

68110-9-I

No. 698110-9-10

**COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON**

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ELVIRA WILLIAMS, Appellant,

v.

SEATTLE PLASTIC SURGERY ASSOCIATES, P.C. d/b/a  
LIFESTYLE LIFT SEATTLE, a domestic corporation; and  
SCIENTIFIC IMAGE CENTER MANAGEMENT, INC., a foreign  
corporation, Respondents.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY  
#10-2-05815-0 SEA

**OPENING BRIEF OF APPELLANT**

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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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BEN WELLS & ASSOCIATES

By BEN W. WELLS  
WSBA #19199  
LUIGI COLOMBO  
WSBA #32816  
Attorneys for Appellant  
210 E Third Street  
Arlington, WA 98223  
(360) 435-1663

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## I. INTRODUCTION

This appeal asks an important question of law: Is a merchant that sells a medical procedure by deceiving the public and using unfair or deceptive practices immune from the Consumer Protection Act? Defendant Scientific Image Center Management, Inc. is a Delaware corporation that manages the marketing and sale of a surgical procedure to prospective customers nationwide. Plaintiff Elvira Williams was one of those customers. She bought the Lifestyle Lift®, advertised as a revolutionary, breakthrough medical procedure. The Lifestyle Lift® had been sold to her as a minor surgical procedure, performed under local anaesthetic in about an hour, with quick recovery times, like going to the dentist. What she got instead was a referral to a plastic surgeon for an ordinary facelift. Mrs. Williams got an ordinary, invasive surgical procedure, the plastic surgeon got 15% of the revenues of the sale, and the Lifestyle Lift® corporations got the remaining 85%. Mrs. Williams sued the corporations that sold her this elective surgical procedure under the Consumer Protection Act, asking for a refund of the \$4,600.00 she paid for the Lifestyle Lift®. Her claim was dismissed on summary judgment because of a broad interpretation of *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009).

The Trial Court found that “[h]ere, the advertising of Lifestyle Lift is clearly entrepreneurial and indeed may be deceptive.” (Order, Supplemental ¶ 2; CP 272). In spite of this fact, in spite of the merits of her claim, Plaintiff was denied her trial on the Consumer Protection Act due to an erroneous interpretation of the law.

## **II. ASSIGNMENTS OF ERROR**

Elvira Williams assigns error to the Superior Court’s November 22, 2011 Order Granting Defendants Scientific Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C.’s Motion for Partial Summary Judgment Dismissal of Plaintiff’s Consumer Protection Act Claims (CP 269-272), and to the December 16, 2011 Order Denying Plaintiff’s Motion for Reconsideration (CP 287). Specific assignments of error are as follows:

A. The Trial Court erred by granting Defendants Scientific Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C.’s Motion for Partial Summary Judgment Dismissal of Plaintiff’s Consumer Protection Act and dismissing with prejudice the Consumer Protection Act claims against those

Defendants. It is an error of law and a ruling that is not supported by substantial evidence.

B. The Trial Court erred by failing to consider all facts submitted in support of Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and all reasonable inferences therefrom in the light most favorable to the nonmoving party. It is an error of law and a ruling that is not supported by substantial evidence.

C. The Trial Court erred by denying Plaintiff's Motion for Reconsideration. It is an error of law and a ruling that is not supported by substantial evidence

Issues pertaining to these assignments of error are as follows:

1. *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009) was not intended to immunize merchants of medical services from the Consumer Protection Act. Here, the Trial Court ignored the fact that the damages under the Consumer Protection Act were not caused by the personal injury claim, and that a Consumer Protection Act claim could have been brought in the absence of any personal injury. Did the Trial Court err by

interpreting too broadly the *Ambach* decision and ignoring the fact that the Consumer Protection Act claim was an independent claim?

2. The facts in support of Plaintiff's Response to Defendants' Motion for Partial Summary Judgment and Plaintiff's Motion for Reconsideration, and inferences therefrom, showed that Plaintiff would not have paid for the Lifestyle Lift® procedure absent the misrepresentations of Defendants, and that she wanted a refund of her money. Did the Trial Court err by finding that "surely, if everything had gone well for the Plaintiff, she would be making no claim"? (Order, Supplemental ¶ 3, CP 272)

### **III. STATEMENT OF THE CASE**

#### **A. The Lifestyle Lift®**

The Lifestyle Lift® is widely advertised on television and in print as a "breakthrough medical procedure" (CP 546): a "minor one-hour procedure with major results." It "[t]akes about 1 hour", with "[m]inimal bruising or swelling." (CP 551). The Lifestyle Lift® is performed under local anesthesia, like going to the dentist. (CP 551). The customer can expect to "[r]eturn to work quickly compared to a traditional procedure." (CP 551).

Scientific Image Center Management, Inc. (hereinafter "Lifestyle Lift® Management") is the exclusive licensee of the

trademark “Lifestyle Lift®” and controls who is authorized to use that trade name. (CP 534). Lifestyle Lift® Management manages the centers where the “Lifestyle Lift®” is sold and performed, and is involved in all aspects of the marketing and sale of the Lifestyle Lift® to consumers across the nation, including in the state of Washington. (CP 534). As part of its contract with the surgeons performing the Lifestyle Lift®, Lifestyle Lift® Management gets 85% of all revenues from the sale of the Lifestyle Lift® and the surgeons get 15%. (CP 522).

Seattle Plastic Surgery Associates, P.C. (hereinafter “Lifestyle Lift® Seattle”) is the domestic corporation (CP 592-94) that hires the surgeons that perform the Lifestyle Lift®. (CP 437-450). Its contract with Lifestyle Lift® Management allows it to use the Lifestyle Lift® trademark and to sell the Lifestyle Lift® to consumers in the State of Washington. (CP 453-65). It collects all revenues from the sale of the Lifestyle Lift®, holds back 15% to pay the surgeon that performed the surgery, and gives the remaining 85% to Lifestyle Lift® Management. (CP 522, CP 363).

The Lifestyle Lift® is first and foremost a business model.

What is revolutionary about the Lifestyle Lift is its **business model** and the ability to **market** a safe, affordable facial plastic surgery to the general public.

**It's the revolutionary business model that is the important thing. The procedure is something that medical folks have known about for years.**

(CP 532, emphasis added).

Lifestyle Lift Management® and Lifestyle Lift® Seattle use a registered trademark and the illusion of a revolutionary, unique good or service, to generate a high volume of referrals to affiliated plastic surgeons. (CP 569). It is a very successful business model, generating high volume of revenues every year<sup>1</sup> (CP 530-31) and affecting a large number of consumers in the State of Washington and nationwide. (CP 534-35).

**B. The Sale of the Lifestyle Lift® to Elvira Williams**

The Lifestyle Lift® is sold to prospective customers by a trained salesperson, known as a "Physician Consultant." (CP 372-73). The "Physician Consultant" wears a white lab coat while meeting with the prospective customer. (CP 490). The Physician Consultants are just sales consultants that have been instructed on the medical terminology to use while talking to the prospective customer. (CP 389). The "Physician Consultant's" goal is to close the sale of the Lifestyle Lift®. (CP 373, 407-13, 429, 431).

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<sup>1</sup> The revenues for Lifestyle Lift® Seattle in 2007 were \$5,624,119.00. (Cp 530-31). This was only one of the many centers around the nation managed by Lifestyle Lift® Management – as of 2009 there were 32 Lifestyle Lift® centers operating in 19 different states. (CP 535).

The "Physician Consultant" takes the prospective customer to a room where they are shown a video that sells the Lifestyle Lift® procedure. (CP 377). The "Physician Consultant" then writes down the complaints of the prospective customer about his or her appearance, and selects a number of surgeries to address those problems. (CP 556). The "Physician Consultant" can then show the prospective customer the expected outcome of those surgeries by placing his/her hands on the customer's face and stretching it as needed to make the face look younger. (CP 388). The "Physician Consultant" has a number of sales techniques that he or she is trained to use to guarantee that the prospective customer will pay his or her deposit for the surgical procedure that same day – for example, the salesperson is trained to pretend that there are only few openings available, and long waiting times. (CP 407-13). Financing is offered at the end of that first visit to make the customer pay not just the deposit but the full price of the surgery. (CP 557-60).

Elvira Williams met with a "Physician Consultant" on March 3, 2007 who closed the sale at the time of her initial consultation. (CP 556). She paid a 10% deposit of \$460.00, by credit card, for a Lifestyle Lift® with chin liposuction. (CP 557-58). She also filled

out an application for financing through CareCredit for the remainder of the cost of the procedure, for a total balance of \$4,600.00. (CP 559-60). At the time of the consultation Defendants scheduled her surgery for March 17, 2007, two weeks later. (CP 556). According to Lifestyle Lift®'s Refund Policy Elvira Williams had seven days to ask for a refund. (CP 425).

Elvira Williams was not given the fine print about the "Lifestyle Lift" until the morning of her scheduled surgery, while she was being prepped for surgery ("Informed Consent: Lifestyle Lift" – four pages of fine print explaining the risks of the surgery in detail). (CP 147-50, CP 471). This was standard procedure, in accordance with Lifestyle Lift®'s "Surgical Tech New Hire Manual." (CP 471). By then it was too late to obtain a refund of the cost of the procedure. (CP 425).

Mrs. Williams has stated under oath that she bought the Lifestyle Lift® expecting a revolutionary, breakthrough medical procedure, performed using local anaesthetic, like going to the dentist. (CP 285-86). She was not in the market for an ordinary facelift.<sup>2</sup> (CP 286). She was lead to believe that the Lifestyle Lift®

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<sup>2</sup> In a facelift the surgeon undermines (or separates) the skin from the surface beneath it by using surgical dissection. The extent of the undermining and skin flap can vary depending on the technique used. It is a surgical procedure where

was different from an ordinary facelift, and would not have paid for this elective surgery had she known the truth. (CP 286). Mrs. Williams left the surgery bruised and bandaged, as could be expected from an ordinary facelift. (CP 572-73). That night Mrs. Williams looked in the mirror, and realized for the first time that what she had purchased was very different from the promised Lifestyle Lift®:

I looked into the mirror and I couldn't see my face because it was all bandaged but I could feel it. I could feel that I was bloated from cheek to cheek. And I looked in the mirror and all I could see was my eyes. And I told myself I said, oh my God, what have I done? I didn't think it was supposed to be like this.

(CP 573). This was nothing like going to the dentist, this is what a surgical "bait and switch"<sup>3</sup> feels like. (CP 573).

Mrs. Williams's property loss is the money she gave to Defendants for the Lifestyle Lift®. (CP 500, 557-60). The jury will decide whether Defendants unfair or deceptive acts caused that

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bruising, bleeding, numbness, scarring, discomfort, and pain, are to be expected (CP 147-48).

<sup>3</sup> "[B]ait and switch: A sales practice whereby a merchant advertises a low-priced product to lure customers into the store only to induce them to buy a higher-priced product. Most states prohibit the bait and switch when the original product is not actually available as advertised." BLACK'S LAW DICTIONARY 163 (9<sup>th</sup> e. 2009). In this case, the "price" is not the monetary cost but the physical invasiveness of the surgical procedure – the low-priced product or "bait" was the revolutionary procedure that was like going to the dentist (a minimally invasive procedure), and the higher-priced product or "switch" was the regular facelift (an invasive surgical procedure where bruising, numbness, scarring, discomfort, and pain are to be expected) (CP 147-48).

loss, and whether the amount of that loss is equal to only part of Mrs. Williams's deposit, all of her deposit (\$460.00), or the full cost of the Lifestyle Lift® surgery (\$4,600.00).

**C. The Dismissal of the Consumer Protection Act Claim Against Lifestyle Lift®**

Defendants Lifestyle Lift® Management and Lifestyle Lift® Seattle moved for partial summary judgment on a number of issues, including the dismissal of Elvira Williams's Consumer Protection Act. (CP 42-63). The matter was fully briefed<sup>4</sup> and the Trial Court heard oral argument on November 15, 2011 (CP 226). For purpose of the Motion for Summary Judgment of the Consumer Protection Act claim, Elvira Williams admitted that she had no personal injury claim (CP 498), and Lifestyle Lift® Management and Lifestyle Lift® Seattle admitted that their actions were unfair or deceptive (CP 197, n. 1; CP 228, n. 2), leaving only one question to be decided: whether as a matter of law Elvira Williams could claim injury to her property or business as a result of Lifestyle Lift® Management and Lifestyle Lift® Seattle's unfair or deceptive acts

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<sup>4</sup> Due to the terms of a Stipulated Protective Order Regarding Treatment of Confidential Information (CP 296-304) some of the exhibits in support of Plaintiff's Response to the Motion for Summary Judgment were originally only produced with the Judge's Working Copies and not filed with the Clerk's Office. Following a ruling of the Trial Court (CP 316-18, Order Granting Plaintiff's Motion Re Protective Order, GR 15), Plaintiff was allowed to file with the Clerk's Office copies of the "confidential" documents that were reviewed by the Trial Court (CP 310-487)

(CP 228, n. 2). The Trial Court originally entered an Order denying Defendants Scientific Image Center Management, Inc., and Seattle Plastic Surgery Associates, P.C.'s Motion for Summary Judgment on November 15, 2011 (CP 223-25). The Trial Court then sent an e-mail to the parties the following morning asking for additional briefing (CP 487), and then entered a new Order vacating the prior Order, granting Defendants Scientific Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C.'s Motion for Partial Summary Judgment Dismissal of Plaintiff's Consumer Protection Act Claims, and dismissing Defendant Scientific Image Center Management, Inc. from the lawsuit. (CP 269-72). Elvira Williams moved for reconsideration (CP 278-284) and the Motion was denied on December 16, 2011 (CP 287). The remaining claims were tried before a jury and a verdict in favor of the Defendants was entered on December 16, 2011.

The merits of Elvira Williams's claim under the Consumer Protection Act were never adjudicated. Because her claim was erroneously dismissed as a matter of law, Elvira Williams now appeals that dismissal. She respectfully requests this Court to vacate the Order Granting Defendants Scientific Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C.'s

Motion for Partial Summary Judgment Dismissal of Plaintiff's Consumer Protection Act Claims and remand this matter for a trial of her Consumer Protection Act's claim.

#### IV. SUMMARY OF ARGUMENT

Mrs. Williams had two separate and independent types of claims against Lifestyle Lift® Seattle – a personal injury claim, and a Consumer Protection Act claim, in which Mrs. Williams asked for a refund of the cost of the Lifestyle Lift® (\$4,600.00). Even in the absence of any personal injury, Mrs. Williams had all the elements of a *prima facie* Consumer Protection Act claim against Lifestyle Lift®. She was marketed and sold a good or service, the Lifestyle Lift®, that was very different than advertised. Her Consumer Protection Act claim could be analogized to that of a “bait and switch” victim who is cajoled into buying a car different than advertised.

*Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009) was not intended to provide immunity from Consumer Protection Act claims – such broad interpretation of the ruling of *Ambach* is dangerous; it encourages moral hazard<sup>5</sup> and unethical behavior

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<sup>5</sup> “Moral hazard” is a term of art used in economics theory and in the insurance industry. Here it is used to describe the behavior of an actor that feels insured against a specific risk or liability, and as a result acts taking greater risks than if

while ignoring the will of the Washington legislature. The test to decide whether a Consumer Protection Act claim can coexist with a personal injury claim is whether the two claims are independent of each other. Elvira Williams's Consumer Protection Act's claim was independent of her personal injury claim. It was based on the way the Lifestyle Lift® was sold to her, regardless of the outcome of the procedure, and should have survived summary judgment.

## V. STANDARD OF REVIEW

This Court reviews the Trial Court's ruling on a motion for summary judgment *de novo*. See, e.g., *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App 769, 773, 875 P.2d 705 (1994). Any findings of fact entered by the Trial Court will be considered superfluous. See, e.g., *Thongchoom v. Graco Children's Products, Inc.*, 117 Wn. App. 299, 309, 71 P.3d 214 (2003).

## VI. ARGUMENT

### A. **The Consumer Protection Act Is a Remedial Act to Protect the Public from Unfair or Deceptive Acts**

Unfair methods of competition and **unfair or deceptive** acts or practices in the conduct of **any trade or commerce** are hereby declared unlawful

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he or she were uninsured. For example, economics and actuarial theory suggest that someone with fire insurance, a bank "too big to fail", or a corporation immune from lawsuits might choose to engage in riskier behavior because they know that they will not bear the full cost of their decisions.

RCW 19.86.020 (emphasis added). The Washington Consumer Protection Act (hereinafter “CPA”) was enacted to protect the public from unfair or deceptive practices. It replaced the maxim *caveat emptor* (buyer beware) with a set of rules, regulations, and stern penalties designed to protect consumers and encourage fair and honest dealing.

The CPA “shall be liberally construed that its beneficial purposes may be served.” RCW 19.86.920. *See also Short v. Demopolis*, 103 Wn.2d 52, 60, 691 P.2d 163 (1984); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 40, 204 P.3d 885 (2009). The Washington Supreme Court has stated that the CPA’s broad prohibition on unfair or deceptive practices reflects the Legislature’s intent to “provide sufficient flexibility to reach unfair or deceptive conduct that **inventively evades regulation.**” *Panag*, 166 Wn.2d at 49 (emphasis added).

Prior to 1971, the enforcement of the Consumer Protection Act was solely the province and responsibility of the Attorney General of Washington. In 1971, the Washington legislature decided that more needed to be done to protect consumers, and amended the statute to create a private cause of action, and to allow ordinary citizens to act as private Attorney Generals and

protect the public interest. This was done “[i]n apparent response to the escalating need for additional enforcement capabilities.” *Hangman Ridge Training Stable, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). In order to make those private actions effective in deterring tortfeasors, and in order to make it economically viable to enforce the CPA, the Washington legislature allowed private plaintiffs to seek recovery of punitive damages, specifically treble damages up to \$25,000, attorney fees and costs, and to seek injunctive relief. RCW 19.86.090.

**B. A CPA Claim and a Personal Injury Claim can be Parallel and Independent**

Justice Chambers in *Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009) authored a concurring opinion to clarify the following point of law:

I write separately to stress that there is nothing in our jurisprudence that should prevent a patient from bringing a CPA claim against a doctor who falsely and deceptively prescribed unnecessary or unnecessarily expensive surgeries as part of a business strategy. *Cf. Wright*, 104 Wn. App. At 479-80, 16 P.3d 1268 (upholding CPA claim based on the “advertising, marketing, and sale of diet drugs”). *Wright* remains good law after today. ...

*Ambach* at 412. *Wright v. Jeckle*, 104 Wn. App. 478, 16 P.3d 1268 (2001) was a case about a doctor advertising and selling

the now infamous fen-phen to customers. It was a case about misrepresentation. It was a case about a merchant who also happened to be a doctor.<sup>6</sup> *Wright* really stands for the proposition that a medical degree does not authorize a doctor to mislead customers. The doctor in *Wright*, Dr. Jeckle, had advertised the “Dr. Jeckle’s Fen Phen Medical Weight Loss Program” in the Nickel Nick and Spokesman Review. He had advertised the fen-phen as “safe,” with testimonials and free drawings to promote the sale of the drug directly from his office. He directly profited from those sales.

In *Wright* the Court of Appeals reversed the trial court’s dismissal of the CPA claim against Dr. Jeckle. The Doctor had clearly engaged in trade or commerce, which the Court described as the “entrepreneurial aspects” of the Doctor’s practice. *Wright* at 482. Dr. Jeckle was not being sued for malpractice, he was being sued for being an unscrupulous salesman.

A recent case by the Court of Appeals, *Young v. Savidge*, 155 Wn. App. 806, 230 P.3d 222 (2010) stands for a similar proposition – that a medical professional must not mislead his or her prospective customers when advertising his or her products.

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<sup>6</sup> Defendant Lifestyle Lift® Management is not even a medical provider, just a corporation managing the sale of a medical procedure (CP 43, 73, 77).

*Young* was a case about a dentist, Dr. Edward Savidge, who was advertising and selling crowns made of rare metals (gold, platinum, or palladium) and then using nickel crowns instead. Dr. Savidge's patient bought and paid for a "high noble" crown and got a nickel crown instead. The nickel crown caused injuries to the patient and eventually had to be removed and replaced. The patient sued the dentist alleging misrepresentation and a CPA claim in addition to her medical malpractice claim. The trial court dismissed both the misrepresentation and CPA claim, and the Court of Appeals reversed dismissal of those claims and remanded for a trial on the merits. The Court of Appeals found that genuine issues of material fact precluded summary judgment on those claims. Whether the dentist had misrepresented the product he was selling to the public, and whether he had benefited from that misrepresentation, was a question for the jury to decide.

Both *Wright* and *Young* show that it is possible to have a CPA claim and a personal injury claim coexist with each other, as long as the two claims are independent of each other. For example, Dr. Savidge's patient had an independent CPA claim against Dr. Savidge. Dr. Savidge sold her a nickel crown for the price of a "high noble" crown; even if the nickel crown worked

perfectly, even in the absence of any personal injury, she was still the victim of unfair or deceptive acts.<sup>7</sup>

Elvira Williams's case can be analogized to *Wright* and *Young*. Mrs. Williams was sold a Lifestyle Lift® by Lifestyle Lift® Seattle and Lifestyle Lift® Management. Lifestyle Lift® Management had control over most or all aspects of the sale, including control over the "Physician Consultant" that closed the deal. It knew or should have known that it was selling a product that did not exist as advertised and sold. It knew or should have known about the misrepresentations used to sell the product. It knew or should have known that the Lifestyle Lift® is simply a trademark used to make high volume referrals to plastic surgeons in exchange for 85% of the revenues.

There is not much difference between selling an ordinary, invasive facelift by calling it a "revolutionary," "minor one-hour procedure with major results," and selling a nickel crown by calling it a "high noble" crown as in *Young*.<sup>8</sup> There is not much difference

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<sup>7</sup> A distinction must be made between the independent legal claims, and the evidence those claims rely upon – two claims that are legally independent of each other may share or rely upon the same evidence or same set of facts. Here, for example, both legal claims against Dr. Savidge shared the fact that the doctor used a nickel crown instead of a high noble crown in the mouth of the patient.

<sup>8</sup> One important difference is that high noble crowns actually exist, while the "revolutionary," "breakthrough medical procedure" sold by Lifestyle Lift® does not

between the misrepresentation that was at the heart of *Young and Wright* and the present case: here the merchant is selling a Lifestyle Lift® as a “revolutionary,” “breakthrough medical procedure” with “minimal bruising and swelling,” “a minor one-hour procedure with major results” performed under local anaesthesia, like going to the dentist (CP 546, 551), knowing very well that the Lifestyle Lift® is simply a referral for invasive plastic surgery where bruising, bleeding, numbness, scarring, discomfort, and pain are to be expected (CP 147-48).

This is like a new kind of “bait and switch,” where the merchant substitutes a minimally invasive surgery for a much more invasive one. The cost to the consumer is how much he or she is willing to endure. Consumers are lured to Lifestyle Lift® with promises of minimally invasive, revolutionary medical procedures (the low cost product) and once they get there, on the day of the surgery, as they are getting prepped on the surgical chair, they are presented with four pages of fine print (CP 147-50). The Lifestyle Lift® turns out to be nothing more than a cheaper type of facelift, performed without general anaesthesia, where the patient's skin is

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really exist. “It's the revolutionary business model that is the important thing. The procedure is something that medical folks have known about for years.” (CP 532).

lifted from the underlying tissues and where the surgeon decides how much to lift, cut, stitch, and bruise. The customer, who has already paid his or her non-refundable deposit, has taken time away from work or other obligations to go to Lifestyle Lift® Seattle's offices, has made special arrangements to have a loved one drive him or her home, and is being prepped for the Lifestyle Lift®, is now expected to carefully read four pages of fine print and realize that what he or she is about to get is different than what he or she had originally bought. Rather than making a scene, getting up from the surgical chair, and exiting the office, thereby forfeiting his or her deposit and the full cost of her procedure, he or she now takes the "switch" and proceeds with the non-refundable surgery. Based on the record in this case, "there is nothing in our jurisprudence that should prevent a patient from bringing a CPA claim... ." *Ambach* at 412 (Justice Chambers concurring opinion).

**C. *Ambach* Can Be Easily Distinguished – Here the CPA Claim is Parallel and Independent from the Personal Injury Claim**

*Ambach v. French*, 167 Wn.2d 167, 216 P.3d 405 (2009) was nothing more than a personal injury claim. It was a case about a botched shoulder surgery. The ruling of the Washington Supreme Court was foreseeable given the facts of the case – but

for the harm caused by the medical malpractice, the plaintiff in *Ambach* did not have a claim for damages. Plaintiff's attempts in *Ambach* to disguise a personal injury claim as a CPA claim were transparent.

[A]t the hearing on the motion for summary judgment, *Ambach* agreed that her CPA injury was "part and parcel of a personal injury claim."

*Id.* at 174. *Ambach* was not a case about the way the surgery had been advertised and sold, in spite of *Ambach*'s counsel's claims to the contrary. It was not a case about unfair or deceptive advertising. *Id.* at 177-78. Perhaps most importantly, *Ambach* was not a case about protecting consumers. The all-important public interest prong of the Consumer Protection Act was sorely lacking. *Id.* at 178.

The Washington Supreme Court in *Ambach* made a point of the plaintiff's "failure to state a cognizable CPA claim" – the fact that she failed to allege that her surgeon had actively solicited her as a patient, and that she had failed to allege that her surgeon had advertised or marketed his surgeries to the general public. *Id.* at 177-78. Therefore, it should come as no surprise that the Washington Supreme Court in *Ambach* denied the plaintiff's CPA claim – it was the proper decision given the facts of the case.

The test to be used in determining whether or not a CPA claim is independent of a personal injury claim is simple: assuming a hypothetical set of facts where there is no injury to the plaintiff (and therefore no grounds for a personal injury claim), are there still all the elements of a CPA claim? In other words, could the plaintiff have brought a CPA claim in the absence of a personal injury? In the case of *Ambach* the answer is clearly no – if the plaintiff in *Ambach* were to admit that the doctor had done no harm (in other words, if she were to admit that the surgery performed by the defendant was medically necessary and was performed within the standard of care), she would have no CPA claim.

While the plaintiff's CPA claim in *Ambach* depended entirely on the fact that she had been injured by her medical procedure, this one does not. Elvira Williams's CPA claim is independent of any injury. It is a claim about **the way** the Lifestyle Lift® was sold to her, not about **the outcome** of the procedure. For purpose of the Motion for Summary Judgment, the facts before the Trial Court were that Elvira Williams admitted that she was not injured by the procedure. However, the lack of any personal injury made no difference to the strength of her CPA claim. Therefore, this case can be easily distinguished from *Ambach*.

Elvira Williams's case can also be easily distinguished from a number of other cases that ultimately stand for the same proposition as *Ambach* – that a CPA claim must be independent of a claim for personal injury. For example, *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wn. App. 366, 773 P.2d 871 (1989) was a case about a purchaser of athletic shoes with cleats who injured herself while using those shoes. It was a case of product liability disguised as a CPA claim. Plaintiff's problem in *Stevens* was not that the seller had promised her a leather shoe and then sold her a cheap leather imitation shoe instead. The seller in *Stevens* had marketed the defective shoes as the "best and most popular softball shoe on the market." *Id.* at 367. The whole of Plaintiff's claim depended on the fact that she was injured by those shoes – but for the injury caused by the shoes she would not have been able to sue the manufacturer and seller of those shoes. Applying the test described *supra*, and assuming a set of facts where the plaintiff was not injured by the defect in the shoes, the plaintiff would not have a CPA claim.

*Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 959 P.2d 1158 (1998), had a similar fact pattern and a similar problem. It was a case about a purchaser of snow tires claiming that the

manufacturer had failed to warn her of the risk of using those tires on only two of the wheels of her car. Again, it was a case of product liability, of the “failure to warn” kind, disguised as a CPA claim. Plaintiff in *Hiner* did not claim that she had been sold regular tires advertised as snow tires – the tires were snow tires, as advertised. This was not a case about the way the tires had been marketed, it was not a case of misrepresentation – it was a case of failure to warn of a defect in the tire. But for the injury caused by the tires, she would not have had an independent claim against the manufacturer of the product. Applying the test described *supra*, and assuming a set of facts where the plaintiff was not injured by the improper installation of the snow tires, the plaintiff would not have a CPA claim.

*Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696 (9<sup>th</sup> Cir.), is another case that entirely depended on the existence of a personal injury. This was a lawsuit by hospitals against a cigarette manufacturer, for the increased cost of medical care caused by the use of cigarettes. The hospitals’ only damages were the result of the injuries caused by the cigarettes to the smokers – without those injuries, there would be no damages. The hospitals did not buy the cigarettes, they had no expenses directly

associated with purchasing the good, and no independent CPA claim against Philip Morris Inc.. Their CPA claim was properly dismissed for a number of reasons, including lack of proximate cause. Applying the test described *supra*, and assuming that no patients were injured by the cigarettes, the hospitals would have no CPA claim.

All of the above cases ultimately stand for a simple proposition – a CPA claim must be independent of a personal injury claim. It must be able to stand on its own in the absence of a personal injury. All of the above cases can be easily **distinguished** from the present case. None of the above cases stands for the proposition that the existence of a personal injury case **parallel** to an independent CPA claim bars the CPA claim. Elvira William's CPA claim is independent of any personal injury claims, and therefore is able to stand on its own.

**D. One Must Look at the Five Elements of a CPA Claim Together and Not Individually to Determine the True Nature of the Plaintiff's Claim.**

There are five elements to a CPA claim:

We hold that to prevail in a private CPA action ... a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; 3) public interest impact; (4) injury

to plaintiff in his or her business or property; (5) causation.

*Hangman Ridge Training Stable, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The Washington Supreme Court in *Ambach* warned us that “[t]he individual *Hangman Ridge* factors **should not be read in isolation so as to render absurd conclusions.**” *Ambach* at 178 (emphasis added). In other words, a CPA claim should look like a CPA claim, and not like a personal injury claim disguised as a CPA claim.

It is especially important that a CPA claim meet the public interest requirement. *Ambach* at 178. This is consistent with the intent behind the enactment of the Consumer Protection Act, to protect the public from unfair or deceptive acts that could affect a great number of citizens in our State.

Elvira Williams's CPA claim at its heart is the claim of someone who was fooled by a merchant and now wants a refund. Mrs. Williams, like many other customers of Lifestyle Lift®, wants a refund for the money she paid for what she thought was going to be a minimally invasive medical procedure and turned out to be ordinary, invasive plastic surgery. Unlike the case of *Ambach*, or *Michael v. Mosquera-Lacey*, 165 Wn.2d 595, 200 P.3d 695 (2009),

here it is clear that Elvira Williams's lawsuit would serve the public interest. A refund of \$4,600.00 for a product, good, or service that was widely advertised and sold to the public using unfair or deceptive practices is clearly the kind of claim that is usually brought under the Consumer Protection Act.

**E. A Broad Interpretation of *Ambach* Encourages Moral Hazard by Providing Unintended Immunity to Unscrupulous Merchants**

The Legislature's intent in enacting the Consumer Protection Act was to "provide sufficient flexibility to reach unfair or deceptive conduct that **inventively evades regulation.**" *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 49, 204 P.3d 885 (2009) (emphasis added). A broad interpretation of *Ambach* effectively defeats the legislative intent. This raises a serious public policy issue that this Court has an opportunity to address before it repeats itself. *See Marshall v. Higginson*, 62 Wn. App. 212, 216 n. 3, 813 P.2d 1275 (1991).

There have been many attempts to hold Lifestyle Lift® accountable, including a recent class action lawsuit that was dismissed not based on the merits, but based on the failure of Plaintiff to obtain class certification. *See Faktor v. Lifestyle Lift*, 2010 WL 271346 at 5 (N.D. Ohio) (Order Denying Plaintiff's Motion

to Certify Class, due to failure to meet the commonality and typicality requirements). As explained *infra*, there are unique legal challenges that must be overcome in a case of misrepresentation to meet the commonality requirement necessary to obtain class action certification. However, the fact remains that there are a large number of people who were fooled into purchasing a Lifestyle Lift® who would seek individual redress and ask for a refund if it were economically feasible.<sup>9</sup>

A broad interpretation of *Ambach*, such as the one that was suggested by Defendants at the trial court level, is socially undesirable and ignores the reasons for the enactment of the Consumer Protection Act by the Washington legislature. Appellant respectfully asks the Court to take judicial notice of the fact that nowadays elective surgical procedures are sold to the masses by merchants armed with three tools: a registered trademark, savvy marketing, and trained sales consultants. The type of commercials that lured Elvira Williams to the Lifestyle Lift® are not uncommon – similar commercials and infomercials are used nowadays to promote other forms of trademarked **elective** surgeries by

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<sup>9</sup> Another complication is the secrecy surrounding the Lifestyle Lift® procedure. Proof of what Lifestyle Lift® is and of its unfair or deceptive acts required extensive discovery. Much of the exhibits marked "confidential" were hidden from the public prior to this lawsuit.

downplaying their risks and emphasizing the uniqueness of the trademarked product.<sup>10</sup> This new breed of merchants takes advantage of the unique aura enjoyed by the medical profession to sell their goods and services to a large number of unsuspecting or unsophisticated consumers. Meanwhile, the local medical community finds itself outcompeted by these high volume, low cost, well-marketed operations.

The Consumer Protection Act provides a legal remedy to stop this from happening. As previously explained *supra*, it is a remedial act passed by the Washington legislature to stop or discourage “unfair or deceptive conduct that inventively evades regulation.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 49, 204 P.3d 885 (2009). The CPA allows the victims of these practices to obtain legal representation, since the defendant will be responsible for the cost of the plaintiff’s attorney’s fees. It also provides a strong deterrent that puts a price on this type of

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<sup>10</sup> Examples of well known trademarked procedures that have been in the news are Lifestyle Lift® (facelift), Sono Bello® (liposuction), and 1-800-GET-THIN® (lab band® surgery). Various reports have been published about this new trend. See, e.g., Jayne O’Donnell, *Cosmetic Surgery Gets Cheaper, Faster, Scarier*, USA TODAY, available at <http://www.usatoday.com/money/perfi/basics/story/2011-09-14/risks-low-cost-cosmetic-surgery/50409740/1> (updated September 20, 2011).

behavior, something the prospective defendants will factor in their cost/benefit analysis.

A Consumer Protection Act claim is often the **only** remedy the consumer of this new wave of medical services would have, both from a legal and pragmatic point of view. Not every one that was fooled into buying an elective medical procedure has a claim for personal injury. Most consumers only have a claim for a refund of the cost of the procedure after they discover, to their dismay, after paying for the procedure by credit card or financing, that they have received a much more invasive medical procedure than what had been advertised and what they had thought they were purchasing.

The merchant who profited from the marketing and sale of the medical procedure often has the economic resources to create a David versus Goliath scenario, making it economically impossible to get a refund or to pursue claims for misrepresentation (negligent or intentional) that are not accompanied by a claim for personal injury.<sup>11</sup> Furthermore, a class action is often out of the question

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<sup>11</sup> In spite of the potential for punitive damages and attorney's fees, there is often an economic barrier to bringing a CPA claim given the incentive of the defendants to keep evidence of their unfair or deceptive acts hidden from the public, and the significant investment of time and resources required to obtain evidence thereof and litigate the claim. (See, e.g., "Confidential" documents, CP

given the fact that misrepresentation often does not lend itself to the commonality requirement necessary for class certification. See, e.g., *Faktor v. Lifestyle Lift*, 2010 WL 271346 at 5 (N.D. Ohio) (Order Denying Plaintiff's Motion to Certify Class due to failure to meet the commonality and typicality requirements).

By broadly interpreting *Ambach* the consumers of our state lose a remedy for their harm, and the wrongdoers enjoy immunity for their unfair or deceptive acts. Such broad interpretation of *Ambach* allows a merchant to trademark an ordinary medical procedure and claim that it is new, revolutionary, and special, without fear of retaliation. The merchant who lures the customer and sends them to an affiliated doctor will not be liable if the doctor falls below the standard of care,<sup>12</sup> and when the doctor delivers something different than what was originally promised by the merchant, the merchant will simply argue that under a broad interpretation of *Ambach* it is impossible for the consumer to get a refund because he or she cannot show any injury to property or business. This is not what the Washington Supreme Court

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310-486; See also *Washington State Physicians In. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 307-09, 858 P.2d 1054 (1993)).

<sup>12</sup> For example, Defendant Lifestyle Lift® Management is not a medical provider, just a corporation managing the sale of a medical procedure, and is therefore immune from medical malpractice lawsuits. (CP 43, 73, 77, 223-25)

intended, and this is the kind of mistake that Justice Chambers warned us about in his concurring opinion. This defeats the will of the Washington legislature.

**F. RAP 18.1 – Attorney’s Fees Incurred for this Appeal Available on Remand**

Pursuant to RAP 18.1(a) and (b) Plaintiff respectfully requests the Court to award reasonable attorney fees incurred in this appeal should Plaintiff prevail at trial on her Consumer Protection Act claim against Defendants. The applicable law granting Plaintiff the right to recover reasonable attorney’s fees is RCW 19.86.090. The award will be dependent on Plaintiff’s ability to prevail at trial following remand. The award of the attorney’s fees incurred for the appeal will be determined by the Trial Court. RAP 18.1(i). *See also Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 601-02, 675 P.2d 193 (1983).

**VII. CONCLUSION**

Elvira Williams was denied justice when the Trial Court dismissed her Consumer Protection Act claim against Lifestyle Lift® Management and Lifestyle Lift® Seattle. This could be a blessing in disguise – this Court now has the opportunity to clarify whether a plaintiff can have a Consumer Protection Act claim and a personal

injury claim where the two are independent of each other. This Court can uphold the will of the Washington legislature and remind all merchants that if they flood our airwaves with unfair or deceptive advertising, luring customers with false promises, they are not immune from the Consumer Protection Act. Elvira Williams respectfully requests that this Court reverse the dismissal of her Consumer Protection Act claim against Defendants Seattle Plastic Surgery Associates, P.C., and Scientific Image Center Management, Inc., and remand this matter for a new trial solely on the Consumer Protection Act claim.

DATED this 9<sup>th</sup> day of April, 2012

Respectfully submitted,

BEN WELLS & ASSOCIATES

By 

Ben W. Wells, WSBA# 19199  
Luigi Colombo, WSBA# 32816  
210 E Third Street  
Arlington, WA 98223  
(360) 435-1663  
Attorneys for Appellant

## DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the date stated below, I mailed or caused delivery of the **Opening Brief of Appellant** to:

Kimberly Baker  
Mary Spillane  
Williams Kastner & Gibbs, PLLC  
601 Union Street, Suite 4100  
Seattle, WA 98101-2380

DATED this 10<sup>th</sup> day of April, 2012

  
Elizabeth Minish

**APPENDIX**

Order Denying Defendants Lifestyle Lift Holding, Inc, Scientific Image Center Management, Inc., and Seattle Plastic Surgery Associates, P.C.'s Motion for Summary Judgment CP 223-225

Order Granting Defendants Scientific Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C.'s Motion for Partial Summary Judgment Dismissal of Plaintiff's Consumer Protection Act Claims CP 269-272

Order Denying Plaintiff's Motion for Reconsideration CP 287

*Faktor v. Lifestyle Lift*, 2010 WL 271346 (N.D. Ohio)

**FILED**  
COUNTY, WASHINGTON

NOV 15 2011

The Honorable Michael Heavey  
Hearing Date: Tuesday, November 15, 2011  
With Oral Argument at 4:00 p.m.

SUPERIOR COURT CLERK  
BY Ed Gueco  
DEPUTY

**SUPERIOR COURT OF WASHINGTON FOR COUNTY OF KING**

ELVIRA WILLIAMS,

Plaintiff,

vs.

LIFESTYLE LIFT HOLDING, INC., a foreign  
corporation d/b/a LIFESTYLE LIFT;  
SCIENTIFIC IMAGE CENTER  
MANAGEMENT, INC., a foreign corporation  
d/b/a LIFESTYLE LIFT; SEATTLE PLASTIC  
SURGERY ASSOCIATES, P.C., a domestic  
corporation; DAVID Q. SANTOS, M.D. and  
JANE DOE SANTOS, husband and wife, and  
the marital community composed thereof; and  
John Doe and/or Jane Doe 1 through 10

Defendants

NO. 10-2-05815-0 SEA

~~(PROPOSED)~~

ORDER DENYING DEFENDANTS  
LIFESTYLE LIFT HOLDING, INC.,  
SCIENTIFIC IMAGE CENTER  
MANAGEMENT, INC., AND  
SEATTLE PLASTIC SURGERY  
ASSOCIATES, P.C.'S MOTION  
FOR SUMMARY JUDGMENT

THIS MATTER having come on duly and regularly before the Court on Defendants  
Lifestyle Lift Holding, Inc., Defendant Scientific Image Center Management, Inc., and  
Defendant Seattle Plastic Surgery Associates, P.C.'s Motion for Partial Summary Judgment,  
and the Court having considered the pleadings submitted in support of and in opposition to  
the motion, specifically the following pleadings:

~~(PROPOSED)~~ ORDER DENYING DEFENDANTS' MOTION FOR  
SUMMARY JUDGMENT - 1

BEN WELLS & ASSOCIATES  
ATTORNEYS AT LAW  
210 E. Third St.  
Arlington, WA 98223  
PHONE (360) 435-1663 - FAX (360) 474-9751

1 1. Defendants Lifestyle Lift Holding, Inc., Defendant Scientific Image Center  
2 Management, Inc., and Defendant Seattle Plastic Surgery Associates, P.C.'s Motion for  
3 Partial Summary Judgment;

4 2. Declaration of Kimberly D. Baker in Support of Defendants' Motion;

5 3. Plaintiff's Response;

6 4. Declaration of Ben W. Wells in Support of Plaintiff's Response;

7 5. Defendant's Reply.

8  
9 NOW THEREFORE, it is hereby ORDERED, ADJUDGED, and DECREED the  
10 following:

11 1. Defendants' Motion <sup>to dismiss Consumer Protection Act claim</sup> is hereby DENIED

12 2. ~~Defendant SICM's motion to dismiss~~  
13 ~~medical negligence / informed consent claim is~~  
14 ~~granted.~~

15 3. \_\_\_\_\_  
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18 4. \_\_\_\_\_  
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20 IT IS SO ORDERED.

21 DATED this 15<sup>th</sup> day of November, 2011.

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24 Judge Michael Heavey

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Presented by:

BEN WELLS & ASSOCIATES

---

BEN W. WELLS, WSBA No. 19199  
Attorney for Plaintiff

COPY RECEIVED:

WILLIAMS, KASTNER & GIBBS PLLC

---

Arissa M. Peterson, WSBA No. 31875  
Kimberly D. Baker, WSBA No. 14257

FLOYD, PFLUEGER & RINGER, P.S.

---

Rebecca S. Ringer, WSBA No. 16842

**FILED**  
KING COUNTY, WASHINGTON

The Honorable Michael Heavey

NOV 28 2011

SUPERIOR COURT CLERK  
BY Ed Gueco  
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

ELVIRA WILLIAMS,

Plaintiff,

v.

LIFESTYLE LIFT HOLDING, INC., a foreign corporation d/b/a LIFESTYLE LIFT;  
SCIENTIFIC IMAGE CENTER MANAGEMENT, INC., a foreign corporation d/b/a LIFESTYLE LIFT; SEATTLE PLASTIC SURGERY ASSOCIATES, P.C., a domestic corporation; DAVID Q. SANTOS, M.D. and JANE DOE SANTOS, husband and wife, and the marital community composed thereof; and John Doe and/or Jane Doe 1 through 10,

Defendants.

No. 10-2-05815-0 SEA

ORDER GRANTING DEFENDANTS SCIENTIFIC IMAGE CENTER MANAGEMENT, INC. AND SEATTLE PLASTIC SURGERY ASSOCIATES, P.C.'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSAL OF PLAINTIFF'S CONSUMER PROTECTION ACT CLAIMS

THIS MATTER having come on duly and regularly before the Court on Defendants Scientific Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C.'s Motion for Partial Summary Judgment Dismissal, and the Court heard oral argument by the parties and considered the records and files herein and the following pleadings prior to the Court's ruling on November 15, 2011 denying Defendants' Motion for Partial Summary Judgment Dismissing Plaintiff's Consumer Protection Act ("CPA") claims:

ORDER GRANTING DEFENDANTS SCIENTIFIC IMAGE CENTER MANAGEMENT, INC. AND SEATTLE PLASTIC SURGERY ASSOCIATES, P.C.'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSAL OF PLAINTIFF'S CONSUMER PROTECTION ACT CLAIMS - 1

Williams, Kastner & Gibbs PLLC  
601 Union Street, Suite 4100  
Seattle, Washington 98101-2380  
(206) 628-6600

3311341.1

1 1. Defendants Lifestyle Lift Holding, Inc., Scientific Image Center Management,  
2 Inc. and Seattle Plastic Surgery Associates, P.C.'s Motion for Partial Summary Judgment  
3 Dismissal;

4 2. Declaration of Kimberly D. Baker in Support of Defendants Lifestyle Lift  
5 Holding, Inc., Scientific Image Center Management, Inc. and Seattle Plastic Surgery  
6 Associates, P.C.'s Motion for Partial Summary Judgment Dismissal, and exhibits attached  
7 thereto;

8 3. Plaintiff's Response to Defendants Lifestyle Lift Holding, Inc. et al., Scientific  
9 Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C.'s Motion for  
10 Partial Summary Judgment;

11 4. Declaration of Ben W. Wells In Support of Plaintiff's Response to Defendants'  
12 Motion for Summary Judgment, and exhibits thereto;

13 5. Defendants' Reply in Support of Motion for Partial Summary Judgment  
14 Dismissal;

15 6. Supplemental Declaration of Kimberly D. Baker in Support of Motion for  
16 Partial Summary Judgment Dismissal, and exhibits thereto; and

17 7. ~~Defendants' Scientific Image Center Management, Inc. and Seattle Plastic~~  
18 ~~Surgery Associates, P.C.'s Supplemental Brief In Support of Motion for Partial Summary~~  
19 ~~Judgment Dismissal, dated November 18, 2011.\*~~

20 The Court on its own initiative requested additional briefing in connection with  
21 Defendants' summary judgment motion seeking dismissal of the CPA claim and having  
22 reviewed the following:

23 8. Plaintiff's Supplemental Brief, dated November 18, 2011;

24 9. Defendants' Supplemental Brief, dated November 18, 2011.\*

25 **ORDER GRANTING DEFENDANTS SCIENTIFIC  
IMAGE CENTER MANAGEMENT, INC. AND SEATTLE PLASTIC  
SURGERY ASSOCIATES, P.C.'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT DISMISSAL OF PLAINTIFF'S  
CONSUMER PROTECTION ACT CLAIMS - 2**

**Williams, Kastner & Gibbs PLLC**  
601 Union Street, Suite 4100  
Seattle, Washington 98101-2380  
(206) 628-6600

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10. Defendants' Reply (if any);

11. Plaintiff's Reply (if any).

12. \* The court is unsure as to the differences between  
submittal #7 and submittal #9, therefore the court  
deleted #7.

NOW, THEREFORE, it is hereby ORDERED that:

(1) The Court's Order of November 15, 2011 denying Defendants' Motion for Partial Summary Judgment Dismissal of Plaintiff's Consumer Protection Act claims is vacated.

(2) Defendants' Motion for Partial Summary Judgment Dismissal is GRANTED and Plaintiff's Consumer Protection Act claims against defendants Scientific Image Center Management, Inc. and Seattle Plastic Surgery Associates, P.C. are dismissed with prejudice.

(3) The remaining portion of the Court's November 15, 2011 Order dismissing the medical negligence and lack of informed consent claims against Defendant Scientific Image Center Management, Inc. with prejudice stand and are not altered in any way by this Order. ①

DATED this 22<sup>nd</sup> day of November, 2011.

*Michael Heavey*  
Judge Michael Heavey

① Again, the court apologizes for putting the parties/counsel through the extra work, aggravation and grief. At first, this court did not have a grasp of the "entrepreneurial aspects" of their medical practice.

ORDER GRANTING DEFENDANTS SCIENTIFIC IMAGE CENTER MANAGEMENT, INC. AND SEATTLE PLASTIC SURGERY ASSOCIATES, P.C.'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSAL OF PLAINTIFF'S CONSUMER PROTECTION ACT CLAIMS - 3

Williams, Kastner & Gibbs PLLC  
601 Union Street, Suite 4100  
Seattle, Washington 98101-2380  
(206) 628-6600

see next page →

If this were about billing practices, setting and collection of fees or how the defendants retained, obtained, and dismissed patients; this might involve the entrepreneurial aspect (See Shurt 130-103 W2d 52)

Presented By: Dr. French, this was about a doctor/clinic that "prescribed unnecessary or unnecessarily expensive surgeries as part of WILLIAMS, KASTNER & GIBBS PLLC of a business strategy" (Chambers, Ambach 167 W2d at 180). then again, this might involve the entrepreneurial aspect of medical practice actionable under the CPA. For the purposes of the summary judgment motion Dr. French admitted that prescribing the operation was

By s/Arissa M. Peterson, WSBA #31875 entrepreneurial. #2 Here, the advertising of Kimberly D. Baker, WSBA No. 14257 of Lifestyle Lift is clearly entrepreneurial and Arissa M. Peterson, WSBA #31875 indeed may be deceptive. And that gives the Plaintiff a leg

up on Ambach and Michael. #3 However, this before this court, but for the alleged med-mal and lack of informed consent. Surely, if everything had gone well for the Plaintiff, she would be making no claim. #4 The legislature

APPROVED AS TO FORM: concrete damages within the coverage of the CPA. Personal injury damages are not compensable under the CPA (Fission) and do not constitute injury to "business or property" (Fusion). The #5 The cost of surgery is a traditional damage in a medical malpractice claim. The alleged deceptive advertising is entrepreneurial, but it is not the but for of this case.

Ben Wells, WSBA No. 19199 Plaintiff William CPA injury is payment for surgery from which personal injury arose, just like Ambach. And the holding in Ambach is "because

Attorneys for Plaintiff Ambach's purported CPA injury is payment for a surgery from which personal injury also arose, she has failed to state a prima facie CPA claim."

*Mike Dewey*

ORDER GRANTING DEFENDANTS SCIENTIFIC IMAGE CENTER MANAGEMENT, INC. AND SEATTLE PLASTIC SURGERY ASSOCIATES, P.C.'S MOTION FOR PARTIAL SUMMARY JUDGMENT DISMISSAL OF PLAINTIFF'S CONSUMER PROTECTION ACT CLAIMS - 4

Williams, Kastner & Gibbs PLLC  
601 Union Street, Suite 4100  
Seattle, Washington 98101-2380  
(206) 628-6600

**FILED**  
KING COUNTY, WASHINGTON

DEC 16 2011

SUPERIOR COURT CLERK  
BY Ed Gucco  
DEPUTY

SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF KING

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4 ELVIRA WILLIAMS,

5 Plaintiff,

6 VS.

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8 LIFESTYLE LIFT HOLDING, INC., et al.,

9  
10 Defendants.  
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CASE NO. 10-2-05815-0 SEA

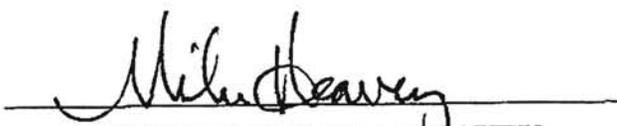
ORDER DENYING PLAINTIFF'S  
MOTION FOR RECONSIDERATION

12  
13 This matter came before the Court on Plaintiff's Motion for Reconsideration. The  
14 court having considered Plaintiff's Motion for Reconsideration and not requesting a  
15 response, now, therefore, being fully advised in the premises makes the following order:

16 NOW, THEREFORE, Plaintiff's Motion for Reconsideration is Denied.

17  
18  
19 DATED

December 16, 2011

  
JUDGE MICHAEL J. HEAVEY

Not Reported in F.Supp.2d, 2010 WL 271346 (N.D. Ohio)  
 (Cite as: 2010 WL 271346 (N.D. Ohio))

## H

Only the Westlaw citation is currently available.

**This decision was reviewed by West editorial staff and not assigned editorial enhancements.**

United States District Court,  
 N.D. Ohio.  
 Mary FAKTOR, Plaintiff,  
 v.  
 LIFESTYLE LIFT, et al., Defendants.

No. 1:09-CV-511.  
 Jan. 15, 2010.

Eric H. Zagrans, Zagrans Law Firm, Elyria, OH, Daniel E. McKenzie, Peter W. Burg, Seth A. Katz, Burg Simpson EldredgeHersh Jardine, Englewood, CO, Janet G. Abaray, Burg Simpson EldredgeHersh Jardine, Cincinnati, OH, Jeffrey Robert Wahl, Cleveland, OH, for Plaintiff.

Christina A. Daskas, Allan S. Rubin, John C. Signorino, Jackson Lewis, Southfield, MI, David J. Duddleston, Gina K. Janeiro, Jackson Lewis, Minneapolis, MN, Patricia Fleming Krewson, Vincent J. Tersigni, Jackson Lewis, Cleveland, OH, Richard W. Hosking, K&L Gates, Pittsburgh, PA, for Defendants.

OPINION & ORDER [Resolving Doc. No. 90 ]  
 JAMES S. GWIN, District Judge.

\*1 Plaintiff Mary Faktor moves this Court to certify a class in this fraud and breach of contract action against the Defendants. [Doc. 90.] The Defendants, David M. Kent, D.O., David M. Kent P.C. ("DMK"), Lifestyle Lift Holdings, Inc. ("LLH"), Lifestyle Lift (Cleveland Surgical Associates, "CSA"), and Scientific Image Center Management, Inc. ("SICM"), oppose the motion. <sup>FN1</sup> [Doc. 100.]

FN1. Defendant Dr. Kent developed the Lifestyle Lift. [Doc. 89-26 at 3.] Defendant LLH owns the "Lifestyle Lift" trade-

mark and licenses the mark exclusively to Defendant SICM. [Doc. 89-25 at 2.] In turn, SICM sub-licenses the Lifestyle Lift mark to various medical centers and provides them with management and consulting services. [Id.] Defendants DMK and CSA are two medical centers licensed to use the Lifestyle Lift trade name. DMK, located in Troy, Michigan, employs one surgeon to perform the procedure, and CSA in Cleveland, Ohio, employs three surgeons. [Doc. 89-25 at 4-5.] Defendant Dr. Kent is either the sole shareholder or member of each of the above entities. [Doc. 89-25 at 4.]

In resolving the motion to certify, this Court must decide whether the Plaintiff's claims-that the Defendants misrepresented the nature of their Lifestyle Lift facelift procedure in promotional materials and in individual consultations with prospective patients-will be efficiently adjudicated as a class action. For the following reasons, the Court **DENIES** the Plaintiff's motion to certify.

### I. Background

Plaintiff Mary Faktor asks this Court to certify a Rule 23(b)(1) or (b)(3) class of those individuals who agreed to undergo and paid for the Lifestyle Lift procedure after seeing the Defendants' advertisements and hearing or viewing other representations about the nature of the procedure. With her complaint, Plaintiff Faktor says that the Defendants fraudulently misrepresented the nature of the Lifestyle Lift-a type of facelift performed under local anaesthesia-and breached their contract to provide her and the class members with a minimally-invasive, simple, and relatively painless procedure.

According to the Plaintiff's First Amended Complaint, these claims arise from two primary sources, statements made (and not made) in: (1) the Defendants' marketing materials, and (2) in one-on-one consultations at Lifestyle Lift surgical cen-

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ters. [Doc. 83 at ¶¶ 22-24.] The Plaintiff says that a typical class member first becomes aware of the Lifestyle Lift after seeing a television infomercial. FN2 [Doc. 83 at ¶ 23.] After calling the listed 1-800 number, the class members speaks with an employee at the Defendants' call center, who sends them additional marketing material and schedules a consultation at a local Lifestyle Lift surgical center. [Id.]

FN2. The Defendants also advertise in shorter television commercials, magazines, and brochures. [Doc. 90-12 at 3.]

At this consultation, a sales person meets with the prospective patient, shows them a video presentation, and makes a sales pitch about the procedure. [Doc. 83 at ¶ 23.] According to the Plaintiff, this sales pitch is scripted and closely-controlled by the Defendants. [Doc. 83 at ¶ 24.] After this presentation, the class member agrees to undergo the procedure and pays a deposit. [Doc. 83 at ¶ 23.] The Plaintiff says this deposit is often refundable for no more than a few days, sometimes becoming non-refundable before a patient ever speaks with a Lifestyle Lift surgeon. [Doc. 83 at ¶¶ 23, 30.]

Ultimately, the Plaintiff says that while the Defendants represent the procedure as new, advanced, minor, and relatively painless, the truth is anything but. [Doc. 83 at ¶ 25.] In fact, she essentially says that the Defendants are merely performing a traditional facelift—a major and painful surgery—under local anaesthetic. Thus, the Plaintiff claims that the Defendants commit fraud when they induce patients to put down a deposit on the procedure in reliance on untrue representations about its nature. As for the breach of contract claim, the Plaintiff says that these misleading statements become part of the contract between the patient and the Defendants upon payment of the deposit. Thus, the Defendants allegedly breach the contract by performing a more painful and invasive surgery.

\*2 Plaintiff Faktor underwent the Lifestyle Lift

procedure and a blepharoplasty (an “eyelid lift”) on January 7, 2008. She says that contrary to what she expected, the procedure was “traumatic” and “horrific.” [Doc. 89-3 at 13, 89-4 at 5.] Moreover, after undergoing the Lifestyle Lift, the Plaintiff became depressed, which she attributes to the trauma of the procedure. [Doc. 89-5 at 6.]

On February 3, 2009, approximately thirteen months after her Lifestyle Lift, Plaintiff Faktor filed the instant class action lawsuit in the Cuyahoga County Court of Common Pleas. [Doc. 1-1.] The Defendants removed the suit to this Court on March 6, 2009. [Doc. 1.] On October 26, 2009, the Plaintiff filed a Motion for Class Certification. [Doc. 90.] The Defendants oppose the motion. [Doc. 100.] The Plaintiff has replied. [Doc. 121.] Accordingly, the motion is now ripe for ruling.

## II. Legal Standard

Rule 23 of the Federal Rules of Civil Procedure governs class action lawsuits. *Fed.R.Civ.P. 23*. A court may certify a class action if all of the Rule 23(a) procedural requirements are met, and if certification is appropriate under Rule 23(b)(1), (b) (2) or (b)(3). *Id.* The party seeking certification bears the burden of proof. *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1079 (6th Cir.1996). District courts have broad discretion in certifying a class, but must first conduct a “rigorous analysis” into whether the prerequisites of Rule 23 have been met. *See Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *Sprague v. General Motors Corp.*, 133 F.3d 388, 397 (6th Cir.1998), *cert. denied*, 524 U.S. 923, 118 S.Ct. 2312, 141 L.Ed.2d 170 (1998).

In reviewing a class certification motion, the court does not evaluate the merits of the plaintiff's claims and accepts as true the allegations in the complaint. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974); *see also Reeb v. Ohio Dep't of Rehab. & Corr.*, 81 Fed. App'x 550, 555 (6th Cir.2003). The court, however, may need “to probe behind the pleadings before coming to rest on the certification

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question.” *Falcon*, 457 U.S. at 160. In fact, although maintainability may be determined on the basis of the pleadings, “ordinarily the determination should be predicated on more information than the pleadings will provide ... The parties should be afforded an opportunity to present evidence on the maintainability of the class action.” *Am. Medical Sys.*, 75 F.3d at 1079 (considering evidence in record presented by nonmoving party in reversing district court’s order granting class certification).

Rule 23(a) sets forth the following four prerequisites to class certification: (1) the class must be so numerous that “joinder of all members is impracticable”; (2) there must be “questions of law or fact common to the class”; (3) the claims of the representative party must be “typical” of those of the class; and (4) the representative party must “fairly and adequately protect the interests of the class.” *Fed.R.Civ.P. 23(a)*. The Court evaluates each prerequisite to certification in turn.

### III. Analysis

\*3 The Defendants say that the Plaintiff cannot meet either the Rule 23(a) prerequisites or Rule 23(b) requirements for class certification. In addition, the parties dispute which state law governs the claims in this case. While the Plaintiff says that Michigan law applies, the Defendants say the substantive law of the state where each class member’s claim arose applies. Because the Court finds the Plaintiff’s claims inappropriate for class certification even under Michigan law, it does not undertake an exhaustive choice-of-law analysis and instead accepts as true-for purposes of this motion only the Plaintiff’s contention that Michigan’s law of fraud and contracts governs her claims.<sup>FN3</sup>

FN3. To prove fraud under Michigan law, a plaintiff must show:

(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth, and as a positive

assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury.

*Hi-Way Motor Co. v. Int’l Harvester Co.*, 398 Mich. 330, 247 N.W.2d 813, 816 (Mich.1976).

The Court now turns to each of the Rule 23(a) prerequisites.

#### A. Rule 23(a) Prerequisites

##### 1. Rule 23(a)(1): Numerosity

Rule 23(a)(1) provides that a class action may be maintained only if “the class is so numerous that joinder of all members is impracticable.” *Fed.R.Civ.P. 23(a)(1)*. There is no strict numerical test for determining when too many parties make joinder impracticable, and the court should look to the specific facts of each case. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 n. 24 (6th Cir.1976), cert. denied, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976). The practicability of joinder depends on the size of the class, the ease of identifying members, the ability to make service, and their geographic dispersion. However, “impracticable” does not mean “impossible.” A class representative need only show that joining all members of the potential class is extremely difficult or inconvenient. Numbers alone are not determinative of this question. *Golden v. City of Columbus*, 404 F.3d 950, 965 (6th Cir.2005).<sup>FN4</sup>

FN4. See also *Taylor v. CSX Transp.*, 2007 WL 2891085, at \*3 (N.D. Ohio 2007) (noting that “although no firm numerical test exists, ‘substantial’ numbers are usually enough to satisfy the numerosity requirement, and ‘it is generally accepted that a class of 40 or more members is sufficient’ ”); *Olden v. LaFarge Corp.*, 203 F.R.D. 254, 269 (E.D.Mich.2004), aff’d, 383 F.3d 495 (6th Cir.2004) (stating that when “the exact size of the class is un-

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known but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied”) (internal citation omitted); *Lichoff v. CSX Transp., Inc.*, 218 F.R.D. 564, 570 (N.D.Ohio 2003) (finding that plaintiffs are required to “present more than speculation, but plaintiffs do not have to ‘establish class size with precision’ ”).

Here, the Plaintiff satisfies the numerosity requirement. The Plaintiff says that nearly 120,000 persons have undergone the Lifestyle Lift procedure and would be potential class members. In opposing class certification, the Defendants make no challenge to this allegation or argument that the Plaintiff’s claims fail the numerosity requirement. Thus, because joinder of the claims would be impracticable, the Court finds the Plaintiff has satisfied her burden to show numerosity.

## 2. Rule 23(a)(2): Commonality

The plaintiff must also show “questions of law or fact common to the class.” *Fed.R.Civ.P. 23(a)(2)*. A class representative must “be part of the class and ‘possess the same interest and suffer the same injury’ as the class members.” *Falcon*, 457 U.S. at 156 (internal citation omitted). In this regard, there must be at least one question of law or fact common to the class, the resolution of which will advance the litigation. *Sprague*, 133 F.3d at 397 (“It is not every common question that will suffice ....”).

Discussing this standard, the Sixth Circuit has held that claims involving individualized issues of reliance, causation, and damages are generally not appropriate for class treatment. *See, e.g., Sprague*, 133 F.3d at 397-98 (holding class certification improper on contract and estoppel theories because claims rested on unique representations made to and unique reliance by class members); *see also Am. Medical Sys., Inc.*, 75 F.3d at 1081 (granting mandamus to reverse class certification in defective implant case where defendant had produced ten different implant models over twenty years and each

class member and/or doctor would need to testify as to conversations between them).

\*4 Here, the Plaintiff says that commonality exists because each class member saw “uniform written, photographic and videographic materials containing identical ... representations and omissions of material fact” regarding the Lifestyle Lift procedure. [Doc. 90-1 at 7.] In addition, the Plaintiff points to various scripts and training manuals used by the Defendants’ employees during the consultation process. Because the Plaintiff repeatedly avers that the injury complained of in this case is complete once the class member attends the Lifestyle Lift consultation, schedules the surgery, and pays a deposit, [Doc. 121 at 9, 11, 14 ], she says that only the advertising materials and misrepresentations or omissions made by the consultants *prior to this deposit* give rise to the class claims for breach of contract and fraud.

In probing behind these contentions as part of its rigorous analysis, however, the Court finds that a lack of commonality defeats class certification in this case. First, the Defendants advertising is not entirely uniform across the proposed class. [Doc. 102 at 3-4.] According to Defendant Dr. Kent and Steven Hanson, chief marketing officer for Defendant SICM, both the nature of the Lifestyle Lift procedure and the Defendants’ advertising have changed since their inception in 2002. Specifically, Dr. Kent says that from 2002 to 2007, the Lifestyle Lift was performed exclusively using a “type one incision”—a small incision from the top of the ear to the ear lobe. [Doc. 89-26 at 4.] In late 2006 or early 2007, however, the Defendants began to offer the Lifestyle Lift as a variable incision procedure—permitting small “type one” incisions, longer “type three” incisions, or medium “type two” incisions. [Doc. 89-26 at 5.]

Both Dr. Kent and Hanson say that the Defendants’ advertising has similarly “evolved” to represent this variation in outcomes. [Doc. 102 at 3-4, 89-26 at 10.] For example, a brochure produced in 2005 when the procedure only involved a type one

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incision touts the Lifestyle Lift as a “minor one-hour procedure” and disclaimed only that “results and recuperation may vary.” [Doc. 102-26 at 3, 7.] In contrast, print materials from 2008 refer to the procedure more generally and contain much longer, more exhaustive disclaimer language. [Doc. 102-27, 102-28, 102-29.]

In a similar manner, a video advertisement from March 2003 shows Dr. Kent demonstrating the incision made, saying, “We make a very small incision in the crease of the ear that’s completely hidden when it heals.” [Doc. 102-22.] In a 2007 video, however, Dr. Kent says that the procedure varies from person to person: “Every client is different so we customize the procedure to each person’s individual needs.” [Doc. 102-19.] In fact, the video presentation Plaintiff Faktor watched during her consultation in December 2007 illustrates how a much larger incision is made, tracing a line down the front of the ear and around the back. [Doc. 126.]

\*5 Even if these variations in the Defendants’ promotional materials are viewed as relatively minor, the same cannot be said for the class members’ consultations with Lifestyle Lift employees.<sup>FN5</sup>

Although employees at the Defendants’ call center do use scripts, the Plaintiff does not point to these conversations as the focus of her claims. In fact, according to the call center script produced by the Plaintiff, the only statement made by the operator about the procedure is that it is “minor” and can take “about an hour depending on how many areas [the caller has] treated.”<sup>FN6</sup> [Doc. 90-6 at 1.] Rather than induce the caller to commit to the procedure or make any payment, the call center operator simply schedules the initial Lifestyle Lift consultation.<sup>FN7</sup>

FN5. In fact, the Plaintiff’s own briefing on class certification illustrates the difficulty of handling her contract and fraud claims on a class-wide basis. Among other questions the Plaintiff says this Court must answer “one time for all the class members”

is whether the Defendants “mislead their customers about the extent of the Lifestyle Lift surgery during their consultation.” [Doc. 121 at 4.]

FN6. Thus, this case differs from one in which the consumer views an advertisement, calls a 1-800 number, and makes a purchase using her credit card over the phone. Here, the Plaintiff says the class member is not “harmed” until after speaking with a Lifestyle Lift consultant and making a deposit. [Doc. 121 at 9, 11, 14.]

FN7. In a similar “Inbound Call Guide,” the operators are instructed to inform callers that the Lifestyle Lift consultant is the person who can answer questions about how the procedure is performed and what to expect. [Doc. 107-2 at 3.]

These subsequent consultations do have some common characteristics. Although Lifestyle Lift consultants are instructed to “apply their general training and experience in discussing the Lifestyle Lift procedures with prospective patients,” [Doc. 89-37 at 5], the Defendants’ Consultant Training Manual does provide a general structure for consultants to follow in their meetings, including fourteen questions and other items for discussion. [Doc. 109-3 at 2.] In addition, the training manual instructs consultants not to say “surgery” but instead to say “procedure” when discussing the Lifestyle Lift. [Doc. 109-2 at 9.]

Despite this generalized structure, the inherently variable nature of these consultations is strong factor precluding class certification. For example, although one class member may have been so decided on a facelift no matter the pain that she did not even care to hear the details of the procedure from the consultant before making a deposit, another may have wanted every detail and specification about the procedure. Thus, the first patient’s consultant may never have gone beyond the terms of the advertisements and brochures, while the

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second's consultant could have discussed in detail how the procedure might be done for her. Without individual testimony, the Court would have no practical means of determining what each class member actually heard prior to making a deposit.

In addition, even though the Defendants do discourage their consultants from using the term "surgery," this fact does not mean that the class members uniformly received no details or only minimal details about the Lifestyle Lift procedure. In fact, the Defendants' Consultation Review Form sets out places for the consultant to check off if he or she discussed "possible prolonged recovery, infection, realistic expectations, scar locations, pain/discomfort, [and] bruising" with the prospective patient. [Doc. 109-8 at 5, 109-3 at 2.] Moreover, the fact that the procedure varies across patients or may be combined with other procedures—such as the blepharoplasty Plaintiff Faktor underwent—further shows that class members did not receive a sufficiently uniform sales pitch.

\*6 Finally, even assuming that the Defendants made generally uniform statements or omissions regarding the Lifestyle Lift procedure, the class members' reliance would necessarily need be determined on an individual basis. This fact alone prevents class certification in this case because, without an inquiry into what each class member heard and whether that class member would have elected to undergo the Lifestyle Lift even if they knew "the truth," the Court could not ascertain whether the Defendants in fact committed fraud.<sup>FN8</sup> See, e.g., *rague*, 133 F.3d at 398 (reversing class certification on claim requiring proof of justifiable reliance where "there must have been variations in the [plaintiffs'] subjective understandings of the representations and in their reliance on them"); see also *Hudson v. Delta Air Lines, Inc.*, 90 F.3d 451, 457 (11th Cir.1996) ("Even if the plaintiffs are able to prove that Delta disseminated a false and uniform message ... they would also have to show that all members of the class would have deferred their retirement [in reliance]. This sort of decision would

necessarily have been highly individualized for each potential retiree."), *cert. denied*, 519 U.S. 1149, 117 S.Ct. 1082, 137 L.Ed.2d 217 (1996); *In re St. Jude Med., Inc.*, 522 F.3d 836, 838 (8th Cir.2008) ("Because proof often varies among individuals concerning what representations were received, and the degree to which individual persons relied on the representations, fraud cases often are unsuitable for class treatment."); *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 341 (4th Cir.1998) (reliance element not readily susceptible to class-wide proof).

FN8. In fact, the Court is further troubled by the subjective nature of the harm alleged in this case. Although Plaintiff Faktor says that her experience undergoing the procedure was "horrible," another class member who had an identical procedure might say that his experience was exactly as he expected.

Recognizing this difficulty, the Plaintiff says that Michigan law does not require individualized reliance where the defendants make a misrepresentation as part of a "standard presentation" or "single course of conduct." [Doc. 90-1 at 4-5.] For support, the Plaintiff relies on *Yadlosky v. Grant Thornton LLP*, 197 F.R.D. 292 (E.D.Mich.2000) and *Fuller v. Fruehauf Trailer Corp.*, 168 F.R.D. 588 (E.D.Mich.1996). In *Yadlosky*, a securities fraud case, the district court ultimately found class certification inappropriate because the plaintiff had "sued ten separate brokers/dealers that allegedly made misrepresentations to 2,811 individual investors over the course of thirteen years." 197 F.R.D. at 299. Moreover, the court in *Fuller* certified a class of retirees in an ERISA action based largely on the Sixth Circuit's soon-to-be-vacated panel decision in *Sprague Fuller*, 168 F.R.D. at 597 (citing *Sprague v. Gen. Motors Corp.*, 92 F.3d 1425 (6th Cir.1996), *vacated*, 102 F.3d 204.)

This case is not one of securities fraud permitting a showing of group reliance based on a fraud on the market theory. Nor is it a case where the ele-

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ments of fraud are defined by statutory interpretation to exclude reliance. *See, e.g., Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, ---, 128 S.Ct. 2131, 2141, 170 L.Ed.2d 1012(2008) (“Congress chose to make mail fraud, not common-law fraud, the predicate act for a RICO violation. And the mere fact that the predicate acts underlying a particular RICO violation happen to be fraud offenses does not mean that reliance, an element of common-law fraud, is also incorporated as an element of a civil RICO claim.”) (internal quotations omitted).

\*7 Therefore, given the variation in both the statements made to and potential degrees of reliance by the various class members, the Court finds that the Plaintiff's fraud claim lacks a common issue of law or fact the resolution of which would advance the litigation. Although the Court recognizes the issue is somewhat close, the unique nature of the claims in this case ultimately makes class certification unsuitable.

For similar reasons, the Court finds class treatment of the Plaintiff's contract claim inappropriate under the commonality analysis. The Plaintiff says that the Defendants' allegedly fraudulent promises and representations were “incorporated into the terms of the Plaintiff's and the Class members' contracts with Lifestyle Lift.” [Doc. 83 at ¶ 44.] Because the Defendants' advertising varied over time and because the consultant meetings were not sufficiently uniform or scripted, the Court would be unable to ascertain the relevant content of the each class member's contract. Thus, absent a standard contract, no relevant common issue of fact or law exists as to the contract claim.

### 3. Rule 23(a)(3): Typicality

Under *Fed.R.Civ.P. 23(a)(3)*, a plaintiff seeking class certification must show that his or her claims are typical of other potential class members' claims. The Sixth Circuit holds, “Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may

properly attribute a collective nature to the challenged conduct.” *Sprague*, 133 F.3d at 399. The court summarized this legal standard simply: “as goes the claim of the named plaintiff, so go the claims of the class.” *Id.*

In this case, the Court finds that Plaintiff Faktor's fraud and contract claims are not sufficiently typical of other class members' claims. Like the named plaintiffs in *Sprague*, Plaintiff Faktor could not advance the interests of the entire class because each class members' claim depends on what materials if any she viewed and what conversation she had with a Lifestyle Lift consultant. 133 F.3d at 399 (“Each claim, after all, depended on each individual's particular interactions with GM—and these, as we have said, varied from person to person. A named plaintiff who proved his own claim would not necessarily have proved anybody else's claim.”); *see also Romberio v. Unumprovident Corp.*, No. 07-6404, 2009 WL 87510 at \*8 (6th Cir. Jan.12, 2009) (reversing class certification for lack of typicality in wrongful denial of insurance benefits case even though plaintiffs alleged that defendant engaged in “uniform policies and practices,” because this uniformity did not “eliminate the need for an individualized assessment as to the ultimate propriety of the benefits decisions affecting each and every class member”).

For example, even if a jury were to find that the Defendants fraudulently misrepresented the nature of the procedures Plaintiff Faktor underwent, this determination might not be binding on a class member who saw wholly different advertising, underwent a less-invasive Lifestyle Lift, or who did not have an accompanying blepharoplasty. Thus, it cannot be said that so go the claims of Plaintiff Faktor, so go the claims of the class. Accordingly, the Plaintiff has not shown the typicality required for class certification.

### 4. Rule 23(a)(4): Adequacy of Representation

\*8 A plaintiff seeking to represent the class must also show that he or she will “fairly and adequately protect the interests of the class.”

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*Fed.R.Civ.P. 23(a)(4)*. This requirement is “essential to due process, because a final judgment in a class action is binding on all class members.” *Amer. Med. Sys., Inc., 75 F.3d at 1083*. Adequacy of class representation is initially measured by two standards. First, class counsel must be qualified, experienced and generally able to conduct the litigation. Second, class members must not have interests that are antagonistic to one another. *Id.*

Interests are antagonistic when there is evidence that the representative plaintiff appears unable to “vigorously prosecute the interests of the class.” *Id.* See also *Alexander Grant & Co. v. McAlister, 116 F.R.D. 583, 588-89 (S.D. Ohio 1987)* (explaining that the three-pronged Rule 23(a)(4) test asks: “is the representative a class member, does the representative have a stake in the outcome, and is the representative familiar with the facts and conditions to be challenged on behalf of the class?”).

Here, the Defendants do not dispute that the Plaintiff's purported class counsel is qualified. Moreover, reviewing the affidavits provided by class counsel, the Court finds that they would more than adequately represent the class in this litigation. In addition, this Court does not doubt that Plaintiff Faktor would vigorously prosecute the interests of the class.

The Defendants do, however, challenge Plaintiff Faktor's adequacy as a representative because she is allegedly subject to several unique defenses. [Doc. 100 at 28.] This concern, however, more appropriately bears on whether the Plaintiff's claims are typical of the class members' claims. See *Bittinger v. Tecumseh Prod. Co., 123 F.3d 877, 884 (6th Cir.1997)* (considering impact of varied defenses to plaintiffs' claims under Rule 23(a)(3) typicality analysis). Thus, the Court finds that were class certification appropriate, Plaintiff Faktor would adequately represent the class.

In summary, the Court finds that although the Plaintiff would satisfy the numerosity and adequate

representation prongs of Rule 23(a), she has not satisfied the commonality and typicality requirements. Accordingly, the Court finds class certification of the Plaintiff's claims inappropriate.<sup>FN9</sup>

FN9. rBecause the Court finds that the Plaintiff has not satisfied the Rule 23(a) requirements for class certification, it does not discuss whether the Plaintiff has additionally met the requirements of Rule 23(b)(1) or (b)(3).

#### IV. Conclusion

For the foregoing reasons, this Court **DENIES** the Plaintiff's motion to certify.

IT IS SO ORDERED.

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