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No. 70843-1-I

COURT OF APPEALS  
OF THE STATE OF WASHINGTON, DIVISION I

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SEATTLE-TACOMA INTERNATIONAL TAXI ASSOCIATION,

Plaintiff/Appellant,

v.

GURUNHAM SINGH KOCHAR, KAHSAI SIUM, CABDI NUUR  
CALASOW, DEEQ A. FARAH, MICHAEL B MEGNTA, GENENE  
DEMAMU, NIRMAL CHEEMA, PARMINDER SINGH CHEEMA,  
PARAMJIT SINGH DHALIWAL, SARWAN SINGH BAL, MUSTAFE  
HASSAN ISMAIL, HASSAN MOHAMED, DEJENE W. GEMECHU and  
SOLOMON MELLES,

Defendants/Respondents

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**REPLY BRIEF OF APPELLANT SEATTLE-TACOMA  
INTERNATIONAL TAXI ASSOCIATION**

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## I. INTRODUCTION

In its opening brief, Appellant STITA pointed out that, in rescinding the Defendants' contracts based on a finding of negligent misrepresentation, the trial court made a number of clear legal errors. Defendants have no valid response, so as they have throughout the case, they obfuscate and launch ad hominem attacks at STITA. Defendants tell the Court that STITA intentionally misled a group of naïve, immigrant taxi drivers, but that is at odds with reality. Specifically:

- The trial court found STITA did not act with intentional fraud. The alleged failure to disclose information regarding the airport contract renewal was found only to be negligent misrepresentation.
- The Court denied Defendants' various claims that STITA had somehow taken advantage of Defendants' alleged lack of English proficiency. STITA did not force the contracts on Defendants unfairly. Rather, the undisputed evidence at trial was that, in a process taking several months, a committee of drivers reviewed the applications and requested changes from STITA, which resulted in the Amended Applications at issue here.
- Like the Defendants, the membership and management of STITA

are virtually all immigrants from places like India and East Africa.

Defendants' legal arguments fare no better. First, STITA pointed out in its opening brief that, to find an actionable claim of negligent misrepresentation, the Court would have had to find net out-of-pocket loss by Defendants. But that was impossible because Defendants did not give the Court any evidence about their actual earnings while they were at STITA. Defendants' incoherent rejoinder to this point, which misconstrues caselaw and turns the meaning of Restatement (Second) of Torts § 552B on its head, proves that they have no sound legal arguments. Try as they might, Defendants cannot find a way around the requirement that they show out-of-pocket loss. At trial, Defendants hitched their wagon to a case about "financial expectation losses." (CP 617). That theory might have worked for a fraud claim, but the trial court did not find fraud, and Defendants are lacking a necessary element of negligent misrepresentation.

Second, STITA pointed out that the trial court's finding was based on a failure to disclose, but that there was no duty to speak here because there was no "special relationship" between the parties, as caselaw requires. Defendants do not argue that such a "special relationship" exists. Instead, they desperately look for an exception to the rule, but none

applies. Without a duty to speak, there was no tort.

Third, the trial court erred by granting rescission despite Defendants' manifest lack of diligence in seeking the remedy. Defendants' response is telling: they argue that they were fully entitled to wait and see whether their contracts with STITA would work out favorably before they had any obligation to seek rescission. But this "free play" mentality is completely at odds with black-letter law on rescission. Defendants make a variety of other excuses as to why rescission would be inconvenient, but convenience is not part of the test. Finally, Defendants have no excuse as to why, even after they left STITA in the fall of 2010, they still waited over a year to bring a claim for rescission in court.

Fourth, Defendants' only response to STITA's independent duty doctrine claim is to argue that the doctrine *only* applies in construction and real property cases. But the State Supreme Court has said that "to date" the doctrine has only been applied in those areas, not that it can never be applied elsewhere. Beyond that, this case is on all fours with prior caselaw where the doctrine was applied to bar negligent misrepresentation claims where the contract specifically allocated the risks.

Fifth, STITA observed that the trial court could not impose unjust enrichment if there was no basis to rescind the contract. Defendants'

newfound buzzword, “quasi contract,” does not serve to rebut STITA’s argument. If a valid express contract exists (as is the case here), the trial court cannot decided, on abstract considerations of fairness, to rewrite the bargain between the parties.

Sixth, and finally, STITA pointed out that, without a basis to rescind the contract, the trial was required to enter judgment in STITA’s favor on its contract claim. Here too, Defendants’ offer no convincing counterargument. If the errors described above are reversed, this point follows as a necessary consequence.

The trial court erred, and the judgment in Defendants’ favor must be reversed.

## **II. REPLY ARGUMENT**

### **A. The Trial Court Erred by Finding Negligent Misrepresentation Without Evidence of Out-Of-Pocket Loss by Defendants.**

As STITA explained in its opening brief, damages are a necessary element of a cause of action for negligent misrepresentation. *Ross v. Kirner*, 162 Wn. 2d 493, 499, 172 P.3d 701, 704 (2007). Without a showing of cognizable damage, there is no tort. Further, Washington courts, applying Section 552B of the Restatement (Second) of Torts, have made clear that only out of pocket loss, and not the lost expectation of

profit, can be considered damages for purposes of negligent misrepresentation. *Janda v. Brier Realty*, 97 Wn. App. 45, 51, 984 P.2d 412, 415 (1999). Finally, as a general matter, courts are required to examine both the costs and benefits of a contract when they ascertain what damages, if any, a party has sustained. *See Family Med. Bldg., Inc. v. State, Dept. of Soc. & Health Services*, 37 Wn. App. 662, 674, 684 P.2d 77, 85 (1984) *aff'd and remanded*, 104 Wn.2d 105, 702 P.2d 459 (1985) (trial court erred in not instructing jury to consider benefits as well as costs under lease).<sup>1</sup>

Combining these concepts, Defendants were required to show net out of pocket loss in order to sustain their negligent misrepresentation

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<sup>1</sup> Defendants argue that the *Family Medical Building* case is inapplicable because “it does not involve a negligent misrepresentation claim and its analysis has been overturned.” (Resp. Brief at p. 38). First, the case describes a general principle of law that applies broadly: damages must be net of gains. If the rule were otherwise, any party to any contract that included expenses, no matter how profitable the contract could claim that it suffered damage. As comment b to Restatement § 549 (discussed *infra*) explains, in fraud and negligent misrepresentation cases the court is required to consider the value of what the claimant obtained when determining whether a loss exists. Second, *Family Medical Building* has not been overturned. The state Supreme Court affirmed the opinion on appeal, and only addressed the separate issue of mitigation of damages, which do not apply here. *Family Med. Bldg., Inc. v. State, Dep't of Soc. & Health Servs.*, 104 Wn.2d 105, 112, 702 P.2d 459, 463 (1985). To the best of STITA’s knowledge, no case has ever overturned the Court of Appeals’ holding that the jury should consider the benefits as well as the costs under a lease when determining damages.

claims. But because they failed to offer any evidence of their earnings at STITA (and even refused to provide this information in discovery), Defendants undeniably failed to carry their burden. The trial court sustained the negligent misrepresentation claim by erroneously using an expectation damages model, which is directly contrary to Restatement Section 552B and *Janda*. Under the proper standard, the negligent misrepresentation claim must fail.

Defendants so thoroughly mischaracterize Section 552B of the Restatement that it is worthwhile to reproduce the entire section here:

**552B DAMAGES FOR NEGLIGENT MISREPRESENTATION**

(1) The damages recoverable for a negligent misrepresentation are those necessary to compensate the plaintiff for the *pecuniary loss* to him of which the representation is a legal cause, including

(a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and

(b) pecuniary loss suffered otherwise as a consequence of the plaintiffs' reliance upon the misrepresentation

(2) *the damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendants*

Comment:

a. The rule stated in this Section applies, as the measure of damages for negligent misrepresentation, the *rule of out-of-pocket loss* that is stated as to fraudulent misrepresentations in Subsection (1) of s 549. Comments a to f under s 549 are therefore applicable to this Section, as far as they are pertinent.

b. This Section rejects, as to negligent misrepresentation, the possibility that, in a proper case, the plaintiff may also recover damages that will give him the benefit of his contract with the defendant, which is stated, as to fraudulent misrepresentations, in Subsection (2) of s 549. This position is consistent with that taken in s 766C, that there is a general rule of no liability for merely negligent conduct that interferes with or frustrates a contract interest or an *expectation of pecuniary advantage*. The considerations of policy that have led the courts to compensate the plaintiff for the loss of his bargain in order to make the deception of a deliberate defrauder unprofitable to him, do not apply when the defendant had honest intentions but has merely failed to exercise reasonable care in what he says or does.

Restatement (Second) of Torts, § 552B (1977) (emphasis added). The comments to Section 549, incorporated by reference in comment a *supra*, further explain:

If notwithstanding the falsity of the representation, the thing that the plaintiff acquires through the fraudulent transaction is of equal or greater value than the price paid and he has suffered no harm through using it in reliance upon its being as represented, he has suffered no loss and can recover nothing under the rule stated in this Clause.

Restatement (Second) of Torts, § 549 (1977) cmt. b. This is clearly a description of net out-of-pocket loss. To show such loss, Defendants

would have had to show that their expenses (the equivalent of the “price paid”) outweighed the earnings they received while at STITA (the equivalent of the value of the “thing that the plaintiff acquires”). But with no evidence as to earnings, this determination could not be made. The trial court clearly erred when it substituted an expectation model of damages, finding that the Defendants suffered damages because they did not receive the economic opportunity they had hoped for at STITA. (CP 617) (“Many drivers suffered financial expectation losses because the dispatch services were inadequate to support night leases); (VR at Vol. 3, 38:23 – 39:5) (“What was different is the *opportunity* to spend \$20,000 to be -- to have your cab worth more and to be an owner and to be a member. And that -- that that has value.”) (emphasis added).

Defendants’ attempts to reconcile the trial court’s clear error with the Restatement are, to say the least, unconvincing. Defendants rely largely on *Chapman v. Marketing Unlimited, Inc.*, 14 Wn. App. 34, 539 P.2d 107, (1975), a case that predates the Second Restatement of Torts and (at least under Defendants’ reading) is inconsistent with Restatement Section 552B and the later *Janda* case. *Chapman* endorses the use of a “benefit of a bargain” rule in negligent misrepresentation cases, which is clearly contrary to the Restatement. *Compare Chapman*, 14 Wn. App. at

38, *with Janda*, 97 Wn. App. at 50 (“Recovery of damages for the benefit of the plaintiff’s contract with the defendant is specifically not allowed under the Restatement”). Likewise, *Chapman’s* use of a permissive damages model for all losses “proximately caused” by a negligent misrepresentation is inconsistent with the clear intent of the restatement to narrow damages for this tort. Defendants cite not a single case, from Washington or otherwise, that applies Section 552B and still awards damages absent a showing of actual pecuniary loss.

Further, even assuming that Defendants’ invocation of *Chapman* was proper, they still fail under the test the case provides. *Chapman* involved a claim that an employer negligently induced an employee to leave his previous employment and work for the Defendants – a situation loosely analogous to what Defendants claim here. After determining that the “proximate cause” model of damages was appropriate, the Court ruled as follows:

[Plaintiff] gave up employment with Browning Arms to come to Yakima and accept a position with the defendant. He was discharged within four months. *This resulted in a substantial reduction in his income for approximately the next three years...*

We hold that the trial court was justified, under the evidence, in using as a means of determining the extent of the plaintiff’s damage, *the difference between what he*

*actually earned and what his earnings would have been had he continued in the employ of Browning Arms.*

*Chapman*, 14 Wn. App. at 40 (emphasis added). Thus, even under the test suggested by *Chapman* Defendants still have no case. The Court here cannot compare Defendants' income before and after the alleged misrepresentation, because Defendants did not disclose what their income is. This is indicative of a broader problem with Defendants' theory. Even if a proximate cause model is used, there is still no loss if the expenses proximately caused by the transaction are outweighed by the earnings proximately caused by it – a question the Court cannot answer without any evidence of the earnings side.

Defendants also attempt to distinguish *Janda* because here, “the drivers were not awarded lost profits.” (Resp. brief at 38). But this distinction is irrelevant. Damages come into play in two distinct stages in an analysis of negligent misrepresentation: when determining whether the element of the cause of action has been satisfied, and when determining what the claimant should receive. Defendants might not be seeking lost profits as damages, but they were relying on lost profits to show that the damage element had been satisfied. And this is improper under the Restatement Section 552B, which holds that expectation damages are not

cognizable at all in a case for negligent misrepresentation. *See also* Restatement (Second) of Torts, § 549 (1977) cmt. b (claimant can recover nothing if no pecuniary loss is shown).

Defendants' analogy to a personal injury case is far off the mark. Obviously, a plaintiff who suffers medical losses is not required to offset those losses against his or her income. But the difference in this case is that the STITA contract *caused* Defendants to earn a certain amount of income, the extent of which is completely unknown due to a failure of proof. This income is a necessary input into the determination of whether Defendants were damaged under the contract. *See Family Med. Bldg, Wn. App.* at 674. In the injury case, where the injury clearly did not cause the income, the same is not true

Recasting this issue in another way: Defendants went into the deal with STITA knowing they would pay initiation fees, have to paint and relicense their cars, etc. This is not the injury that they are claiming resulted from the negligent misrepresentation. Rather, Defendants claim they are injured because they did not receive the additional income that would have resulted if STITA had retained the airport contract. That is a dead giveaway that Defendants are alleging expectation damages, which are not cognizable under Restatement Section 552B.

Finally, Defendants claim that the trial court had a sufficient basis to find that Defendants' incomes were actually reduced. But there is no finding to this effect. The Court noted that some individual types of income, such as night lease income, were lower than Defendants expected, but found that "The drivers who testified did not produce tax records showing income or losses for any applicable year." (CP 617). Thus, the Court clearly did not find evidence of net pecuniary loss. Rather, the Court erroneously used a different damage framework, finding damages based on Defendants' lost expectations of profit. Defendants cannot sustain the trial court's erroneous ruling by concluding that the trial court *might* have found net economic loss when it clearly did not do so, and where it lacked the evidentiary basis to do so.

**B. The Court Erred in Finding Negligent Misrepresentation Where STITA Owed no Duty to Disclose.**

The trial court's finding of negligent misrepresentation is based not on an affirmative misstatement, but on an alleged failure to disclose information regarding the Airport contract going up for competitive bid. (CP 619-620). However, STITA argued below and in its opening brief that nondisclosure is actionable only when the accused is under a duty to disclose. And Washington courts have held that such a duty only exists

when the parties are in a “special relationship,” akin to a fiduciary relationship. *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wn.2d 726, 732, 853 P.2d 913, 917 (1993). The trial court found no such relationship here, but glossed over this requirement when it found for Defendants. This was also error.

Defendants do not argue that, in spite of the lack of a court finding, there was a special relationship here. Rather, they try to pigeonhole this case into exceptions mentioned in older caselaw. But Defendants read those cases so broadly that they would swallow the general rule, and allow virtually anyone, special relationship or not, to claim a duty to disclose.

As expected, Defendants continue to rely on *Liebergesell* for the notion that STITA owes a “good faith” duty as broad as the standard duty to disclose. *Liebergesell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980). STITA discussed this case at length in its opening brief and will not repeat that full analysis here. It should be remembered, however, that the act of bad faith in *Liebergesell* was wholly different in character than that alleged here: a trusted advisor deliberately wrote in a usurious loan provision to gain leverage over the plaintiff. There is simply no application to the facts here. Moreover, the trial court made no finding

that STITA failed to disclose in bad faith, as would be required for the *Libersgesell* exception to apply.

Defendants also argue that STITA had a duty to disclose on the basis of alleged superior knowledge, which was not readily ascertainable by the Defendants (Resp. Brief at 15-16). But there is no finding that Defendants could not have found out about the alleged renewal information by, for example, asking STITA members, asking Ms. Mattson at the Port, or making a public records request. Defendants claim that they were so vulnerable and naïve in business matters that even a basic level of diligence cannot be expected of them, but this too is belied by the facts. Many of the Defendants had owned their own cabs as owner-operators for some time, many had driven at the Airport for years, and some owned other business as well. (Defendant Sium, for example, owned a janitorial franchise). Tellingly, there was no finding regarding the “lack of business experience” that Defendants represent is required under *Oates v. Taylor*, 31 Wn.2d 898, 904, 199 P.2d 898, 928 (1948).

**C. The Court Erred in Granting Rescission Where Defendants Did Not Seek it Promptly**

Next, STITA argued in its opening brief that Defendants waived their right to rescission through inaction. Defendants undisputedly became aware of

the allegedly concealed information about competitive bidding no later than December 2009, when Yellow Cab was announced as the winner. But no Defendant attempted to rescind the contract at this point. Rather, for nearly a year after that, Defendants kept one foot in STITA and reached the other out to Yellow Cab, so that, whoever won the airport contract litigation, they could enjoy lucrative airport business. Even after Defendants left STITA in the fall of 2010, they still waited more than another year before actually filing a claim for rescission in court. Under any reasonable standard, this lack of diligence precludes rescission.

As expected, Defendants argue that, because the taxi situation was complicated, it would have been a hardship for them to seek rescission. But this is unavailing. First, Defendants cite no authorities for the proposition that the “prompt rescission” requirement does not apply when it might be inconvenient. Second, STITA pointed predicted in its opening brief, Defendants are conflating *leaving* STITA and *suing* to rescind the contracts.<sup>2</sup> Parties often resolve disputes in litigation while continuing a broader business relationship (as evidenced, for example, by the many anti-retaliation statutes

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<sup>2</sup> Again, this one of several reasons that STITA’s previous statement that “Defendants promptly abandoned STITA once an opportunity with Yellow Cab appeared” is irrelevant to this question. Defendants’ decision to eventually stop doing business with STITA is very different than demanding rescission of the contracts.

that preclude an employer from taking action against an employee who has brought a claim or complaint against the employer). Doing so might be awkward at times, but that alone is not enough to set aside the requirement for prompt rescission.

As to the real reason Defendants did not seek rescission, Defendants' brief lets the cat out of the bag:

Furthermore, leaving would not be feasible because the whole purpose of the deal and investment was to get a shot at the airport. It would unreasonably skyrocket damages to leave STITA simply to preserve a legal right for a decision made years from then.

(Respondents Brief at 24). In other words, Defendants stayed with STITA so that they could still benefit under the contract if STITA eventually prevailed in the airport litigation. That might be a savvy business move – in conjunction with Defendants' getting on the Yellow Cab waiting list, it basically guaranteed that they would get airport access no matter what. But here it comes at a legal cost, as an injured party “may not wait to see whether the contract turns out to be profitable or unprofitable, good or bad,” before seeking rescission. *B. C. Richter Contracting Co. v. Cont'l Cas. Co.*, 230 Cal. App. 2d 491, 500, 41 Cal. Rptr. 98, 104 (1964). Defendants cannot have their cake and eat it too. In order to preserve the opportunity to drive at the airport for STITA

if it won the litigation, Defendants reaffirmed their contracts and, in doing so, waived the right to rescind.

Defendants also argue that they could not seek rescission yet because they had not suffered damage until it was clear that they would not get airport business. But this contradicts Defendants' argument regarding pecuniary damages. To try to meet that requirement, Defendants argue that they suffered losses while at STITA, such as the re-licensing expenses and a lack of night lease income. If that is true, Defendants had all of the damage they needed by December 2009. But what Defendants are really saying here is, again, that the real damage they claim to have suffered is the loss of the airport opportunity (a "benefit of the bargain" damage claim not allowable for negligent misrepresentation).

Further, even if the Court accepted all of these excuses, they all played themselves out by the fall of 2010, when Yellow Cab started operating at the airport and all of the Defendants left STITA. At this point, there was nothing whatsoever tying Defendants to STITA that would have made rescission risky or messy. But Defendants did not file a rescission claim promptly after they left. They did not even file one promptly after STITA commenced this lawsuit in June of 2011. Rather, Defendants waited until their second amended answer and counterclaims, filed in December of 2011, to seek rescission.

Defendants appear to argue that this year-plus gap should be excused because their counsel was in Africa for some indeterminate amount of time. There is nothing in the record on this point, and Counselor Sium was presumably not in Africa for the entire year-plus. Either way, absence of counsel is not a blank check. Counselor Sium should have found a way to file the claim earlier, and, if he could not, Defendants should have gotten another attorney to do so. Counselor Sium's failure to timely plead rescission is a matter between him and his clients; it is not an excuse for ignoring the black-letter law on prompt rescission.

**D. The Independent Duty Doctrine Precludes a Negligent Misrepresentation Claim**

As STITA explained in its opening brief, the independent duty doctrine precludes a party from asserting tort remedies for economic loss unless the defendant violated an independent tort duty. *Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 241 P.3d 1256 (2010). This case is on all fours with *Alejandre v. Bull*, 159 Wn.2d 674, 688, 153 P.3d 864, 871 (2007), which found a negligent misrepresentation to be barred where the contract explicitly assigned the risk of loss. Here, Defendants' contracts all included the following conspicuous disclaimer:

STITA City-County members may not pick up passengers at the Airport unless the Port of Seattle invites them to do so. ***STITA makes no guaranty, promise or prediction*** as to whether the Port will allow City-County members to pick up passengers at Seattle-Tacoma International Airport.

(*See, e.g.*, CP 111 (emphasis added)).

Defendants' only response is to claim that the independent duty doctrine never applies outside of construction and real property cases. But this takes the state Supreme Court's pronouncements too far. In *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 165, 273 P.3d 965, 969 (2012) the court stated: "*To date*, we have applied the doctrine to a narrow class of cases, primarily limiting its application to claims arising out of construction on real property and real property sales." (emphasis added). While the Court has not applied the doctrine as a matter of general application, *id.* that is not to say that no case outside of construction and real estate can ever qualify.

And if there is a fitting case for extending the doctrine, it is this one. The disclaimer cited above could not be clearer – the contract did not guarantee that the Defendants would have the opportunity to drive at the Airport. Defendants are unhappy with the risk allocation under the contract they agreed to, so they are seeking a tort remedy that is plainly contrary to the terms of their contracts.

**E. The Court Erred in Applying Unjust Enrichment**

As discussed above, there was no valid basis for rescinding the contracts. After rectifying the trial court's errors in that regard, this Court is then faced with a set of valid, express contracts between STITA and the Defendants. The ensuing question is whether, despite the existence of those contracts, the Court can still apply unjust enrichment. And the answer is clearly no. *See Ehreth v. Capital One Servs., Inc.*, C08-0258RSL, 2008 WL 3891270, at \*3 (W.D. Wash. Aug. 19, 2008) ("a party to an express contract may not bring an action under a theory of an implied contract relating to the same matter") (citing *Chandler v. Washington Toll Bridge Auth.*, 17 Wn.2d 591, 604, 137 P.2d 97, 103 (1943)).

Defendants have no answer for this, so they argue only that unjust enrichment was proper because the contracts were rescinded. But they say nothing about what must happened if that rescission were found to be improper. Defendants also spill a great deal of ink discussing how the trial court had an equitable basis for the damages it ordered. But if there was a valid contract, the Court cannot invoke unjust enrichment at all, so the merit of the trial court's methodology is irrelevant. *See Ehreth* 2008 WL 3891270, at \*3; *see also Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d

1279, 1284-85 (1980) (“A court cannot, based upon general considerations of abstract justice, make a contract for parties which they did not make for themselves.”).

**F. The Court Erred in Not Entering Judgment for STITA on its Contract Claim**

Finally, STITA has argued that, since the contracts were valid and cannot be rescinded, this Court should order Defendants to pay the initiation fees that they plainly owe and have not yet paid. Defendants respond that rescission was proper, but that is obviously no defense if the Court reverses that portion of the trial court’s ruling.

Defendants also argue that judgment should not be entered because the contracts were “ambiguous,” but do not actually identify which provisions of the contract they claim to be ambiguous. Their argument fails on two counts. First, the payment provisions of the contracts (obligating Defendants to make certain payments by certain dates) were not ambiguous. *See, e.g.*, CP 110. Even assuming *arguendo* that some other provisions of the contract, not relevant here, are ambiguous, that does not prevent the Court from finding the provision actually at issue to be unambiguous. *See Mayer v. Pierce Cnty. Med. Bureau, Inc.*, 80 Wn. App. 416, 421, 909 P.2d 1323, 1326 (1995) (“A contract *provision* is

ambiguous when its terms are uncertain or when its terms are capable of being understood as having more than one meaning. A *provision*, however, is not ambiguous merely because the parties suggest opposing meanings.”) (emphasis added) (citations omitted).

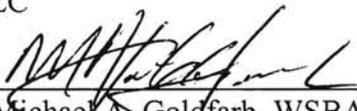
Second, Defendants are not applying the right standard in determining whether a contract is ambiguous. “Generally, the question of whether a written instrument is ambiguous is a question of law for the court.” *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971, 974 (1983). The contracts are not ambiguous just because Defendants’ counsel claims, without explanation, that they are. *See Mayer*, 80 Wn. App. at 421. And the fact that STITA representatives could not fully explain some contract provision on the witness stand means nothing. The Court determines whether a contract is ambiguous by reading the agreement, applying its legal knowledge, and determining whether a provision is susceptible to more than one interpretation. Contracts are sometimes complicated – there is a reason transactional attorneys are often hired to draft them. It has never been the law that a party cannot enforce a contract unless it can train a witness to accurately recite the legal meaning of all of a contract’s provisions at trial.

### III. CONCLUSION

The trial court's findings and judgment should be reversed as set forth in STITA's opening brief.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of May, 2014.

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**DECLARATION OF SERVICE**

The undersigned certifies under the penalty of perjury, under the laws of the State of Washington, that on May 30, 2014, I caused the service of the foregoing pleadings on each and every attorney of records herein:

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\_\_\_\_\_  
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Paul EHRETH, Plaintiff,

v.

CAPITAL ONE SERVICES, INC., Defendant.

No. Co8-0258RSL. | Aug. 19, 2008.

#### Attorneys and Law Firms

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#### Opinion

### ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS

ROBERT S. LASNIK, District Judge.

#### I. INTRODUCTION

\*1 This matter comes before the Court on a Rule 12(b)(6) motion to dismiss filed by defendant Capital One Services, Inc. ("Capital One"). Plaintiff, who seeks to represent a class, contends that defendant violated the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 *et seq.*, breached the parties' contract, and unjustly enriched itself by charging plaintiff a late fee of \$39 for his credit card account.

For the reasons set forth below, the Court grants in part and denies in part defendant's motion.<sup>1</sup>

#### II. DISCUSSION

##### A. Background Facts.

Plaintiff became a credit card customer of Capital One in September 2005. At least some of the time, he paid his credit card bills electronically through his bank's electronic payment

system without incident. Plaintiff contends that he attempted to pay his credit card bill that way in November 2007. His received a "payment complete" message from his bank. Nevertheless, his payment was rejected. Plaintiff alleges that his "efforts to make electronic payments were rejected as a consequent of a change by Capitol [sic] One in its processing of electronic payments." First Amended Complaint at ¶ 9. As a result, plaintiff was charged late fees and finance charges. The contract provides that Capital One is entitled to assess a fee for late payments. Plaintiff contends that the "late fees assessed against Ehreth were greater than those authorized by Ehreth's contract with Capital One and had been unilaterally increased by Capital One without reasonable notice of the increase." *Id.* at ¶ 11.

##### B. Dismissal Standard.

Defendants have filed a 12(b)(6) motion for failure to state a claim upon which relief can be granted. The complaint should be liberally construed in favor of the plaintiff and its factual allegations taken as true. *See, e.g., Oscar v. Univ. Students Co-Operative Ass'n*, 965 F.2d 783, 785 (9th Cir.1992). The Supreme Court has explained that "when allegations in a complaint, however true, could not raise a claim of entitlement to relief, this basic deficiency should be exposed at the point of minimum expenditure of time and money by the parties and the court." *Bell Atlantic Corp. v. Twombly*. ---U.S. ---, 127 S.Ct. 1955, 1966, 167 L.Ed.2d 929 (2007) (internal citation and quotation omitted). "A district court ruling on a motion to dismiss may consider documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the plaintiff's pleading." *Parrino v. FHP, Inc.*, 146 F.3d 699, 705 (9th Cir.1998) (internal citation and quotation omitted).

##### C. Analysis.

##### 1. FCRA Claim.

Plaintiff argues that defendant violated the FCRA, Section 1681s-2(b) by "wilfully and/or negligently failing to comport" with the statute. Section 1681s-2(b) provides that "[a]fter receiving notice pursuant to section 1681i(a)(2) of this title of a dispute with regard to the completeness or accuracy of any information provided by a person to a consumer reporting agency," the furnisher of information<sup>2</sup> to a consumer reporting agency ("CRA") shall follow certain procedures established to ensure that accurate information is being provided. By the statute's plain language, the

furnisher's duty to investigate and make any corrections is triggered only after notice. Furthermore, pursuant to § 1681i(a)(2) and interpreting case law, the notice that triggers the investigative duties under § 1681s-2(b) must come from the CRA, not the consumer. *Nelson v. Chase Manhattan Mortgage Corp.*, 282 F.3d 1057, 1060 (9th Cir.2002);<sup>3</sup> *Peasley v. Verizon Wireless (VAW) LLC*, 364 F.Supp.2d 1198, 1200 (S.D.Cal.2005); see also 15 U.S.C. § 1681i(a)(2)(A) (imposing a duty on consumer reporting agencies to notify furnishers of information after they "receive[] notice of a dispute from any consumer"). Plaintiff attempts to counter this authority by noting that a proposed regulation would permit a consumer to notify a furnisher of information of a dispute directly. Plaintiff's reliance on a proposed regulation not yet in force is untenable.

\*2 Accordingly, to state a claim under Section 1681 s-2(b), plaintiff must allege that he notified a CRA of his dispute and the CRA notified defendant of the same. The first amended complaint is deficient because it does not contain those allegations.

Plaintiff requests leave to amend his complaint to state that he notified two CRAs of the dispute "[o]n or about February 12, 2008," and he believes that the CRAs notified defendant. Response at p. 4 n. 2. Courts should "freely give leave [to amend] when justice so requires." Fed.R.Civ.P. 15(a)(2). Where, as here, a plaintiff has "previously filed an amended complaint ... the district court's discretion to deny leave to amend is particularly broad." *Miller v. Yokohama Tire Corp.*, 358 F.3d 616, 622 (9th Cir.2004). The Court considers four factors in deciding whether to grant leave to amend: "bad faith, undue delay, prejudice to the opposing party, and the futility of amendment." *Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir.1994). A proposed amendment is futile if it could be defeated by a motion to dismiss or if plaintiff cannot prevail on the merits. See, e.g., *Smith v. Commanding Officer*, 555 F.2d 234, 235 (9th Cir.1977).

In this case, plaintiff contends that he notified two CRAs of the dispute two days before he filed this lawsuit. The statute, however, explicitly provides that furnishers of information like Capital One have thirty days from the date the dispute is reported to the CRA to complete their investigation and report the results to the CRA. 15 U.S.C. § 1681s-2(b)(2); 15 U.S.C. § 1681 i(a)(1). Therefore, even if Capital One later violated the FCRA, it had not done so at the time plaintiff filed his complaint. A plaintiff must have standing to bring his or her action "at the time the action commences." *Friends of*

*the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 191, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). At the time plaintiff commenced this action, he had not yet suffered an injury cognizable under the FCRA.<sup>4</sup> Accordingly, any amendment to remedy the deficient pleading of that claim would be futile. Plaintiff's FCRA claim is dismissed with prejudice.

## 2. Breach of Contract Claim.

Plaintiff alleges that defendant breached the contract by improperly rejecting his electronically tendered payment and subsequently charging late fees that it was not entitled to charge. Plaintiff also contends that even if defendant had been entitled to charge him a late fee, it charged him more than the fee provided for in the contract. Defendant counters that plaintiff cannot state a claim for an excessive fee because it sent plaintiff a notice, months before it charged the late fee, explicitly stating that the fee would increase to exactly the amount it subsequently charged plaintiff. However, whether and when the notice was sent are facts that are neither stipulated to nor appear in the complaint. Therefore, the Court cannot consider them for purposes of this motion.

\*3 Similarly, plaintiff's claim that defendant improperly charged him a late fee also implicates facts beyond the scope of this motion. Defendant argues that plaintiff's bank improperly rejected the payment, so defendant is not at fault. However, the complaint alleges that plaintiff's "payment was rejected due to Capital One's internal technical errors." First Amended Complaint at ¶ 18. That allegation must be taken as true for purposes of this motion.

Defendant argues that regardless of the reason the payment was not processed, it cannot be liable because the contract provides, "We may in our sole discretion, offer an expedited payment service." Defendant's Motion, Ex. 1. However, defendant did offer the service, plaintiff used it successfully for a time, and there is no explanation for why plaintiff's payment was not processed in November 2007. Although defendant disclaims liability if the customer's depository institution dishonors the payment, the contract does not disclaim liability if defendant does so.

Finally, defendant argues that plaintiff has not identified any specific portion of the contract it allegedly breached. However, the breach of contract allegations satisfy Rule 8's notice pleading requirement and allege the elements of a contract. In addition, the alleged breaches are obvious:

defendant cannot charge a fee higher than the contract authorizes, nor can it charge him a late fee if he timely tendered payment. Whether defendant actually did either or both of those things can be resolved by a later motion. Accordingly, defendant's request to dismiss plaintiff's breach of contract claim is denied.

### 3. Unjust Enrichment Claim.

Plaintiff contends that defendant was "unjustly enriched by charging late payment fees, finance charges, and other charges ... and accepting those fees and finance charges even though payments were timely tendered." First Amended Complaint at § 22. The contract states that Virginia law governs. Defendant's Motion, Ex. A. Regardless of whether Virginia or Washington law applies, a party to an express contract may not bring an action under a theory of an implied contract relating to the same matter. *Chandler v. Wash. Toll Bridge Auth.*, 17 Wash.2d 591, 604-05, 137 P.2d 97 (1943); *Inman v. Klockner-Pentaplast of Am. Inc.*, 467 F.Supp.2d

642, 655 (W.D.Va.2006). Plaintiff argues that a party to a contract may nevertheless bring an unjust enrichment claim based on matters outside the scope of the contract or if the contract is unenforceable. In this case, however, plaintiff does not argue that the contract is unenforceable. In addition, he had an express contract with defendant that governed the circumstances in which defendant could charge late fees and the amount of those fees. Accordingly, plaintiff's unjust enrichment claim must be dismissed.

### III. CONCLUSION

For all of the foregoing reasons, the Court GRANTS IN PART AND DENIES IN PART defendant's motion to dismiss (Dkt.# 6). The Court DISMISSES plaintiff's claims for unjust enrichment and for violation of the FCRA. Plaintiff may proceed with his breach of contract claim.

#### Footnotes

- 1 Because the Court finds that this matter can be decided on the parties' memoranda, declarations, and exhibits, defendant's request for oral argument is denied.
- 2 Capital One assumes, solely for purposes of this motion, that it is a "furnisher of information" under the FCRA.
- 3 The court in *Nelson* explained, "But Congress did provide a filtering mechanism in § 1681s-2(b) by making the disputatious consumer notify a CRA and setting up the CRA to receive notice of the investigation by the furnisher." *Nelson*, 282 F.3d at 1060.
- 4 Indeed, allowing plaintiff to pursue a FCRA claim under these circumstances would defeat the purpose of the notice and investigation provision, which is to provide a pre-litigation "opportunity for the furnisher to save itself from liability by taking the steps required by § 1681s-2(b)." *Nelson*, 282 F.3d at 1060.