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COURT OF APPEALS

10 APR 16 AM 9:34

Court of Appeals Docket Number 40525-3-III DATE OF FILING

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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ADAIR HOMES, INC., an Oregon corporation,

Respondent and Plaintiff,

v.

KASEY BUTLER,

Appellant and Defendant.

Appeal from the Clark County Superior Court
Case No. 08205722-8

RESPONDENT ADAIR HOMES, INC.'S BRIEF

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I. INTRODUCTION

Appellant Kasey Butler (“Butler”), a licensed real estate broker, entered into a construction contract with Respondent Adair Homes, Inc. (“Adair”) to develop a real estate investment property located in Vancouver, Washington. Butler intended to construct a “spec home” on the property with Adair’s assistance and, upon its completion, “flip” the home at a profit. Butler financed his purchase of the property and his construction costs by taking out two loans with Pacific Continental Bank (“PCB”). Each PCB loan was evidenced by a promissory note and that was secured by a deed of trust against the property.

Butler defaulted on his loan obligations with PCB. PCB assigned the two promissory notes and trust deeds to Adair, and Adair subsequently filed this lawsuit for breach of the promissory notes and to foreclose the trust deeds. Thereafter, Butler asserted a counterclaim against Adair for violation of the Washington Consumer Protection Act (“CPA”).

Butler now appeals from orders of the trial court granting Adair’s motion for summary judgment and dismissing Butler’s CPA counterclaim, entering general judgment in favor of Adair, and entering a supplemental judgment awarding attorneys’ fees in favor of Adair. The key question on appeal is whether the trial court erred in dismissing Butler’s CPA counterclaim. Because Butler has not offered evidence to establish the

requisite elements of his CPA claim, Adair respectfully submits that this Court should affirm the challenged orders of the trial court in their entirety.

II. STATEMENT OF THE CASE

1. Statement of Facts

a. The Adair Entities

Adair Homes, Inc. is a licensed construction contractor that builds homes in Washington. (Affidavit of Byron Van Kley (“Van Kley Aff.”), ¶ 4, CP138). Adair Financial Services, LLC (“AFS”) is a licensed mortgage brokerage company. *Id.* Adair and AFS are two separate and distinct entities. (*Id.*; see also Affidavit of Kristopher Gomez (“Gomez Aff.”), ¶ 3, CP552). Neither Adair nor AFS holds any ownership interest in the other company, and neither Adair nor AFS is a subsidiary of the other company. (Van Kley Aff., ¶ 4, CP364-65). Adair and AFS do not exist solely to serve each other; each company has customers not shared by the other. (*Id.*, ¶ 4, CP364-65; Gomez Aff., ¶ 5, CP553; Gomez Depo., 24:4-6, 24:16-20, CP196). AFS is not a party to this lawsuit. (Complaint, CP1).

AFS brokers loans using the lending services of a number of lenders, including PCB. (Gomez Aff., ¶ 5, CP553). At the time Butler’s loans were made, AFS and Adair had an agreement with PCB identifying the criteria under which PCB would make interim constructions loans to Adair’s customers. Affidavit of Charlotte Boxer (“Boxer Aff.”), ¶ 6, CP369).

However, PCB determined whether it would loan money to a particular borrower based solely on its own underwriting guidelines and the borrower's individual financial situation or creditworthiness. (*Id.*, at 7).

During the same time period, Peter Marsh, who is a shareholder of Adair, had a loan guaranty agreement with PCB.¹ (Van Kley Aff., ¶ 7, CP138; Agreement, CP226-229). Under the guaranty agreement, Marsh, in his individual capacity, agreed to provide PCB additional collateral securing loans from PCB to Adair customers. (Agreement, CP226-229.) Marsh agreed to guarantee 20 percent of each loan with funds from a dedicated account at PCB. (*Id.*, ¶¶ 3-4, CP227).

The guaranty was to protect PCB in the event that any of Adair's customers were to default on a loan before the completion of construction of the home serving as collateral for the loan. (*Id.*; Boxer Aff., ¶ 4, CP369). Thus, a default by an Adair customer could result in PCB holding an unfinished home – i.e., collateral that would be difficult to liquidate. (Van Kley Aff., ¶ 7, CP138-39; Boxer Aff., ¶ 4, CP369). At the time of Butler's loans, such an agreement was not uncommon in the mortgage industry. Gomez Aff., ¶ 6, CP 553, 558-575.

¹ Neither Adair nor AFS is party to the guaranty agreement. (Agreement, CP226). The agreement was executed by Peter Marsh on his own behalf. (*Id.*, CP229).

The guaranty agreement applied to all of the construction loans issued by PCB to Adair's customers, irrespective of an individual customer's creditworthiness or financial condition. (Boxer Aff., ¶ 5, CP369). The guaranty agreement did not affect whether any individual customer received a loan, nor did it affect the terms of any individual customer's loan. (*Id.*, ¶ 7, CP369; Van Kley Aff., ¶ 7, CP139).

b. Timeline of Events

When Butler contacted Adair in 2005, Butler was a licensed real estate salesperson in Washington. (Butler Depo., 13:14-20, 32:17-20, CP155, CP159). To obtain this license, Butler had completed 60 credit hours of real estate education classes and had passed a state licensing examination. (*Id.*, 13:14-20, 16:14-19, CP155). One of Butler's real estate clients, Darius Roberts, referred Butler to Adair. (*Id.*, 21:9-21, 28:9-21, CP329, CP334). Butler was interested in building a "spec" home for resale, and Roberts referred him to Adair based on Roberts' own experience with the company. (*Id.*, 28:12-25, CP333). Based on Roberts' referral, Butler contacted Adair with the intent "to build a home and basically build it and flip it and sell it as an investment." (*Id.*, 23:15-21, 28:9-21, 29:7-11, 35:11-15, CP332-333 and 335).

Butler worked with one of Adair's then-employees, a "home planner" named Jeff Potts. (Butler Depo., 80:15-19, CP346). Butler met

with Potts several times to discuss Butler's planned construction project. (*Id.*, 46:3-21, CP337). Butler claims that, at some point, Potts allegedly told him that the planned construction "looks doable." (*Id.*, 46:14-21, CP337). However, Potts did notify Butler, in writing, that performing the necessary excavation on his lot may be difficult and needed to be carefully considered. (Butler Deposition, Exhibit 11, CP 545).

Adair referred Butler to AFS for financing options. (Van Kley Aff., ¶ 6, CP138). Other than initially referring Butler to AFS, Adair had no other involvement with Butler's obtaining financing for the transaction. (*Id.*).

Butler provided AFS with a copy of his credit report. (Gomez Aff. ¶ 7(b), CP554). On May 27, 2005, AFS sent Butler a letter denying Butler's initial application for financing. (Letter, CP235; Gomez Aff. ¶ 7(b), CP554; Butler Depo., 58:2-16, CP340). The AFS letter instructed Butler to improve his credit report and credit score. (Letter, CP235; Gomez Aff. ¶ 7(b), CP554; Butler Depo., 58:17-59:13, CP340). In response to the letter from AFS, Butler took action to improve his credit score. (Butler Depo., 59:11-13, CP341).

On June 15, 2005, Butler entered into an agreement to purchase two contiguous lots of land in Washington, which are the subject of Adair's foreclosure action ("the Subject Property"). (Agreement, CP204-07). Butler required financing in order to complete the purchase. Again, Butler pursued

financing through AFS' mortgage brokerage services. Butler received an "Affiliated Business Arrangement Disclosure Statement Notice" that made clear the relationship between Adair and AFS. (Notice, CP536; Butler Depo., 72:7-73:9, CP344). This notice states that: "I/we understand that we are not required to use Adair Financial Services, LLC and may negotiate and engage independently with other service providers for our loan." (Notice, CP536). Butler signed the notice. (*Id.*)

In his efforts to obtain financing through AFS, Butler completed a loan application. In the loan application, Butler knowingly and fraudulently stated and certified that he was going to use the Subject Property as his primary residence. (Gomez Aff., ¶ 7(h), CP556; Butler Depo., 65:18-66:5, 70:16-71:19, CP342, 344). In actuality, Butler was "in process" of buying, developing, and selling the Subject Property for a profit. (Butler Depo, 71:17-72:6, CP344). Had Butler honestly represented that the Subject Property was not intended to be his principal residence, he would have obtained less favorable loan terms, had he obtained the loan at all. (Gomez Aff., ¶ 7(h), CP556).

AFS pulled a loan eligibility report for Butler. AFS relied on a computer program called "Loan Prospector" to determine the loan eligibility of every potential borrower, irrespective of with which lender the borrower was ultimately placed. (Van Kley Aff., ¶ 7, CP366). Contrary to Butler's

unsupported assertion (Appellate Brief² (“App. Br.”), at 7), AFS does not use Loan Prospector to determine the eligibility of a loan for sale on the secondary market. (Gomez Aff., ¶ 7(c), CP554-555).

At the time AFS applied Loan Prospector to Butler’s application, Butler’s mid credit score was 686. (Gomez Aff., ¶ 7(b), CP554). This score was sufficient to qualify for a construction loan from most lenders, including PCB. (*Id.*). Similarly, Butler’s median credit score was sufficient to qualify him for a loan irrespective of the guaranty between Mr. Marsh and PCB. (Gomez Aff., ¶ 7(g), CP556). The guaranty in no way affected Butler’s initial rejection, and subsequent qualification, for the loan, or the terms of Butler’s loan. (Boxer Aff., ¶ 5, CP369; Gomez Aff., ¶ 7(g), CP556).

At the same time, Loan Prospector issued a “caution” for Butler’s loan. (Gomez Aff., ¶ 7(c), CP554-555). This “caution” was issued because Butler was seeking a no income/no asset loan – it was not issued because of Butler’s personal qualifications. (*Id.*).

On July 29, 2005, Butler executed a construction contract (the “Construction Agreement”) with Adair. (Construction Agreement, CP221-222). Under the terms of the Construction Agreement, Adair and Butler

² Appellant also filed “Appellant’s Amended Brief,” but advised that the only change from Appellant’s Brief is to add citations to the Clerk’s Papers concerning the attorney fee petition proceedings.

were each responsible for certain portions of the necessary construction work in order to build a “spec home” on one of the two lots within the Subject Property. (*Id.*) Butler’s intent was to complete the spec home and sell it to a third party for a profit. (Butler Depo., ¶ 71:17-72:6, CP344).

Paragraph 17 of the Construction Agreement makes clear that all of the representations made by Adair are contained in the contract. (Construction Agreement, CP221). Paragraph 17 states:

There are no verbal agreements between the Parties, nor will any be honored. . . . All prior arrangements, understandings or agreements between [Butler] and Adair are superseded by this Contract and no other agreement, statement or promise made by either Party which are not contained herein shall be binding or valid. IF OTHER PROMISES, REPRESENTATIONS OR COMMITMENTS HAVE BEEN MADE, DO NOT SIGN THIS CONTRACT UNTIL THEY ARE SET FORTH IN WRITING AS PART OF THIS CONTRACT AND SUPPORTING DOCUMENTS.

(*Id.* (emphasis in original)). The Construction Agreement also contains a dispute resolution provision providing for alternative dispute resolution (including mandatory mediation and arbitration) of “all disagreements arising at any time and in any way relating to the construction or to this Contract.” (*Id.*, ¶ 15, CP221).

On the same day that he executed the Construction Agreement, Butler executed a “sales evaluation.” (Evaluation, CP544; Butler Depo.,

79:25-80:11, Ex. 10). The document (with responses from Butler) states as follows:

1. Was the contract read to you as you followed along with another copy? (Butler: YES)
2. Were the other documents reviewed to your satisfaction? (Butler: YES)
3. Is there anything that you do not understand? (If "yes", state what it is) (Butler: NO)
4. Did the home planner or any other person make any promises, representations or agreements other than what is stated in the documents? (if "yes" state what they are) (Butler: NO)

(Evaluation, CP544.)

On August 16, 2005, Butler completed his purchase of the Subject Property, and PCB issued to Butler a loan in the amount of \$312,300. (Affidavit of Mary Fechtel ("Fechtel Aff."), ¶ 4, CP60; Note, CP62-63). The loan was secured by a promissory note and trust deed signed by Butler for the benefit of PCB. (Fechtel Aff., ¶ 4, CP60; Note and Trust Deed, CP62-77).

In early 2006, after he had received the initial loan from PCB, Butler purchased two additional investment properties in Ridgefield, Washington unrelated to the Subject Property. (Butler Depo., 127:5-128:14, CP358). Butler defaulted on the loans for these Ridgefield properties, and the lender

initiated foreclosures. (*Id.*, 131:6-25, CP359). Accordingly, Butler cannot assert that any action of Adair caused the drop in his credit score.

Thereafter, on May 23, 2006, Butler requested and PCB issued to Butler a \$30,000 line of credit. (Fechtel Aff., ¶ 5, CP60). The loan was secured by a second promissory note and a second trust deed on the Subject Property signed by Butler for the benefit of PCB. (*Id.*, CP60; Note and Trust Deed, CP78-91).

The initial construction loan came due in full on October 16, 2006, and the line of credit came due in full on November 16, 2006. (Fechtel Aff., ¶¶ 4-6, CP60; Promissory Notes, CP62-64, CP78-79). Butler failed and refused to pay PCB the amounts required. (Fechtel Aff., ¶ 6, CP60). Under the terms of the trust deeds, Butler's default under each of the two notes constituted a default of the trust deed securing the note. (Trust Deeds, CP70, CP78).

Notwithstanding Butler's default of the PCB loans, AFS nonetheless attempted to assist Butler with obtaining permanent financing. (Email, CP257-258). AFS was unsuccessful in doing so because of the significant erosion of Butler's credit score (Gomez Aff., ¶ 7(f), CP556). When AFS suggested alternative financing, Butler declined, telling AFS that he was experienced in the business and knew what he was doing. (Email, CP257-258). At the time of Butler's default of the PCB loan, construction of the

home on the Subject Property was incomplete. (Van Kley Aff., ¶ 7(c), CP365). Butler did not obtain additional financing and remained in default of the PCB loans. Instead, Butler ripped out several lights, sinks, and appliances paid for by the PCB loan proceeds. (Butler Depo., 123:9-22, 124:10-14, 125:14-18, CP 357).

In exchange for an assignment of the two notes and two trust deeds from PCB, Adair paid PCB the amount owed by Butler on the notes. (Van Kley Aff., ¶ 5, CP56; Fechtel Aff., ¶ 7, CP60). At the time of the assignment, Butler owed PCB in excess of \$250,000 in principal, together with interest on the principal balance. (Van Kley Aff., ¶ 6, CP56; Fechtel Aff., ¶ 8, CP60-61). When Butler refused to negotiate with Adair regarding the repayment of his debt, Adair filed this lawsuit.

2. Statement of Procedure

On September 8, 2008, Adair filed suit against Butler for breach of the two promissory notes and to foreclose the trust deeds securing those notes. (Complaint, CP1). The complaint against Butler does not in any way involve the Construction Agreement; it seeks solely to enforce Adair's rights as the assignee of the two notes and trust deeds. (Complaint, CP1-5).

In his answer to the complaint, Butler asserted four affirmative defenses (waiver, estoppel, unclean hands, and abandonment) and asserted a vague counterclaim against Adair for violation of the CPA (RCW 19.86).

(Answer, ¶¶ 9-10, CP47). The counterclaim stated only that Adair's actions had violated the CPA. Butler failed to allege or identify in his answer any factual basis for his CPA counterclaim. (*Id.*, ¶ 10, CP47). Despite demand to do so, Butler refused to clarify his CPA allegations.

Adair subsequently moved the trial court for summary judgment in its favor on Adair's claims for Butler's breach of the promissory notes and foreclosure of trust deeds, and dismissing Butler's CPA counterclaim. (Motion, CP52-53, 422-429). In response, Butler did not challenge that Adair is entitled to summary judgment on its affirmative claims. (Response, CP499-500). Instead, Butler asserted that any award to Adair should be offset by Adair's purported liability under Butler's CPA claim. (*Id.*, CP500). Butler's response to Adair's motion for summary judgment was the first time in the proceeding that he explained the basis for his CPA counterclaim. Butler claimed that Adair engaged in unfair or deceptive acts by means of misrepresentations and concealments concerning the repurchase agreement between Adair, AFS, and PCB; the guaranty between Marsh and PCB; and misrepresentations concerning the Construction Agreement.

The trial court granted Adair's motion in its entirety. (Ruling, CP380-384; Order, CP400-403). Butler subsequently moved the court for reconsideration. (Motion, CP385-390). The trial court denied Butler's motion (Order, CP399), entered a general judgment in favor of Adair

(Judgment, CP404-406), and subsequently entered a supplemental judgment awarding Adair attorneys' fees.

III. ARGUMENT

1. Standard of Review

“A motion for summary judgment is properly granted where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.” *City of Sequim v. Malkasian*, 157 Wn.2d 251, 261 (2006) (citing CR 56(c)).

The Court of Appeals' review of an order on summary judgment is *de novo*, and the appellate court “engages in the same inquiry as the trial court.” *City of Sequim*, 157 Wn.2d at 261. The Court of Appeals' inquiry “is limited, however, to the evidence and issues presented to the trial court.” *Bldg. Indus. Ass'n of Wash. v. McCarthy*, 152 Wn. App. 720, 733-34 (2009) (citing RAP 9.12). Moreover, “[t]he nonmoving party may not rely on speculation, argumentative assertions that unresolved factual issues remain, or having its affidavits considered at face value; after the moving party has submitted adequate affidavits, the burden shifts to the nonmoving party to set forth specific facts that sufficiently rebut the moving party's contentions and disclose the existence of a genuine issue of material fact.” *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 640-641 (2001).

Moreover, “CR 56(e) requires that affidavits submitted in support of or opposition to a motion for summary judgment set forth facts based upon personal knowledge admissible as evidence to which the affiant is competent to testify. However, evidence may be presented in affidavits by reference to other sworn statements in the record such as depositions and other affidavits.” *Mostrom v. Pettibon*, 25 Wn. App. 158, 162 (1980).

Accordingly, Butler, as the non-moving party before the trial court, must respond to the evidence proffered by Adair, not with mere speculation or rhetoric, but with admissible *facts* establishing his CPA claim.

2. Butler Does Not Dispute Adair Was Entitled to Summary Judgment on Adair’s Claim

Adair successfully proved, and the court awarded, summary judgment on Adair’s foreclosure claim, based on the undisputed material facts in the record, showing Adair’s entitlement to judgment on its affirmative claims for breach of the promissory notes and foreclosure of the trust deeds. (CP 59-61, 380-84, 423-25, 427, and 452-72). Butler does not offer any argument to dispute Adair’s right to summary judgment on its foreclosure claim. Instead, Butler only argues that Adair’s judgment should be offset by Butler’s CPA counterclaim. (App. Br., at 46). Accordingly, Adair does not re-argue the undisputed right to summary judgment on Adair’s affirmative claims for relief.

3. The Trial Court Properly Granted Adair’s Motion For Summary Judgment With Respect To Butler’s CPA Counterclaim

In order to prevail on a private CPA cause of action, a party must establish *each* of five distinct elements: (1) an unfair or deceptive act or practice; (2) taking place in trade or commerce; (3) that impacts the public interest; and (4) caused, (5) injury to the party’s business or property. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Because Butler failed to establish four of the five elements in opposing Adair’s motion for summary judgment before the trial court, the trial court did not err in granting Adair summary judgment and dismissing Butler’s counterclaim.

a. Butler Failed To Establish That Adair Engaged In Any Unfair Or Deceptive Act Or Practice

Butler claims that Adair engaged in unfair or deceptive acts by misrepresenting or concealing information concerning financing and construction, and by engaging in “bait and switch” sales tactics.³ In order to

³ To the extent Butler argues that Adair engaged in a “bait and switch,” he is foreclosed from pursuing this claim because he failed to raise the argument before the trial court. Accordingly, it is not appropriate for resolution here. *Sorrel v. Eagle Healthcare*, 110 Wn. App. 290, 299 (2002). Moreover, the record is devoid of evidence that any “bait and switch” took place. “‘Bait and switch’ describes an offer which is made

establish that these alleged acts were, in fact, “unfair or deceptive” under the CPA, Butler must provide admissible evidence establishing three things. First, he must show that the alleged statements and omissions were material. *Holiday Resort Cmty. Ass’n v. Echo Lake Assocs., LLC*, 134 Wn. App. 210, 226 (2006) (“Implicit in the definition of ‘deceptive’ under the CPA is the understanding that the practice misleads or misrepresents something of material importance.”); *Robinson v. Avis Rent a Car Sys.*, 106 Wn. App. 104, 116 (2001). Then, Butler must establish that Adair had a duty to disclose the allegedly concealed information. *Barstad v. Stewart Title Guar. Co.*, 145 Wn.2d 528, 534 (2002) (dismissing CPA claim based on allegedly deceptive omissions because defendant had no duty to disclose). Finally, Butler must show that the alleged statements and omissions “had the capacity to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wn.2d at 785.

not in order to sell the advertised product at the advertised price, but rather to draw a customer to the store to sell him another similar product which is more profitable to the advertiser.” *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 215 (2010). Butler offers no evidence of *any* advertised offer by Adair, much less that the offer was part of a bait and switch.

**i. The Purported Representations and Omissions
Cannot be Material**

For purposes of the CPA, a material fact is one “which, if communicated to the buyer, will render the goods unacceptable or, at least, substantially less desirable.” *Testo v. Russ Dunmire Oldsmobile*, 16 Wn. App. 39, 51 (1976). None of the representations or omissions alleged by Butler are actionable, because they are not material.⁴

Butler contends that Adair’s statements and omissions concerning Marsh’s guaranty agreement with PCB were material because they led Butler to believe “he was being offered financing based upon his own credit worthiness and the viability of his project.” (App. Br., at 24). Butler’s perception of the basis for his financing was exactly correct. Testimony from AFS’s operations manager confirms that Butler was denied a loan in May 2005, and was subsequently approved for a loan in July 2005, on the basis of his (improved) credit score. (Gomez Aff., ¶¶ 7(b), (g), CP554, CP556). Marsh’s guaranty agreement with PCB in no way affected

⁴ As the trial court correctly held, the alleged misrepresentations and omissions concerning construction are not actionable in this proceeding because they arise out of the Construction Agreement and are subject to arbitration. (Construction Agreement, ¶ 15, CP221). Even were this not the case, however, Butler’s claim would fail with respect to the construction issues because (i) the alleged misrepresentations and omissions are not material and (ii) Butler expressly stated in writing that all of Adair’s representations and promises with respect to that contract were contained in the Construction Agreement. (Evaluation, CP544).

Butler's qualification for the loan. (*Id.*; Boxer Aff., ¶ 7, CP369). Since Butler's understanding about the basis for his qualifying for financing was accurate, Adair's alleged statements or omissions could not have made Butler's agreements with Adair or PCB "substantially less desirable" than his expectations.⁵ Therefore, the purported statements cannot be material for purposes of establishing a claim under the CPA. *Testo, supra*, at 51.

**ii. Adair Had No Duty To Disclose Any
Information Concerning Financing**

Butler also cannot prove the first element of his CPA claim because Adair had no duty to disclose any information concerning financing. In Washington, courts will find a duty to disclose where there is (a) a quasi-fiduciary relationship, (b) a special relationship of trust and confidence between the parties, (c) a statutory duty to disclose, (d) where one party is relying upon the superior specialized knowledge and experience of the other, and (e) where a seller has knowledge of a material

⁵ Similarly, Butler cannot prove that the alleged construction "misrepresentations" were material because they were not misrepresentations at all. Allegedly Mr. Potts told Butler that his project was "doable" – and, in fact, it was. (Butler Depo., 106:16-20, CP169). Excavation on the property was completed and the house built to completion. (Butler Depo., 106:16-20, CP169; Van Kley Aff., ¶ 6, CP365). Also, because the alleged representations were dealing specifically with issues unique to Butler's project, they do not affect the public interest.

fact not easily discoverable by the buyer.” *Favors v. Matzke*, 53 Wn. App. 789, 796 (1989).

Butler has not presented any evidence that the parties had a quasi-fiduciary or special relationship. Nor has Butler argued that Adair had a statutory duty to disclose.

Butler also fails to present evidence showing that he relied on Adair’s “specialized knowledge or experience” regarding the alleged financing omissions. Nor could he. Adair is not in the business of providing financial services, and did not provide any such services to Butler. (Butler Depo., 138:16-22; Van Kley Aff., ¶ 6, CP138).⁶

Finally, Butler fails to present evidence that Adair had any knowledge of “material facts [regarding financing] not easily discoverable by” Butler. To the contrary, Butler was in a better position than Adair to discover information about the basis for his obtaining financing: Butler worked directly with AFS and PCB as financial services providers. (Van Kley Aff., ¶ 6, CP138).

⁶ The legal authority cited by Butler is inapposite here. In *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 87 Wn.2d 298 (1976), the court found that defendant violated the CPA by making numerous affirmative misrepresentations concerning financing and credit insurance *that it sold to the consumer directly*. *Id.*, at 306, 308. By contrast, Adair did not itself provide any of the actual or contemplated loans to Butler.

**iii. The Purported Misrepresentations And
Omissions Do Not Have The Capacity To Deceive
A Substantial Portion Of The Public**

Butler further fails to establish the “unfair or deceptive act” element of his CPA claim because he has not established that the purported misrepresentations and omissions “ha[ve] the capacity to deceive a substantial portion of the public.” *Hangman Ridge*, 105 Wn.2d at 785. To meet this burden, Butler must offer admissible evidence – not mere speculation. *Micro Enhancement Int’l, Inc. v. Coopers & Lybrand, L.L.P.*, 110 Wn. App. 412, 438-39 (2002) (mere speculation that alleged unfair or deceptive act had the capacity to deceive a substantial portion of the public is insufficient to survive summary judgment); *Westview Invs., Ltd. v. U.S. Bank*, 133 Wn. App. 835, 854 (2006) (dismissal of a CPA claim on summary judgment was appropriate because the plaintiff made only unsupported allegations that the deceptive act had the capacity to deceive a substantial portion of the public).

Because Butler offered no admissible evidence that Adair’s alleged misrepresentations and omissions had the capacity to deceive a substantial portion of the public, Butler’s CPA claim must fail.

**iv. There is No Reliable Evidence of the Purported
Misstatements**

Potts has not been deposed by either party in this litigation. Butler's "evidence" in this litigation concerning Potts' alleged conduct is based entirely on the paraphrasing of Butler's self-serving, uncorroborated deposition testimony. Moreover, Appellant's Brief does not even accurately reflect Butler's deposition testimony on the issue of Potts' statements. For instance, Appellant's Brief erroneously charges Potts with "advis[ing] Butler that no payments would be required on any loan while construction was proceeding," citing CP 160. (App. Br., at 6). There is nothing on CP 160 that supports such a statement. The closest statement made by Butler in his deposition is that Butler came to Adair in the first place based on his impression, from an undisclosed source, that no payments were due during the course of construction and that he discussed the issue with Potts. (CP 159). There is no testimony or evidence from Butler or any other source that shows Potts gave Butler the misinformation or what Potts stated when Butler purportedly discussed the issue with Potts. (CP 159).

**b. Butler Has Not Established That There Is An Impact On
The Public Interest**

Even if Butler had somehow demonstrated that Adair engaged in unfair or deceptive acts, his claim would nonetheless fail because he cannot

establish the second element of his CPA claim: that the acts impact the public interest. “It is the obvious purpose of the Consumer Protection Act to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public generally.” *Lightfoot v. Macdonald*, 86 Wn.2d 331, 333 (1976). “Ordinarily, a breach of a private contract affecting no one but the parties to the contract is not an act or practice affecting the public interest.” *Hangman Ridge*, 105 Wn.2d at 790.

Butler offers unsupported speculation that Adair has engaged in the same conduct alleged by Butler with other Adair customers. Butler offers absolutely no evidence to support his speculation. Butler references CP 151, 318, and 250 in connection with this argument; however, these documents do not support Butler’s contentions. There is no record of any evidence that supports the bold allegations of repetitive conduct in Appellant’s Brief. (*See* App. Br., at 5, 33).

Contrary to Butler’s claim (App. Br., at 32), this case is quintessentially a “private” transaction. Butler’s claim against Adair does not arise out of a typical consumer transaction in which an individual purchased some defective product generally available to the public. *See, e.g., Hangman Ridge*, 105 Wn.2d at 790 (citing cases constituting consumer transactions). Rather, Butler here claims that he engaged in private services

contracts with Adair, AFS, and PCB, and that he was injured as a result of those contracts. This is “essentially a private dispute.” *Id.* at 790 (citing cases constituting private disputes).

In this context, “it is the likelihood that additional plaintiffs have been or will be injured in *exactly the same fashion* that changes a factual pattern from a private dispute to one that affects the public interest.” *Id.* (emphasis added). In determining whether a party sufficiently established the likelihood of additional injured parties, courts will consider factors including whether: (1) the acts were committed in the course of the defendant’s business, (2) defendant advertised to the public in general, (3) defendant actively solicited the plaintiff in particular, (4) and plaintiff and defendant occupied unequal bargaining positions. *Id.*, at 790-91.

Although Butler claims that this case implicates the public interest because there is the “potential for repetition” of the injury he allegedly sustained (App. Br., at 31, 33), he fails to offer any evidence to establish three of the four factors set forth in *Hangman Ridge*. Butler has not shown that Adair advertised regarding the specific unfair or deceptive acts at issue. *See Hangman Ridge*, 105 Wn.2d at 794 (“there are no facts in the record to indicate widespread advertising of loan closings by [defendant]”); *Cashmere Valley Bank v. Brender*, 128 Wn. App. 497, 510 (2005) (with respect to alleged deceptive acts by a loan officer, public interest prong not met where

“there is no evidence indicating that [defendant] advertised these loans to the public”). There is no evidence that Adair’s website included any offers or representations about the alleged financing or construction issues. (*See, e.g.* Website, CP297-303.) There is also no evidence that Adair “actively solicited” Butler. In fact, Butler admits that he *sought out* Adair’s services on the referral of a third-party. (Butler Depo., 21:9-21, 28:9-21, CP329, CP334).

Finally, there is no evidence that Butler – a licensed real estate agent – occupied an unequal bargaining position with Adair with respect to the alleged deceptive acts. As the trial court noted (Ruling, CP 383), it is simply not credible to believe that an experienced real estate agent would not know or be able to discover information that was clearly set forth in the terms of his various contracts with Adair, AFS, and PCB. *Id.*

Because Butler failed to offer evidence to establish the factors required by *Hangman Ridge*, he has not shown that this case implicates the public interest. This conclusion is also supported by common sense. Under *Hangman Ridge*, Butler must demonstrate that others “have been or will be injured in *exactly the same fashion*.” 105 Wn.2d at 790 (emphasis added). But the heart of Butler’s claim is that a single, former Adair employee misrepresented or concealed information from Butler in the course of private conversations between the two of them regarding specific conditions

regarding a specific construction project.⁷ Isolated acts that are, at heart, private contract disputes do not give rise to liability under the CPA. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-605 (2009) (“[T]here must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act’s being repeated.”); *Cashmere Valley Bank*, 128 Wn. App. at 510 (where “all of the alleged wrongful acts took place behind closed doors,” “there is no evidence suggesting that these allegations are likely to occur with other members of the public.”).

For all of these reasons, Butler cannot establish this required element of his CPA claim, and the Court should affirm the trial court’s decision dismissing his claim.⁸

⁷ Butler’s reliance on a single email (Email, CP379) to suggest that Mr. Potts engaged in a “generalized course of conduct,” is unavailing. This document contains no evidence of any specific representations by Mr. Potts, much less representations identical to those purportedly made to Butler. Moreover, Butler’s construction-related CPA claim was based upon an alleged representation by Mr. Potts regarding the proposed location of the house on his particular lot. (Plaintiff’s Summary Judgment Reply Memorandum, 2:3-13, CP 504; Butler Deposition, 136:20-25 and 137: 1-2, CP 360).

⁸ Because he cannot meet the test required by *Hangman Ridge*, Butler instead seeks to persuade this Court that the public interest is implicated because other customers of Adair also obtained loans from PCB. (App. Br., at 33). But even this evidence is unpersuasive; within the single Adair office that Butler examined, less than half of Adair’s customers obtained financing from PCB, and Butler offers no evidence concerning what information the

c. There Is No Evidence That Butler Was Injured

To recover under the CPA, Butler must also show that he suffered injury to his “business or property.” Rev. Code Wash. § 19.86.090. In this context, “business or property” is meant to denote a “commercial venture or enterprise.” *Ambach v. French*, 167 Wn.2d 167, 172 (2009). The Washington courts have found injury to “business or property” “where the defendant’s act in violation of the CPA caused the plaintiff to suffer loss of professional or business reputation, loss of goodwill, or inability to tend to a business establishment.” *Id.* at 173. Butler failed to establish that he suffered any injury to his business or property as a result of Adair’s purported CPA violations.

Butler claims that he was injured because (i) he devoted time and effort to the construction project, (ii) he purchased land he otherwise would not have bought, and (iii) he made payments to interest on his loans and for construction expenses. But none of these expenses constitute “injury” to Butler’s business or property. Butler does not offer any evidence that he incurred any expenses for which he did not receive the benefit of the bargain. Butler purchased land and received the bargained-for lots. Butler paid interest to PCB in exchange for PCB’s loaning him significant sums of

PCB customers received from Adair, or what expectations they may have had with respect to Adair. *Id.*, at 5, 33.

money. Butler paid for construction expenses and, in turn, received construction improvements on his property. Butler's speculative claim that he would not have purchased the land or improved it cannot render these garden-variety transactions injurious under the CPA. There is no evidence that Butler was "injured." Indeed, when asked at his deposition how Adair's supposed failure to give Butler "full disclosure as to [the] relationship with Pacific Continental Bank and Adair Homes" damaged him, Butler replied, "It didn't." (Butler Depo., 136:20-137:4, CP360).

Similarly, while "nonquantifiable injuries" may suffice to establish the injury element, Butler must nonetheless identify some harm capable of remedy. *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740 (1987) (noting that loss of goodwill could suffice to establish injury, in part because CPA allows for remedy of injunctive relief); *see also Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854 (1990) ("A loss of use of property which is causally related to an unfair or deceptive act or practice is sufficient injury"). Here, Butler merely claims that he spent time working on a construction project (in accordance with his obligations under the Construction Agreement). He does not allege that he spent any time specifically dealing with the effects of Adair's supposed unfair acts. *Compare Sign-O-Lite Signs, Inc. v. Delaurenti Florists, Inc.*, 64 Wn. App. 553, 564 (1992) (plaintiff testified that, because of defendant's unfair acts,

she was unable to conduct her paying work for periods of time because she was addressing unfair conduct with defendant). Indeed, Butler admitted at his deposition that he was not even aware of the supposedly unfair acts until after this litigation was commenced – well after the completion of his work on the property. (Butler Depo., 140:15-21, CP361).

Because Butler has not identified any “injury” actionable under the CPA, the Court should affirm the dismissal of his claim for this reason as well.

d. There Is No Proximate Causation Between The Alleged Unfair Acts And Butler’s Claimed Injury

Finally, Butler must prove that there exists proximate cause “between the unfair or deceptive acts and the injury suffered.” *Hangman Ridge*, 105 Wn.2d at 793-94.

To the extent Butler alleges that Adair misrepresented material facts, Butler must show that he relied on the misrepresentations. *Robinson v. Avis Rent a Car Sys.*, 106 Wn. App. 104, 113-114 (2001). Contrary to Butler’s assertion, he cannot establish reliance merely by showing that he lost some amount of money. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 81 (2007). Rather, Butler must show that Adair’s misrepresentations “‘induced’ [him] to act or refrain from acting.” *Robinson*, 106 Wn. App. at 113.

Butler made no such showing of reliance.⁹ His claim that he would not have purchased the lots or entered into the Construction Agreement but for the misrepresentations is based only on his own self-serving statements. There is no evidence contemporaneous to the transaction that shows Butler had any intention or belief regarding the financing or construction issues. Moreover, as discussed above, Butler's claim that he relied on the purported misrepresentations is foreclosed by the fact that he executed the loan documents and Construction Agreement. (*See, supra*, pg. 6).

Butler failed to present any admissible evidence concerning Mr. Potts' purported hearsay statements about financing. To the extent Butler alleges that Mr. Potts' statements concerning financing were deceptive, Butler did not provide any evidence that Mr. Potts had any specialized financial knowledge, or that such knowledge would be superior to the knowledge of Butler, a licensed real estate broker.¹⁰

⁹ Butler attempts to evade this requirement by claiming that this case involves only "issues of non-disclosure of issues regarding financing." (App. Br., at 36). But it is clear that Butler also bases his claim on purported misrepresentations concerning both financing and construction issues. (*See, e.g., id.*, 23, 27). Butler's failure to demonstrate reliance on these affirmative misrepresentations is fatal to his ability to assert a CPA claim in connection with them.

¹⁰ Butler suggests that this Court can simply impute the activities of AFS to Adair on the basis of the fact that AFS and Adair are "closely connected." (App. Br., at 25). This is patently false. Butler is not entitled

Indeed, the trial court found it “patently incomprehensible that a licensed realtor such as [Butler] would assign any weight” to Mr. Potts’ purported representation that no interest payments would be due during construction. (Ruling, CP383). Again, it is not credible to believe that Butler, a licensed real estate broker, would rely on a contractor, rather than his mortgage broker or lender, to tell him whether or not he would have to qualify for a future loan.

Moreover, as the trial court correctly held, Butler’s claims regarding Mr. Potts’ supposed misrepresentations about financing are also foreclosed by the parol evidence rule. (Ruling, CP383). All of the terms of the loan agreements are contained within the agreements, including explicit requirements concerning monthly interest payments. (Promissory Notes, “Payment,” CP62, CP78). Butler cannot contend that he relied on

to disregard the corporate form and engage in veil-piercing unless he can establish that “the corporate form was used to violate or evade a duty and that the corporate veil must be disregarded in order to prevent loss to an innocent party.” *Chadwick Farms Owners Ass’n v. FHC, LLC*, 166 Wn.2d 178, 200 (2009). Butler must also prove that there is “such a commingling of property rights or interests [between Adair and AFS] as to render it apparent that they are intended to function as one, and, further, to regard them as separate would aid the consummation of a fraud or wrong on others.” *J.I. Case Credit Corp. v. Stark*, 64 Wn.2d 470, 475 (1964). Butler has not attempted to make any such showing here. Moreover, nothing prohibits Butler from pursuing any claims he might have against AFS directly. Because Butler has not met his significant burden to pierce the corporate veil, he cannot impute the acts of these completely separate entities to Adair.

representations by Mr. Potts that were clearly in contravention of the written terms of the agreements. *Randall v. Tradewell Stores*, 21 Wn.2d 742, 749 (1944) (“In no case, of course, can parol evidence be admitted which is inconsistent with the written instrument.”).

With respect to the alleged concealments, Butler must present evidence to establish “some causal link between [Adair’s] unfair act and [Butler’s] injury.” *Schnall v. AT&T Wireless Servs., Inc.*, 168 Wn.2d 125, 145 (2010). Again, Butler offers no such evidence. As the trial court correctly noted, Butler “has provided no evidence that he was falsely induced by Adair’s non-disclosure to misperceive his obligations under the loan agreements, nor has [Butler] demonstrated any evidence that the guarantee agreement was material to his decision, other than his own subject declaration.” (Ruling, CP384).

Because there is no evidence establishing proximate cause between Adair’s purported unfair acts and Butler’s “injury,” Butler’s CPA claim must be dismissed for this reason as well.

4. The Trial Court Did Not Err In Disposing Of Butler’s Affirmative Defense Of Laches

In his response to Adair’s motion for summary judgment, Butler asserted for the first time that Adair improperly failed to promptly seek foreclosure. Butler claims that Adair’s delay increased Butler’s exposure to

a deficiency judgment in connection with the foreclosure of the trust deed. As an initial matter, Butler is foreclosed from making this argument because he failed to plead any affirmative defense based on laches in his answer to the complaint. (Answer, ¶¶ 9-10, CP47). Washington Court Rule 8(c) requires that a party affirmatively plead certain defenses including “laches . . . and any other matter constituting an avoidance or affirmative defense.”

Moreover, as the trial court noted in its decision granting summary judgment, Butler’s laches defense is precluded by the terms of the loan documents themselves. (Ruling, CP382; Promissory Notes, CP63, CP79; Trust Deeds, CP73, CP88). Laches is an equitable defense. *In re Marriage of Watkins*, 42 Wn. App. 371, 374 (1985). Contracting parties are free to negotiate terms that waive or otherwise prohibit equitable defenses. Where parties have agreed, by the terms of an agreement, to waive such defenses, the court may not disregard such agreement absent a showing of fraud. *Bernard v. Triangle Music Co.*, 1 Wn.2d 41, 48 (1939) (rejecting equitable defense asserted by one party in contravention of contract terms and noting, “in the absence of a showing of fraud or other infirmity in its inception, the court must enforce [a written contract] as written; that the court cannot disregard or suppress any of its terms; and, of course, by the same token, it cannot read anything into the instrument which is not already there”). Accordingly, Butler must be bound by the numerous mentions in the loan

documents that make clear that the lender's delay in taking some action does not waive the lender's right to such action. (Promissory Notes, CP63, CP79; Trust Deeds, CP73, CP88).

5. Issues Relating To The Construction Contract Issues Are Not Properly Before This Court And Are Subject To Arbitration

Butler repeatedly conflates the claims that arise out of the loan agreements at issue in this litigation with claims arising out of the separate and distinct Construction Agreement. As the trial court correctly noted, however, "[t]he mere fact that Adair is now the assignee of the loans does not somehow make the lender/borrower relationship a part of the construction contract. The two relationships are separate and distinct." (Ruling, CP383). Moreover, as Butler himself acknowledges, the Construction Agreement contains a mandatory arbitration clause. Accordingly, to the extent Butler's CPA claim arises out of that contract, his claim must be arbitrated. (Construction Agreement, ¶ 15, CP221; Ruling, CP383; *Garmo v. Dean, Witter, Reynolds*, 101 Wn.2d 585 (1984)). Butler attempts to avoid this arbitration clause by arguing that the clause is unconscionable and that Adair waived its right to arbitrate. Both of these arguments are unavailing.

a. The Arbitration Clause Is Not Unconscionable

Butler claims that the arbitration clause in the Construction Agreement is substantively unconscionable because the clause prohibits customers from engaging an attorney. But Butler's position mischaracterizes the terms of the arbitration clause. Moreover, Butler's position is not supported by case law from any jurisdiction.

Arbitration agreements will only be found substantively unconscionable where they are "one-sided or overly harsh." *McKee v. AT&T Corp.*, 164 Wn.2d 372, 396 (2008). For example, the court in *McKee* found an arbitration clause barring class actions substantively unconscionable because the clause effectively barred the defendant from liability where individual claims were so small as to be impractical to pursue on anything but a class-wide basis. *Id.*, at 397. The court also found it one-sided and harsh that the agreement barred an arbitrator from awarding attorneys' fees – further discouraging injured individuals from pursuing claims against a defendant – even though the contract reserved the defendant's right to collect its own attorneys' fees. *Id.*, at 398-99. Finally, the clause reduced by half the statute of limitations for aggrieved consumers to bring CPA claims. *Id.*

By contrast, the arbitration clause here does not create the sort of lopsided playing field seen in *McKee*. Neither does it function to deter

customers from pursuing claims against Adair. The provision's limitation on the use of attorneys affects both parties equally, and the arbitration agreement does not prevent either party from offering evidence in support of its position. (Construction Agreement, CP221). Moreover, it is clear from the face of the Construction Agreement that the challenged language is not mandatory. The clause states, "[t]o the extent permitted by law, the parties agree to not being represented by counsel or others in the Dispute Resolution process" (*Id.*, ¶15, CP221). It is clear that, if the limitation on counsel is not permissible under Washington law, the parties nonetheless agreed that the remainder of the arbitration agreement would remain enforceable. For all of these reasons, the arbitration clause is not unconscionable, and Butler's construction contract-related claims must be arbitrated.

b. Adair Did Not Waive Its Right To Arbitrate Construction Claims

"[A] waiver cannot be found absent conduct *inconsistent with any other intention* but to forego a known right." *Lake Washington School District v. Mobile Modules Northwest*, 28 Wn. App. 59, 62 (1980) (emphasis added). In the arbitration context, such conduct is typically shown where a party commences litigation and fails to invoke an arbitration clause. *Id.*, at 61. Butler claims that Adair waived the right to arbitrate disputes arising out of the construction contract by pursuing this litigation. (App. Br., at 45).

But Adair's commencement of this litigation is utterly unconnected to the Construction Agreement. Adair commenced this lawsuit solely for the purpose of foreclosing the promissory notes and trust deeds. There is no legal basis whatsoever for concluding that Adair's actions with respect to these loan documents somehow bind Adair with respect to the Construction Agreement. (*See* Ruling, CP383).

Moreover, Adair has previously made it clear to Butler that its lawsuit was based solely on the PCB documentation. In fact, early in these proceedings, Butler acknowledged that the dispute resolution provisions in the Construction Agreement did not apply to Adair's claims because it was not asserting any claims under that contract. (Supp. Mem., at 4:1-4, CP395). Moreover, Adair did not know that Butler based his CPA counterclaim on construction activities covered by the Construction Agreement until Butler filed his response to Adair's motion for summary judgment. Until that time, Butler had not identified any basis for his counterclaim. (Answer, ¶¶ 9-10, CP47.) Nonetheless, Adair always took the position that, if Butler's CPA claims did include claims based on the Construction Agreement, those claims were subject to the mandatory arbitration provision in that contract. (Adair's Response to Motion to Compel, at 2:21-26 and 3:1-2, CP 461-462; Adair's Response to Motion to Continue, at 3:10-15, CP 469). For all of these reasons, it is clear that Adair did not waive its right to enforce the

arbitration provision of the Construction Contract regarding Butler's construction-related claims.

6. The Trial Court Did Not Err In Entering The Judgment And Supplemental Judgment In Favor Of Adair

For all of the foregoing reasons, the trial court properly determined that Adair was entitled to summary judgment in favor of its foreclosure claim against Butler, and dismissing Butler's CPA counterclaim. Accordingly, the trial court's General Judgment in favor of Adair was not error. Moreover, the trial court was well within its power by entering the supplemental judgment awarding attorneys' fees to Adair in connection with its foreclosure claim.¹¹ Because the trial court properly dismissed Butler's CPA claim, Butler is not entitled to attorneys' fees, nor is Butler entitled to any offsetting fee award.

IV. CONCLUSION

For all of the foregoing reasons, the trial court did not err by granting Adair's motion for summary judgment dismissing Butler's CPA counterclaim; the trial court did not err by entering judgment for Adair; and the trial court did not err by entering the supplemental judgment in favor of Adair. Accordingly, the Court should affirm the decision of the trial court in

¹¹ Butler acknowledges that Adair is entitled to an award of its attorneys' fees in connection with this claim. (App. Br., at 47).

its entirety.

V. STATEMENT REQUIRED BY RAP 18.1(a) and (b)

Adair seeks to recover its attorney fees on appeal. Adair is entitled to recover its attorney fees pursuant to the August 16, 2005 and May 23, 2006 promissory notes executed by Butler (collectively the "Notes"). The Notes were secured by trust deeds. Butler defaulted under the Notes and, therefore, Adair, as holder of the Notes, filed its action for breach of the Notes and for foreclosure of the trust deeds, and received the judgment which Butler appealed herein. Under the sections entitled "Attorney's Fees; Expenses" and "Successor Interests," the Notes provide that Butler agrees to pay Adair's collection costs, including its attorneys' fees and legal expenses on appeal. (August 15, 2005 Note, CP 63; May 23, 2006 Note, CP 97). Accordingly, Adair is entitled to recover its attorney fees and legal expenses incurred in connection with this appeal.

Dated this 3rd day of August, 2010.

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By 
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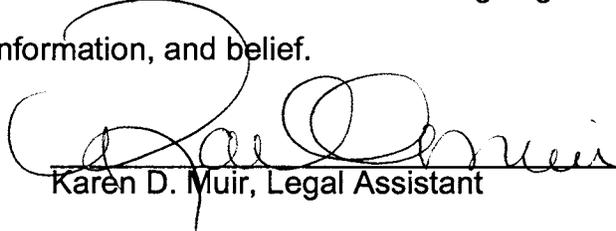
THE UNDERSIGNED certifies:

1. My name is Karen D. Muir. I am a citizen of Washington County, State of Oregon, over the age of eighteen (18) years and not a party to this action.

2. On August 3, 2010, I caused to be delivered, via **First Class Mail**, a copy of **Respondent Adair Homes, Inc.'s Brief** to the interested parties of record, addressed as follows:

Ben Shafton
Caron, Colven, Robinson & Shafton, PS
900 Washington Street, Suite 1000
Vancouver, WA 98660
Attorneys for Defendant-Appellant

I SWEAR UNDER PENALTY OF PERJURY that the foregoing is true and correct to the best of my knowledge, information, and belief.



Karen D. Muir, Legal Assistant

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