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DIVISION II  
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STATE OF WASHINGTON  
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No. 43155-6-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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JEFFERY AND RENEE KRUGER, a/k/a Zillow.com user  
“pugetsoundcruiser,” and the marital community comprised thereof, and  
PACIFIC COAST CONSTRUCTION GROUP, INC., a Washington  
corporation,

Appellants,

v.

JEFF DANIEL,

Respondent.

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APPELLANTS’ REPLY TO RESPONDENT’S BRIEF

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**TABLE OF CONTENTS**

I. INTRODUCTION ..... 1

II. ARGUMENT ..... 2

    A. Reviews of Real Estate Professionals on Consumer Websites Are Necessarily of Public Concern. ....2

        1. Uniform authority applies anti-SLAPP laws to consumer information, including reviews.....2

        2. California law supports this result. ....7

        3. The Legislature mandated that the anti-SLAPP law be construed broadly.....11

        4. Washington’s anti-SLAPP statute does not exempt speech about competitors. ....12

    B. Respondent Failed to Prove a Probability of Prevailing on the Merits by Clear and Convincing Evidence. ....14

        1. The allegedly libelous statements are not provably false. ....15

        2. Respondent failed to prove actual malice. ....18

        3. Respondent failed to show he suffered damages. ....21

        4. Respondent’s remaining claims lack merit. ....22

    C. The Trial Court Erred by Failing to Dismiss the Claims Under CR 12. ....24

    D. The Krugers Are Entitled to the Anti-SLAPP Law’s Mandatory Remedies. ....24

III. CONCLUSION..... 25

**TABLE OF AUTHORITIES**

|   | <b>Page(s)</b> |
|---|----------------|
| <b>WASHINGTON CASES</b>   |                |
| <i>Alpine Indus. Computers, Inc. v. Cowles Publ'g Co.</i> ,<br>114 Wn. App. 371 (2002) .....                  | 5              |
| <i>City of Spokane v. State, Dep't of Labor &amp; Indus.</i> ,<br>100 Wn. App. 805 (2000) .....               | 13             |
| <i>City of Yakima v. In'tl Ass'n of Fire Fighters, AFL-CIO, Local<br/>469</i> ,<br>117 Wn.2d 655 (1991) ..... | 12             |
| <i>Dunlap v. Wayne</i> ,<br>105 Wn.2d 529 (1986) .....  | 16, 17         |
| <i>Herron v. Tribune Publ'g Co.</i> ,<br>108 Wn.2d 162 (1987) .....   | 19             |
| <i>Kauzlarich v. Yarbrough</i> ,<br>105 Wn. App. 632 (2001) .....   | 19             |
| <i>Margoles v. Hubbart</i> ,<br>111 Wn.2d 195 (1988) .....  | 19             |
| <i>Mohr v. Grant</i> ,<br>153 Wn.2d 812 (2005) .....  | 12             |
| <i>Nuttall v. Dowell</i> ,<br>31 Wn. App. 98 (1982) .....   | 3              |
| <i>Rye v. Seattle Times Co.</i> ,<br>37 Wn. App. 45 (1984) .....  | 20             |
| <i>Schmalenberg v. Tacoma News, Inc.</i> ,<br>87 Wn. App. 579 (1997) .....                                    | 18             |
| <i>Short v. Demopolis</i> ,<br>103 Wn.2d 52 (1984) .....  | 23             |

|  |          |
|--|----------|
| <i>Silverhawk, LLC v. KeyBank Nat'l Ass'n</i> ,<br>165 Wn. App. 258 (2011) .....                                   | 13       |
| <i>State v. Black</i> ,<br>100 Wn.2d 793 (1984) .....  | 23       |
| <i>Vern Sims Ford, Inc. v. Hagel</i> ,<br>42 Wn. App. 675 (1986) .....   | 18, 19   |
| <i>Waechter v. Carnation Co.</i> ,<br>5 Wn. App. 121 (1971) .....  | 22       |
| <i>White v. State</i> ,<br>131 Wn.2d 1 (1997) .....  | 5, 6, 11 |
| <b>OTHER CASES</b>   |          |
| <i>Amerisure Ins. Co. v. Laserage Tech. Corp.</i> ,<br>2 F. Supp. 2d 296 (W.D.N.Y. 1998) .....                     | 17       |
| <i>Auvil v. CBS 60 Minutes</i> ,<br>800 F. Supp. 928 (E.D. Wash. 1992) .....                                       | 22       |
| <i>Bose Corp. v. Consumers Union of U.S., Inc.</i> ,<br>466 U.S. 485 (1984) .....                                  | 21       |
| <i>Browne v. Avvo, Inc.</i> ,<br>525 F. Supp. 2d 1249 (W.D. Wash. 2007) .....                                      | 16       |
| <i>Commodity Trend Serv., Inc. v. Commodity Futures Trading<br/>Comm'n</i> ,<br>149 F.3d 679 (7th Cir. 1998) ..... | 12       |
| <i>Connick v. Myers</i> ,<br>461 U.S. 138 (1983) .....   | 11       |
| <i>Consumer Justice Ctr. v. Trimedica Int'l, Inc.</i> ,<br>107 Cal. App. 4th 595 (2003) .....                      | 9        |
| <i>Davis v. Avvo, Inc.</i> ,<br>2012 WL 1067640 (W.D. Wash. Mar. 28, 2012) .....                                   | 3, 4     |

|   |          |
|---|----------|
| <i>Dex Media W., Inc. v. City of Seattle</i> ,<br>__ F.3d __, 2012 WL 4857200 (9th Cir. Oct. 15, 2012) .....                              | 12       |
| <i>Dible v. Haight Ashbury Free Clinics, Inc.</i> ,<br>170 Cal. App. 4th 843 (2009) .....   | 7        |
| <i>Eastwood v. Nat’l Enquirer, Inc.</i> ,<br>123 F.3d 1249 (9th Cir. 1997) .....  | 20       |
| <i>Gardner v. Martino</i> ,<br>2005 WL 3465349 (D. Or. Sept. 19, 2005) .....  | 6, 10    |
| <i>Gertz v. Robert Welch, Inc.</i> ,<br>418 U.S. 323 (1974).....  | 2, 15    |
| <i>Gilbert v. Sykes</i> ,<br>147 Cal. App. 4th 13 (2007) .....  | 7, 8, 10 |
| <i>Higher Balance, LLC v. Quantum Future Grp., Inc.</i> ,<br>2008 WL 5281487 (D. Or. Dec. 18, 2008) .....                                 | 6, 7, 10 |
| <i>Jackson v. Paramount Pictures Corp.</i> ,<br>68 Cal. App. 4th 10 (1998) .....  | 20       |
| <i>Makaeff v. Trump Univ., LLC</i> ,<br>2010 WL 3341638 (S.D. Cal. Aug. 23, 2010) .....   | 8        |
| <i>Mann v. Quality Old Time Serv., Inc.</i> ,<br>120 Cal. App. 4th 90 (2004) .....  | 9        |
| <i>New York Studio, Inc. v. Better Bus. Bureau of Alaska, Or. &amp; W.<br/>Wash.</i> ,<br>2011 WL 2414452 (W.D. Wash. June 13, 2011)..... | 4        |
| <i>NTP Marble, Inc. v. AAA Hellenic Marble, Inc.</i> ,<br>799 F. Supp. 2d 446 (E.D. Pa. 2011) .....                                       | 14       |
| <i>Rivero v. Am. Fed’n of State, Cnty. &amp; Mun. Emps., AFL–CIO</i> ,<br>105 Cal. App. 4th 913 (2003) .....                              | 8, 9, 10 |
| <i>Sandals Resorts Int’l Ltd. v. Google, Inc.</i> ,<br>925 N.Y.S.2d 407 (N.Y. App. Div. 2011) .....                                       | 17       |

|  |              |
|--|--------------|
| <i>Sedgwick Claims Mgmt. Servs., Inc. v. Delsman</i> ,<br>2009 WL 2157573 (N.D. Cal. July 17, 2009).....         | 8            |
| <i>St. Amant v. Thompson</i> ,<br>390 U.S. 727 (1968).....   | 20           |
| <i>State ex rel. Nixon v. QuikTrip Corp.</i> ,<br>133 S.W.3d 33 (Mo. 2004) .....                                 | 14           |
| <i>Steaks Unlimited, Inc. v. Deaner</i> ,<br>623 F.2d 264 (3d Cir. 1980).....                                    | 17           |
| <i>Sunshine Sportswear &amp; Elecs., Inc. v. WSOC Television, Inc.</i> ,<br>738 F. Supp. 1499 (D.S.C. 1989)..... | 17           |
| <i>Tener v. Cremer</i> ,<br>2012 N.Y. Misc. LEXIS 3721 (N.Y. Sup. Ct. July 16, 2012) .....                       | 17           |
| <i>Terry v. Davis Cmty. Church</i> ,<br>131 Cal. App. 4th 1534.....  | 10           |
| <i>Fireworks Restoration Co. v. Hosto</i> ,<br>371 S.W.3d 83 (Mo. Ct. App. 2012).....                            | 14           |
| <i>Traditional Cat Ass'n, Inc. v. Gilbreath</i> ,<br>118 Cal. App. 4th 392 (2004) .....                          | 10           |
| <i>Weinberg v. Feisel</i> ,<br>110 Cal. App. 4th 1122 (2003) .....   | 11           |
| <i>Wilbanks v. Wolk</i> ,<br>121 Cal. App. 4th 883 (2004) .....  | 8, 9, 10, 11 |
| <b>OTHER STATUTES</b>  |              |
| Cal. Civ. Proc. Code § 425.17 .....  | 13           |
| RCW 4.24.525 .....   | 3, 14        |
| RCW 18.85, 18.86 <i>et seq.</i> .....  | 6            |

**RULES**

RAP 18.9.....25

CR 12 .....2, 24

**CONSTITUTIONAL PROVISIONS**

U.S. Const., Amend. I.....2, 12, 16, 22

**OTHER AUTHORITIES**

S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010).....11

Robert D. Sack, *Protection of Opinion under the First Amendment: Reflections on Alfred Hill, "Defamation and Privacy Under the First Amendment,"* 100 Colum. L. Rev. 294 (2000).....16

8A Stuart M. Speiser et al., *The American Law of Torts* (West 2011) .....16

## I. INTRODUCTION

Respondent Jeff Daniel's brief tries to cloud the record with factual disputes and cites inapplicable law. Undisputed facts and applicable law required the trial court to dismiss his claims, which are based on Appellant Jeffery Kruger's online review about Mr. Daniel's practices as a real estate agent. The review was published, if at all, for one business day. This cannot form the basis for a libel or any other claims.

Courts have unanimously applied anti-SLAPP laws (including Washington's) to claims based on reviews by their angry subjects because consumer information, by its nature, concerns the public. These cases, combined with the Legislature's mandate that the statute be "construed liberally," required the trial court to apply it here. Mr. Daniel attempts to distract the Court by claiming Mr. Kruger's speech is commercial (it is not) and citing three anti-SLAPP tests from California that even that state's courts have rejected in the context of consumer information.

Finding the anti-SLAPP statute applicable did not itself require dismissal of Mr. Daniel's claims. Instead, it required him to prove, by clear and convincing evidence, a probability of prevailing on the merits. He did not. Above all, he failed to show the review is provably false. His claims are based on the review's alleged implication that he is "dishonest." Modern libel law does not permit claims premised on pure opinions whose

basis is disclosed. The review adequately describes the basis for Mr. Kruger's opinion, which, in any event, amounts to a claim of aggressive salesmanship. Mr. Daniel focuses on law that predates the opinion doctrine, rooted in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Mr. Daniel also failed to show that Mr. Kruger acted with actual malice or that the review caused him damage. The actual malice standard requires proof that the speaker actually entertained serious doubts about the truth of his statements. There is no evidence of this here. Instead, three sources undisputedly told Mr. Kruger they believed Mr. Daniel was unethical, and Mr. Kruger told Mr. Daniel this *before* he wrote the review.

The trial court should have dismissed the claims on this basis. It should also have dismissed them under Rule 12(c) because the Complaint fails to specify the allegedly libelous statements, a First Amendment requirement. This Court should dismiss the lawsuit, award the Krugers their fees, and impose the anti-SLAPP statute's mandatory remedies.

## **II. ARGUMENT**

### **A. Reviews of Real Estate Professionals on Consumer Websites Are Necessarily of Public Concern.**

#### **1. Uniform authority applies anti-SLAPP laws to consumer information, including reviews.**

Mr. Daniel does not dispute the essential facts relevant to application of the anti-SLAPP statute. First, the review contained

statements about Mr. Daniel's qualifications as a real estate broker, a profession regulated extensively by the state to ensure the "welfare of the general public." App. Br. at 17 (citing *Nuttall v. Dowell*, 31 Wn. App. 98, 108 (1982)). Second, Mr. Kruger posted the review to a popular real estate website, Zillow.com, designed to "empower consumers with information about real estate," including ratings for agents, "an incredibly useful tool to help consumers choose an agent." CP 210.

From these facts alone, the trial court should have applied the anti-SLAPP statute. The statute applies to lawsuits that target an act involving public participation and petition, defined to include several subcategories of speech. RCW 4.24.525(2). Here, Mr. Kruger's speech falls within subsections (d) and (e), statements "made ... in a ... public forum in connection with an issue of public concern," and "conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public concern." RCW 4.24.525(2). Mr. Daniel disputes only that Mr. Kruger's statements are a matter of public concern.

But courts have unanimously concluded that consumer information is a matter of public concern, including statements about a single company or professional by another individual. App. Br. at 14-16 (citing cases).

One case, *Davis v. Avvo, Inc.*, is directly on point. 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012). There, a lawyer complained that a

rating website, Avvo.com, had misstated his practice area and address and used a photograph without his permission. *Id.* at \*2. His claim was premised on a single profile of one professional on the Avvo.com website, just as *this* lawsuit is based on a single review of one professional on a rating website. The court had “no difficulty” finding the *entire* Avvo site is “an action involving public participation, in that it provides information to the general public which may be helpful to them in choosing a ... lawyer” where “members of the general public may participate in the forum by providing reviews of an individual doctor or lawyer on his or her profile page.” *Id.* at \*3. *See also New York Studio, Inc. v. Better Bus. Bureau of Alaska, Or. & W. Wash.*, 2011 WL 2414452, at \* 4 (W.D. Wash. June 13, 2011) (press release warning consumers about plaintiff child talent agency’s deceptive practices was matter of public concern). In this respect, Zillow.com is the same as Avvo.com and is an action involving public participation.

Respondent does not discuss *New York Studios* at all and mentions *Davis* only to argue that not all statements made on Avvo.com or any website are necessarily of public concern. Resp. Br. at 17. Mr. Kruger does not dispute either point; instead, he claims only that the portions of Zillow.com that provide consumer information (like the profiles on Avvo.com) *are* matters of public concern. This plainly includes reviews.

By finding otherwise, the trial court effectively held that *no* negative review is of public concern because all may involve a “personal dispute.”

Mr. Daniel gives short shrift to the other two Washington cases the Krugers cited to show the statements involve a matter of public concern. The court’s decision in *Alpine Indus. Computers, Inc. v. Cowles Publ’g Co.* did not depend on the fact that an article about software piracy “involved a large corporation” and a retailer “found guilty of selling counterfeit software.” Resp. Br. at 19. Instead, the court found, although “[v]iewed narrowly, the story pertains to a private dispute between two business entities ... [it] touches on a matter of public importance, software piracy .... [T]he retail distribution of pirated software is a matter of acute importance to general consumers.” 114 Wn. App. 371, 393 (2002). Here, too, the practice of real estate agents is an important matter to consumers.

Mr. Daniel brushes aside the Washington Supreme Court’s decision in *White v. State*, 131 Wn.2d 1, 12 n.5 (1997), by claiming the statement there—a nurse’s report about patient abuse by one individual—was “clearly” a matter of public concern. Resp. Br. at 19-20. So, too, is a consumer review about an individual providing services to the public. In *White*, the court found the “public concern over proper care of vulnerable nursing home patients is reflected in RCW 70.124”; here, too, the “public concern” over real estate professionals is reflected in Washington statutes.

RCW 18.85, 18.86 *et seq.* In *White*, it was irrelevant that the abuse allegation was “without merit”; here, too, it is irrelevant that Mr. Kruger’s review is allegedly false. Finally, in *White*, the “history of animosity” between the nurse and abuser did “not diminish the concern the public would have in this matter”; similarly, a prominent real estate agent’s practices are of public concern, irrespective of the parties’ dispute.

Cases outside Washington support the same result. In *Gardner v. Martino*, 2005 WL 3465349 (D. Or. Sept. 19, 2005), a woman who bought a personal watercraft from a shop in rural Oregon contacted a radio show to complain about its refusal to issue her a refund. The court—construing Oregon’s anti-SLAPP statute, which, like Washington’s, was modeled after California’s—found that “issues of consumerism, including complaints about products and services, are issues of public interest,” including the customer’s complaints. *Id.* at \*7. In *Higher Balance, LLC v. Quantum Future Grp., Inc.*, 2008 WL 5281487 (D. Or. Dec. 18, 2008), the plaintiff, a meditation institute, filed a lawsuit over postings in an online forum about the plaintiff’s products and criminal charges against its co-founder. The court rejected arguments that the statements were “of interest only to a limited, definable portion of the public” outside the context of an “ongoing controversy.” *Id.* at \*4. It found there was “no doubt that the statements here were made in connection with an issue of

public interest, specifically, the quality of [the plaintiff's] products and services developed by [its co-founder]." *Id.* at \*5.

Significantly, none of these cases discusses the intent of the speaker. The Krugers do not "argue that intent and motive are irrelevant to ... defamation claims in general." Resp. Br. at 27. Although Mr. Kruger *did* genuinely intend to inform consumers,<sup>1</sup> the trial court needed not visit this issue: His motive is irrelevant to deciding whether the anti-SLAPP statute's protections apply. In *Dible v. Haight Ashbury Free Clinics, Inc.*, 170 Cal. App. 4th 843, 851 (2009), the California Court of Appeal unequivocally found that "the motive of the communicator does not matter" so long as "the actionable communication fits within the definition contained in the [anti-SLAPP] statute." Mr. Daniel fails to meaningfully distinguish this case.

## **2. California law supports this result.**

California cases require the same result. *See, e.g., Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23-24 (2007) (website describing "nightmare" results from plaintiff, a plastic surgeon, "contribute[d] to the public

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<sup>1</sup> Respondent repeatedly refers to the review as "fake" because, he argues, it claims the reviewer toured a home with Mr. Daniel in 2011. In fact, as the Krugers have explained, these were fields that Zillow.com required Mr. Kruger fill out, CP 14, the review does not state Mr. Kruger was looking for a home, and in any event, Mr. Kruger undisputedly *did* tour a home with Mr. Daniel. Resp. Br. at 3. Respondent's brief is riddled with more errors that the Krugers do not address because they are legally irrelevant. *See, e.g.,* Resp. Br. at 7 (citing to affidavit that contains hearsay about Mr. Kruger's verbal statements).

debate” about plastic surgery); *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 890 (2004) (applying statute to warning to “[b]e very careful when dealing” with plaintiff, a viatical settlement broker, because he “provided incompetent advice,” and was “unethical”); *Makaeff v. Trump Univ., LLC*, 2010 WL 3341638, at \*2-4 (S.D. Cal. Aug. 23, 2010) (customer’s complaints about plaintiff); *Sedgwick Claims Mgmt. Servs., Inc. v. Delsman*, 2009 WL 2157573, at \*8 (N.D. Cal. July 17, 2009) (same).

Rather than meaningfully tackle this overwhelming authority,<sup>2</sup> Mr. Daniel instead focuses on three tests purportedly used by California courts to construe the anti-SLAPP statute. Resp. Br. at 20-23. But those courts do not dogmatically follow any one test. In fact, the California Court of Appeal refused to do so in *Wilbanks*. Recognizing that statements criticizing a single viatical settlement broker “do not meet” the test set forth in *Rivero v. American Fed’n of State, County & Municipal Employees, AFL–CIO*, 105 Cal. App. 4th 913, 924 (2003), it found:

Wolk’s comments on plaintiffs’ business practices *do not* meet these criteria, as plaintiffs are not in the public eye, their business practices do not affect a large number of people and their business practices are not, in and of themselves, a

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<sup>2</sup> Mr. Daniel makes no attempt to distinguish *Gilbert*. He critiques *Makaeff* as “unpublished” with “little precedential value,” Resp. Br. at 26 n.10, even though the Krugers do not argue it is binding. He claims *Sedgwick Claims* is different because the customer there “created numerous blogs” about the plaintiff, but under this theory, Mr. Kruger’s statements would be of public concern if he had distributed them more broadly.

topic of widespread public interest.  
*Consumer information, however, at least  
when it affects a large number of persons,  
also generally is viewed as information  
concerning a matter of public interest.*

121 Cal. App. 4th at 898 (emphasis added).

Mr. Daniel tries to distinguish *Wilbanks* because there, the defendant had written broadly about the same industry, quoting the court as saying “[t]he statements made by Wolk were not simply a report of one broker’s business practices, of interest only to that broker and to those who had been affected by those practices.” Resp. Br. at 25-26. But he omits the next sentence, which makes clear that the statements, even though they *were* about one broker, were nonetheless protected: “Wolk’s statements were a warning not to use plaintiffs’ services. In the context of information ostensibly provided to aid consumers choosing among brokers, the statements, therefore, were directly connected to an issue of public concern.” 121 Cal. App. 4th. at 900.<sup>3</sup>

Even if the *Rivero* test did apply, it is satisfied here because the review “involve[s] conduct that could directly affect large numbers of

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<sup>3</sup> Respondent relies on two cases already distinguished by the Krugers. In *Consumer Justice Center v. Trimedica International, Inc.*, 107 Cal. App. 4th 595 (2003), the defendant made statements about *its own* product in an advertisement. Mr. Kruger made no statements promoting his own services. In *Mann v. Quality Old Time Service, Inc.*, 120 Cal. App. 4th 90 (2004), individuals posed as company employees to make disparaging comments in an effort to lure business to themselves. The Krugers made no such effort because they do not (like Mr. Daniel) sell homes.

people beyond the direct participants.” Resp. Br. at 20 (quoting *Rivero*, 105 Cal. App. 4th at 924). Courts have applied this principle to statements concerning professionals, even those who operate in discrete, small, or niche markets—not just the viatical settlement broker in *Wilbanks*, but also the personal watercraft seller in *Gardner*, meditation institute in *Higher Balance*, and plastic surgeon in *Gilbert*. See also *Traditional Cat Ass’n, Inc. v. Gilbreath*, 118 Cal. App. 4th 392, 397 (2004) (statute applied to statements concerning only the cat breeding community); *Terry v. Davis Cmty. Church*, 131 Cal. App. 4th 1534, 1547 (2005) (statute applied to church’s report about plaintiff’s conduct with minor, circulated to 100 individuals; “[W]hether ... an adult who interacts with minors in a church youth program has engaged in an inappropriate relationship with any of the minors is clearly a matter of public interest.”).

Mr. Daniel is no different than these plaintiffs. He has described himself as “the top selling real estate professional in Ocean Shores every year since 2008,” who “also sells homes and properties throughout Washington State,” and has been “regularly featured in various local newspapers and guides.” CP 20 ¶ 5. He *now* characterizes himself as “only a single real estate agent in a small market.” Resp. Br. at 21. Whatever the truth, statements about his practices are plainly of interest to a large segment of the Washington public, i.e., residents of Ocean Shores.

Mr. Daniel points to two more tests to argue the anti-SLAPP law does not apply—those outlined in *Weinberg v. Feisel*, 110 Cal. App. 4th 1122 (2003) and *Connick v. Myers*, 461 U.S. 138 (1983). Resp. Br. at 21-23. He cites to no cases advocating their use. Moreover, *Weinberg* relied almost entirely on cases before 1997, when California amended its statute to reject cases narrowly construing it.<sup>4</sup> The *Connick* test supports the Krugers' position: It was that test the *White v. State* court used to find that an allegation of patient abuse by a nurse—even if meritless and made out of spite—concerned the public. 131 Wn.2d 1 at 12.

Thus, under well-established law, Mr. Kruger's review was a matter of public concern because it provided information to consumers.

**3. The Legislature mandated that the anti-SLAPP law be construed broadly.**

If there were any doubt about this conclusion, the Legislature directed that the anti-SLAPP statute be “construed liberally.” S.B. 6395, 61st Leg., Reg. Sess. (Wa. 2010). “A policy requiring liberal construction is a command that the coverage of an act's provisions be liberally

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<sup>4</sup> *Weinberg* found that a token collector's claim that another collector stole one of his coins was private. 110 Cal. App. 4th 1122. The defendant had engaged in a “campaign to oust plaintiff from the token collecting avocation,” orchestrated his expulsion from an association, and led a letter-writing campaign in which a writer “could say almost whatever he wanted ... without fear of any legal implications.” *Id.* at 1128-29. As *Wilbanks* stated, *Weinberg* “did not consider whether the publications might have been a kind of warning to consumers,” and “the defendant's accusations were not part of a general broadcast, but were made only to a few collectors.” 121 Cal. App. 4th at 900 n.6. Here, the statements were made on a website designed to provide consumer information.

construed and that its exceptions be narrowly confined.” *City of Yakima v. In’tl Ass’n of Fire Fighters, AFL-CIO, Local 469*, 117 Wn.2d 655, 670 (1991). The trial court erred by narrowly construing the anti-SLAPP statute’s scope, despite ample precedent counseling its applicability here.

This is particularly important given that Washington courts favor early dismissal of meritless libel claims. *Mohr v. Grant*, 153 Wn.2d 812, 821 (2005) (“summary judgment plays a particularly important role in defamation cases”). The Krugers do not argue, as Mr. Daniel suggests, that a court deciding an anti-SLAPP motion must weigh the evidence at all, let alone more favorably to the moving party. Resp. Br. at 29-30. Instead, they note that the proper early resolution of a libel claim—including by applying the anti-SLAPP statute—is particularly significant given the potential chill on free speech.<sup>5</sup>

**4. Washington’s anti-SLAPP statute does not exempt speech about competitors.**

This principle also requires rejecting Mr. Daniel’s attempt to create out of whole cloth an exception from the anti-SLAPP law for speech about competitors. Resp. Br. at 15-17. The court should not consider this claim

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<sup>5</sup> Mr. Daniel argues that the Constitution provides “no protection for misleading commercial speech.” Resp. Br. at 12-13. Of course, the Krugers dispute that the review was misleading. But more importantly, under hornbook First Amendment law, “commercial speech” is “speech which does no more than propose a commercial transaction.” *Dex Media W., Inc. v. City of Seattle*, \_\_ F.3d \_\_, 2012 WL 4857200 (9th Cir. Oct. 15, 2012). The review does not propose a transaction. See *Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm’n*, 149 F.3d 679, 686 (7th Cir. 1998) (cataloguing cases stating that reviews are not commercial speech).

since Mr. Daniel raises it for the first time on appeal. *Silverhawk, LLC v. KeyBank Nat'l Ass'n*, 165 Wn. App. 258, 265 (2011) (“[a]n argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal”). Even so, this argument assumes the parties are competitors and relies on a California statutory exemption, first discussed in a now-dead line of cases and then adopted by the state’s legislature.

Of course, Mr. Daniel does not argue that Mr. Kruger’s speech falls within California’s express exemption, which makes the anti-SLAPP statute inapplicable to claims brought against “a person primarily engaged in the business of selling or leasing goods or services” if the statement “consists of representations of fact about that person’s or a business competitor’s operations, goods or service” made “for the purpose of” promoting the person’s goods or services, and “[t]he intended audience is an actual or potential buyer or customer.” Cal. Civ. Proc. Code § 425.17(c). Washington’s law does not contain such an exemption, and the Legislature’s failure to adopt one implies an intent *not* create one. *See City of Spokane v. State, Dep’t of Labor & Indus.*, 100 Wn. App. 805, 815 (2000) (legislature’s omission of phrase contained in statute from which it borrowed suggested intent for different construction).

Moreover, there is no evidence suggesting the parties are competitors, nor did the Krugers concede this. Mr. Daniel appears to have

abandoned his argument that Ms. Kruger's license to practice real estate is evidence of competition, given that she undisputedly used the license (which she no longer holds) to access listings, *not* show homes. CP 91; CP 122-27, 209, 268. Instead, he claims that anyone who operates in the same market is a competitor. Resp. Br. at 15. The Krugers and Mr. Daniel do not operate in the "same market" any more than a manufacturer and its supplier do. The Krugers build houses, and Mr. Daniel sells them. Homebuyers do not choose between the Krugers and Mr. Daniel and previously engaged both of them at the same time.<sup>6</sup> In short, Mr. Daniel and the Krugers do not compete for the same business.<sup>7</sup>

**B. Respondent Failed to Prove a Probability of Prevailing on the Merits by Clear and Convincing Evidence.**

The parties agree that once a court decides to apply the anti-SLAPP statute, the non-moving party must prove, by clear and convincing evidence, a probability of prevailing on the merits, as on summary judgment. RCW 4.24.525(4)(b). The parties also agree a libel plaintiff must show the statements were false, unprivileged, made with the requisite

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<sup>6</sup> The other two cases Mr. Daniel cites are remarkable only because they have nothing to do with anti-SLAPP statutes. In *Fireworks Restoration Co. v. Hosto*, 371 S.W.3d 83 (Mo. Ct. App. 2012), the court decided that a jury properly awarded reputational damages to a prevailing libel plaintiff. In *NTP Marble, Inc. v. AAA Hellenic Marble, Inc.*, 799 F. Supp. 2d 446 (E.D. Pa. 2011), the court declined to dismiss a counterclaim that the plaintiff had libeled the defendants by saying they had written fake reviews.

<sup>7</sup> By contrast, in the case Respondent cites, *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33 (Mo. 2004), the court found that parties who both sold fuel were competitors.

level of fault, and caused damage. Resp. Br. at 31. Because Mr. Daniel failed to offer any evidence on three of these four elements, his claims fail.

**1. The allegedly libelous statements are not provably false.**

Respondent claims the Krugers “ignore decades, if not centuries, of jurisprudence showing that allegations of professional dishonesty and unethical behavior are provably false.” Resp. Br. at 32-33. If this lawsuit had taken place fifty years ago, he might be right, and the numerous cases he cites, *id.* at 33, might be persuasive. But it did not, and modern defamation law recognizes that statements of pure opinion—such as the claim that someone is “dishonest”—are not actionable.

In the 1974 landmark case *Gertz v. Robert Welch, Inc.*, the Supreme Court declared that “there is no such thing as a false idea.” 418 U.S. 323, 339 (1974). That statement transformed the case law on libel claims premised on opinions. The Washington Supreme Court explained:

Reasoning from [the *Gertz*] *dicta*, the Restatement concluded:

A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion  
....

We believe the rule of Restatement § 566 should be adopted. It is unnecessary to reach the issue of constitutional protection of

statements of opinion on private affairs. Common law principles are sufficient to support the conclusion that statements of “pure” opinion should be nonactionable.

*Dunlap v. Wayne*, 105 Wn.2d 529, 538 (1986).

Washington is not alone. As Judge Robert Sack, author of a major libel treatise, has noted, “courts the length and breadth of the country came unanimously to the view that ... opinions are as a matter of constitutional law not actionable.” Robert D. Sack, *Protection of Opinion under the First Amendment: Reflections on Alfred Hill, “Defamation and Privacy Under the First Amendment,”* 100 Colum. L. Rev. 294, 313-14 (2000). *See also* 8A Stuart M. Speiser et al., *The American Law of Torts* § 29:15 (West 2011) (*Gertz’s* “utterance may technically have been ... *dicta*, but it has been crystallized into a holding ... by a myriad of ... courts.”).

The nearly two dozen cases the Krugers cited in their Opening Brief were all decided after this major shift in the law. *See* App. Br. at 22-27. They find the First Amendment protects the following statements: that someone was “lying,” “dishonest,” “unethical,” “immoral,” or that his acts were “sometimes illegal,” “sleazy,” and “unethical.” *Id.* (citing cases). They also underscore this importance in reviews, which “are, by their very nature, subjective and debatable.” *Browne v. Avvo, Inc.*, 525 F. Supp. 2d 1249, 1252 n.1 (W.D. Wash. 2007). App. Br. at 23 (citing cases). As one

court stated, “readers give less credence to allegedly defamatory remarks published on the Internet than to similar remarks made in other contexts ... [T]he anonymity ... makes it more likely that a reasonable reader would view its assertions with some skepticism and tend to treat its contents as opinion rather than fact.” *Tener v. Cremer*, 2012 N.Y. Misc. LEXIS 3721, at \*13 (N.Y. Sup. July 16, 2012) (quoting *Sandals Resorts Int’l Ltd. v. Google, Inc.*, 925 N.Y.S.2d 407 (N.Y. App. 2011)).

Respondent cites outdated Washington law and a handful (not “thousands,” Resp. Br. at 34) of inapposite decisions. In *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980), the statement that a company deceived customers about the price and quality of its products could be provably false; there was no generic allegation of dishonesty or deception. *Amerisure Ins. Co. v. Laserage Tech. Corp.*, 2 F. Supp. 2d 296 (W.D.N.Y. 1998) discussed whether an insurance company was obligated to provide coverage to an insured. Even in *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499 (D.S.C. 1989), the court found the terms “scam” and “rip-off” were provably false only when made in a news broadcast purporting to investigate and objectively state facts.

Mr. Daniel also notes that “an expression of opinion can be defamatory if it implies that defamatory facts are the basis of the opinion.” Resp. Br. at 36-37 (citing, among other cases, *Dunlap*, 105 Wn.2d 529).

But again, the review discloses its basis, i.e., that Mr. Daniel points out the flaws of homes for which he is not the listing agent. App. Br. at 25-26. Again, consumers could readily disagree whether such behavior is “dishonest” or merely aggressive. Because the review states the facts upon which it is based—and Mr. Daniel does not allege they are defamatory—the opinion doctrine bars his claims.<sup>8</sup>

Mr. Daniel continues to rely upon *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675 (1986). But again, that decision, also decided before the bulk of modern opinion doctrine, states only that “[a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected.” *Id.* at 683. There, the defendant claimed that a car dealership and its salesperson were “thieves” and threatened to tell others unless the plaintiffs paid him nearly \$60,000. The review here does not accuse Mr. Daniel of committing any crimes, nor did the Krugers try to extort Mr. Daniel in exchange for silence.

## **2. Respondent failed to prove actual malice.**

The actual malice standard is applicable for two reasons. First, Mr. Kruger’s statements were about a matter of public concern. *See* App Br. at 27. Second, he is a limited purpose public figure. In this respect, there

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<sup>8</sup> Again, even if the review appears to be from a buyer rather than a builder (which it does not), the gist is the same, meaning it is not actionable. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 598 (1997). Mr. Daniel does not rebut this.

is no dispute that Mr. Daniel actively sought out a position in the public as an honest and trustworthy expert on real estate in Ocean Shores. CP 157, 165, 168, 170, 174, 176. These efforts are not confined to “marketing materials.” Resp. Br. at 39. Instead, Mr. Daniel has been featured on radio and in newspapers and guides, and even spoken publicly. CP 20 ¶ 5; CP 27; CP 179-83; CP 540. He is far different than the *Vern Sims* plaintiffs, who only engaged in routine advertising. 42 Wn. App at 679.

Mr. Daniel has failed to show actual malice by clear and convincing evidence. Rather than discuss the authority in the Krugers’ opening brief, he cites a single Washington case to argue a court may infer actual malice from circumstantial evidence, such as the defendant’s hostility, knowledge that a source is hostile, or a failure to investigate. Resp. Br. at 39-40 (citing *Margoles v. Hubbart*, 111 Wn.2d 195 (1988)). Of course, that does not mean that any one of those factors shows actual malice, since a court must investigate the entire record to decide whether Mr. Kruger “did in fact [entertain] serious doubts as to the truth of his publication.” *Herron v. Tribune Publ’g Co.*, 108 Wn.2d 162, 171 (1987); *Kauzlarich v. Yarbrough*, 105 Wn. App. 632, 647 (2001) (“circumstantial evidence of a possible malicious motive is a far cry from proving with clear and convincing evidence that [the defendant] knew his statement was false or was reckless in regard to its truth or falsity”).

Applying this rigorous standard, courts have refused to find actual malice even where: a reporter's two principal sources were hostile to the plaintiff, *Rye v. Seattle Times Co.*, 37 Wn. App. 45, 54 (1984); the defendant televised a rival's statement accusing a union president of bribery, relying solely on the statement without independent investigation, *St. Amant v. Thompson*, 390 U.S. 727, 730 (1968); a newspaper failed to call the plaintiff's representatives, ask witnesses to corroborate the story, or ask for details about the source's knowledge, and instead took a "see-no-evil, hear-no-evil" tack, *Eastwood v. Nat'l Enquirer, Inc.*, 123 F.3d 1249, 1254-55 (9th Cir. 1997); and a program reported on authorities' search for a videotape showing Michael Jackson fondling a young boy, where the source fabricated the story, the prosecutor refused to confirm the claim, and a witness testified she told the reporter the story "sounds like B.S.," to which the reporter responded "Yeah, that's what I thought." *Jackson v. Paramount Pictures Corp.*, 68 Cal. App. 4th 10, 24 (1998).

The evidence here falls far short of the actual malice standard. Mr. Daniel does not dispute that three independent sources, including a former customer of Mr. Daniel's<sup>9</sup> and another real estate agent, told Mr. Kruger

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<sup>9</sup> Mr. Daniel makes much of the fact that Mr. Taber "provided the declaration only after the lawsuit was commenced," Resp. Br. at 9, but of course, no declaration was needed before that. Mr. Daniel also argues that Mr. Kruger stated he was "honest" and "ethical," Resp. Br. at 40 (citing CP 576), but he wrote that message (which appears at CP 570) before others reported their contrary opinions to him. See CP 138-39 ¶¶ 9.14-9.20; 219.

they believed Respondent pushed customers to purchase houses he had listed. CP 135 ¶¶ 4-8; CP 119 ¶ 28; CP 111 ¶¶ 5-8; 138-39 ¶¶ 9.14-9.20, 219. He also does not dispute that Mr. Kruger told Mr. Daniel himself that other agents believed he “regularly act[s] in ways that aren’t in the best interest of your clients/listers.” CP 242. In short, the evidence in the trial court suggested Mr. Kruger *believed* his statements, *not* that he knew they were false or acted with reckless disregard whether they were false.

Mr. Daniel does not dispute that the trial court should have addressed actual malice because it is a question of law, when, in fact, the court stated, “I just don’t see how I can conclude [Mr. Kruger’s] subjective state of mind.” RP at 11:1-2. *See also Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 498 (1984) (reversing actual malice finding; faulting trial court for failing to identify “any independent evidence that [speaker] realized the inaccuracy of the statement, or entertained serious doubts about its truthfulness”).

### **3. Respondent failed to show he suffered damages.**

Presumed damages are unavailable here because, the parties agree, they are impermissible so long as the statements involve a matter of public concern and are not libelous *per se*. Resp. Br. at 40-41.

Nor has Mr. Daniel provided evidence of actual damages. Although Mr. Daniel claims he has suffered reputational damages and

“pecuniary loss, personal humiliation, and loss of standing in the community,” Resp. Br. at 42, he has provided no evidence of them. Instead, he rests on one affidavit from someone who said she “understood” the review could be “harmful” to Mr. Daniel’s reputation. CP 635-36.<sup>10</sup> The affidavit does not claim the review caused such harm, nor attempt to quantify it. And such a result is unlikely given that the review was published, if at all, for one business day. *See* App. Br. at 9-10.<sup>11</sup>

#### **4. Respondent’s remaining claims lack merit.**

Dismissal of Mr. Daniel’s remaining claims is also appropriate.

*First*, as Mr. Daniel fails to dispute, the failure of a libel claim necessarily requires dismissal of all other claims premised on the same speech. *See* App. Br. at 32-33 (citing numerous cases finding that First Amendment protections are not confined to libel claims and apply to all claims that target speech, and several cases dismissing unfair competition and tortious interference claims based on protected opinions).

*Second*, as three courts have already found, a review on a website is not an act in “trade” or “commerce” under the Consumer Protection

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<sup>10</sup> Respondent misstates the holding in *Waechter v. Carnation Co.*, 5 Wn. App. 121 (1971). The court did not find damages proper where one person heard the statement, but instead for that and other statements. *Id.* at 128. *Waechter* is also from the same era as the rest of Mr. Daniel’s cases and “is no longer good law for its treatment of defamation.” *Auvil v. CBS 60 Minutes*, 800 F. Supp. 928, 937 n.7 (E.D. Wash. 1992).

<sup>11</sup> Zillow did not “confirm[] that March 5 was the date of publication.” Resp. Br. at 6 n.3. An email from Zillow states only that the review was “written” that day. CP 627. And Mr. Kruger received a message stating that Zillow had rejected the review. CP 221.

Act. App. Br. at 34-35. Neither case Mr. Daniel cites rebuts this point. In *State v. Black*, 100 Wn.2d 793, 803 (1984), the court did *not* find that disparagement of a real estate broker's services could violate the CPA, but instead that even if it could, the plaintiff had failed to show a violation. *Short v. Demopolis*, 103 Wn.2d 52 (1984) found the CPA could apply to a client's claim regarding billing of legal fees. Mr. Daniel also cites the Federal Trade Commission's alleged finding that reviews can be unfair competition, but Washington courts use a "narrower interpretation of the words 'unfair method of competition' than ... federal courts." *Black*, 100 Wn.2d at 802. Nor is Mr. Kruger's review an "advertisement."

*Third*, even if the review *was* made in trade or commerce, any damages are too speculative. The question is not whether Mr. Daniel is a "potential victim" of the review. Resp. Br. at 45. Rather, the question is whether consumers are the most direct victims (because they, if anyone, were deceived), and whether Mr. Daniel's self-serving speculation that a consumer could have been deceived and selected a different agent as a result is too remote to state a claim for violation of the CPA. Again, as three courts have already found, it is. App. Br. at 35-36.

*Finally*, the parties agree on the elements of tortious interference, but again, Mr. Daniel has not shown, by clear and convincing evidence, that the Krugers interfered with any business expectancy for an improper

purpose (informing consumers about a real estate agent's practices is not an "improper purpose") nor that he suffered any damages. That emotional distress damages might be available does not mean they are presumed. Here, Mr. Daniel has provided no evidence of them.

**C. The Trial Court Erred by Failing to Dismiss the Claims Under CR 12.**

Mr. Daniel does not dispute that so long as this Court finds the review is a protected opinion, dismissal is appropriate under CR 12(c). Instead, he claims only that dismissal under Rule 12 was inappropriate because he adequately pled the allegedly libelous statements. He tries to distinguish only one of the numerous cases the Krugers cited, which uniformly require a plaintiff to specify such statements so as not to chill speech. App. Br. at 38-39. Mr. Daniel's brief is an example for why this rule exists. He now claims that Mr. Kruger's use of the terms "push" and "ploy" are defamatory. The trial court should have dismissed the Complaint on this basis alone.

**D. The Krugers Are Entitled to the Anti-SLAPP Law's Mandatory Remedies.**

Mr. Daniel does not dispute that the Krugers are entitled to the anti-SLAPP statute's mandatory remedies—attorneys' fees and \$10,000 in statutory damages per movant—if this Court reverses the trial court's decision. Thus, the Krugers renew their request for this relief.

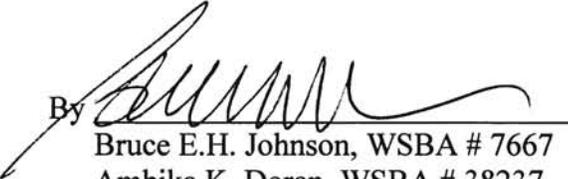
Instead, Mr. Daniel now argues that this Court should award the anti-SLAPP statute's remedies to him. He has waived this argument by failing to cross-appeal the trial court's denial of that relief. CP 26. Moreover, both the anti-SLAPP statute (as to non-moving parties) and RAP 18.9 allow a fee award only upon a showing of frivolousness, which, as the trial court properly found, is obviously not the case here.

### III. CONCLUSION

Appellants ask this Court to reverse the trial court's order, dismiss this action, and award them their attorneys' fees and statutory damages.

RESPECTFULLY SUBMITTED this 5th day of November, 2012.

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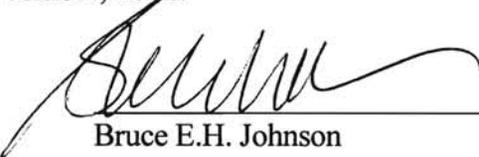
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Declared under penalty of perjury under the laws of the state of  
Washington this 5th day of November, 2012.

  
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Bruce E.H. Johnson