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Pursuant to RAP 17.4(e), Respondent The Clinic replies in support of its motion to dismiss for lack of justiciability.

**A. VanRad Concedes That It Has No Injury As It Pled Its CPA Claim; Dismissal Is Proper.**

VanRad concedes that it has received compensation for the pecuniary injury that it alleged to support the injury element of its CPA claim. *See Reply Brief of Appellant*, pp. 1-5. This should end the mootness inquiry. The appeal should be dismissed. VanRad asserts two arguments to defeat mootness. VanRad first argues that its claim survives because VanRad has a “monetary stake” in the case because it desires an attorney’s fee award if it were to prevail on its CPA claim. VanRad then seems to argue that it can assert new injuries on appeal. Neither argument is persuasive.

**1. A Vaguely Asserted “Monetary Stake” Is Not Sufficient to Establish a CPA Claim That Lacks the Requisite Injury Element; VanRad Has No “Monetary Stake.”**

VanRad argues that its claim survives because VanRad has a “monetary stake” in the case. *Reply Brief*, p. 2. This is not an accurately stated test. VanRad’s argument rests on a misapplication of caselaw, especially *Kuehn v. Renton School Dist.*, 103 Wn.2d 594, 694 P.2d 1078 (1985). VanRad has no “monetary stake” within the meaning of this caselaw. VanRad’s hope that its CPA claim will survive and that it might

prevail and be entitled to an attorney's fee award is not a monetary stake. The argument also ignores that VanRad alleged no other damages to sustain the necessary injury element under the CPA.

VanRad did not address The Clinic's argument that the costs of suit and damage enhancement recoverable under the CPA do not establish a viable claim. VanRad left unaddressed The Clinic's discussion and authorities at IV.A.2. of Respondent's Brief that because the attorney's fees and trebling provisions of the CPA are not elements of damage, they cannot satisfy the injury element. The text of the CPA is clear that attorney's fees are an element of costs. They cannot support the injury element. This remains undisputed. The Fourth Amended Complaint supports no viable claim now that the only alleged injury is satisfied. Dismissal should result.

Without directly addressing The Clinic's authorities or the text of the CPA, VanRad cites *Kuehn v. Renton School Dist.*, 103 Wn.2d 594, 694 P.2d 1078 (1985), for the proposition that "whenever a plaintiff retains any 'monetary stake' in a case—even if it is only establishing a right to recover attorney fees—there is a justiciable controversy and an appeal is not moot." *Reply Brief*, pp. 2-3. This argument incorrectly applies *Kuehn*. It states a false test, and one that VanRad does not meet. In fact, *Kuehn* solidifies The Clinic's point because in *Kuehn* nominal damages remained

at issue under 42 U.S.C. § 1983. Under Section 1983, actual injury is not a required element. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 150 (1970) (only two elements required, deprivation of a federal right and that action was “under color of law.”). *See also Carey v. Piphus*, 435 U.S. 247, 266 (1978) (actual injury need not be shown to redress violation of constitutional rights). The *Kuehn* court specifically recognized that to make a claim under 42 U.S.C. § 1983 a party need not demonstrate actual injury, but “need only establish a violation of their constitutional rights.” *Kuehn*, 103 Wn.2d at 598. This case is inapposite here. Under the CPA, injury *is* a required element. The costs recoverable under the CPA including attorney’s fees are irrelevant to the mootness inquiry. Given the full payment of the alleged injury, which VanRad necessarily concedes, VanRad has no viable CPA claim.

VanRad also cited *Yacobellis v. Bellingham*, 55 Wn. App. 706, 710, 780 P.2d 272 (1989). This case is unavailing. Although the declaratory relief initially sought in *Yacobellis* was moot, because statutory damages remained at issue the controversy was not moot. *Id.* In our case, the CPA does not provide statutory damages. The mootness analysis of *Yacobellis* cannot be analogized here.

None of VanRad’s cases support applying an “any monetary stake” analysis where an element of the claim at issue is missing. VanRad cites

cases addressing declaratory actions, which are not relevant or helpful.

The most that they stand for is that where a trial court has *already* awarded attorney's fees to a prevailing party below, the appellate court retains authority to resolve the propriety of that award even where other aspects of the trial court ruling, such as whether declaratory relief should have issued, have become moot. That is not the present situation. For example, in *Allstate Ins. Co. v. Bowen*, 121 Wn. App. 879, 882-83, 91 P.3d 897 (2004), an insurer brought a declaratory action regarding its duties to indemnify and defend. The insured prevailed on summary judgment, and was awarded attorney's fees as the prevailing party. *Id.* at 882. The insurer appealed. *Id.* Before resolution of the appeal, the insurer indemnified the insured. *Id.* The insured claimed the appeal of the duty to indemnify issue was moot, but the Court refused to dismiss that aspect of the appeal. *Allstate Ins. Co. v. Bowen*, 121 Wn. App. at 882-83. While the appellate court need not have decided whether the duty to indemnify existed given that the insurer had in fact indemnified, the appellate court needed to decide the issue to determine whether the insured was entitled to the trial court's prevailing party attorney's fee award. *Id.* The correctness of the attorney's fee award *previously made* depended on the correctness of the ruling on the declaratory action. The appellate court thus retained that issue on the appeal. *Id.*

*Allstate* relies on *McGary v. Westlake Investors*, 99 Wn.2d 280, 661 P.2d 971 (1983), another case where a *previously made* attorney’s fee award was at issue on appeal. Although the outcome of the declaratory relief was no longer an active controversy on appeal, the Supreme Court held that appellate review of the attorney’s fee award by the trial court necessarily required resolution of the declaratory relief issues. *McGary v. Westlake Investors*, 99 Wn.2d. at 282, 284. VanRad has no “monetary stake” on appeal like that at issue in *Allstate* and *McGary*. No attorney’s fee award was previously made below.

Here, the Court need not reach review of the trial court’s dismissal because VanRad no longer has a CPA claim. VanRad admittedly received compensation for the only injury it alleged. Whether VanRad alleged a public interest element—the only issue on appeal—is academic because the injury VanRad asserted has been compensated.

**2. VanRad Cites No Authority to Permit It to Alter On Appeal Its Injury Allegations.**

VanRad argues that it has not been made whole, and its claim should therefore survive. *Reply Brief*, p. 4. Without directly stating so, VanRad seems to argue that its claim should survive so that it can go before the trial court and move to amend its claim to state new injuries not previously alleged. *Id.* (“VanRad can still show injury” other than its

pecuniary loss). It is too late for that. VanRad blurs the trial court standard with the standards on appeal. The question for this Court is whether under the Fourth Amended Complaint, *Appendix A1 to Opening Brief* (CP 87-94), this Court can discern an alleged injury other than pecuniary loss. None exists. No alleged facts demonstrate other losses. The Fourth Amended Complaint asserts only pecuniary loss and prays only for that relief. That relief is now moot.

The Court need not reach the issues on appeal where VanRad has admittedly been compensated for the only injury asserted. The Assignments of Error relate exclusively to whether the pled facts establish a “public interest” element. *Opening Brief*, p. 1. Nothing about the appeal involves the injury element. To decide mootness, this Court must focus on the injury actually alleged. VanRad has no right on appeal to assert new damages.

The CPA claim was dismissed for the first time September 28, 2007. CP 84-86. Upon amendment, VanRad did not alter any allegations bearing on injury. The CPA was dismissed a second time (with prejudice this time), on January 9, 2008. CP 173-78. The matter continued to be litigated over the unjust enrichment and quantum meruit claims for three to four months until it was dismissed April 1, 2008, pursuant to stipulation. CP 178-79. During this time, VanRad never asserted any

additional damage beyond the pecuniary loss stated. VanRad never moved again to amend its pleadings. VanRad never suggested an injury beyond the pecuniary loss contained in its Fourth Amended Complaint. Appeal is not the time to assert new injury theories. VanRad cites no authority to permit it to alter its damage allegations on appeal.

**B. The CPA Claim Was Not “Extensively Litigated” Before It Was Dismissed; There Is No Inequity In Dismissing the Claim for Lack of Justiciability.**

After almost one year of litigation without any CPA allegations, VanRad attempted to shoehorn its private, commercial claims into the CPA to co-opt a right to attorney’s fees that it otherwise did not have. Once it thought to try this approach, VanRad never adequately stated the CPA claim. As it turns out, it is now evident that its asserted injury under the CPA claim was compensated. VanRad suggests unfairness that its CPA claim is now moot after it was forced to “file suit and litigate for a year-and-a-half” before it received payment “immediately before trial and appeal.” *Reply Brief*, p. 2. Equity or fairness are not tests of justiciability. VanRad’s characterization of the litigation of its CPA claim is unfounded, with no citation to the record. VanRad asserts that *Eagle Point Condo Owners Ass’n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000), could somehow remedy its situation. *Reply Brief*, p. 2 (citing “*Condo Owners v. Coy*” [sic]) The *Coy* case is inapplicable.

Contrary to its assertion, VanRad did not litigate its CPA claim for over a year-and-a-half. At most, the CPA claim was alive off-and-on for approximately seven months from May 2007 to its ultimate demise January 9, 2008.<sup>1</sup> During this time, the merits of the claim were not explored by the parties. VanRad simply tried to keep it alive by trying to find a way to state it and support its theory to the trial court. VanRad is inaccurate to paint a different picture and suggest that The Clinic swooped in to tender a check after extensive litigation of the CPA claim “immediately before trial.” *Reply Brief*, p. 2. The Clinic settled the quantum meruit and unjust enrichment claims in April 2008, months after the CPA claim had been dismissed. CP 178-79. The parties expended little resources on the CPA claim other than scrutinizing whether it should survive immediate dismissal. The CPA claim should not be remanded so that it can now be extensively litigated when the injury complained of is satisfied. VanRad’s stated claim *is* moot.

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<sup>1</sup> VanRad did not assert a CPA claim when it initiated litigation in August 2006 or in subsequent amendments. *See* CP 1-16 (Complaint), 17-22 (First Amended Complaint), 26-32 (Second Amended Complaint). It wasn’t until its Third Amended Complaint filed May 14, 2007, that VanRad first raised the CPA. Within weeks the Clinic moved to dismiss the claim. CP 44-60 (5/23/07 Motion to Dismiss). The trial court granted this motion on September 28, 2007, and permitted amendment. CP 84-86. VanRad amended on November 2, 2007. CP 87-94. The Clinic again promptly moved to dismiss. CP 95-107 (12/4/07 Motion to Dismiss). The trial court dismissed the CPA claim January 9, 2008. CP 173-78.

*Eagle Point Condo Owners Ass'n v. Coy*, 102 Wn. App. 697, 9 P.3d 898 (2000), does not support VanRad. This case concerned an Offer of Judgment under CR 68 that indeed came on the eve of trial. *Id.* at 707-09. The defendant argued that his offer under CR 68 should be applied to prevent not just cost recovery, but also attorney's fee recovery from the condo association who had sued him. *Id.* In rejecting that approach, the *Coy* court surmised in dicta that it would be a disincentive to wronged homeowners to apply CR 68 to that effect in these circumstances. *Id.* at 709. This case has nothing to do with the mootness of VanRad's CPA claim.

**C. Submission of the Declaration of Russillo to Present Matters Relevant to the Mootness Argument Is Not Improper**

VanRad did not move to strike the Declaration of Russillo relating to the payment of VanRad's alleged pecuniary injury. It conceded the payment. VanRad describes the declaration as "improper" because it was outside of the trial court record. *Reply*, p. 2. VanRad cited *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), which stands for the general rule that matters outside the record will not be considered on review. The matters submitted in the *Declaration of Russillo* did not relate to the matters under review, however. The submission was proper because it relates to the justiciability of the claim before this Court, a

matter that was not at issue below. Pursuant to RAP 7.3, this Court has authority to determine whether a matter is properly before it, and “to perform all acts necessary or appropriate to secure the fair and orderly review of cases.” This includes taking evidence that relates to the justiciability of the case. In *Lockwood v. A C & S, Inc.*, 44 Wn. App. 330, 361-62, 722 P.2d 826 (1986), *aff’d*, 109 Wn.2d 235, 744 P.2d 605 (1987), the appellate court affirmed its jurisdiction to take evidence on issues that did not arise in the original proceeding. In *Lockwood*, the evidence was taken as part of a reasonableness hearing on a post-appeal settlement. *Id.* Where a case has become moot by the time of an appeal, the facts demonstrating mootness may not be of record. It is proper to timely present facts relevant to mootness to the Court.

### CONCLUSION

The CPA claim is moot. Both parties acknowledge that the injury that VanRad alleged is satisfied. The appeal should be dismissed for mootness.

VanRad offers no support to sustain its claim. *It offers no authority to support any right to assert new injuries on appeal.* When this Court examines the injury alleged by VanRad in the Fourth Amended Complaint, it must conclude that the injury no longer exists. The issues on

appeal do not concern the injury element. It would be academic to entertain them when the injury element was satisfied.

This Court should reject VanRad's assertion of a "monetary stake" in this appeal to resist dismissal. The assertion is irrelevant because a "monetary stake" does not establish justiciability where a necessary element of the claim on appeal is lacking. VanRad has no "monetary stake" in this appeal, not having received an attorney's fee award from the trial court.

Not only was the CPA claim never an appropriate theory for this case or adequately stated, the CPA claim is moot.

RESPECTFULLY submitted this 22<sup>nd</sup> day of October, 2008.

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**CERTIFICATE OF SERVICE**

PLEASE TAKE NOTICE that on the 22<sup>nd</sup> day of October, 2008,  
I caused to be served by first class U.S. Mail Respondent's Reply in  
Support of Motion to Dismiss for Lack of Justiciability on the following  
parties at the following addresses:

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DATED this 22<sup>nd</sup> day of October, 2008.

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