than forty-five years of continuous and substantially exclusive use in the relevant area; (6) ANP's intent in selecting the conflicting GARY FOX PLUMBING & HEATING mark was to trade on the established recognition and good will developed by Fox over more than forty-five years; (7) ANP is seeking to further expand into Fox's long established market; and (8) the nature of the parties' identical plumbing services

demonstrates the reduced degree of care likely to be exercised by the purchasers, which in turn increases the likelihood of confusion?
(Assignment of Error No. 1)

B. CONSUMER PROTECTION ACT VIOLATION AND TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCIES AND RELATIONS

Do genuine issues of material fact preclude summary judgment in favor of ANP on the issues of Consumer Protection Act (RCW 19.86) violation and tortious interference with business expectancy where (1) the trial court expressly found genuine issues of material fact regarding the controlling factor for a Consumer Protection Act violation, and (2) ANP's deceptive acts or practices regarding unauthorized use of the FOX PLUMBING & HEATING brand injure Fox and tortiously interfere with its business expectancies and relationships? (Assignment of Error No. 1)

C. LACHES AND ESTOPPEL BY ACQUIESCENCE

Do genuine issues of material fact preclude summary judgment in favor of ANP on the issue of laches and estoppel by acquiescence where (1) ANP must own rights in the GARY FOX PLUMBING & HEATING mark to establish a laches and estoppel by acquiescence defense; (2) the trial court acknowledged credibility issues regarding ANP's claim of ownership rights in the mark; and (3) undisputed evidence confirms that Fox owns all rights in the mark? (Assignment of Error No. 1)

D. DISCOVERY ABUSES AND CR 11 VIOLATIONS PRECLUDE SUMMARY JUDGMENT

Does ANP's discovery abuses and Wash. R. Civ. P. 11 violations preclude summary judgment in favor of ANP where ANP and its counsel purposefully concealed a "smoking gun" signed and notarized January 2, 2009 Purchase And Sales Agreement between ANP's predecessor and third party Gary Fox that superseded any prior agreements between the parties and confirms that ANP never obtained any rights in the GARY FOX PLUMBING & HEATING mark? (Assignment of Error No. 1)

IV. STATEMENT OF THE CASE

The following background facts are drawn from the evidence of record in the trial court proceeding.

A. A LIFE'S WORK—FOX PLUMBING & HEATING

In 1973, at the age of 21, David Brown joined Fox Plumbing & Heating as a journeyman plumber and tradesman. (CP 067) The owner and founder, Virgil Fox, had established this local plumbing and heating business roughly ten years earlier in 1964. (CP 067) In 1975, David Brown became a minority owner in Fox Plumbing & Heating, and by 1979, a fifty percent owner and vice president. (CP 068) In 1983, Brown formed Appellant David N. Brown, Inc. and purchased, in its entirety, Fox Plumbing & Heating. (CP 068) Over the ensuing three decades, Fox, doing business as FOX PLUMBING & HEATING, grew its business to 20 full-time employees, 3,600 customer calls per year, and estimated annual gross revenues of \$3.2 million. (CP 068) Today, twenty-eight years

since he purchased the business, David Brown continues to run and manage Fox as its president and sole shareholder. (CP 067)

B. THE MARK—FOX PLUMBING & HEATING

For more than forty-five years, Fox has owned all right, title and interest in the FOX PLUMBING & HEATING mark (or herein “Fox’s Mark” or “the Mark”) (CP 002) Since 1964 and continuously to the present, the Mark has been used to promote and perform plumbing, heating and other services in the greater Puget Sound area for the general public, primarily, residential and commercial customers. (CP 003; 068) Fox has used the Mark both in word form (e.g., FOX PLUMBING & HEATING) and as part of various designs (e.g., , at all times emphasizing the distinctive FOX component of the brand. (CP 032) Using the FOX PLUMBING & HEATING mark, Fox spends an average of \$320,000 per year promoting its services. (CP 068) Fox promotes the services via its website at www.foxph.com; traditional print such as Dex and Yellow Page ads, newspapers, direct mail; radio and television commercials; as well as on billboards and buses. (CP 068; 080-084)

As a result of its time, energy and effort, Fox, under the FOX PLUMBING & HEATING mark, has become well recognized and well regarded in the community for the quality of its services and its leadership in the local heating and plumbing industry. David Brown was the Charter President of the National Trade Organization for Plumbing Heating and

Cooling Contractors. (CP 068-069) Under the FOX PLUMBING & HEATING mark, Fox is rated among the top 5% of all plumbing businesses on Angie's List, been awarded "Best of Local Business" by the US Commerce Association for Plumbing Contractors and rated No. 1 in Seattle for Customer Satisfaction by The Seattle 10 by City Spur, a national customer service organization. (CP 068-069) Fox maintains a 5 Star Rating on Yellowpages.com, Insider pages, and Yahoo, and 4 ½ Star ratings on Goggle, CitySearch, and Judy's Book. (CP 068-069)

C. LAWSUIT BETWEEN FOX AND THIRD PARTY GARY FOX

In the early 1980s, Gary Fox began operating GARY FOX PLUMBING in the Puget Sound area. (CP 464) On October 29, 1984, Fox brought a trademark infringement action against Gary Fox for the unauthorized use of (a) the mark FOX DELUX, and (b) a fox logo confusingly similar to the fox logo used by Fox (CP 162-175) On November 8, 1984, the trial court found in favor of Fox and entered a preliminary injunction against Gary Fox. (CP 176-179) While the court found actual confusion, i.e., trademark infringement, it held that Gary Fox had a limited equitable right to use his surname provided that such use did not deceive the purchasing public. (CP 180-183)

Fox continued to monitor the limited authorized use by Gary Fox of his name while he provided plumbing services. In March 2004, when Gary Fox sought to expand this limited use by listing his business as FOX

GARY PLUMBING, Fox successfully demanded removal of the listing.
(CP 184-187)

D. RESPONDENT ACT NOW PLUMBING, LLC

Respondent ANP is a Washington limited liability company. It was formed October 31, 2008 shortly after its sole member, Igor Ivanchuk, sought to purchase certain plumbing assets and the customer list from Gary Fox. Ivanchuk admits that he has no prior professional experience in the plumbing and/or heating field. (CP 051) As evidenced from its website www.garyfox.com, its print advertisements, and by admission, ANP offers plumbing and heating services similar (if not identical) to those of Fox (CP 051-66) Again as evidenced by its website, its print advertisements, and by admission, ANP offers its competing services in the same geographic region, using the same marketing channels, and to the same residential and commercial customers as Fox. (CP 051-66)

E. ANP'S TRADEMARK INFRINGEMENT

On or about April 7, 2009, Fox discovered ANP using the term GARY FOX PLUMBING & HEATING and GARY FOX PLUMBING in connection with its services (collectively the "Infringing Marks"). (CP 003) ANP has used the Infringing Marks both in word form (e.g., GARY FOX PLUMBING & HEATING) and as part of various designs (e.g., , but always emphasizing the FOX component of the Infringing Marks. (CP 032) Fox has not authorized any use of the Infringing Marks. (CP 003) On or about May 12, 2009, counsel

for Fox contacted ANP demanding that it cease use of the Infringing Marks. (CP 003) ANP refused to comply with Fox's demands and continues deliberately and willfully to infringe Fox's Mark. (CP 003)

F. INCIDENTS OF ACTUAL CONFUSION

Since ANP first began infringing the FOX PLUMBING & HEATING mark, Fox has received and continues to receive an ever-increasing stream of consumer confusion and complaint, *i.e.*, consumers believing that ANP and its services are associated with Fox and its services. (CP 069) Fox maintains a log detailing such incidents of confusion, which is based on ordinary consumers who encounter ANP's services and mistakenly assume that those services emanate from or are in some way sponsored, endorsed, approved by, or connected with Fox. (CP 043-050; 085-092)

ANP does not deny such confusion. To the contrary, ANP admits that it was aware of the FOX PLUMBING & HEATING mark prior to adopting the Infringing Marks. (CP 051-053) ANP admits that it has received customer complaints for services performed under the Infringing Marks. (CP 051-053) ANP admits that it has received correspondence, including vendor and customer inquires, looking for and/or believing ANP to be associated with the FOX PLUMBING & HEATING mark and/or Fox. (CP 051-053) ANP's systematic, continuous, and ongoing selling of services under the Infringing Marks is intended to trade on Fox's

reputation and goodwill, and to cause the dilution of the distinctive quality of the FOX PLUMBING & HEATING mark.

G. FOX'S MOTION FOR PARTIAL SUMMARY JUDGMENT OF TRADEMARK INFRINGEMENT

On April 12, 2010, Fox brought a motion for partial summary judgment on liability on the issues of trademark infringement and Consumer Protection Act (RCW 19.86) violation. Fox presented substantial evidence demonstrating a likelihood of confusion between ANP's GARY FOX PLUMBING & HEATING mark and Fox's FOX PLUMBING & HEATING MARK as used for the same services and in the same geographic area and channels of trade. (CP 025-092; 131-189; 198-204) After significant briefing and multiple hearings, in its July 19, 2010 oral ruling the trial court denied Fox's motion specifically on the basis that genuine issues of material fact existed on the controlling *Sleekcraft* trademark infringement factors:

Uh, the Court's perspective on this is that there remain, uh, Court does find that there are general, uh, genuine issues of material facts in regards to these, uh, *Sleekcraft* [sic] factors and therefore the motion for summary judgment is denied.

(RP 7/19/10 Vol. 1, p. 37, l. 22 – p. 38, l. 1) The trial court denied summary judgment for Fox's claim for Consumer Protection Act violation under RCW 19.86 on the same basis:

Now, um, on the violation of [inaudible] code of Washington 90—1986, um, does the use of, uh, Gary Fox Plumbing violate the consumer protection act, uh, making the, again the summary judgments the appropriate outcome.

Um, again I think that it's, it's a fact of one that—it would require facts would be the ones to make that determination.

(RP 7/19/10 Vol. 1, p. 38, ll. 2-7)

In its July 19, 2010 written order, the trial court specifically held that Fox's Washington Trademark Registration No. 53864 was valid and enforceable. (CP 205-208)

H. ANP'S MOTION FOR SUMMARY JUDGMENT

Less than six months later, on January 4, 2011, ANP brought a motion for summary judgment on all claims asserted by Fox on the following bases: (1) notwithstanding the July 19, 2010 order of the trial court confirming the validity and enforceability of Fox's state trademark registration, Fox lacked standing to bring its statutory trademark infringement claim because that registration had expired as of the date Fox filed its complaint; (2) Fox's trademark infringement claim is barred under the statute of limitations; (3) Fox's trademark infringement claim is barred by the doctrines of laches and estopped by acquiescence on the basis that ANP acquired Gary Fox's trademark rights dating back to 1984 or earlier; (4) there is no likelihood of confusion between Fox's FOX PLUMBING & HEATING mark and the GARY FOX PLUMBING & HEATING mark; and (5) the Consumer Protection Act and tortious interference claims fail on the same reason as the underlying trademark infringement claim. (CP 227-250)

Fox had been proceeding based on the trial court's July 19, 2010 confirmation of the validity and enforceability of its state trademark

registration. (CP 205-208) ANP had never challenged standing as part of its opposition to Fox's earlier summary judgment motion. Partly in response to this new defense asserted by ANP, on January 21, 2011, Fox filed its amended complaint, adding a claim for common law trademark infringement separate from its statutory trademark infringement claim. (CP 211-226) Leave to file this amended complaint had been granted by the trial court by order dated November 9, 2010. (CP 209-210)

The fundamental premise of ANP's summary judgment motion on the issues of laches and estoppel is that Ivanchuk acquired the GARY FOX PLUMBING & HEATING mark from Gary Fox via an October 27, 2008 Business Opportunity Purchase and Sale Agreement and Bill of Sale. ANP argued that because these acquired GARY FOX PLUMBING & HEATING mark rights date back at least to 1985, all use of the mark since that time inures to the benefit of ANP and provides defenses against Fox's claims that ANP's use of the mark infringes Fox's long established rights in the FOX PLUMBING & HEATING mark.

I. THE "SMOKING GUN" DOCUMENT AND ANP'S EFFORTS TO HIDE IT FROM FOX AND THE TRIAL COURT

Unbeknownst to Fox until late December 2010, the October 27, 2008 Business Opportunity Purchase and Sale Agreement and Bill of Sale relied upon by ANP in its opposition to Fox's earlier summary judgment motion, and produced in discovery, was neither valid nor the controlling agreement between Ivanchuk and Gary Fox. On or around December 20th 2010, counsel for Fox had a series of conversations with counsel for the

party believed to be the prior owner of the GARY FOX PLUMBING & HEATING mark regarding this litigation. Fox's counsel was able to ascertain through those conversations that Gary Fox had in fact not sold or otherwise transferred rights in the GARY FOX PLUMBING & HEATING mark to anyone—including to ANP or its owner and sole member Ivanchuk. (CP 474-475) Furthermore, counsel learned of the existence of a document that would confirm that fact. (*Id.*) Because of the holidays and the unavailability of Gary Fox's counsel, it was not until January 17th, 2011 that Fox's counsel had an opportunity to meet in-person with Gary Fox and examine the evidence.

At that time, counsel for Fox confirmed that Gary Fox never sold any rights in the GARY FOX PLUMBING & HEATING mark to Ivanchuk or ANP. Additionally, counsel learned that in a January 2, 2009 Purchase And Sales Agreement Gary Fox consummated with Ivanchuk, not only were the trademark rights in the GARY FOX PLUMBING & HEATING mark not included in the assets transferred, they were specifically *excluded* by the agreement and Ivanchuk expressly agreed not to use the GARY FOX PLUMBING & HEATING mark. (CP 474-477; 492-493) At the same time it was learned that Ivanchuk's son, acting as an agent of ANP, recently approached Gary Fox in an unsuccessful effort to purchase the rights in the GARY FOX PLUMBING & HEATING mark, constituting an admission that ANP had no rights in the mark—contrary to what it had claimed in its January 4, 2011 summary judgment motion. (CP 465; 474-477)

Based on the new, dispositive evidence of the January 2, 2009 Purchase And Sales Agreement recently discovered by Fox—evidence that ANP had been aware of but failed to disclose—Fox made verbal along with a January 21, 2011 written request to ANP to withdraw or reneote its summary judgment motion in advance of the opposition deadline. (CP 496-499). ANP refused and Fox was forced to prepare and timely file its opposition on January 24, 2011. By letter dated February 9, 2011, ANP’s counsel reiterated their denial of any knowledge they or their client had of the January 2, 2009 Purchase And Sales Agreement prior to January 24, 2011, and in fact accused Fox of intentionally withholding the document Fox only received on January 21, 2011:

Apparently, you are under the false assumption that my client was aware of this purported January 2, 2009 Purchase and Sale Agreement that you intentionally withheld from producing until you filed your response to our motion for summary judgment. Our client was not aware of this document and contends that the Business Opportunity Purchase and Sale Agreement dated 10/27/08 . . . is the only valid and enforceable purchase and sale agreement between Gary Fox Plumbing and Igor Ivanchuk. Thus, my client has no additional information to supplement Interrogatory Nos. 5-7 [related to communications or transfer with Gary Fox].

(CP 500-502) This representation by ANP and its counsel is shocking given the subsequent testimony made less than a week later, on February 15, 2011, by ANP’s owner Ivanchuk, that he not only knew about this superseding agreement, but freely admits to signing it before a notary:

Q. Good afternoon, Mr. Ivanchuk. Did you enter into a Purchase and Sale Agreement on January 2, 2009, with Gary Fox regarding his company, Gary Fox Plumbing?

A. Yes.

Q. Mr. Ivanchuk, is Exhibit 2 the Purchase and Sales Agreement entered on January 2, 2009, with Gary Fox?

Objection

A. I don't know what it is. Actually, I know what that is.

.....

Q. The answer again.

A. The answer is: I know what that is.

Q. Is that your signature on Exhibit 2?

A. Yes.

Q. And did you sign it on or about January 2, 2009?

Q. Yes.

.....

Q. And your signature was notarized at the time you signed the document?

Objection

A. Yes, it was done in the bank.

(CP 505-506)

J. ANP OWNS NO RIGHTS IN THE GARY FOX PLUMBING & HEATING MARK—ALL SUCH RIGHTS ARE OWNED BY FOX

According to Gary Fox, Ivanchuk sought to purchase Gary Fox's plumbing business in late 2008, but a proposed October 27, 2008 purchase

and sale agreement and bill of sale were never concluded because the terms were not agreed and Ivanchuk never paid the purchase price to acquire Gary Fox's company. (CP 464) Gary Fox never agreed that any sale to Ivanchuk would include the GARY FOX PLUMBING brand, but only certain fixed assets of the company. (CP 464) Because Ivanchuk had only \$15,000 to buy the company assets, Gary Fox and Ivanchuk subsequently entered into a January 2, 2009 Purchase And Sales Agreement. (CP 465) By the terms of this agreement, Ivanchuk purchased only the client list and phone number of the business for \$10,000 and supplies for \$5,000. Not only were the trademark rights in the GARY FOX PLUMBING & HEATING brand not included in the sale, they were specifically excluded. (CP 465, 467-568) This was confirmed by the following evidence submitted during the trial court proceedings:

- There was never a meeting of the minds regarding terms of any sale agreement or required attorney approval until the notarized January 2, 2009 Purchase And Sales Agreement. Gary Fox testified that the price varied constantly until the final purchase price of \$15,000 for the client list, phone number and some supplies reflected in the January 2, 2009 agreement—which specifically did not include the company name or trademark. Moreover, earlier draft agreement proposals preceding the January 2, 2009 Purchase and Sales Agreement were all subject to attorney approval, which was never obtained. (CP 508-509; 512-513; 519)
- Ivanchuk's son Nazary Ivanchuk dramatically altered the terms of the original proposed agreement without Gary Fox's approval, attempting to add in Gary Fox's business assets such as the company name not part of any contemplated agreement and changing the price from \$15,000 to \$115,000. (CP 510-561)

- Gary Fox did not sign the altered October 27, 2008 purchase and sale agreement or bill or sale. (CP 514-517; 539-561)
- Gary Fox and Ivanchuk went over, discussed, understood and agreed to the specific terms of the simple, one page January 2, 2009 Purchase And Sales Agreement at the time it was executed and notarized. (CP 536-561)
- The only assets sold to Ivanchuk were the customer list, phone number and some supplies, not the company name or trademark. (CP 521; 561)
- Ivanchuk took a copy of the notarized January 2, 2009 Purchase And Sales Agreement with him at the time of the transaction. (CP 507; 558-561)
- Third party witness Sandra Oatman, the notary on the January 2, 2009 agreement, confirms that Ivanchuk freely executed the agreement. (CP 459-463)
- Gary Sather, who was present when Gary Fox and Ivanchuk discussed the specific terms of the January 2, 2009 Purchase And Sales Agreement *in English—a language Ivanchuk both speaks and reads fluently*—confirms Ivanchuk’s understanding and consent to the terms of the controlling January 2, 2009 Purchase And Sales Agreement. (CP 471-473)

Gary Fox testified that he repeatedly warned Ivanchuk not to use the company name in breach of the January 2, 2009 Purchase And Sales Agreement. (CP 465; 522; 523-524; 527; 529-530; 553-554) Gary Fox testified that Ivanchuk stated he would cease use of the company name. (CP 528; 554)

On January 21, 2011, Fox and Gary Fox consummated a deal through which Fox acquired all right, title and interest in the GARY FOX PLUMBING & HEATING mark, including the goodwill attached thereto. (CP 465; 469-470; 474-477; 494-495)

**K. TRIAL COURT'S SUMMARY JUDGMENT RULING AND
SUBSEQUENT CLARIFICATION**

The summary judgment hearing on ANP's motion occurred March 15, 2011. During oral argument, ANP admitted, and the trial court recognized, that there were genuine issues of material fact, in particular related to the credibility of key witnesses surrounding the questions of ownership of the GARY FOX PLUMBING & HEATING mark, as well as serious concerns about ANP's abusive tactics during the discovery process pertaining to the newly discovered January 2, 2009 Purchase And Sales Agreement:

McKillop: And, and, their, you know, their attempt to, you know, assert all these make all these assertions about this later, uh, purchase and sale agreement, we provided the Court with all the testimony. There is refush—, refutations all over the place.

Court: So, but there's also discussion about credibility of witnesses.

McKillop: Yes. You're—

Court: So we talked about Mr. Gary Fox—

McKillop: Correct.

Court: —having credibility issues.

McKillop: Right.

Court: It, it appears from the Court's perspective, Mr. Ivanoff?

McKillop: Ivanchuk.

Court: Ivanchuk? Sounds like, it, it appears he has credibility issues as well.

McKillop: Well, your Honor, that, I, well I would disagree with the Court because

Court: Well, we've, I guess—

McKillop: Yeah.

Court: —we disagree on that one.

....

Court: I think glossing over it is a, um, uh, maybe doesn't do your client justice in, in, in, uh, address them. You know, there seems to have been modifications made of, uh, of a, a, an, a, a, the, uh, Octobra [sic] purchase and sale agreement. That certainly the behavior of the, uh, Defendant not presenting this document in the course of the discovery process here—

(RP 3/15/11 p. 33:19–p. 34:24)

The trial court's order granting ANP summary judgment issued March 24, 2011. (CP 638-640) The order was unclear, however, as to what the trial court had ruled upon in its decision. Specifically, whether the trial court had ruled on only the standing issue with respect to Fox's statutory trademark infringement claim, or had considered and ruled on the common law trademark infringement claim asserted in Fox's January 21, 2011 amended complaint, as well as its Consumer Protection Act and tortious interference claims.

Fox timely sought clarification or reconsideration of the trial court's summary judgment order on April 4, 2011. (CP 683-696) Fox did not challenge the trial court's grant of summary judgment on the basis that Fox lacked standing at the time it originally filed its complaint to bring the statutory trademark infringement claim of Washington Registration No. 015131 under RCW 19.77. If that had been the basis of the ruling, Fox's common law trademark infringement, Consumer Protection Act and

tortious interference claims would remain in the suit, and Fox would not be prohibited from filing a new complaint including claims for statutory trademark infringement based on its current state registration. On the other hand, if the basis of the trial court's ruling was that there was no likelihood of confusion or laches or estopped by acquiescence was a defense to infringement, Fox would have no option but to appeal the erroneous ruling.

By order dated April 14, 2011 (CP 710-712), the trial court confirmed that it had granted summary judgment on the basis that there was no reasonable likelihood of confusion between

FOX PLUMBING & HEATING

and

GARY FOX PLUMBING & HEATING

for the same services and in the same geographic area and channels of trade—despite the evidence, including instances of actual confusion, to the contrary. The present timely appeal followed. (CP 713-721)

V. AUTHORITY AND ARGUMENT

A summary judgment motion can be granted only when no genuine issue as to any material fact exists and the moving party is entitled to judgment as a matter of law. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833 (2004); *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). A material fact is one upon which the outcome of litigation depends in whole or in part. *Island Air*,

Inc. v. LaBar, 18 Wn. App. 129, 566 P.2d 972 (1977). The trial court must consider the facts in the light most favorable to the nonmoving party and the motion should be granted only if reasonable persons could reach only one conclusion. *Labriola*, 152 Wn.2d at 833. Summary judgment should not be granted when the credibility of a material witness is at issue. *Gingrich v. Unigard Sec. Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990).

A. TRADEMARK LIKELIHOOD OF CONFUSION

Because of the intensely factual nature of trademark disputes, summary judgment is generally disfavored in the trademark arena. *Interstellar Starship Servs., Ltd. v. Epix, Inc.*, 184 F.3d 1107, 1109 (9th Cir. 1999); *Nat'l Ass'n of Realtors v. Champions Real Estate Servs.*, 2011 U.S. Dist. LEXIS 93698 (W.D. Wash. Aug. 22, 2011). Indeed, after significant briefing and multiple oral hearings, in its July 19, 2010 oral ruling the trial court denied Fox's motion specifically on the basis that genuine issues of material fact existed on the controlling *Sleekcraft* trademark infringement factors:

Uh, the Court's perspective on this is that there remain, uh, Court does find that there are general, uh, genuine issues of material facts in regards to these, uh, Sleepcraft [sic] factors and therefore the motion for summary judgment is denied.

(RP 7/19/10 Vol. 1, p. 37, l. 22 – p. 38, l. 1)

The trial court's 180 degree reversal six months later in granting ANP's summary judgment on the trademark infringement claim under the same *Sleekcraft* factors is inexplicable.

Washington trademark law is guided by and interpreted consistently with the Lanham Act, 15 U.S.C. §1051, et seq. RCW 19.77.930. To prevail on a Lanham Act trademark infringement claim, Fox must establish that ANP is using a mark confusingly similar to its own. *Sleekcraft*, 599 F.2d at 348-49. Put another way, the central inquiry of trademark infringement is whether "the similarity of the marks is likely to confuse customers about the source of the goods or services." *E.&J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1290 (9th Cir. 1992). In the Ninth Circuit, likelihood of confusion is determined by the application of the eight-factor test enunciated in *Sleekcraft*. The factors are: (1) the similarity of the marks; (2) the relatedness of the two companies' services; (3) the marketing channels used; (4) evidence of actual confusion; (5) the strength of plaintiff's mark; (6) defendant's intent in selecting its mark; (7) the likelihood of expansion into other markets; and (8) the degree of care likely to be exercised by the purchasers.¹ *Sleekcraft*, 599 F.2d at 348-49.

The courts also note that the eight-factor test for likelihood of confusion is pliant. *Brookfield Communications, Inc. v. West Coast*

¹ The *Sleekcraft* factors are substantially similar to the factors enunciated in RCW 17.77.140(2). Washington case law appears to refer exclusively to the *Sleekcraft* factors.

Entertainment Corp., 174 F.3d 1036, 1054 (9th Cir. 1999). Some factors are much more important than others, and the relative importance of each individual factor will be case-specific. *Id.* Although some factors—such as the similarity of the marks and whether the two companies are direct competitors—will always be important, it is often possible to reach a conclusion with respect to likelihood of confusion after considering only a subset of the factors. *Id.*; see also *GoTo.com, Inc. v. Walt Disney Co.*, 202 F.3d 1199, 1205 (9th Cir. 2000). As suggested above, the similarity of the marks has always been considered the most critical question in the likelihood of confusion analysis. This factor, along with the second and third factors (*i.e.*, overlap between the two companies' services and marketing channels), is central to the *Sleekcraft* analysis. *GoTo.com*, 202 F.3d at 1205.

1. The Marks are Strikingly Similar in Sight, Sound, and Commercial Meaning

To gauge similarity, the marks must be first examined in their entirety and as they appear in the marketplace; second, similarity is adjudged in terms of appearance, sound, and meaning; and third, similarities are weighed more heavily than differences. *Id.* at 1206.

The visual similarities between Fox's Mark and the Infringing Marks, both in word and design formats, are striking:

FOX PLUMBING & HEATING

versus

GARY FOX PLUMBING & HEATING

also exemplary design formats:



Fox's Mark (design)



Infringing Mark (design)

In the word format the terms are identical save for the addition of GARY; the distinctive term FOX is identical. In the design format, ANP unabashedly emphasizes the word FOX in prominent size and font while diminishing the other components of the Infringing Marks. The resulting visual and sound effect is, in all practical sense, FOX Plumbing & Heating. Likewise, the commercial meaning of the marks, i.e., PLUMBING & HEATING, is identical. The overall appearance of Fox's Mark is strongly associated with the term FOX such that confusion from the Infringing Mark is likely despite any minor differences that exist between the parties' respective marks. Indeed, ANP admits that the Infringing Marks are similar in sight, sound, and commercial impression to Fox's Mark. (CP 051-053) The first *Sleekcraft* factor weighs in favor of Fox.

2. *The Services Offered are Identical*

The second of the three controlling *Sleekcraft* considerations is that related services are generally more likely than unrelated services to

confuse the public as to the providers of those services. *Brookfield*, 174 F.3d at 1055. There is no dispute that the services offered by the parties are substantially, if not completely, identical. Fox is involved in providing plumbing and heating services to residential and commercial customers. Likewise, ANP provides plumbing and heating services to residential and commercial customers. Both parties operate in the Puget Sound region, specifically including King County, and are therefore direct competitors. The relatedness and proximity of services provided under the marks is painfully high. Fox easily meets the second *Sleekcraft* factor.

3. *The Marketing Channels and Customers are Identical*

“Convergent marketing channels increase the likelihood of confusion.” *Sleekcraft*, 599 F.2d at 353. The issue is not only whether “both lines [a]re sold under the same roof,” but also whether the marketing channels are “parallel” such that “the general class of ... purchasers exposed to the products overlap.” *Id.* In *Sleekcraft*, the Ninth Circuit looked for similarities in sales methods employed, price ranges, advertising, and retail methods. *Id.*

Here, Fox’s and ANP’s trade channels, advertising techniques and marketing channels overlap in several significant ways. First, both companies market their products via print ads such as Dex and the Yellow Pages. Second, both companies use Internet webpages, local online referrals, and search engines. Finally, both companies are engaged in targeting the same residential and commercial customers in much the same

demographic and in the same geographic region. There can be no dispute that Fox and ANP advertise and compete in the same media channels to reach the same consumers in the same geographic region. The third *Sleekcraft* factor favors Fox.

4. Evidence of Actual Confusion

Although a showing of actual confusion is not essential for a finding of likelihood of confusion, courts place significant weight on any evidence of actual confusion however small. *See, e.g., Boston Athletic Association v. Sullivan*, 867 F.2d 22, 31 (1st Cir. 1989) (actual confusion is such persuasive evidence of the likelihood of confusion that even a minimal demonstration of actual confusion may be significant). Here Fox has demonstrated through its detailed conflict log and ANP has also admitted extensive and continuing instances of actual confusion. Fox readily meets the fourth *Sleekcraft* factor.

5. Strength of Fox's Mark is High

This factor is evaluated in terms of a mark's conceptual and commercial strength. *See GoTo.com*, 202 F.3d at 1207. The scope of the trademark protection given depends upon the strength of the mark, with stronger marks receiving greater protection than weak ones. *Nautilus Group, Inc. v. Icon Health & Fitness, Inc.*, 372 F.3d 1330, 1339 (Fed. Cir. 2004). The commercial strength of a mark refers to its degree of recognition in the minds of the relevant customer class, and it is measured by advertising expenditures, length of exclusive use, and other indicia of

actual marketplace recognition. See *Entrepreneur Media*, 279 F.3d 1135, 1144 (9th Cir. 2002); *Moose Creek, Inc. v. Abercrombie & Fitch Co.*, 331 F. Supp. 2d 1214, 1224 (C.D. Cal. 2004).

Marks can be conceptually classified along a spectrum of increasing inherent distinctiveness. See *Brookfield*, 174 F.3d at 1058. From weakest to strongest, marks are categorized as generic, descriptive, suggestive, and arbitrary or fanciful. *Id.* Fox's use of the word "Fox" as well as the image of a fox fixing a leaky pipe (in the design format) are arbitrary, i.e., the strongest classification on the spectrum. Likewise, the full phrase FOX PLUMBING & HEATING has acquired distinctiveness based on the length of time Fox's Mark has been used; Fox's relative fame in its field; and Fox's diligence in both promoting and protecting FOX PLUMBING & HEATING mark.

Fox's Mark's commercial strength is also robust. There is no dispute that Fox has spent significant amounts of time and money promoting and protecting Fox's Mark, e.g., \$320,000 per year. At more than forty-five years, there is also no dispute that Fox's Mark has been used in commerce for a substantial period of time. Nor is there a dispute that Fox's Mark has achieved significant commercial success. Thus, the relative strength and fame of Fox's Mark is not seriously disputable. Both conceptually and commercially, this "strength of mark" *Sleekcraft* factor weighs in favor of Fox.

6. ANP Intended to Create Confusion

“[W]hen the alleged infringer knowingly adopts a mark similar to another’s, reviewing courts presume that the defendant can accomplish his purpose: that is, the public will be deceived.” *Sleekcraft*, 599 F.2d at 354. However, “an intent to confuse customers is not required for a finding of trademark infringement.” *Brookfield*, 174 F.3d at 1059. “Thus, the intent factor, if present, will weigh heavily in favor of finding a likelihood of confusion but, if absent, will generally have no effect. *eAcceleration Corp. v. Trend Micro, Inc.*, 408 F.Supp.2d 1110, 1117 (W.D. Wash. 2006) (citing *Brookfield*, 174 F.3d at 1059).

At the time the lawsuit was commenced, ANP had been in business less than a year. The name of the limited liability company is Act Now Plumbing, LLC, a name under which ANP still advertises. (CP 065-066) There is no rational or reasonable justification for ANP to adopt the Infringing Marks other than to sow confusion in the marketplace. ANP admits that it was aware of Fox’s Mark prior to adopting the Infringing Marks. (CP 051-53) Thus, the evidence proves ANP’s intent and this *Sleekcraft* factor weighs in its favor. Even was ANP to prove credibly that it had no knowledge of Fox’s mark, this *Sleekcraft* factor is neutral.

7. Likelihood of Expansion into Other Markets

Given the identical nature of the services and marketing channels, the seventh *Sleekcraft* factor, likelihood of expansion into other markets, is irrelevant.

8. Degree of Care Likely to be Exercised by the Purchaser

This factor requires consideration of “the typical buyer exercising ordinary caution.” *Sleekcraft*, 599 F.2d at 353; *Nautilus Group*, 372 F.3d at 1334 (“Under Ninth Circuit law, the core element of trademark infringement is whether the ‘reasonably prudent consumer’ is likely to be confused ‘as to the origin of the good or service bearing one of the marks.’”).

Fox suggests that the typical buyer of plumbing and heating services exercises moderate caution in the best of circumstances and low caution when an emergency plumbing or heating crisis is unfolding. Fox’s Mark and the Infringing Marks are so similar in sight, sound and meaning that the typical buyer would not be likely to know of or otherwise determine a distinction until after the fact. The evidence of actual confusion provides important evidence supporting this assertion. This *Sleekcraft* factor weighs in Fox’s favor.

In summary, the facts that show a likelihood of confusion as between

FOX PLUMBING & HEATING

versus

GARY FOX PLUMBING & HEATING

are compelling. The marks are nearly identical. The companies provide the same services. They use similar marketing channels, including websites and telephone directories. Fox’s phone intercept logs show actual confusion. (CP 043-050) Indeed, summary judgment in favor of Fox

arguably should have been granted given the strength of this evidence. At a minimum, the evidence demonstrates a genuine issue of material fact regarding likelihood of confusion, and the trial court erred in granting summary judgment in favor of ANP as a matter of law.

B. CONSUMER PROTECTION ACT VIOLATION AND TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCIES AND RELATIONS

Whether or not there has been unfair competition and tortious interference is a question of fact. *See Olympia Brewing Co. v. Northwest Brewing Co.*, 178 Wash. 533, 538, 35 P.2d 104 (1934); *Evergreen State Amusement Co. v. S.F. Burns & Co.*, 2 Wn. App. 416, 422-23, 468 P.2d 460 (1970). Indeed, after significant briefing and multiple oral hearings, in its July 19, 2010 oral ruling the trial court denied summary judgment for Fox's claim for Consumer Protection Act violation under RCW 19.86 based on the existence of genuine issues of material fact:

Now, um, on the violation of [inaudible] code of Washington 90—1986, um, does the use of, uh, Gary Fox Plumbing violate the consumer protection act, uh, making the, again the summary judgments the appropriate outcome. Um, again I think that it's, it's a fact of one that—it would require facts would be the ones to make that determination.

(RP 7/19/10 Vol. 1, p. 38, ll. 2-7) Once again, the trial court's 180 degree reversal six months later in granting ANP's summary judgment on the Consumer Protection Act claim (and by extension the tortious interference claim on the same basis) is inexplicable.

1. Fox Makes Out a Strong Case for Consumer Protection Act Violation

RCW 19.86.020 states “[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” In order to demonstrate a Consumer Protection Act violation, Fox must show (1) an unfair or deceptive act or practice; (2) in the conduct of trade or commerce; (3) injury to the claimant’s business or property; (4) a causal link between the unfair act and injury suffered; and (5) sufficient showing of public interest. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-92, 719 P.2d 531 (1986).

Washington courts have directly analogized the RCW 19.86 unfair competition statute to the Lanham Act. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 739, 733 P.2d 208 (1987). Quite simply, if there is trademark infringement, there is a *prima facie* violation of RCW 19.86.020. In *Tampourlos*, the Court described the connection between the *Hangman Ridge* elements and a Lanham Act violation as follows:

An unfair or deceptive act or practice. The *Tampourlos* Court held that wrongful appropriation of a trade name was a deceptive or unfair trade practice. *Id.* at 739. Thus, the first *Hangman* element is met here by ANP’s misappropriation of Fox’s Mark.

In the conduct of trade or commerce. The *Tampourlos* Court held that use of a trade name advertising to the public the sale of goods

and services falls squarely within this broad definition. *Id.* at 740. Thus, the second *Hangman* element is met here by ANP's use of the Infringing Marks in commerce, namely, advertising on the Internet and via Dex and Yellow Page ads.

Injury to the claimant's business or property and a causal link between the unfair act and injury suffered. The *Tampourlos* Court held that the use of the word "injured" rather than suffering "damages" makes it clear that no monetary damages need be proven, and that nonquantifiable injuries, such as loss of goodwill would suffice for this element. *Id.* Thus, the third and fourth *Hangman* elements are met here by ANP's use of the Infringing Marks in commerce resulting in actual confusion between ANP and Fox leading to lost business, loss of goodwill, and dilution and tarnishment of Fox's Mark.

Sufficient showing of public interest. The *Tampourlos* Court found that, because use of an infringing name tends to and does deceive or mislead persons of ordinary caution into the belief that they are dealing with one concern when in fact they are dealing with the other, that this confusion of the public, absent some unusual or unforeseen circumstances, will be sufficient to meet the public interest requirement of the Consumer Protection Act. *Id.* at 742. Thus, the fifth *Hangman* element is met here by ANP's use of the Infringing Marks in commerce. This element is further ratified and confirmed by the evidence of actual confusion.

In sum, because ANP is liable for trademark infringement under the Lanham Act, it is also liable for unfair competition under

RCW 19.86.020. At a minimum, the evidence demonstrates a genuine issue of material fact regarding unfair competition, and the trial court erred in granting summary judgment in favor of ANP as a matter of law.

2. *Fox Makes Out a Strong Case for Tortious Interference with Business Expectancy*

The elements of this claim are (1) the existence of a valid contractual relationship or business expectancy; (2) the defendant knew of that relationship; (3) the defendant intentionally interfered, inducing or causing a breach or termination of the relationship or expectancy; (4) the defendant interfered for an improper purpose or used improper means; and (5) resultant damages. *Pleas v. Seattle*, 112 Wn.2d 794, 800, 803-04, 112 Wn.2d 794 (1989). In Washington, “an existing enforceable contract is not necessary . . . All that is needed is a relationship between parties contemplating a contract, with at least a reasonable expectancy of fruition.” *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1971).

After more than forty-five years, Fox has a valid business expectancy that the consumers of plumbing and heating services in the greater Puget Sound region would not be confused about FOX PLUMBING & HEATING and its services. As set forth above, ANP knew about not only Fox’s well-established brand, but also its long-standing customer base and their reliance upon Fox’s brand. By displaying and otherwise using the confusingly similar GARY FOX PLUMBING & HEATING mark without authorization and in direct competition with

Fox, ANP intentionally used improper means for an improper purpose to interfere with Fox's business expectancies. As the direct and proximate result of ANP's actions, Fox has suffered and continued to suffer injury with its business relationships, both direct and consequential. (CP 043-050; 069; 085-092) At a minimum, the evidence demonstrates a genuine issue of material fact regarding tortious interference, and the trial court erred in granting summary judgment in favor of ANP as a matter of law.

C. LACHES AND ESTOPPEL BY ACQUIESCENCE

ANP's entire argument with respect to its invocation of the affirmative defenses of statute of limitation, laches and estoppel by acquiescence is based upon the false assertion that ANP owns the GARY FOX PLUMBING & HEATING mark and can claim the benefit of defenses thereto. ANP claims ownership right in the GARY FOX PLUMBING & HEATING mark through documents purported to transfer such rights. But the evidence before the trial court established that ANP owns absolutely no rights in the GARY FOX PLUMBING & HEATING mark, but rather those rights are owned by Fox. At a minimum, there are credibility issues acknowledged by the trial court that create genuine issues of material fact and preclude summary judgment.

First, ANP provided no evidence that any trademark rights ostensible acquired by Ivanchuk from Gary Fox were ever assigned to ANP. Accordingly, even if Ivanchuk acquired the claimed rights, as a

matter of law such rights cannot be claimed or used as the basis for defenses by the legal entity ANP. On this basis alone ANP's defenses must fail.

Second, and equally dispositive, to the extent any defenses associated with Gary Fox's prior use of the GARY FOX PLUMBING & HEATING mark are available (known as "tacking," or gaining the benefit of a prior owner's use of a mark), *they are only available to the rightful owner of the rights in the GARY FOX PLUMBING & HEATING mark.* *One Indus., LLC v. Jim O'Neal Distrib.*, 578 F.3d 1154, 1160 (9th Cir. 2009) (for purposes of tacking, only a trademark owner can claim priority in a mark based on the first use date of a similar mark in an infringement case).

The evidence conclusively establishes that ANP does not own any rights in the GARY FOX PLUMBING & HEATING mark. To the contrary, the evidence establishes that Fox owns the rights to the GARY FOX PLUMBING & HEATING mark by virtue of the January 21, 2011 Trademark Assignment from Gary Fox to Fox, (CP 465; 469-470), and all uses of the mark since at least as early as 1985 and associated goodwill set forth in ANP's evidence inure to the benefit of Fox. (CP 474-477; 494-495; 465; 469-470; 557-561) For this reason, only Fox, not ANP, can claim the benefit of any defenses that might have been held by prior owner of the GARY FOX PLUMBING & HEATING mark.

For the same (and other) reasons, ANP's argument that a statement made by Fox's counsel in her March 18, 2004 enforcement letter to Gary

Fox regarding his use limited equitable right to use his personal name for his plumbing services under the surname exception is without merit. (CP 184-187) As part of that enforcement effort, Fox's counsel expressed her opinion that "use of the name GARY FOX PLUMBING is somewhat distinguished from [the FOX PLUMBING & HEATING] trademark." (*Id.*) Contrary to ANP's position below, such qualified and equivocal opinion does not constitute a legally binding admission or acquiescence. Equally important, and perhaps most dispositive, is that because ANP owns no rights in the GARY FOX PLUMBING & HEATING mark or privity with Gary Fox regarding the trademark, even if the opinion by Fox's counsel in 2004 was held to constitute an admission, such a defense would only be available to Gary Fox. As Fox now owns all trademark rights formerly held by Gary Fox, ANP has no standing to assert any claimed admissions or acquiescence. (CP 474-477; 494-495; 465; 469-470; 557-561)

At the very least, the ownership rights in the GARY FOX PLUMBING & HEATING mark are in controversy and the facts surrounding that ownership are material to the issues presented by ANP. Indeed, during oral argument at the March 15, 2011 summary judgment hearing, ANP admitted, ***and the trial court recognized***, that there were genuine issues of material fact, in particular related to the credibility of key witnesses surrounding the questions of ownership of the GARY FOX PLUMBING & HEATING mark, as well as serious concerns about ANP's abusive tactics during the discovery process pertaining to the newly

discovery January 2, 2009 Purchase And Sales Agreement. (RP 3/15/11 p. 33:19–p. 34:24) Accordingly, there are genuine issues of material fact that preclude summary judgment and on that basis ANP’s motion for summary judgment should have been denied. *Quiksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 759 (9th Cir. 2006) (tacking is a question of fact); *see, e.g., Sanchez v. Sanchez*, 2010 U.S. Dist. LEXIS 122180, 13-14 (S.D. Cal. Nov. 17, 2010) (“In light of the parties contradictory declarations and the evidence that accompanies them, the Court cannot resolve the issue of whether Plaintiff has a protectable ownership interest in the POLY-MVA mark without credibility determinations. Accordingly, the Court concludes that Plaintiff has not demonstrated a likelihood of success on the merits of his claim under section 43(a) of the Lanham Act.”); *Yountville Investors, LLC v. Bank of America, NA*, 2009 U.S. Dist. LEXIS 67425, at *2 (W.D. Wash. Mar. 4, 2009) (finding likelihood of success on the merits not established in light of witnesses’ contradictory declarations).

D. DISCOVERY ABUSES AND CR 11 VIOLATIONS PRECLUDE SUMMARY JUDGMENT

ANP’s entire argument on summary judgment with respect to its invocation of the affirmative defenses of statute of limitation, laches and estoppel by acquiescence is based upon the false assertion that ANP owns the GARY FOX PLUMBING & HEATING mark and can claim the benefit of the defenses thereto. Such reliance was misleading if not an outright fabrication because (1) the documentary evidence expressly

provides that neither Ivanchuk nor his company ever acquired such rights from Gary Fox and (2) Fox has since acquired and presently owns all rights in the GARY FOX PLUMBING & HEATING mark. (CP 464-470; 474-477; 557-561) Furthermore, Ivanchuk has admitted to knowledge of the January 2, 2009 Purchase And Sales Agreement he executed with Gary Fox. This agreement was notarized and is self-executing, and specifically excluded the GARY FOX PLUMBING & HEATING mark from the limited assets actually acquired by Ivanchuk from Gary Fox as well as expressly prohibited Ivanchuk's use of the GARY FOX PLUMBING & HEATING mark. (CP 465, 467-568) Indeed, the fact that ANP only recently sought to acquire the GARY FOX PLUMBING & HEATING mark from Gary Fox after repeated demands by Gary Fox to cease infringing the trademark, and after the commencement of this litigation, is a further admission that ANP lacks any of the trademark rights it has asserted in this case. (CP 465; 474-477; 531-533; 534-536; 554-557)

In point of fact, ANP and its counsel sought to conceal the existence of this information and the "smoking gun" agreement from Fox, not to mention mislead counsel and the trial court with direct and provably false statements as to ANP's knowledge of the dispositive January 2, 2009 Purchase And Sales Agreement. This agreement was never identified or produced by ANP in this case in response to no less than eleven discovery requests intended to illicit such information, and ANP's counsel has repeatedly denied knowledge of the January 2, 2009 agreement. (CP 474-477; 479-491) Indeed, in what can only be viewed as clear

discovery abuse—and in direct contradiction of Ivanchuk’s subsequent deposition testimony—by letter dated February 9, 2011, ANP’s counsel reiterated their denial of any knowledge they or their client had of the January 2, 2009 Purchase And Sales Agreement prior to January 24, 2011, and in fact accused Fox of intentionally withholding the document Fox only received on January 21, 2011:

Apparently, you are under the false assumption that my client was aware of this purported January 2, 2009 Purchase and Sale Agreement that you intentionally withheld from producing until you filed your response to our motion for summary judgment. Our client was not aware of this document and contends that the Business Opportunity Purchase and Sale Agreement dated 10/27/08 . . . is the only valid and enforceable purchase and sale agreement between Gary Fox Plumbing and Igor Ivanchuk. Thus, my client has no additional information to supplement Interrogatory Nos. 5-7 [related to communications or transfer with Gary Fox].

(CP 500-502)

Notwithstanding Ivanchuk’s admitted knowledge under oath of the notarized January 2, 2009 agreement he personally signed, ANP and its counsel specifically asserted to the trial court as part of their January 4, 2011 summary judgment motion that:

[o]n or about October 27, 2008 Gary Fox and Ivanchuk executed a purchase and sale agreement and a bill of sale for the transfer of GARY FOX PLUMBING to Ivanchuk. As part of this transaction, Gary Fox transferred the goodwill, name, mark and assets of GARY FOX PLUMBING to Ivanchuk.

(CP 232) ANP and its counsel intentionally omitted any information regarding the existence of the notarized January 2, 2009 agreement, calling into question violation of their discovery obligations and CR 11 statements to the trial court and opposing counsel. See CR 11, 26(e), (g). The fact that the trial court recognized this discovery abuse during oral argument (RP 3/15/11 p. 33:19–p. 34:24) further confirms that ANP’s and/or its counsel’s discovery abuses and CR 11 violations preclude summary judgment in favor of ANP, if not mandate further sanctions.

VI. CONCLUSION

Fox is entitled to protect the brand it has carefully and at great expense cultivated over more than forty-five years as a source of quality plumbing and heating services in the greater Puget Sound region. Fox respectfully submits that the trial court erred in summarily dismissing Fox’s claims because, at a minimum, there are genuine issues of material fact as to whether (1) there is a likelihood of confusion between the GARY FOX PLUMBING & HEATING mark and the FOX PLUMBING & HEATING mark; (2) there is any recognizable laches or estopped by acquiescence defense given that Fox, not ANP, owns any and all rights in the GARY FOX PLUMBING & HEATING mark; and (3) there exists actionable Consumer Protection Act violations and tortious interference with business expectancies. Accordingly, Fox respectfully urges the Court to reverse the trial court’s summary judgment and remand the case for subsequent proceeding and trial on the merits, as may be necessary.

RESPECTFULLY SUBMITTED this 7th day of September, 2011.

A handwritten signature in black ink, appearing to read "Richard R. Alaniz", written over a horizontal line.

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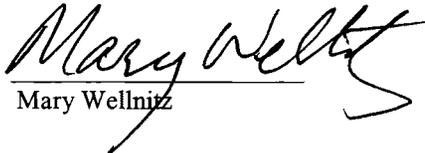
David N. Brown, Inc.

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2011, a true copy of the foregoing was served via Hand Delivery by Seattle Legal, addressed as follows:

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