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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

JEFFREY 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.

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case arises out of a corporation's attempt to drive a competitor out of the Grays Harbor County real estate marketplace by distributing a defamatory statement online in the form of a fake negative customer testimonial. The President and Vice-President of Appellant Pacific Coast Construction Group, Jeffrey and Reneé Kruger ("PCCG/Krugers"), at one time the largest real estate developer in Ocean Shores, hired Respondent Jeff Daniel ("Daniel") to sell their properties. A dispute arose and Daniel stopped acting as the Krugers' agent. Approximately a year later, PCCG/Krugers disguised themselves online as potential home buyers and wrote statements about Daniel and another pair of local brokers/agents, alleging unethical and dishonest behavior.

After Daniel brought suit for defamation, unfair competition/business practices, and intentional interference with business relationships, PCCG/Krugers filed a special motion to strike under RCW § 4.24.525 (the "anti-SLAPP" statute). The trial court found that PCCG/Krugers' statements were not related to a public concern under the statute, but were connected only to a personal dispute between the parties, and denied the motion.

The court's decision should be affirmed. The relevant statements were unrelated to public participation and petition or a matter of public

concern. Daniel provided sufficient evidence to move forward. The motion and this appeal are frivolous.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court properly dismiss PCCG/Krugers' special motion to strike under RCW § 4.24.525, where PCCG/Krugers' statements were not related to public participation and petition, and in connection with a matter of public concern, and Daniel provided sufficient evidence under a clear and convincing standard to show a probability of prevailing on the merits?
- B. Did the trial court properly dismiss PCCG/Krugers' motion to dismiss for failure to state a claim under CR 12(c) where Daniel's complaint was alleged with sufficient specificity?
- C. Did the trial court properly deny PCCG/Krugers' request for attorneys' fees and statutory damages, where the special motion was properly denied?
- D. Is this appeal is frivolous and should Daniel thus be awarded attorneys' fees and costs under RAP 18.9 and RCW § 4.24.525?

III. RE-STATEMENT OF THE CASE

A. PCCG/Krugers Posted a Fake Customer Testimonial About Jeff Daniel on Zillow.com.

Jeff Daniel has been one of the top-producing real estate agents in the Ocean Shores area every year since 2008. CP 539 ¶ 5. As almost all

sales persons and business owners do, he has made efforts to become known in the community and has worked to build a reputation for honest and ethical dealings. CP 539-40. Daniel is a successful real estate agent who has on rare occasions participated in various activities related to the local real estate market.¹ CP 27-28. He has received many positive reviews regarding his work. *e.g.*, CP 602-04; CP 639-40. His online advertising reflects those achievements and his reputation. CP 156-189; 600-02.

PCCG/Krugers are a real estate development corporation and its officers, at one time the highest-producing manufacturer and seller of small homes in the Ocean Shores area. PCCG/Krugers do not dispute that Daniel was once a "strategic partner" and an agent of the company. CP 249. In addition, PCCG Krugers admit that Daniel is a competitor with the company. Opening Brief at 35 ¶ 1; 7 ¶ 3.

In 2009 PCCG/Krugers sought to hire Daniel, one of the top producers in the area. CP 207-08. PCCG/Krugers met with Daniel on or about March 3, 2009, after his services were retained. CP 541 ¶ 2. At the meeting, Daniel described what he saw as some deficiencies in the PCCG buildings as a courtesy. *Id.* He never described what PCCG/Krugers now allege is an unethical "negative counterpoint" "tactic." *Id.*

¹ The undisputed facts on record show that Daniel's involvement in advertising and local media is limited to his web site, a single appearance on one AM radio show in 2007 or 2008, appearing as a guest panelist at the chamber of commerce with 5 or 6 other professionals on a single occasion, and occasionally sharing real estate data with a journalist for the North Coast News for his column. CP 27-28.

Despite observing what PCCG/Krugers now claim was a display of dishonest, unethical and illegal behavior, the company commenced using Daniel's services in earnest. The record is filled with praise for Daniel's work, his results, his honesty and his ethics. CP 543-45; 574, 576, 578, 579, 580, 583, 585. PCCG/Krugers expressed to at least one other seller that they thought Daniel was honest and ethical. CP 576. At one point, Jeffrey Kruger stated to Daniel, "there is only one way to make sure the agent on both sides is competent. You have to get both halves." CP 545, 569. PCCG/Krugers clearly approved of Daniel handling a transaction as both the buyer's and seller's agent.

It is not disputed that PCCG/Krugers were aware of Daniel's representation of other builders in the area at the time they hired them. There is a relatively small number of other builders in the area, and at all relevant times mainly consisted of JTK Properties, Barney Homes, Brunk Homes, and Custom Builders NW. CP 464 ¶ 2. There is no restriction on a real estate broker or agent representing multiple builders in the same market, and PCCG/Krugers do not point to any rule or standard that would prevent such agency. However, such representation became a point of contention between the parties. CP 542, 587, 588, 589-91, 592-93, 594, 595, 596. In early March, 2010, Daniel stopped acting as the Krugers' agent in part because of PCCG/Krugers' demand that he "fire" all of his

builder clients, which would damage his sales and reputation. CP 597-98. At the time of the split, Jeffrey Kruger referenced their March 3, 2009 meeting: "[y]ou were certainly free to point out some of the flaws you saw in our houses when we first met." CP 547 ¶ 2, 589.

Daniel also quit because PCCG/Krugers displayed an aggressive method of competing with other participants in the local real estate market, which included attempting to damage other builders' businesses by word of mouth. CP 542 ¶ 2, 543 ¶¶ 4-5, 545 ¶ 7, 603. While Daniel disapproved of such tactics, as an agent he felt he had no right to opine on PCCG/Krugers' methods. CP 542 ¶ 2.

After the parties dissolved their business relationship, PCCG/Krugers appealed to Daniel to represent them on several occasions between March 2010 and December 2011. CP 546 ¶ 6, 547 ¶¶ 1-3. Daniel declined to represent PCCG/Krugers on each occasion. CP 600-02. Daniel handled one real estate transaction for PCCG/Krugers as part of the transition to a new agent after March 2010. CP 599-600. PCCG/Krugers praised Daniel's handling of the matter. CP 600. In December 2010, when asking Daniel to represent them, PCCG/Krugers wrote, "we really liked the fact that you weren't afraid to give us your opinion—no matter what it was." CP 602.

On March 5, 2011, PCCG/Krugers posted the following

testimonial on Daniel's profile on the popular real estate website Zillow.com. PCCG/Kruger wrote under the anonymous user name "pugetsoundcruiser"²:

Will never recommend.

Showed home in 2011 in Ocean Shores, WA

...

This is another Ocean Shores agent that will really push you to buy one of his own listings. He will find something negative to say about other listings in hope that as the "expert" the clients will listen and not consider the listing.

Jeff Daniel said some horrible things about other builders whose homes he didn't list. He would point out the smallest of flaws and say it was indicative [sic] of the quality of that builder and say that we should just turn around and leave. When I pointed out some of the same flaws in some of his listings he would just pooh pooh it and say that it can be easily fixed. He never said it was in any way indicative [sic] of the quality of that home. He readily boasts about being the highest producing [sic] agent in the small area. I am surprised that so many people fall for his obvious ploys. I would not recommend [sic] anyone that wants an honest agent that places their needs first work with Jeff Daniel.

CP 634.³ The posting was crafted to appear as if it had been written by a

potential home buyer who had actually toured a home with Daniel in

² Jeffrey Kruger registered his identity as "Rather really Notsay" [sic] on the Yahoo! account associated with the user name. CP 643-46.

³ While there is a dispute as to the date of publication, Zillow.com confirmed that March 5 was the date of publication. CP 634-36.

2011. *Id.* There is no dispute that PCCG/Krugers neither sought to purchase a home using Daniel's services, nor ever toured a home with him in 2011.⁴ The post provided several distinct defamatory claims: the claim that Daniel was engaged in "ploys" that implied an absence of loyalty to his clients; the claim that Daniel pushes buyers to his own listings, carrying with it the false implication that such behavior is unethical, and the claim that Daniel is not "honest" in his dealings in the real estate market. *Id.*

The fake client testimonial was removed after Daniel contacted Zillow.com and pointed out that it violated their terms of use. CP 461 ¶ 4. At least one other person viewed the posting before Daniel discovered it. CP 641-42. It is unknown how many other people may have viewed the posting.

After the posting was discovered, Daniel learned that PCCG/Krugers had made at least one other negative statement about him to a third party. PCCG/Krugers verbally claimed that Daniel was "fired" for "ethical reasons" to a subcontractor who regularly worked in the Ocean Shores area. CP 638.

While Daniel suspected that PCCG/Krugers were responsible for the posting, the poster's identity was only revealed after discovery requests

⁴ The same day, PCCG/Krugers posted a similar fake customer testimonial on Zillow.com regarding Laurie and Christian Kazimir. CP 604. PCCG/Krugers do not dispute that they never toured a home with either Kazimir at any time, for any purpose.

to Internet service providers were made after filing the "John Doe" lawsuit on May 11, 2011. CP 643-46. On learning that PCCG/Krugers were responsible, Daniel filed and served an Amended Complaint on July 28, 2011. CP 25-30.

B. PCCG/Krugers' Special Motion to Strike was Denied.

On September 28, 2011, PCCG/Krugers filed a special motion to strike pursuant to RCW § 4.24.525 in the trial court, the day before response to properly served discovery materials was due. CP 38-446.

Throughout their voluminous pleadings, supporting affidavits, and exhibits, PCCG/Krugers repeatedly expressed that the allegations in the fake testimonial were "absolutely true,." CP 114-121; 121 (affidavit of Jeffrey Kruger entitled "Truth"). Jeffrey Kruger testified that "[w]hat I wrote in the review of Jeff Daniel was absolutely true and reflected my true experiences and opinion of him." CP 121 ¶ 1. PCCG/Krugers claimed that it was "true" that Daniel "pushed" clients to his "own listings," which were claimed to be direct violations of ethics and Washington state law.⁵ CP 121 ¶ 1, 132. PCCG/Krugers claimed that they had direct knowledge that Daniel has broken the law: "I believe Jeff Daniel violated more than one state statute with regard to real estate brokers. I could have filed suit against him." CP 132 ¶ 1. In support of the truth of these statements,

⁵ PCCG/Krugers point to no law, rule, or ethical standard preventing an agent from showing his or her own listings to potential clients.

PCCG/Krugers provided one declaration from a PCCG customer, Gary Taber, who made no allegations of dishonesty, and provided the declaration only after the lawsuit was commenced. CP 134-40.

PCCG/Krugers also provided disparaging comments in an email exchange with a rival agent, Dave Granlund. CP 220-30. The agent made the comments in response to an email from PCCG/Krugers disparaging Daniel. CP 219, 223-24. To prove that Daniel "pushed" clients to his own listings, PCCG/Krugers provided a hand-tallied chart of real estate sales alleging to show Daniel's sales ratios from part of 2010. CP 191.

Daniel provided substantial evidence contradicting Krugers' claims. Daniel showed that he earned "both sides" of sales commissions infrequently. CP 540 ¶¶ 1-2; CP 559-63; CP 606-625. He showed that he informed clients, including Gary Taber, about many listings that were not his own, and encouraged them to view those properties, so he did not "push" clients to his own listings. CP 540 ¶ 1, CP 541 ¶ 2, CP 551-57. Daniel also provided testimony of the shock and humiliation he has felt since the review was posted, as well as the worry that the real estate business community, and the Ocean Shores community in general, now considers him unethical and dishonest. CP 543 ¶ 1.

At oral argument on December 5, 2011, PCCG/Krugers argued that an individual or business with an online profile invites any and all

claims or statements to be written about them, including statements alleging criminal behavior. For example, Judge McCauley asked PCCG/Krugers' counsel:

I mean, maybe he subjectively thought the plaintiff was a child molester. Could he go into that site and say, "From the way I've seen him deal with people and families and kids, I think he's a child molester, he's a predator. You shouldn't have this real estate agent around your family." And maybe he subjectively believed that because he thought he was too sweet with kids or something like that. Do you think that, you know, you could go out and do that on Zillow? Subjectively, if I believe it, that's okay then?

PCCG/Krugers' counsel responded, "[y]eah." RP 11:4-11:15.

The trial court also stated the law with regard to summary judgments and other "case-terminating motions" and defamation claims.

...my personal preference is and I think there's even case law that talks in Washington sometimes when you're dealing with these sort of case-terminating motions, to be very careful and err on the side of letting the thing be aired out in open court using the justice system, which is, I think, a very good one.

RP 13:1-13:7. The motion was denied February 15, 2012.

IV. SUMMARY OF ARGUMENT

PCCG/Krugers ask this Court to define the scope of Washington's "anti-SLAPP" legislation, RCW § 4.24.525, so broadly that any speech or

action would be automatically subject to its protection. The legislature clearly intended that there be limits to the protection provided by the statute.

PCCG/Krugers' online statement regarding Jeff Daniel, who they admit is a direct competitor in the Ocean Shores real estate market, is not a matter of public concern and thus not a matter of petition or public participation under RCW § 4.24.525. PCCG/Krugers' characterization of their statements as "consumer information" is wrong. The "review" was made in bad faith by an officer of the largest housing manufacturer in the relevant market, not a consumer or consumer advocate. Even if PCCG/Krugers were not competitors, the statement does not relate to a matter of public concern under any of the commonly-applied tests for public interest or concern.

Even if the statements are found to be related to a matter of public concern, Daniel has provided substantial evidence of the torts of defamation, unfair competition, violations of the Washington Consumer Protection Act, and intentional interference with business relationships. The special motion would have been properly denied had the trial court reached the second step of the relevant statutory analysis.

Many courts have noted that while statutes like RCW § 4.24.525 are useful in disposing of *baseless* lawsuits swiftly, defendants have

abused the statutes and use them as tools to prevent legitimate lawsuits. Here, PCCG/Krugers' abuse of the anti-SLAPP statute is designed to halt a legitimate lawsuit, delay Daniel's right to access the courts, and burden him with significant legal expense. This Court should recognize and refuse to tolerate such abuse.

V. ARGUMENT

A. Standard of Review.

Denials of a special motion to strike under RCW § 4.24.525 and a motion to dismiss under CR 12 are reviewed *de novo*. See *Spokane Police Guild v. Wash. State Liquor Control Bd.*, 112 Wn.2d 30, 35- 36, 769 P.2d 283 (1989).

B. The First Amendment and Washington State Constitution Provide No Protection for Misleading Commercial Speech Like PCCG/Krugers' Statement.

Article I, section 5 of the Washington State Constitution guarantees that "[e]very person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Although article I, section 5 generally "provides broader free speech protection than the first amendment to the United States Constitution," *JJR Inc. v. City of Seattle*, 126 Wash.2d 1, 8, n.6, 891 P.2d 720 (1995), "the inquiry must focus on the specific context in which the state constitutional challenge is raised," and "it does not follow that greater protection is provided in all contexts,"

Ino Ino, Inc. v. City of Bellevue, 132 Wash.2d 103, 115, 937 P.2d 154 (1997). For example, "[c]ommercial speech is not protected by the First Amendment if it is either unlawful or misleading." *State v. Budik*, 173 Wn.2d 727, 746, 272 P.3d 816 (2012), citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566, 100 S.Ct. 2343 (1980). Here, there is no real dispute that PCCG/Krugers' speech was commercial, and was misleading by design. There is no layer of constitutional protection for such speech. In addition, while PCCG/Krugers wrongly claim that courts favor early dismissal of all libel claims (Appellant's Opening Brief at 11, V.B.), Washington courts have regularly acknowledged the "important social values which underlie the law of defamation," and recognized that "[s]ociety has a pervasive and strong interest in preventing and redressing attacks upon reputation." *Mohr v. Grant*, 153 Wn.2d 812, 821, n. 5, 108 P.3d 768 (2005), citing *Rosenblatt v. Baer*, 383 U.S. 75, 86, 86 S.Ct. 669, 676, 15 L.Ed.2d 597 (1966). PCCG/Krugers omit that Washington courts seek to balance the right to free speech with the right to be free from attacks on reputation.

C. RCW § 4.24.525 Does Not Protect PCCG/Krugers' Speech.

A party bringing a special motion to strike a claim has the initial burden of showing by a preponderance of the evidence that the claim is based on an action involving public participation and petition. RCW §

4.24.525(4)(b). If the moving party meets this burden, the burden shifts to the responding party to establish by clear and convincing evidence a probability of prevailing on the claim. *Id.* Importantly, the proof required for a plaintiff to show a "probability of prevailing" is a much lower threshold than a "substantial" probability of prevailing. The plaintiff must only show that he has a "reasonable probability of prevailing," meaning that a "*prima facie*" showing of facts is required. *Wilcox v. Superior Court*, 27 Cal. App.4th 809, 823-26 (1994) (finding that higher standard of proof related to SLAPP motion would create unconstitutional weighing of evidence).

Washington's Anti-SLAPP Act is closely modeled on the California Anti-SLAPP Act, Cal. Code Civ. Pro. § 425.16. See, e.g., *Aronson v. Dog Eat Dog Films, Inc.*, 738 F. Supp. 2d 1104, 1109 (W.D. Wash. 2010). California courts have found that its SLAPP statute came to be widely abused by defendants of legitimate claims. The California legislature responded, passing § 425.17, which codified in part courts' exceptions for competitors' speech about other businesses.⁶ Here, while

⁶ To correct the "disturbing abuse of Section 425.16," the California legislature enacted section 425.17 in 2003, which became effective January 1, 2004. The statute made the anti-SLAPP statute inapplicable to "any cause of action brought against a person primarily engaged in the business of selling or leasing goods or services ... arising from any statement or conduct" if the statement or conduct (1) consists of a representation of fact about that person's or a competitor's business operation, goods, or services; (2) is made or engaged in to obtain commercial transactions in the person's goods or services, and (3) is directed to an actual or potential customer. (§ 425.17, subd. (c).)

Washington's legislature did not include a business speech exception to RCW § 4.24.525, Washington courts should recognize the potential for abuse and ensure that proper limits are drawn to prevent businesses from abusing the statute, as in the present case.

1. PCCG/Krugers' speech did not involve a matter of public participation or petition.

PCCG/Krugers' sole description of the "public concern" is limited to "problems he [Jeffrey Kruger] had encountered with a real estate agent who repeatedly and publicly holds himself out as a trustworthy professional." Appellants' Brief, 17 at ¶ 1. PCCG/Krugers describe a private dispute of no concern to the public.

2. RCW § 4.24.525 does not protect a competitor's speech about another business.

PCCG/Krugers do not dispute that the company and its officers are competitors with Jeff Daniel. A competitor is "one that is engaged in selling or buying goods or services in the same market as another." *State ex rel. Nixon v. QuikTrip Corp.*, 133 S.W.3d 33, 37 (Mo. 2004), cf. Webster's Third New International Dictionary at 464. Here there is no dispute that PCCG/Krugers are competitors in the same market. PCCG/Krugers manufacture and sell homes in the Ocean Shores area. Daniel acts as a broker/agent in the same market.

Courts have routinely found that statements by one competitor

about another are not actions involving public participation or petition and are thus not protected by anti-SLAPP legislation. In *Globetrotter Software, Inc. v. Elan Computer Group, Inc.*, 63 F.Supp.2d 1127, 1130 (N.D.Cal. 1999), the court denied a competitor-defendant's anti-SLAPP motion, reasoning that:

The Court has been unable to locate any California cases concluding that the "issue of public interest" test is met by statements of one company regarding the conduct of a competitor company. If such statements were construed as coming within the statute's protection, **any lawsuit alleging trade libel, false advertising or the like in the context of commercial competition would be subject to attack as a SLAPP suit.** This clearly is not the result intended by the Legislature when enacting the anti-SLAPP statute.

(emphasis added). Similarly, in *MCSi, Inc. v. Woods*, 290 F.Supp.2d 1030, 1031-32 (N.D.Cal. 2003), the court denied a special motion to strike claims related to libel, slander, unfair business practices in the form of negative statements about the plaintiff. Woods posted statements under a pseudonym in web postings on chat boards operated by Yahoo! Inc. The court found that "[a]s commercial speech, Woods' postings are not a matter of public interest. Woods thus has failed to make a threshold showing that the challenged causes of action arise from protected activity." *Id.* at 1034. It should be noted that the *MCSi* court reached its

conclusion *before* the California Code of Civil Procedure § 425.17 became effective January 1, 2004, which codified the commercial speech exception in California. In *The Fireworks Restoration Co., L.L.C. v. Hosto*, ED97181, p. 2 ¶ 3 (E.D. Mo. May 9, 2012), a defamation claim was allowed to go to a jury trial where the defendant, a competitor and former business partner, "accessed the internet and posted three fictitious, derogatory reviews regarding Plaintiff and its restoration work," none of which made claims of dishonesty. *See NTP Marble, Inc. v. AAA Hellenic Marble, Inc.*, 799 F.Supp.2d 446 (E.D.Pa. 2011) (discussion of defamation claims regarding fictitious reviews allowed to go forward).

PCCG/Krugers mistakenly rely on *Davis v. Avvo, Inc.*, 2012 WL 1067640 (W.D. Wash. Mar. 28, 2012). While Avvo.com may "provide a *vehicle* for public issues," (emphasis added) it does not follow that all statements made on Avvo.com or any other website are automatically granted public concern status, as PCCG/Krugers argue. *Id.* at p. 3.

PCCG/Krugers mistakenly argue that if one statement on Zillow.com or other website is found not to be a public concern, none of them may be. Appellant's Opening Brief at 17 ¶ 1. PCCG/Krugers by implication ask this court to expand its inquiry on "public concern" to *all* reviews appearing on Zillow.com or other similar websites, with the result that "each one" is a matter of public concern, because they relate to all

participating real estate professionals. *Id.* This interpretation would lead to an absurd result. The proper method of "public concern" analysis is instead to evaluate each statement on its own merits.

3. PCCG/Krugers' statements were not related to matters of public concern even outside the commercial speech exclusion.

Washington courts have not yet adopted a test with relation to the "public concern" requirement. California courts provide several tests that can serve to inform Washington courts. Some courts look to the Supreme Court of the United States' test related to speech made by public employees. Under any of these tests, the PCCG/Kruger statement cannot be characterized as a matter of public concern.

"Public concern" and "public interest" are used interchangeably throughout Washington cases that discuss speech in connection with defamation cases. See e.g. *Taskett v. KING Broadcasting Co.*, 86 Wn.2d 439, 445, 546 P.2d 81 (1976); *Aronson v. Dog Eat Dog Films, Inc.*, *supra* at 1110 (noting that "the legislation [RCW § 4.24.525] mirrors the California Anti-SLAPP Act" and that "both parties cite to California law as persuasive authority for interpreting the Washington amendments.")

a. The PCCG/Kruger statement is not a matter of public concern under any relevant test.

The cases cited by PCCG/Krugers are insufficient to identify a public concern under RCW § 4.24.525. PCCG/Krugers assert that the

only test needed to define a "public concern is articulated in *Nygaard, Inc. v. Uusi-Kerttula*, 159 Cal.App.4th 1027, 1041-42 (2008): "'an issue of public interest'...is any issue in which the public is interested." (emphasis in original). This broad test is tautological and does not provide enough guidance to analyze the public concern or interest element on its own.⁷

The Washington cases cited by PCCG/Krugers are also, on casual review, unhelpful to the public concern analysis. For example, *Alpine Indus. Computers, Inc. v. Cowles Publ'g Co.*, 114 Wn. App. 371, 393-94, 57 P.3d 1178 (2002) involved a newspaper report regarding Microsoft's allegations that a software retailer was selling counterfeit software. The court noted that the public concern element was heightened because the article involved a large corporation and the retailer was actually found guilty of illegally selling counterfeit software, so the claims were substantially true. *Id.* None of these factors are involved here.

PCCG/Krugers also look in error to *White v. State*, 131 Wn.2d 1, 12 n.5, 929 P.2d 396 (1997), as abuse of a nursing home patient is clearly a

⁷ PCCG/Krugers cite at least one case, *Makaeff v. Trump Univ., LLC*, 2010 WL 334163, (S.D. Cal., Aug. 23, 2010), that cites *Nygaard's* formulation, but also looks to both the *Rivero* test and other California cases to determine the public issue element. *Id.* at p.4-5. In addition, the *Makaeff* court found a public interest in part because the defendant was an actual consumer of the plaintiff's services, and "the defendant had received 70 complaints of deceptive practices from consumers." *Id.* The SLAPP motion in that case was denied, in part because defendant's charges of "blatant lies," was "at least reasonably susceptible of an interpretation which implies a statement of fact." *Id.* at p.8. *Id. Sedgwick Claims Mgmt. Servs., Inc. v. Deisman*, 2009 WL 2157573 (N.D. Cal. July 17, 2009) presented a fact situation in which an actual consumer of a large insurance company's products created numerous blogs dedicated to providing consumer information about the company, which is not the facts here. *Id.* at p.2.

matter of public concern, and the "slightest tinge" reference they cite from that case is *dicta*, not a rule adopted by Washington courts. The case also had to do with the termination of a public employee, which is not the situation here. PCCG/Krugers' cited cases are unhelpful to determining whether a public concern exists in this case.

b. The PCCG/Kruger statement is not related to a matter of public concern under the *Rivero* test.

Courts often use the test provided in *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal.App.4th 913, 924 (2003) which identified three categories of statements that are in the public interest:

- (1) the subject of the statement concerned a person or entity in the public eye;
- (2) the statement or activity involved conduct that could directly affect large numbers of people beyond the direct participants;
- or
- (3) the statement or activity concerned a topic of widespread public interest.

Courts have held that to find "widespread public interest," "it is not enough that the statement refer to a subject of widespread public interest; the statement must in some manner itself contribute to the public debate." *Wilbanks v. Wolk*, 17 Cal.Rptr.3d 497, 506 (2004); *Du Charme v. International Brotherhood of Electrical Workers* 110 Cal.App.4th 107, 118, 1 Cal. Rptr.3d 501 (2003) (report that an employee was removed for

financial mismanagement was informational, but not connected to any discussion, debate or controversy); *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO*, 105 Cal. App.4th 913, 924, 130 Cal.Rptr.2d 81(2003) (reports that a particular supervisor was fired after union members complained of his activities are not a discussion of policies against unlawful workplace activities).

Here, Daniel is only a single real estate agent in a small market. There was no evidence before the court showing that he or his services have ever been involved in any public controversy or debate. He cannot be said to be "in the public eye." Daniel's business has made only 300-500 substantial business contacts over a seven-year period. CP 539 ¶ 5. He operates in a relatively small real estate market, in a low population area. The Krugers provide no evidence showing that a large number of people could potentially be affected by Daniel's alleged conduct. Under the *Rivero* test, PCCG/Krugers' statement is not related to a matter of public concern.

c. The PCCG/Kruger statement is not related to a matter of public concern under the *Weinberg* test.

Courts have also looked to *Weinberg v. Feisel*, 110 Cal.App.4th 1122, 2 Cal.Rptr.3d 385 (2003) for a guideline regarding the "public interest" or "public concern" test:

First, "public interest" does not equate with mere curiosity.

Second, a matter of public interest should be something of concern to a substantial number of people. Thus, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest.

Third, there should be some degree of closeness between the challenged statements and the asserted public interest, the assertion of a broad and amorphous public interest is not sufficient.

Fourth, the focus of the speaker's conduct should be the public interest rather than a mere effort "to gather ammunition for another round of [private] controversy...."

Finally, "those charged with defamation cannot, by their own conduct, create their own defense by making the claimant a public figure." A person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

392-93. [citations omitted]. Moreover, courts find that "[t]he fact that 'a broad and amorphous public interest' can be connected to a specific dispute is not sufficient to meet the statutory requirements" of the anti-SLAPP statute. *Id.* Here, the Krugers cite exactly this type of broad and amorphous public interest, that of "real estate purchases." Appellant's Opening Brief at 16 ¶ 2. In the trial court, PCCG/Krugers pointed only to real estate purchases in general as the matter of public concern. CP 56.

There was absolutely no discussion of any existing public concern with relation to the honesty or ethics of real estate professionals in the Ocean Shores area or elsewhere, showing an insufficient closeness between the challenged statements and the alleged public concern or controversy.⁸

d. The PCCG/Kruger statement is not related to a matter of public concern under the *Connick* test.

Some courts look in part to *Connick v. Myers*, which involved a public employee's termination for discussing matters of public concern in the workplace: "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48, 103 S.Ct. 1684 (1983). Here, the content, form and context shows that commercial speech alleging the dishonesty of a former business associate and presented so that readers would believe the speaker was a customer does not meet the *Connick* public concern test.

e. Persuasive authority shows that PCCG/Krugers' speech is not related to a matter of public concern.

Case law shows that mere connection with a potential consumer issue does not automatically grant public concern or interest status, as the Krugers contend. In *Consumer Justice Center v. Trimedica International*,

⁸ PCCG/Krugers' reliance on RCW 18.85 *et seq.* and RCW 18.86 *et seq.* emphasizes the importance of Daniel's need to protect his reputation to adhere to a "minimum standard of conduct" as he acts "in the capacity of a fiduciary." *Nuttall v. Dowell*, 31 Wn. App. 98, 108, 639 P.2d 832 (1982).

Inc. 107 Cal.App.4th 595 (2003)⁹, the maker of an herbal supplement for female breast enlargement sued for fraud and false advertising claimed the action involved a public issue because herbal dietary supplements are a matter of public interest. The court disagreed:

Trimedica's speech is not about herbal supplements in general. It is commercial speech about the specific properties and efficacy of a particular product, Grobust. If we were to accept Trimedica's argument that we should examine the nature of the speech in terms of generalities instead of specifics, **then nearly any claim could be sufficiently abstracted to fall within the anti-SLAPP statute.**

Id. at 601 (emphasis added). The court described a hypothetical that is exactly analagous to this case and PCCG/Krugers' argument:

Blackacre sells a house to Whiteacre, and Whiteacre sues, claiming defendant misrepresented the square footage. **Blackacre brings a special motion to strike, claiming his speech involves a matter of public interest, because millions of Americans live in houses and buy and sell houses.** [Plaintiff] correctly suggests that applying the anti-SLAPP statute in such a case would be absurd.

Id. (emphasis added). Here, the statement is focused only on one business's services, with no connection to an existing, specific public

⁹ PCCG/Krugers apparently agree that disparaging comments made by one competitor about another are not protected here, by dismissing the speech in *CJC v. Trimedica* as "not the kind of third-party criticism the anti-SLAPP statute was designed to protect." Appellants' Brief at 17 ¶ 1.

concern. If PCCG/Krulers' argument is made law, a defendant in any case could cite the profession of the plaintiff as the "public concern." This expansion would lead to a flood of meritless anti-SLAPP motions.

Moreover, PCCG/Krulers reliance on *Wilbanks v. Wolk*, 17 Cal. Rptr.3d 497 (2004) is misplaced. In that case, an author of multiple consumer protection books and the publisher of a website dedicated to consumer protection made comments about the ethics of a brokerage house. The court found that the statements were related to a public interest, reasoning that

Wolk has studied the industry, has written books on it, and that her Web site provides consumer information about it, including educating consumers about the potential for fraud. As relevant here, Wolk identifies the brokers she believes have engaged in unethical or questionable practices, and provides information for the purpose of aiding viators and investors to choose between brokers. The information provided by Wolk on this topic, including the statements at issue here, was more than a report of some earlier conduct or proceeding; it was consumer protection information.

The 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.

Id. at 507-08. (emphasis added). Here, the situation is the opposite.

PCCG/Krugers discussed only Daniel's alleged dishonest practices. They were never consumer advocates, and never "aided" consumers at any other time. The statements were not made in the context of information to aid consumers. The case is not applicable here because PCCG/Krugers were not providing real consumer information to the public, but only airing a private dispute. Casual review of other cases cited by PCCG/Krugers show that their facts are different.¹⁰

Courts also regularly deny SLAPP motions where the action might be related to a public interest or concern, but the defendants' focus of the anti-SLAPP statute was not on the specific nature of the speech. In *Mann v. Quality Old Time Service, Inc.*, 15 Cal. Rptr. 3d 215, 120 Cal.App.4th 90, (2004), the court concluded that the defendants' allegation plaintiff was dumping toxic chemicals into the water supply would not meet the public interest standard. The defendant in *Mann* had claimed that the defendant was "pouring illegal carcinogenic chemicals into public drainage systems throughout Southern California." *Id.* at 219. The court reasoned that "[a]lthough pollution can affect large numbers of people and is a matter of general public interest, the focus of the anti-SLAPP statute must be on the specific nature of the speech rather than on generalities that

¹⁰ *Makaeff v. Trump Univ., LLC*, 2010 WL 3341638, at p. 24 (S.D. Cal. Aug. 23, 2010), is an unpublished case with little precedential value. The *Makaeff* court also denied the anti-SLAPP motion at issue in part because defendant accused plaintiff of crimes including "grand larceny" and "identity theft." *Id.*

might be abstracted from it." *Id.* at 227.

PCCG/Krugers' objections to case law provided to the trial court are wrong. Appellants' Opening Brief at 18 ¶ 2. The objections focus on minor factual distinctions, and do not invalidate the points of law or analogous facts within the cases. For example, PCCG/Krugers object to the reliance on *Mann v. Quality Old Time Serv., Inc.*, *supra* at 120 Cal. App. 4th 90, because "the defendants posed as employees of the plaintiff to make disparaging comments to its customers." *Id.* Here, if the role of "employees" is replaced with "customers," PCCG/Krugers' own analysis shows that the case is directly on point, as "the defendants [PCCG/Krugers] posed as [customers] to make disparaging comments." Similarly, if a reasonable observer merely replaces the role of the defendant in *any* of PCCG/Krugers' cited cases with the term "competitor," it is self-evident that there would be no public concern in those situations.

f. PCCG/Krugers wrongly dismiss intent and/or motive as unrelated to the public concern analysis and defamation, and intentional business torts.

PCCG/Krugers argue that intent and motive are irrelevant to anti-SLAPP litigation, and defamation claims in general. Appellants' Opening Brief, 19 ¶ 1. Intent is relevant to the nature of the dispute between parties in a SLAPP suit. The fourth prong of the *Weinberg* test focuses on "the

speaker's conduct," which requires an analysis of intent and motive.

Weinberg v. Feisel, supra, 110 Cal.App.4th at 392-93. PCCG/Krugers ignore that intent must be analyzed in relation to a public figure/actual malice analysis. *Harte-Hanks Communications v. Connaughton*, 491 U.S. 657, 688 (1989) ("[E]vidence of negligence, **of motive and of intent** may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity.") (emphasis added). PCCG/Krugers also ignore that intent is a required element in relation to the *intentional* interference with business relationships, one of Daniel's claims. Lastly, PCCG/Krugers' reliance on *Dible v. Haight Ashbury Free Clinics, Inc.*, 170 Cal. App. 4th 843, 851, 88 Cal. Rptr. 3d 464 (2009) is wrong. *Dible* cited *Ludwig v. Superior Court*, 37 Cal.App.4th 8, 43 Cal.Rptr.2d 350 (1995), for the proposition that motive or intent is *always* irrelevant in determining whether a statement is protected speech. *Ludwig* applied the *Noerr-Pennington* doctrine, which provides qualified immunity for those who petition the government. *Id.* Under this doctrine "it has long been clear that the motive of the petitioners is irrelevant, **as long as** the intent is genuinely to induce government action rather than to frustrate or deter a third party simply by the **use** of the governmental process." *Id.* (emphasis in original). Here, there is no government petitioning, so the rule does not

apply, and the analogous condition precedent to make motive irrelevant, public petition and participation, is absent. In any case, the statement is defamatory without consideration of intent.

D. Daniel showed a probability of prevailing at trial by clear and convincing evidence.

The trial court did not err in recognizing that the role of the jury in "case-terminating motions" is of utmost importance. RP 12:13-13:7. PCCG/Krugers correctly state that the standard for review related to the second step of the anti-SLAPP statute is one of "clear and convincing evidence." They also note that the process is identical to that of summary judgment. *Stewart v. Rolling Stone LLC*, 181 Cal. App. 4th 664, 679, 105 Cal. Rptr. 3d 98 (2010). Washington courts stress that the "clear and convincing" standard does *not* show that courts favor early dismissal of libel claims on summary judgment as PCCG/Krugers contend:

While the issue turns on what the jury could find, and while the court must keep in mind that the jury must base its decision on clear and convincing evidence, the evidence is still construed in the light most favorable to the nonmoving party and the motion is denied if the jury could find in favor of the nonmoving party.

Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the

weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict.

The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.

Herron v. KING Broadcasting Co., 112 Wn.2d 762, 775, 776 P.2d 98, (1989); quoting in part *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-56, 106 S.Ct. 2505 (1986). Here, the trial court did not reach the second step of the SLAPP analysis because a public concern was not found. However, Judge McCauley correctly stated Washington law.

Other courts have stressed the importance of carefully applying the correct standard in SLAPP motion cases to preserve litigants' constitutional rights. "In order to preserve the plaintiff's right to a jury trial the court's determination of the motion cannot involve a weighing of the evidence." *Wilcox v. Superior Court, supra*, 27 Cal. App.4th at 824. Here, if the trial court had weighed the evidence and found in PCCG/Krugers' favor, it would have unconstitutionally denied Daniel his right to a jury trial.

1. Daniel provided sufficient evidence to prove a *prima facie* defamation claim.

If the second step of SLAPP statute analysis had been reached, there was "a lot" of evidence, as the trial court noted, to support Daniel's claims. RP 10:15-11:3. In Washington, a defamation plaintiff must establish four elements: (1) falsity, (2) an unprivileged communication, (3) fault, and (4) damages. *Mohr v. Grant, supra*, 153 Wn.2d at 822; *Bender v. City of Seattle*, 99 Wn.2d 582, 599, 664 P.2d 492 (1983). Daniel has established these elements with convincing clarity.

a. Claims of dishonesty and implications of breaches of ethics and Washington law are provably false.

A defamation claim must be based on a provably false statement and the plaintiff bears the burden of proving the falsity. *Schmalenberg v. Tacoma News, Inc.*, 87 Wash.App. 579, 590-91, 943 P.2d 350 (1997). A statement may be provably false if it (1) falsely represents the speaker's state of mind, (2) falsely attributes the statement to a person who did not make it, or (3) falsely describes the act, condition or event comprising the statement's subject matter. *Id.*, 87 Wash. App. at 591.

The PCCG/Kruger statement is false under Washington law. It falsely represented Kruger's state of mind at the time of making the statement. The review was written as if a potential buyer had toured a home in 2011 with Daniel. The Krugers never toured homes with Daniel

in 2011, and never toured homes as potential buyers at any time, so Kruger's state of mind was falsely represented in the review. The review attributes the statement to a fictional home buyer, not either of the Krugers. At best, PCCG/Krugers may claim that the statement should be attributed to Gary Taber, although Kruger took the liberty of writing a review on his behalf, without Taber's prior knowledge. In either scenario, the statement is false, as it was attributed to a person who did not make it. It also falsely described the events the statement purported to describe.

Washington courts hold that statements alleging dishonesty and unethical or illegal behavior are defamatory *per se*. In Washington, there are two meanings for defamation *per se*: "[t]hese words may signify either (1) that the article is libelous on its face or (2) that it is actionable without proof of special damage." *Amsbury v. Cowles Pub'g Co.*, 76 Wn.2d 733, 737, 458 P.2d 882 (1969). Here, the statements are defamatory *per se* in both meanings. A defamatory publication is libelous *per se* (actionable without proof of special damages) if it (1) exposes a living person to hatred, contempt, ridicule or obloquy, to deprive him of the benefit of public confidence or social intercourse, or (2) injures him in his business, trade, profession or office. *Id.* at 737-38.

PCCG/Krugers ignore decades, if not centuries, of jurisprudence showing that allegations of professional dishonesty and unethical behavior

are provably false and support claims for defamation and business torts.

Waechter v. Carnation Co., 5 Wn.App. 121, 126-27, 485 P.2d 1000 (1971) ("A statement may...imply the owner or vendor is **dishonest**, fraudulent, or incompetent, thus affecting the owner or vendor's business reputation. In such circumstances, an action may be brought for defamation...") (emphasis added); *Quinn v. Review Pub. Co.*, 55 Wash. 69, 104 P. 181 (1909) (words imputing "fraud, dishonesty, or other moral turpitude" actionable *per se*). In *Corbin v. Madison*, 12 Wn. App. 318, 325-26, 529 P.2d 1145 (1974), defendants' letters to a plaintiff's real estate business partners stated that the plaintiffs "had a scheme afoot to cheat" the defendants out of funds, and that when professional men such as the plaintiffs "get to thieving and robbing old people it is time to put them in quarantine." The court held, "[t]here is no doubt the record contains substantial evidence to support the court's finding of fact that the defendants wrote letters which were libelous *per se* as to both plaintiffs." *Id.* Similarly, in *Michielli v. U.S. Mortgage Co.*, 58 Wn.2d 221, 361 P.2d 758, 762 (1961) statements about home builders by a mortgage company that plaintiffs were "very much in the hole," "they were going into bankruptcy," "they were a bunch of liars and cheats," and that as far as defendant was concerned, "they wouldn't be doing business in this town" were found to be defamatory *per se* because "the success of the business

depended upon their honesty..." *Id.* at 226-27. Washington courts also recognize that a statement about an employee which implies by opinion defamatory facts is actionable. *Getchell v. Auto Bar Sys. Northwest, Inc.*, 73 Wn.2d 831, 832, 440 P.2d 843 (1968) (previous employer's statements that plaintiff wrongly retained company funds and was unable to "meet business commitments" actionable); *Romano v. United Buckingham Freight Lines*, 4 Wn. App. 929, 932, 484 P.2d 450 (1971) (previous employer's comment that plaintiffs were dishonest actionable).

There are thousands of examples of persuasive authority supporting that statements like those made by PCCG/Krugers support defamation claims, of which the following are a small sample: *Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1341 (Colo. 1988) ("...statement that Churchey was 'dishonest' is clearly defamatory and Coors has not disputed this..."); *Hackman v. Dickerson Realtors, Inc.*, 520 F. Supp. 2d 954, 970 (N.D. Ill. 2007) (Realtor stated a claim for slander *per se* against a competitor, where competitor told a listing agent that the Realtor was dishonest - "a statement that Hackman is "dishonest" falls into the realm of defamation *per se* because it suggests that Hackman as an individual or corporate entity lacks integrity"); *Eli Research, Inc. v. United Communications Group, LLC*, 312 F. Supp. 2d 748, 762-63 (M.D. N.C. 2004) (statements that plaintiff was "mismanaging its company," that it

"engaged in unethical and morally repugnant dealings with its employees and contractors," that its substantive work was "shoddy and faulty," and that it was "going bankrupt," and such statements were sufficient to state claim for slander per se); *Beroth Oil Co. v. Whiteheart*, 618 S.E.2d 739, 743, 173 N.C. App. 89 (2005) (competitor's statement that plaintiff was a "lease jumper" and "billboard whore" found to be terms "with extremely negative connotations in the billboard industry," and thus defamatory *per se*, so denial of directed verdict motion upheld); *Pfeifly v. Henry*, 269 Pa. 533, 535, 112 A. 768 (1921) (statement that plaintiff miller dishonestly weighed flour he sold capable of defamatory meaning); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 271 (3d Cir.1980) (news report that plaintiff corporation deceived customers as to both price and quality of its product capable of defamatory meaning); *Amerisure Ins. Co. v. Laserage Tech. Corp.*, 2 F.Supp.2d 296, 304 (W.D.N.Y. 1998) (defamation claim existed where defendant informed customers that the plaintiffs infringed upon two patents and "such customers act at their own risk in purchasing products from" plaintiffs); *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1507 (D.S.C. 1989) (statements about business being a "scam" and "rip-off" capable of defamatory meaning). The PCCG/Kruger statement is capable of defamatory meaning.

b. PCCG/Krugers' statement was an unprivileged

communication.

There is no dispute that the statement was viewed by at least one party - Marti Schmidt, an independent real estate broker/agent in the area, who confirmed that the statement was harmful to Daniel's business. CP 641-42.¹¹ Courts have declined to require defamation plaintiffs to prove that other current and potential customers or participants in a market viewed a defamatory statement on the Internet:

[w]ith the internet, consumers are able to compare businesses and their wares with unprecedented speed...if a consumer declines to engage a business it encounters on the internet, that consumer continues his or her search and the business has no knowledge it has been passed by. As such, it would be unreasonably burdensome to impose upon a business plaintiff the requirement that it locate potential customers that it never knew in order to successfully demonstrate actual damage to its reputation. The deleterious impact of such a constraint far outweighs any benefits it would have in proving reputational harm.

The Fireworks Restoration Co., L.L.C. v. Hosto, p. 9, n. 3, ED97181 (E.D. Mo. May 9, 2012).

PCCG/Krugers' reliance on the opinion privilege is misplaced.

Washington courts hold that an expression of opinion can be defamatory

¹¹ PCCG/Krugers argue that Ms. Schmidt is a "friend" of Daniel with no support. Appellants' Opening Brief at 31 ¶ 2. The uncontested evidence is that they are independent brokers/agents with no personal relationship. In any event, PCCG/Krugers point to no requirement that defamatory communications reach only those plaintiffs do not know.

if it implies that defamatory facts are the basis of the opinion. *Dunlap v. Wayne*, 105 Wn.2d 529, 538, 716 P.2d 842 (1986); *Camer v. Seattle Post-Intelligencer*, 45 Wn. App. 29, 39, 723 P.2d 1195 (1986). In *Vern Sims Ford, Inc. v. Hagel*, 42 Wn. App. 675, 713 P.2d 736 (1986), review denied, 105 Wn.2d 1016, the court found that

[a]ccusations of criminal activity, even in the form of opinion, are not constitutionally protected. . . . As noted by the Supreme Court of California, there is a critical distinction between opinions which attribute improper motives to a public officer and accusations, in whatever form, that an individual has committed a crime **or is personally dishonest**.

42 Wn. App. at 683-84 (quoting *Cianci v. New Times Pub'g Co.*, 639 F.2d 54, 63 (2d Cir.1980)) (emphasis added).

A real estate broker/agent may face serious disciplinary action if he or she is found guilty of, *inter alia*, "[a]ny conduct in a real estate transaction which demonstrates bad faith, dishonesty, untrustworthiness, or incompetence." RCW § 18.85.361(23). Thus, a broker/agent's honesty and ethical behavior is crucial to his or her livelihood and licensure in the State of Washington. It should be noted that dual agency is explicitly permitted under Washington law as long as it is disclosed to the parties to a transaction. RCW §18.86.030(1)(f). However, a broker/agent breaks the law if he fails "to be loyal to the buyer by taking no action that is adverse

or detrimental to the buyer's interest in a transaction" or "to timely disclose to the buyer any conflicts of interest." RCW § 18.86.050(1)(a), (b). Jeffrey Kruger repeatedly confirmed that his Zillow.com statement represented knowledge that Daniel breached these duties and the law. The statement thus implied defamatory facts by telling potential clients that Daniel was regularly engaged in being disloyal to buyers and was dishonest.

c. Daniel is not a public figure and the actual malice standard does not apply.

Washington courts define

"public figures" generally as those who either "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes", or those who become public figures with respect to a particular public controversy because they have "thrust themselves to the forefront ... in order to influence the resolution of the issues involved." To achieve this status, the plaintiff must be involved in a public controversy before the defamatory statement is published.

Vern Sims Ford, Inc. v. Hagel, 42 Wn. App. 675 at 678-79, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974). A business plaintiff does not become a public figure "merely by advertising its services because otherwise the mere fact of advertising would render all businesses public figures." *Vern Sims, supra*, at 42 Wn. App 68, citing *Golden Bear Distrib.*

Sys. of Tex., Inc. v. Chase Revel, Inc., 708 F.2d 944, 952 (5th Cir.1983) (finding car dealership advertising influencing consumer choice insufficient to confer public figure status). Further, the cases cited by PCCG/Krugers are factually unrelated. They provide examples of a popular author on a subject related to the defamation claim, a large corporation with an extensive advertising budget, a "prominent" plastic surgeon who worked in a prestigious medical facility and wrote three books and ninety articles about plastic surgery, and a company that was large enough to spend \$660,000 in advertising in two years and was subject to a television investigation.¹² Here, Daniel's modest marketing materials and rare participation in Ocean Shores' local media do not show that he is a public figure. The negligence standard applies.

i. PCCG/Krugers acted with actual malice.

Actual malice is a heightened standard, and is "knowledge of the falsity or reckless disregard of the truth or falsity of the statement." *Vern Sims*, 42 Wash.App. at 680-81, 713 P.2d 736 (citing *Caruso*, 100 Wash.2d at 354, 670 P.2d 240). Actual malice can be inferred from circumstantial evidence, including a defendant's hostility or spite, knowledge that a source of information about a plaintiff is hostile, and failure to properly

¹² Respectively, *Exner v. Am. Med. Ass'n*, 12 Wn. App. 215, 221, 529 P.2d 863 (1974); *Gilbert v. Sykes*, 147 Cal. App. 4th 13, 23-26, 53 Cal. Rptr. 3d 752 (2007) *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 273-74 (3rd Cir. 1980); *Sunshine Sportswear & Elecs., Inc. v. WSOC Television, Inc.*, 738 F. Supp. 1499, 1507 (D.S.C. 1989).

investigate an allegation. *Margoles v. Hubbart*, 111 Wash.2d 195, 200, 760 P.2d 324 (1988).

Here, PCCG/Krugers acted with actual malice. The record is filled with examples of PCCG/Krugers' hostility and spite toward Daniel. Their motive was to hurt Daniel's (and the Kazimir's) business. While they stated in March 2010 that Daniel was dishonest and implied that Daniel broke Washington law, they possessed actual knowledge that he was honest and ethical, and expressed the belief that those facts were true, yet published the opposite. CP 576. PCCG/Krugers claimed he pushed clients to his own listings, implying illegal disloyalty, but failed to research the facts behind the claim, which showed that Daniel did not engage in such practices. Thus, even if Daniel is found to be a public figure, he can establish a libel claim.

d. Presumed damages are available in this case.

Defamation *per se* is actionable without proof of special damages. *Amsbury v. Cowles Pub'g Co.*, *supra*, 76 Wn.2d at 737. In addition, "where no matters of public concern are involved, presumed damages to a private plaintiff for defamation without proof of actual malice may be available." *Dun & Bradstreet, Inc., v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761, 105 S.Ct. 2939 (1985). Damages may be assessed even if only one person reads or hears a defamatory message. *See Waechter v.*

Carnation Co., *supra* at 5 Wn. App. at 128 (upholding defamation damages where a statement with regard to cheating was read by "only one person who never repeated the statement until she was in court and at that time was continuing her patronage of the plaintiffs"). Presumed damages are available in this case.

e. Actual damages are available in this case.

In defamation cases,

actual injury is not limited to out-of-pocket loss. Indeed, the more customary types of actual harm inflicted by defamatory falsehood include impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering...although there need be no evidence which assigns an actual dollar value to the injury.

Rasor v. Retail Credit Co., 87 Wn.2d 516, 527 (1976), *citing Gertz v. Robert Welch, Inc.*, *supra* at 350. *See Schmalenberg v. Tacoma News, Inc.*, *supra*, 87 Wn. App. at 589, n. 23: "[A] defamation plaintiff's compensable interests include not only general damage to reputation, but also emotional distress, bodily harm, and economic (i.e., "special") damages," *citing Time, Inc. v. Firestone*, 424 U.S. 448, 460, 96 S.Ct. 958, 968 (1976) (defamation plaintiff not prevented from obtaining compensation for "personal humiliation, and mental anguish and suffering," even in the absence of compensable damage to reputation).

Here, Daniel has provided evidence of pecuniary loss, personal humiliation, and loss of standing in the community that is inherent when claims of dishonesty are made to the public. Real estate brokers/agents rely on their reputation to make a living. At least one person has testified that the statement would "be harmful" to Daniel's business if read by a third party. Daniel provided sufficient evidence of damages to go forward.

2. Daniel provided sufficient evidence to prove a *prima facie* case of unfair competition and unfair or deceptive practices.

RCW § 19.86.020 provides, in relevant part: "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." The elements of a private action under the CPA are "(1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; ... [(4)] a showing of injury to plaintiff in his or her business or property; [and (5)] ... a causal link...." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 784-85, 719 P.2d 531 (1986).

Disparagement of a business's services to the public is found to be an unfair practice. *State v. Black*, 100 Wn.2d 793, 802-03, 676 P.2d 963 (1984) (finding that disparaging real estate broker's services to public could violate CPA); *In the Matter of Reverb Communications, Inc.* United States of America Federal Trade Commission, Dkt. no. C-4310,

Complaint (Nov. 22 2009)(prosecuting case as "unfair or defective acts" where "reviews are posted using account names that would give the readers of these reviews the impression they had been submitted by disinterested consumers" and finding "bias and identity" of reviewers in the public interest because it was "material to consumers") CP 515-17; *In the Matter of Legacy Learning Systems, Inc.*, United States of America Federal Trade Commission, Dkt. no. C-4323, Complaint, with Exhibit A (June 2 2011)(charging that short, "5" star reviews posted by employees posing as consumers were deceptive) CP 518-37. Under the CPA, a prevailing plaintiff need not prove bad faith, or even actual damages, to be entitled to an award of reasonable attorney fees. *See* RCW § 19.86.090; *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 93-94, 605 P.2d 1275 (1979)(attorneys' fees awarded under CPA despite plaintiff's absence of pecuniary loss).

PCCG/Krugers wrongly claim that a competitor writing a fake customer testimonial is not an act of trade or commerce. Washington's CPA statute is drafted broadly:

The Legislature has broadly defined the terms "trade" and "commerce" to include "the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2). This court continues to give effect to the intended broad construction of these terms. The CPA, on its face, shows a carefully

drafted attempt to bring within its reaches every person who conducts unfair or deceptive acts or practices in any trade or commerce.

Short v. Demopolis, 103 Wash.2d 52, 61, 691 P.2d 163 (1984).

Advertising is done in trade and commerce. It follows that PCCG/Krugers' interference with Daniel's advertising for competitive advantage is an act done in "trade" and "commerce." PCCG/Krugers' cited cases are unrelated to the facts here. *Browne* involved the hosting web site's system of ratings, not statements made by competitors. *Browne v. Avvo, Inc.*, 525 F.Supp.2d 1249, 1252 (W.D.Wash. 2007). *Davis v. Avvo.com* likewise discussed whether a website that *hosted* reviews was an act of trade or commerce. 2012 WL 1067640 at p. 3. *Fid. Mortg. Corp. v. Seattle Times Co.*, 131 Wn. App. 462, 470, 128 P.3d 621 (2005), found that a newspaper's publishing of articles was not acting in trade and commerce, which is different than the facts here.¹³ The Federal Trade Commission recognizes that disparagement of a competitor is done in trade or commerce.¹⁴ See *In the Matter of Legacy Learning Systems, Inc.*, *supra*, p. 1. Numerous courts

¹³ The *Fidelity* court stated in *dicta* that "paid advertising" would be an act in trade and commerce under the CPA. *Id.*, 131 Wn. App. at 468.

¹⁴ The Washington legislature declared that "It is the intent of the legislature that, in construing this act [the CPA], the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served." RCW § 19.86.920.

easily find that competitors' online reviews are done in commerce. *e.g.*, *MCSi, Inc. v. Woods*, *supra*, at 1030. PCCG/Krugers' acts were done in trade or commerce under RCW § 19.86.010.

Here, there is clear and convincing evidence that the CPA claim has a probability of success. A reasonable jury would find that a competitor's disparagement of another business's services to the public is an unfair business practice. Such information is in the public interest because consumers would materially rely on it in making a decision as to whether to use Daniel's services. Daniel has proved actual damages in the form of a damaged reputation in the real estate community, humiliation and embarrassment, and attorneys' fees and costs in bringing the unfair practices claims. CP 543 ¶ 1. Moreover, the damages are not "too remote" under *Fid. Mortg. Corp.*, as Daniel meets the *Fidelity* test. First, PCCG/Krugers did not address whether or not Daniel met the first and third factors of test. Appellants' Opening Brief, 35-36. In any event, there are few potential victims of PCCG/Krugers' acts other than Daniel to enforce CPA claims, the finder of fact can easily determine damages in a defamation-based CPA claim related to the effect on the victim's business in a small market, and there is no evidence any complicated rules regarding apportionment would need to be applied. The CPA claim should be allowed to go forward.

3. Daniel provided sufficient evidence to prove a *prima facie* case of intentional interference with business relationships.

To prove tortious interference with a business expectancy, a plaintiff must show (1) the existence of a valid contractual relationship or business expectancy; (2) that the defendant had knowledge of that expectancy; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; (4) that the defendant interfered for an improper purpose or used improper means; and (5) resulting damage. *Newton Ins. Agency & Brokerage, Inc., v. Caledonian Ins.*, 114 Wash.App. 151, 158, 52 P.3d 30 (2004). "A valid business expectancy includes any prospective contractual or business relationship that would be of pecuniary value," including a party's prospective customers. *PNSPA v. City of Sequim*, 144 P. 3d 276, 285 (2009); quoting *Newton Ins. Agency & Brokerage, Inc.*, 114 Wash.App. at 158. (finding allegation of prospective contractual relations with "gun collectors, dealers and buyers from all over the northwest" sufficient to plead tort); *Dean v. Metropolitan Seattle-Metro*, 104 Wash.2d 627, 640, 708 P.2d 393 (1985) (actual damages includes emotional distress damages).

Here, there is clear and convincing evidence of a probability of success at trial on this claim. PCCG/Krugers knew or should have known that the statement would tend to harm Daniel's reputation with current and

potential buyers, broker/agents, builders, and any other participants in the real estate market. PCCG/Krugers confirm that the purpose of their statement was to "help consumers" understand that Daniel was dishonest. Daniel has shown that his reputation was damaged in the community, because at least one person saw the statement. Daniel has also shown that he has been emotionally distressed by the interference. A reasonable jury would find that PCCG/Krugers intentionally interfered with Daniel's current and prospective business relationships.

E. PCCG/Krugers' Motion to Dismiss under CR 12(c) Fails.

Dismissal under CR 12 is appropriate only if "it appears beyond doubt that the plaintiff cannot prove any set of facts to justify recovery." *Tenore v. AT&T Wireless Servs.*, 136 Wn.2d 322, 330, 962 P.2d 104 (1998). PCCG/Krugers have not made this showing.

There is no bright line rule dictating with what level of specificity plaintiffs must state their claims involving defamation. However, *Flowers v. Carville*, 310 F.3d 1118, 1131 (9th Cir. 2002) is helpful. In *Flowers*, the plaintiff's complaint was found to have been pled sufficiently when she "list[ed] the precise statements alleged to be false and defamatory, who made them and when." *Id.* PCCG/Krugers cite *Harris v. City of Seattle*, 315 F. Supp. 2d 1112, 1123-24 (W.D. Wash. 2004), in which the claimant only stated "that Weston 'fabricated stories' without stating what the

substance of those 'stories' were or when they occurred." Unlike the plaintiff in *Harris*, Daniel meets the specificity requirements. *Rice v. Comtek*, 766 F. Supp. 1539, 1541-42 (D.Or. 1990) requires only that a plaintiff show "who uttered the statements, when the statements were uttered, whether the statements were oral or written, or any other facts allowing defendants to identify the allegedly wrongful conduct." Daniel has fulfilled these requirements. "[I]n determining whether a publication is defamatory, it must be read as a whole and not in part or parts detached from the main body." *Camer v. Seattle Post-Intelligencer*, 45 Wash.App. at 37. Here, the review is defamatory in that it explicitly states that Daniel is not "honest" in his business practices. It is also defamatory in that it implies knowledge of defamatory facts - because Daniel "pushes" clients to his own listings, the reader is meant to understand that he is disloyal to clients in favor of his own interests, a direct breach of Washington law. The statement also claims Daniel is engaged in "ploys," which are capable of defamatory meaning in the context of the claims of dishonesty. The claim was plead with sufficient specificity. Under the 12(c) standard, PCCG/Krugers have not proved that Daniel is not entitled to relief.¹⁵

F. PCCG/Krugers' Appeal is Frivolous and an Abuse of RCW § 4.24.525.

¹⁵ PCCG/Krugers' renewed 12(c) motion would be inappropriate, as "matters outside the pleadings are presented to," so the motion must "be treated as one for summary judgment." CR 12(c).

An appeal is frivolous if no debatable issues are presented and no reasonable possibility of reversal exists. *Building Industry Ass'n of Wash. v. McCarthy*, 152 Wn. App 720, 746, 218 P.3d 196 (2009). An appellate court may grant attorney fees under RAP 18.9 for a frivolous appeal, among other reasons. Courts have also noted that defendants have often used the statute to waste time and abuse the court system: "however efficacious the anti-SLAPP procedure may be in the right case, it can be badly abused in the wrong one, resulting in substantial cost - and prejudicial delay." *Grewal v. Jammu*, 191 Cal.App.4th 977, 981 (2011).

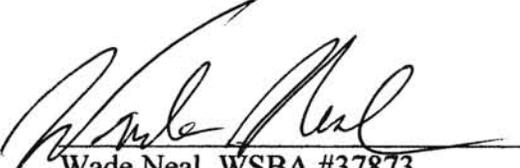
PCCG/Krugers' brief omits all cases that clearly and definitively show that statements made by a competitor about another business are completely excepted from anti-SLAPP protection with and without statutory exceptions for commercial speech. Similarly, there are thousands of cases showing that claims of professional and personal dishonesty are actionable, of which only a few are cited here. It strains credulity that PCCG/Krugers did not encounter the plentiful authority that directly contradicts their position. PCCG/Krugers admit they are competitors with Daniel. PCCG/Krugers point to no relevant case in which a business competitor engaged in defaming another business successfully requested a SLAPP denial to be overturned. Thus, the appeal is frivolous. In addition, this appeal underscores that the original 408-page motion was provided

only for delay, to prevent Daniel's access to a jury trial, and perhaps to seek substantial attorneys' fees.¹⁶ Thus, this court should award a statutory fine against PCCG/Krugers and attorneys' fees under both RAP 18.9 and RCW § 4.24.525.

VI. CONCLUSION

For the foregoing reasons, Daniel respectfully requests that the trial court's decision be affirmed. Daniel also respectfully requests an order for attorneys' fees related to the appeal and underlying motion, and for the maximum statutory fine under RCW § 4.24.525 to be imposed on PCCG/Krugers.

Dated this 5th day of October, 2012.



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Attorney for Respondent Jeff Daniel

¹⁶ See Jeremy Palowski, Olympia co-op members who sued to end boycott must pay \$160K, The Olympian, July 12, 2012, <http://www.theolympian.com/2012/07/12/2171566/olympia-food-co-op-defendants.html> (winning "SLAPP" party seeking \$280,000 in attorneys' fees for work on single special motion to strike).

CERTIFICATE OF SERVICE

I hereby certify that I caused the document to which this certificate is attached to be delivered to counsel of record by e-mail on the 5th day of October, 2012.



Wade Neal, WSBA #37873
Attorney of record for
Respondent

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