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No. 72123-2-I

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

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NORIO MITSUOKA,

Appellant,

v.

FUMOTO ENGINEERING OF AMERICA, INC., a Washington  
Corporation, NAOYUKI YAMAMOTO, an individual, FUMOTO  
GIKEN CO., LTD, a Japanese Corporation,

Respondents.

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REPLY BRIEF OF APPELLANT MITSUOKA

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A. INTRODUCTION

A complaint is valid if it states facts that support a legal claim. That the facts are unusual or even novel does not defeat the complaint, even if they differ from the facts of published cases. The complaint at issue here may not be the most common fact pattern this Court sees, but that is not grounds to dismiss it. The law is more flexible and imaginative than the respondents here would paint it.

Fumoto Engineering of America, Inc., Naoyuki Yamamoto, and Fumoto Giken Co., Ltd, (collectively, “FGC”) breached express and implied promises to Norio Mitsuoka, interfered with his business expectancy and violated his reasonable shareholder expectations. Mitsuoka, in exchange for expending his own capital and unpaid labor to enable FGC’s United States sales, was told and it was implied that he would benefit from that agreement as long as he continued to be successful. He lived up to his promise for decades. FGC turned on him out of avarice and wrongfully ended the agreement.

Mitsuoka has stated claims upon which relief can be granted. His complaint should not have been dismissed, and he should have been allowed to amend it and move forward to discovery.

B. REPLY ON STATEMENT OF THE CASE

FGC recites a great deal of procedural history in this case, although that history is largely irrelevant to question of whether Mitsuoka's complaint should have been dismissed for failure to state a claim. CP 5-15.

However, this Court should note that FGC misrepresents part of the procedural history. FGC claims Mitsuoka did not oppose the motion to dismiss in federal court. Br. of Resp'ts at 9. Not only did Mitsuoka oppose it, CP 164-80, the motion to dismiss in federal court was *denied*. CP 194.

FGC makes much of the fact that Mitsuoka's complaint was modified several times, with some claims added and deleted. *Id.* However that is reflective of the unusual factual background of this case, and the difficulty of articulating all of the possible claims available. Despite FGC's criticism of the complaint amendments, the core facts underlying the complaint have not changed. *Compare* CP 155-61 with CP 26-39.

FGC's argumentative characterization of the facts in Mitsuoka's complaint is also largely irrelevant, but some clarification is useful. First, Mitsuoka did not "concede[] the absence of an express oral or written agreement" below, as FGC claims. Br. of Resp'ts at 11. FGC cites to a

footnote explaining why FGC's "harping" on the absence of an express agreement is irrelevant to an *implied* employment claim. Mitsuoka's complaint contains a claim for breach of express contract. CP 161.

FGC claims that Mitsuoka's proposed third amended complaint was the first time he had "confirmed" that he had started FEA himself. Br. of Resp'ts at 12. This is false. Mitsuoka's first amended complaint stated clearly that Yamamoto asked Mitsuoka to "create and run a company in the U.S. as an exclusive distributor for Yamamoto's company in Japan." CP 155.

C. ARGUMENT IN REPLY

(1) Standard of Review

FGC concedes that the standard of review for a motion to dismiss under CR 12(b)(6) is *de novo*. Br. of Resp'ts at 15. FGC also concedes that this Court may consider hypothetical facts in conducting this analysis. *Id.* at 16.

(2) Washington Recognizes Claims for Wrongful Termination Outside of Claims for Violation of Public Policy; Mitsuoka's Complaint States Such a Claim

Mitsuoka's complaint alleged that FGC wrongfully terminated his just-cause employment by firing him for no cause. Br. of Appellant at 26-29.

FGC responds with the perplexing assertion that in Washington, there is no claim for wrongful termination unless there is an allegation of a violation of public policy. Br. of Resp'ts at 21, citing *Reninger v. State Dep't of Corr.*, 134 Wn.2d 437, 951 P.2d 782 (1998). FGC then states in conclusory fashion that since Mitsuoka alleges no public policy violation, his wrongful termination claim was properly dismissed. *Id.*

(a) Washington Recognizes Claims for Wrongful Termination Based on Additional Employee Consideration; the Claim Is Separate From a Claim of Implied Employment Agreement

FGC's pronouncement, that Washington has no claim for wrongful termination in the absence of a public policy violation, would surprise our courts, including our Supreme Court. *Thompson v. St. Regis Paper Co.*, 102 Wn.2d 219, 685 P.2d 1081 (1984); *Knox v. Microsoft Corp.*, 92 Wn. App. 204, 207, 962 P.2d 839 (1998); *Siekawitch v. Washington Beef Producers, Inc.*, 58 Wn. App. 454, 458, 793 P.2d 994 (1990). *Thompson* is a landmark case which established that when otherwise at-will employees are specific promised treatment in specific situations, a violation of that promise states a claim for wrongful termination. *Thompson*, 102 Wn.2d at 230.<sup>1</sup>

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<sup>1</sup> *Thompson* also recognized the public policy exception to employment at will, but the two claims are separate. *Thompson*, 102 Wn.2d at 230-31.

In fact, Division II of this Court has acknowledged that a claim for wrongful discharge may encompass any broad number of employer actions, including torts, statutory violations, and others:

A discharge may be wrongful for a number of reasons. It may be a breach of the underlying employment contract (or, in the case of public employment, of the underlying statutorily-controlled employment relationship); it may be a violation of statute; it may be a tort; *or it may, conceivably, offend the law in some other way.*

*Riccobono v. Pierce Cnty.*, 92 Wn. App. 254, 263, 966 P.2d 327 (1998) (emphasis added).

An example of “some other way” where wrongful discharge will lie is when the employee offers consideration additional to the contemplated services in exchange for just-cause employment. *Roberts v. Atl. Richfield Co.*, 88 Wn.2d 887, 894, 568 P.2d 764 (1977). This must be consideration in addition to required services which results in a detriment to the employee and a benefit to the employer. *Id.*

FGC appears to confuse the *Roberts* “additional consideration” claim for just-cause employment with a claim for an implied employment agreement. Br. of Resp’ts at 28 (stating that Mitsuoka argued for “an implied employment contract based on ‘additional consideration’”). FGC’s brief addresses this issue in its section on implied employment agreements, rather than in its truncated wrongful termination section. *Id.*

FGC's mistake is not without precedent; the appellant in *Roberts* made the same mistake. *Roberts*, 88 Wn.2d at 894 (“In dealing with this subject appellant has combined and confused two legal theories which must be analyzed separately.”).

FGC's analysis of the wrongful termination issue is also hampered by the fact that claims for wrongful termination without cause are frequently paired with breach of contract claims, and have some overlapping elements. FGC accuses Mitsuoka's complaint of “conflating” wrongful termination and breach of contract claims, suggesting that only breach of contract claims are valid in Washington. *See, e.g., Knox*, 92 Wn. App. at 207; *Gaglidari v. Denny's Restaurants, Inc.*, 117 Wn.2d 426, 432, 815 P.2d 1362, 1366 (1991). The promise of specific treatment in specific situations is frequently described in contractual terms. *Thompson*, 102 Wn.2d at 230. However, the fact that *Thompson* wrongful discharge claims are similar to breach of contract claims does not mean wrongful discharge claims have been abolished in Washington.

FGC is also incorrect when it claims *Reninger* stands for the proposition that no wrongful termination exists in the absence of a public policy violation. *Reninger* simply concludes that the plaintiffs had failed to state a wrongful termination in violation of public policy claim because no public policy was threatened. *Reninger*, 134 Wn.2d at 447-48. It does

not address other kinds of wrongful termination claims, nor hold that *only* public policy violations could support a claim for wrongful termination. *Id.*

In short, Washington does recognize a claim for wrongful termination based on an employee's additional consideration. The claim is separate from a claim of implied employment agreement, addressed *infra* section.

(b) Mitsuoka Offered Extensive Consideration, Beyond the Contemplated Services of Selling FGC's Valves, in Exchange for Just-Cause Employment

Mitsuoka has stated a claim of wrongful termination of just-cause employment based on additional consideration. With FGC's assurances and at its direction, Mitsuoka founded FEA *for the express and exclusive purpose of* allowing Mitsuoka to act as FGC's U.S. seller of FGC valves. CP 155-56. Mitsuoka saved FGC the expense and labor of starting its own U.S. company and then hiring employees in the traditional manner. FGC told Mitsuoka that as long as he succeeded in selling the valves, FEA would continue to benefit from that exclusive relationship. In other words, the exclusive distributorship agreement *was* Mitsuoka's guarantee of just cause employment termination. When FGC became majority owner of FEA, and thus gaining the power to fire Mitsuoka as head of FEA, there was no statement revoking this agreement or suggesting that,

unlike when Mitsuoka was in control of FEA, Mitsuoka could now be fired by FGC for no reason. *Id.*

FGC dismisses Mitsuoka's consideration by arguing it was not sufficiently similar to the consideration offered by the plaintiff in *Malarkey Asphalt Co. v. Wyborney*, 62 Wn. App. 495, 814 P.2d 1219 *opinion corrected*, 62 Wn. App. 495, 821 P.2d 1235 (1991). Br. of Resp'ts at 28-37. FGC suggests that because Mitsuoka's complaint is distinguishable from the facts of *Malarkey*, he has failed to state a claim. *Id.* FGC also argues that under *Malarkey* and *Bakotich v. Swanson*, 91 Wn. App. 311, 957 P.2d 275 (1998) *holding modified by Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 43 P.3d 1223 (2002), Mitsuoka's complaint is invalid because some of his consideration was undertaken after he started FEA. Br. of Resp'ts at 28-37.

As a threshold matter, FGC's argument that *Malarkey* and *Bakotich* are somehow dispositive does not acknowledge the procedural posture of this case. In focusing so much of its argument on those cases, FGC implies that a plaintiff in Washington can only state a claim sufficient to survive a CR 12(b)(6) motion if the facts of his or her case exactly replicate the facts of an existing published Washington case. That has never been the pleading standard in Washington.

On the contrary, Washington requires courts to give plaintiffs the benefit of the doubt when framing complaints. *See Bravo v. Dolsen Companies*, 125 Wn.2d 745, 749, 888 P.2d 147 (1995) (reversing 12(b)(6) dismissal of complaint for union violations that did not use the word “union”). Also, nothing in our state’s jurisprudence requires a complaint to fit into the facts of existing case law to be cognizable. Such a standard would be fundamentally at odds with reality and with our system of justice.

Even assuming FGC’s reliance on *Malarkey* and *Bakotich* were justified, FGC’s narrow reading of those cases does not survive scrutiny. FGC argues that under *Malarkey and Bakotich*, a plaintiff can only state a claim for just-cause employment based on additional consideration if all of the consideration was at the “inception” of employment, or “at the time of the employment offer.” Br. of Resp’ts at 29, 33.

Nothing in *Roberts*, *Malarkey*, or *Bakotich* states that the only relevant “additional consideration” is that offered before employment begins. That is a concept the FGC imagines based upon the factual circumstances of those cases, not on the language of any holding or test.

The applicable test is stated in *Roberts*: Mitsuoka was required to demonstrate that gave consideration in addition to required services which results in a detriment to the employee and a benefit to the employer.

*Roberts*, 88 Wn.2d at 894. There is no temporal limitation to this test; no court has ever held that the consideration must all be completed “pre-employment.”

Also, FGC’s argument about “post-employment consideration” exposes a contradiction. FGC claims that Mitsuoka only became its employee in 1991. Br. of Resp’ts at 36.<sup>2</sup> However, FGC also claims that all of Mitsuoka’s investment and sacrifice in the 1980’s is “post-employment consideration.” FGC cannot have it both ways. Either Mitsuoka became FGC’s employee in 1984, in which case FGC concedes there was an employment agreement at that time, or he became an employee when FGC became majority shareholder, in which case all of Mitsuoka’s consideration from the 1980’s is “pre-employment.”

However, whether some of Mitsuoka’s consideration was pre- or post-employment, it was sufficient to state a claim under *Roberts*, because it was in addition to the contemplated services, a detriment to him and a benefit to FGC. Mitsuoka offered his own capital, unpaid labor, personal financial guarantee, and other valuable consideration in order to launch FGC’s U.S. operations in the form of FEA. FEA’s exclusive business was as the U.S. arm of FGC’s global sales operations.

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<sup>2</sup> FGC claims that it became Mitsuoka’s employer in 1991, but FGC actually became majority shareholder in FEA – and thus acquired the power to fire Mitsuoka – in the late 1980s. CP 29-30.

FGC also argues that even if this Court were to consider all of Mitsuoka's substantial consideration, it claims that the consideration was not sufficiently "detrimental" to Mitsuoka. Br. of Resp'ts at 34-36. FGC complains that Mitsuoka did not sufficiently explain how any of his actions were "detrimental" to him. *Id.*

FGC appears to be conflating the term "detrimental" as used in the law of contracts with that term as it is defined in common parlance. As was explained by our Supreme Court long ago:

Detriment, therefore, as used in testing the sufficiency of consideration means *legal detriment as distinguished from detriment in fact*. It means giving up something which immediately prior thereto the promisee was privileged to keep or doing or refraining from something which then he was privileged not to do or refrain from doing.

*Luther v. Nat'l Bank of Commerce*, 2 Wn.2d 470, 483, 98 P.2d 667, 673 (1940).

Mitsuoka's complaint sufficiently states a cause of action for wrongful termination of just-cause employment based on additional consideration. His complaint should be reinstated.

(3) Mitsuoka Has Alleged Facts Sufficient to State a Claim for Breach of Express Contract

In his opening brief, Mitsuoka argued that his complaint states a claim for wrongful termination and breach of an express contract. Br. of Appellant at 26-29. He explained that the facts sufficiently allege he had

an express agreement FGC that he would only be terminated for cause. *Id.*

As stated *supra*, FGC responds to Mitsuoka's wrongful termination claim by arguing that it does not exist in Washington. FGC does not respond on the merits.<sup>3</sup> Regarding Mitsuoka's express contract claim, FGC claims that Mitsuoka's only evidence of an express agreement is the distributorship agreement between FGC and FEA. Br. of Resp'ts at 23.

FGC completely ignores Yamamoto's written and oral assurances, made on behalf of FGC, that *Mitsuoka* (not FEA) would be the sole distributor of the valves as long as he was successful. CP 29. FEA was merely the vehicle by which Mitsuoka established his ability to be that sole distributor. FGC wishes to seize upon the fact that Mitsuoka – at FGC's direction – set up a corporation through which he could accomplish FGC's business goals in the U.S. FGC should not be allowed to use the corporate form it demanded in order to avoid its express agreement with Mitsuoka.

FGC also dismisses evidence of the distributorship agreement because it is not an employment contract, but an agreement “between two corporate entities.” Br. of Resp'ts at 23.

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<sup>3</sup> In failing to respond to this claim on the merits, FGC apparently concedes it.

However, FGC's argument ignores the context in which that agreement was forged. As with Yamamoto's express oral agreement, the distributorship agreement was Mitsuoka's assurance of just-cause employment with FEA. As long as he was successful, FEA would remain in business (and Mitsuoka would remain employed) for the sole purpose of selling the valves. Mitsuoka acted pursuant to the agreement with FGC that he would be employed by FEA as long as he continued to succeed in selling the valves. However, he was terminated for no cause.

The exclusive distributorship agreement, combined with Yamamoto's repeated oral and written assurances that Mitsuoka would be the sole beneficiary of that agreement as long as he was successful and Mitsuoka's actions fulfilling his part of that agreement, constitutes facts sufficient to state a claim of an express employment agreement. He has stated a claim for wrongful termination of just-cause employment.

(4) Mitsuoka Has Stated a Claim for Breach of Implied Contract

Mitsuoka argued in his opening brief that his complaint stated a claim for breach of an implied employment contract. Br. of Appellant at 26-29. He relied on the same facts and history that he argued sufficiently stated breach of an express contract. *Id.*

Regarding the implied contract claim, FGC has two responses. First, it responds that at best, the facts show Mitsuoka had “nothing more than a subjective belief” of just-cause employment. Br. of Resp’ts at 24-25. Second, FGC claims Mitsuoka was not in an employment relationship in 1984, and that therefore he could never have had an implied employment relationship with FGC in the future. *Id.* at 27.

(a) An Implied Agreement Is Based upon the Total Circumstances and History Between the Parties; the Alleged Lack of “Affirmative Statements” Goes to the Issue of Express Agreement, Not Implied Agreement

To ascertain the terms of an implied agreement, our courts look at all of the facts and circumstances surrounding the agreement. *Id.* Such facts include the alleged understanding, the intent of the parties, business custom and usage, the nature of the employment, the situation of the parties, and the circumstances of the case. *Roberts*, 88 Wn.2d at 895, citing *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L.Ed.2d 570 (1972).

FGC avers that the complaint does not state a claim for an implied agreement because it does not allege any affirmative statements by FGC agreeing to just-cause employment. Br. of Resp’ts at 24-25. Indeed, this is FGC’s only argument on the subject of circumstances sufficient to constitute an implied agreement. *Id.* (“Mitsuoka did not identify a single

affirmative statement...”; “Plaintiff does not even allege an ‘assurance of steady employment...’”; “Mitsuoka has conspicuously made no allegation of an offer from any defendant....”).

The flaw in FGC’s argument regarding an implied contract is that it ignores the definition of the word “implied.” If parties make express “assurances” or “statements,” then those parties have an express agreement, not an implied one.<sup>4</sup> The very nature of an implied agreement is that the agreement is not oral or written. That is why the *Roberts* test looks at all of the facts and circumstances surrounding the parties’ relationship, and not just their words.

The *Roberts* circumstances test is encompassing. It does not require that a plaintiff allege any affirmative statements from the employer in order to state a claim for implied contract.

(b) Given the Unusual Nature of the Arrangements, Customs, and History of the Parties, Just-Cause Employment Was Implied

Mitsuoka’s and Yamamoto’s actions surrounding the formation of their business relationship and the founding of FEA imply a contract for Mitsuoka’s continued employment as long as he was successful in selling FGC’s valves for them. The exclusive distributorship agreement may

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<sup>4</sup> Mitsuoka explained his allegation *supra* that the parties did have an express agreement, contrary to FGC’s claim.

have been between FEA and FGC, but FEA was merely the corporate form that Mitsuoka took – at FGC’s direction – so that Mitsuoka could be FGC’s sole U.S. distributor. Mitsuoka started FEA with the sole purpose of selling FGC’s valves. FEA had no other purpose.

This was not a typical employment situation where an existing company hires a salaried employee for a particular position. Yamamoto was asking Mitsuoka to set up FGC’s U.S. business venture where the outcome was uncertain and Mitsuoka’s pay hinged on his ability to get FEA up and running and sell FGC’s valves. It is implied from the circumstances that Mitsuoka would not have done this upon the belief he could simply be fired by FEA at any time with no recourse. And even if Mitsuoka was FEA’s employee at the time the parties first did business together, the circumstances of FGC’s assumption of controlling interest in FEA after Mitsuoka had worked to make it a success implies that Mitsuoka would continue to work for FEA unless he failed to do his job.

Mitsuoka’s complaint contains facts sufficient to state a claim for implied contract, it should not have been dismissed.

- (5) FGC Does Not Respond to Mitsuoka’s Argument Regarding Tortious Interference with a Business Expectancy, and Misunderstands His Claim for Tortious Interference with a Contract

In his opening brief, Mitsuoka explains that his complaint states a claim for tortious interference with a business expectancy, and tortious interference with contractual relations. Br. of Appellant at 29-32. Mitsuoka argued that the interference was with his contractual rights as a part owner and shareholder of FEA, and with his business expectancy of pecuniary benefit from FEA's distributorship agreement. *Id.* Mitsuoka argued that his complaint sufficiently states that Yamamoto intentionally interfered with it by making misrepresentations to other shareholders, self-dealing between FGC and his son's business to FEA's detriment, and other conduct that interfered with the expectation and contract. *Id.*

FGC responds in a single paragraph that Mitsuoka's only argument on appeal is for tortious interference with a contract, and because Mitsuoka has no claim for an implied employment contract, his tortious interference claim also fails. Br. of Resp'ts at 38.<sup>5</sup>

Regarding Mitsuoka's argument that his complaint states a cause of action for tortious interference with a business expectancy, FGC fails to respond. *Id.* Apparently, the point is conceded. Mitsuoka had a business expectancy of gaining pecuniary benefit from being the sole U.S.

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<sup>5</sup> FGC does offer an extensive response to an argument Mitsuoka has not raised on appeal, that there was interference in his business expectancy in at-will employment. Br. of Resp'ts at 38-42. FGC itself acknowledges that the argument is not raised. *Id.* FGC's reason for raising this argument is unclear. However, in order to conserve judicial time and resources, Mitsuoka is happy to agree with FGC that this issue is not raised.

distributor of FGC's valves. He alleges Yamamoto knew of and intentionally interfered with that expectancy, causing Mitsuoka damage.

Regarding Mitsuoka's argument that his complaint states a cause of action for tortious interference with a contract, FGC appears to misunderstand what Mitsuoka is referring to. Br. of Resp'ts at 38-42. FGC refers to an implied employment contract, stating that "there can be no tortious interference with a contract that never existed." *Id.* at 38.

The contract interference claim stems from Mitsuoka's ownership and contractual rights in FEA, and in his rights under the exclusive distributorship agreement. Mitsuoka's rights under the distributorship agreement stem from the fact that as long as he had rights in FEA, he had rights to benefit from that agreement. It was only at FGC's direction that Mitsuoka set up FEA in order that he could benefit from the distributorship agreement. FGC knew this, and knew that firing Mitsuoka deprived him of those contractual benefits.

Mitsuoka's complaint states claims for tortious interference with a business expectancy, and tortious interference with a contract. The complaint should be reinstated.

- (6) There Is a Claim for Shareholder Oppression in Washington as Acknowledged by This Court and Our Supreme Court

In his opening brief, Mitsuoka argued that his complaint stated a claim for shareholder oppression. Br. of Appellant at 32-33. He argued that the complaint implicated claims articulated by this Court in *Robblee v. Robblee*, 68 Wn. App. 67, 841 P.2d 1298 (1992). *Id.*

FGC responds that no such claim exists in Washington, relying solely on *McCormick v. Dunn & Black, P.S.*, 140 Wn. App. 873, 167 P.3d 610 (2007). Br. of Resp'ts at 42-46. Comparing the facts of *McCormick* to the facts in Mitsuoka's complaint, FGC responds that his claim would not be "legally viable." *Id.* FGC argues in a footnote that *Robblee* did not "adopt" the legal tests upon which Mitsuoka's argument relies. *Id.* at 45 n.15.

Again, FGC appears to misunderstand the roles of the courts in evaluating the sufficiency of a complaint when deciding a CR 12(b)(6) motion. A complaint does not fail to state a claim simply because it does not allege facts identical to the facts of another case. If that were true, then no new cause of action or extension of the common law could have ever occurred. FGC's argument that the complaint does not comport with *McCormick* does not mandate dismissal. The question is whether the claim states a claim under the applicable legal test.

FGC's assertion – that there is no shareholder oppression claim in Washington because under the facts of *Robblee* this Court did not find one

– is disingenuous. In *Robblee*, the trial court concluded that no shareholder oppression occurred, suggesting it was a viable claim, but that the fact did not warrant that relief. *Robblee*, 68 Wn. App. at 76. On appeal, the minority shareholder argued that, based on the facts of his case, the trial court erred in its conclusion. *Id.* at 76. This Court did *not* hold that no claim for shareholder oppression exists, which is what FGC implies. Instead, this Court examined the two most common tests for determining whether shareholder oppression has occurred, and concluded that the trial court’s finding was correct. *Id.* at 77. Later, our Supreme Court affirmed the *Robblee* decision and adopted the same two tests for shareholder oppression. *Scott v. Trans-Sys., Inc.*, 148 Wn.2d 701, 710, 64 P.3d 1, 6 (2003).

Also, FGC’s claim that Mitsuoka cannot state a claim for shareholder oppression because he did not expressly ask for the dissolution of FEA<sup>6</sup> ignores that Mitsuoka’s third amended complaint included a request for precisely that relief. CP 46. Thus, the complaint would meet even FGC’s requirements for stating a shareholder oppression claim.

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<sup>6</sup> FGC argues that there is no claim for shareholder oppression outside of corporate dissolution proceedings. Br. of Resp’ts at 42. There is a lack of clarity in Washington courts on this issue. In *Robblee*, there was no mention of a dissolution or citation to the dissolution statute, RCW 23B.14.300. However, our Supreme Court in adopting the *Robblee* tests for shareholder oppression claimed that *Robblee* was examining RCW 23B.14.300. *Scott*, 148 Wn.2d at 710.

The question for this Court is not whether a shareholder oppression claim exists in Washington, but whether Mitsuoka's complaint meets the legal tests examined in *Robblee* and *Scott*.

Mitsuoka is and has been a minority shareholder in FEA. He owns 12.5% of the stock in the company. He was driven out by the self-interested self-dealing of Yamamoto, the controlling party of majority shareholder FGC. Not only were Mitsuoka's business and contractual expectancies destroyed, but his shareholder rights were not respected. He had a reasonable expectation that his rights as a shareholder would be respected, including being included in all stockholder meetings and decisions. He was not. He has also received no value for his ownership share in FEA, either in the form of dividend payments or a stock repurchase based on the fair market value of his shares.

Mitsuoka's complaint states a claim for shareholder oppression.

(7) Refusing to Consider a Motion to Amend Where There Is No Articulate Prejudice and Defendant Has Not Even Filed an Answer, Is an Abuse of Discretion

In his opening brief, Mitsuoka argued that the trial court abused its discretion in *refusing to even consider* his third amended complaint because it was "not properly before the court."<sup>7</sup> Br. of Appellant at 34.

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<sup>7</sup> This Court should not be confused by FGC's misleading suggestion that the trial court considered the motion to amend on its merits. Br. of Resp'ts at 42 ("the trial

Mitsuoka argued that because the touchstone of a CR 15 motion to amend is prejudice, and that there can be no prejudice at this early stage of the proceedings, the trial court should have allowed the amendment. *Id.* at 35-36.

FGC tacitly concedes (by failing to respond) that the trial court's refusal to consider the motion was procedurally improper.<sup>8</sup> FGC's concession is understandable. There are no legal grounds for declaring a motion to amend to not be "properly before the court" when it is brought in connection with a timely motion for reconsideration only 10 days after a CR 12(b)(6) dismissal. In fact, a motion to amend should be "freely given as justice so requires." CR 15.

If the trial court refused to consider the motion to amend based on its timing, i.e., after the CR 12(b)(6) dismissal, that decision was an abuse of discretion. A CR 15 motion's "timeliness alone, without more, is generally an improper reason to deny a motion to amend." *Quality Rock Products, Inc. v. Thurston Cnty.*, 126 Wn. App. 250, 273, 108 P.3d 805 (2005), citing *Herron v. Tribune Publ'g Co.*, 108 Wn.2d 162, 166, 736

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court did not abuse its discretion *in denying and/or* not considering the motion."). The trial court *did not* consider the motion on its merits, but "declin[ed] to consider" it. CP 97.

<sup>8</sup> Instead, FGC responds (as it did below) by arguing the motion to amend on the merits. Br. of Resp'ts at 42-43; CP 80-85. FGC claim that amendment would have been "futile" because there is no claim for shareholder oppression in Washington. This issue has already been addressed *supra*.

P.2d 249 (1987); *Caruso v. Local Union No. 690 of Int'l Bhd. of Teamsters, Chauffers, Warehousemen & Helpers of Am.*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983).

If the trial court refused to consider the amendment based on alleged prejudice to FGC, that was also an abuse of discretion. The bar of demonstrating prejudice to a defendant in connection with CR 12(b)(6) dismissal is high. Washington courts will consider new facts *even for the first time on appeal*. If it is not prejudicial to a defendant to have a new allegation considered on appeal, it cannot be prejudicial to consider and grant a motion to amend simply because the trial court has just dismissed it under CR 12(b)(6).

In its only argument regarding prejudice, FGC asserts the following:

[A]llowing Mitsuoka's claims to go forward with no legal basis...would cause particular prejudice to the Defendants here, as allowing Mitsuoka to pursue these meritless claims would cause great expense to these parties (and other witnesses and documents) that are in Japan.

Br. of Resp'ts at 47.

FGC's argument raises a straw man that has no bearing on this Court's analysis of prejudice. *Any* defendant could be "prejudiced" by a failure to dismiss "meritless" claims "with no legal basis," regardless of where that defendant resided. A motion to amend should be considered on

its merits if it is procedurally proper.

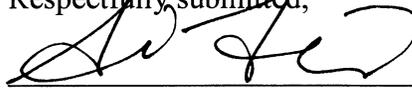
Furthermore, the notion that FGC and its owners would be prejudiced by having to defend a complaint here is unavailing. If they did not wish to risk the “great expense” of being hauled into court outside of Japan, then they should not have availed themselves of the opportunity to do business and earn profits in this jurisdiction.

D. CONCLUSION

Perhaps no Washington court has published a case with a fact pattern like that recited in Mitsuoka’s complaint. That is of no import. This case may be unusual, but it states a claim upon which relief can be granted. It should not have been dismissed.

DATED this 20<sup>th</sup> day of March, 2015.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I emailed a courtesy copy and deposited in the U.S. Mail for service a true and accurate copy of the Reply Brief of Appellant in Court of Appeals Cause No. 72123-2-1 to the following:

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

DATED: March <sup>23<sup>rd</sup></sup>\_\_\_\_, 2015, at Seattle, Washington.



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