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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. \_\_\_\_\_

**SUPREME COURT  
OF THE STATE OF WASHINGTON**

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P.E. Systems, LLC, a Delaware Limited Liability Company,  
Plaintiff/Respondent

v.

CPI Corp., a Delaware Corporation,  
Defendant/Petitioner.

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Appeal from the Court of Appeals, Division III  
of the State of Washington  
Cause No. 29411-1-III

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**PETITIONER CPI CORP.'S**

**PETITION FOR DISCRETIONARY REVIEW**

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TABLE OF CONTENTS

	Page
I. IDENTITY OF PETITIONER .....	1
II. CITATION TO COURT OF APPEALS DECISION .....	1
III. ISSUES PRESENTED FOR REVIEW.....	1
IV. STATEMENT OF THE CASE.....	2
A. Factual Background .....	2
B. Procedural History .....	3
V. LAW AND ARGUMENT.....	6
1. <b>The Court of Appeals Made a Fundamental Error of Law When It Concluded That The Purported Contract Was Not Part of “the Pleadings.”</b> .....	8
2. <b>The Court of Appeals’ Opinion Unilaterally Requires the Trial Court to Consider Evidence Outside the Pleadings on a Rule 12(c) Motion When the Trial Court Has Discretion to Exclude Such Evidence and the <i>Berg</i> Rule Does Not Allow Extraneous Evidence to Modify or Add Terms to the Written Agreement</b> .....	10
3. <b>The Court of Appeals Unilaterally Severed the Addendum Without Any Trial Court Finding That the Severability Clause Was Applicable</b> .....	14
A. <i>Addendum A Was Severed in Conflict With Supreme Court Precedent</i> .....	14
B. <i>The Price of the Offer Was Never Agreed Upon – the Proposed Contract Contains No Consideration</i> .....	15

C.	<i>Even Without Addendum A the Writing Is An Unenforceable Agreement to Agree.....</i>	16
4.	<b>CPI Corp. Did Not Admit That It Took P.E. Systems' Information and Used It.....</b>	18

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>CASES</b>	
<i>16th Street Investors, LLC v. Morrison</i> , 153 Wn. App. 44, 223 P.3d 513 (2009).....	16, 17, 18
<i>Adler v. Fred Lind Manor</i> , 153 Wn. 2d 331, 103 P.3d 773 (2004).....	14
<i>Berg v. Hudesman</i> , 115 Wn. 2d 657, 801 P.2d 222 (1990).....	<i>passim</i>
<i>Bort v. Parker</i> , 110 Wn. App. 561, 42 P.3d 980 (2002).....	11
<i>Branch v. Tunnell</i> , 14 F.3d 449 (9th Cir. 1994) .....	9
<i>Browning v. Howerton</i> , 92 Wn. App. 644, 966 P.2d 367 (1998).....	16
<i>Burnett v. Twentieth Century Fox Film Corp.</i> , 491 F. Supp. 2d 962 (C.D. Cal. 2007) .....	9
<i>Daly v. Viacom, Inc.</i> , 238 F. Supp. 2d 1118 (N.D. Cal., 2002).....	9
<i>Fudge v. Penthouse Intern. Ltd.</i> , 840 F.2d 1012 (1st Cir. 1988).....	9
<i>Gulf Coast Bank &amp; Trust Co. v. Reder</i> , 355 F.3d 35 (1st Cir. 2004).....	10
<i>Hanson Industries Inc. v. Kutschkau</i> , 158 Wn. App. 278, 239 P.3d 367 (2010).....	13
<i>Hollis v. Garwall, Inc.</i> , 137 Wn. 2d 683, 974 P.2d 836 (1999).....	12

<i>Homeowner Options for Massachusetts Elders, Inc. v. Brookline Bancorp, Inc.</i> , 754 F. Supp. 2d 201 (D. Mass. 2010).....	10
<i>Keystone Land &amp; Development v. Xerox Corporation</i> , 152 Wn. 2d 171, 94 P.3d 945 (2004).....	16, 17
<i>King v. Riveland</i> , 125 Wn. 2d 500, 886 P.2d 160 (1994).....	15
<i>Marquez v. Cable One, Inc.</i> , 463 F.3d 1118 (10th Cir. 2006) .....	10
<i>McKee v. AT&amp;T Corp.</i> , 164 Wn. 2d 372, 191 P.3d 845 (2008).....	14, 15
<i>Mosbrucker v. Greenfield Implement, Inc.</i> , 54 Wn. App. 647, 774 P.2d 1267 (1989).....	8
<i>North Coast Enters., Inc. v. Factoria P’ship</i> , 94 Wn. App. 855, 974 P.2d 1257 (1999).....	8, 13
<i>P.E. Systems, LLC v. CPI Corp.</i> , 164 Wn. App. 358, 264 P.3d 279 (2011).....	1
<i>Pac. Cascade Corp. v. Nimmer</i> , 25 Wn. App. 552, 608 P.2d 266, review denied, 93 Wn. 2d 1030 (1980).....	16
<i>Parrilla v. King County</i> , 138 Wn. App. 427, 157 P.3d 879 (2007).....	13
<i>Red Devil Fireworks Co. v. Siddle</i> , 32 Wn. App. 521, 648 P.2d 468 (1982).....	15
<i>Romani v. Shearson Lehman Hutton</i> , 929 F.2d 875 (1st Cir. 1991).....	9
<i>Scott v. Cingular Wireless</i> , 160 Wn. 2d 843, 161 P.3d 1000 (2007).....	15
<i>Seaborn Pile Driving Co., Inc. v. Glew</i> , 132 Wn. App. 261, 131 P.3d 910 (2006).....	11

<i>Sea-Van Investments Assoc. v. Hamilton</i> , 125 Wn. 2d 120, 881 P.2d 1035 (1994).....	16
<i>Spectrum Glass Co., Inc. v. Pub. Utility Dist. No. 1 of Snohomish County</i> , 129 Wn. App. 303, 119 P.3d 854 (2005).....	11
<i>State ex rel. Zempel v. Twitchell</i> , 59 Wn. 2d 419, 367 P.2d 985 (1962).....	20
<i>Stearns v. Veterans of Foreign Wars</i> , 500 F.2d 788 (D.C. Cir. 1974).....	10
<i>Swanson v. Holmquist</i> , 13 Wn. App. 939, 539 P.2d 104 (1975).....	16
<i>Yurtis v. Phipps</i> , 143 Wn. App. 680, 181 P.3d 849 (2008).....	8
<b>COURT RULES</b>	
RAP 13.4(b)(2) .....	10
RAP 13.4(b)(4) .....	9
CR 7(a).....	8
CR 10(c).....	1, 8, 9
CR 12 .....	4
<b>OTHER AUTHORITIES</b>	
Restatement (Second) of Contracts § 178 (1981).....	19

**TABLE OF APPENDICES**

<b><u>Title</u></b>	<b><u>Appendix</u></b>
Court of Appeals Published Decision	A
Court of Appeals Order Denying Motion for Reconsideration	B
Written Instrument Attached to Pleadings Below	C

## I. IDENTITY OF PETITIONER

Petitioner is CPI Corp., a Delaware corporation.

## II. CITATION TO COURT OF APPEALS DECISION

The Court of Appeals decision is published as *P.E. Systems, LLC v. CPI Corp.*, 164 Wn. App. 358, 264 P.3d 279 (2011). A true and correct copy of the decision is provided as Appendix A and is referred to herein as the “Opinion.” CPI Corp.’s motion for reconsideration was denied on December 20, 2011. A true and correct copy of the Order Denying Motion for Reconsideration is provided as Appendix B.

## III. ISSUES PRESENTED FOR REVIEW

1. Can an alleged contract, adopted by a Complaint, attached to the Answer, and admitted by Plaintiff as authentic, be considered pursuant to CR 10(c) in a CR 12(c) motion for judgment on the pleadings as a “matter” within the pleadings for purposes of the contract’s validity?
2. May a Court of Appeals *sua sponte* sever a provision to an alleged contract without any finding that the severed provision is void, invalid, unenforceable, or illegal when the contract contains a severability provision requiring such findings?
3. May a Court of Appeals *sua sponte* enter judgment against a Respondent based on the Court of Appeals’ finding that Respondent admitted liability when in fact Respondent denied liability?
4. Is an alleged “contract” that is not fully executed, is missing price terms, provides that it is not to be performed within one year of the making thereof, and which contains only evidence of a future contractual intent, unenforceable in Washington?

#### IV. STATEMENT OF THE CASE

##### A. Factual Background.

Petitioner CPI Corp. (“CPI Corp.”) operates portrait studios throughout retail stores in North America. CP 13 ¶ 2. Respondent P.E. Systems, LLC (“P.E. Systems”) markets services to merchants to help reduce credit card processing fees paid to credit card companies such as Visa and MasterCard. CP 13 ¶ 1. P.E. Systems filed the present suit claiming that CPI Corp. breached a written agreement between the parties regarding such services. CP 4 ¶ 3. The supposed agreement is two pages in length and contains an “Agreement for Services” page and an “Addendum A” page. CP 20-21 (Exhibit A to CPI’s Answer – also attached hereto as Appendix C for ease of reference).

According to the terms of this claimed agreement (and P.E. Systems’ own allegations), P.E. Systems offered to analyze certain of CPI Corp.’s credit card processing costs and provide methods to lower them. CP 20 ¶ 1; CP 4 ¶ 7. The “agreement” indicates that in order for P.E. Systems to provide these services, and for the parties to ascertain what the cost of the proposed services would be, the parties had to agree on the “historic costs” that CPI Corp. had been paying third parties for credit card processing. In fact, the writing explicitly provides that “Client’s Historic Cost *will be set forth and mutually agreed to by the parties in*

Addendum A.” **Addendum A was never agreed upon by the parties and was never signed.** Appendix C hereto; CP 20 ¶ 3 (emphasis supplied). There was no agreement between the parties on CPI’s “historic cost.” CP 21. There was no agreement as to the price for the services offered by P.E. Systems. *Id.* There was no acceptance of P.E. Systems’ offer. *Id.* There was no contract.

**B. Procedural History.**

P.E. Systems filed a complaint against CPI Corp. for breach of contract and breach of the covenant of good faith and fair dealing on June 8, 2010. CP 3-7. P.E. Systems’ Complaint makes numerous references to this supposed contract.<sup>1</sup> Yet, P.E. Systems did not attach a copy of this “contract” to the Complaint. CPI Corp. answered, denying any breach and denying a contract was formed on August 13, 2010. CP 13-21. CPI Corp. specifically alleged in its Answer that the purported contract was at most an “agreement to agree.” CP 15 ¶ 1. CPI Corp. attached the “contract” to its Answer. CP 20-21; Appendix C hereto. P.E. Systems admitted that the writing attached to the Answer was the alleged contract in dispute. CP 37.<sup>2</sup>

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<sup>1</sup> See CP 4 ¶ 6 (“[o]n July 10, 2009 Defendant CPI executed the agreement for services”); ¶ 7 (“[t]he agreement for services provided that...”); ¶ 8 (“[a]fter the agreement was executed...”); *see also* CP 5 ¶ 15, 16; CP 6 ¶ 19, 20.

CPI Corp. moved for judgment on the pleadings under CR 12(c) on August 27, 2010. RP 20:3-4; RP 31:25-32:1. In response, P.E. Systems attempted to transform the motion into one for summary judgment by filing a declaration of its counsel and asking the Trial Court to consider matters outside the pleadings. CPI Corp. filed a timely motion to strike P.E. Systems' counsel's declaration. CP 76.

On September 10, 2010, the Trial Court heard oral argument on CPI Corp.'s Motion for Judgment on the Pleadings and granted the motion, stating as follows:

Even though [the alleged contract] wasn't filed with the Complaint, the contract or the agreement that you referred to, it has been stipulated in this that this is the contract or agreement, which is a one-page contract with the attachment A or Addendum A, which was never filled out and agreed to. ... How the Court reads it is with Addendum A never being filled out and not being signed, there wasn't a full meeting of the minds. ... I don't believe that this was an agreement that's enforceable because they're missing some material parts of what would be a breach of contract. ... Negotiations need to be finalized, and the Court can't fill in material terms.

RP 20-21 (Judge Plese's September 10, 2010 Oral Ruling) (emphasis supplied). The Trial Court clarified its ruling further at the September 28, 2010 presentment hearing:

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<sup>2</sup> P.E. Systems did not object to this admission at any time below. *See* RP 20-21, RP 31-33.

[CPI's Motion] was a judgment on the pleadings, and that's what I ruled on. ... I only considered the pleadings and the issue for their motion on judgment on the pleadings and not the exhibits [to Mr. Kovarik's Declaration] at that time. ... In other words, that's all I was considering was the CR 12 motion and what's in the file for that, not for the issues of the Summary Judgment, which would be the exhibit that you added in all of that. I guess I should have been very clear that I struck that at that time. ... It was very clear at the hearing that they [CPI] were not asking for a Summary Judgment motion. They were asking for a Judgment on the pleadings.

RP 31:25-32, 33.

P.E. Systems appealed the judgment. The Court of Appeals did not allow oral argument. On October 18, 2011, the Court of Appeals issued its published opinion ("Opinion"). The Court of Appeals reversed and sua sponte entered judgment on the merits in favor of P.E. Systems by finding that the alleged contract was not a part of the pleadings for purposes of CR 12(c), that the Trial Court should not have excluded evidence offered by P.E. Systems, that the blank addendum page to the alleged contract was severable, and that CPI Corp. admitted it breached the alleged contract. CPI Corp. filed a motion for reconsideration, detailing the problems with the Opinion. The Court of Appeals did not address any of the issues raised by CPI Corp. and instead simply issued a one-page denial of the motion for reconsideration on December 20, 2011.

The Court of Appeals' published Opinion is fundamentally flawed. The Opinion conflicts with the Washington Superior Court Civil Rules, and decisions of other Divisions of the Washington Court of Appeals as well as the Supreme Court. The Opinion also contains several statements of purported "fact" that are irreconcilable with the record and demonstrably prejudicial to CPI Corp. As a result, the Opinion not only works a substantial injustice to CPI Corp., but will no doubt lead to uncertainty and confusion for future litigants in Washington.

#### V. LAW AND ARGUMENT

This Court should accept review for four independent reasons. First, the Opinion is directly contrary to the Washington Superior Court Civil Rules, which raises an issue of substantial public interest. The Court of Appeals held that "[t]he contract is not part of the 'pleadings.' And you do not make it so by simply attaching it to an answer or complaint." Opinion, p. 6. The supposed "contract" attached to the Answer is part of the "pleadings" pursuant to CR 10(c), and the Trial Court properly considered it. The Court of Appeals' legal conclusion to the contrary is wrong and creates a direct conflict between a published decision and the Civil Rules.

Second, the Court of Appeals usurped the Trial Court's discretion to exclude evidence under CR 12(c). The Opinion requires trial courts to

consider extraneous evidence in a CR 12(c) motion, and is therefore in direct conflict with CR 12(c) and precedent regarding the “context rule” in this Court’s opinion in *Berg v. Hudesman*. 115 Wn. 2d 657 (1990).

Third, the Court of Appeals unilaterally severed Addendum A to the supposed contract at issue, without any finding by the Trial Court that the addendum was “void, invalid, unenforceable or illegal.” The Court of Appeals severed a material term and rewrote the contract, all in conflict with precedent regarding severability.

Finally, the Court of Appeals erroneously stated that CPI Corp. “admitted” that it breached the proposed contract between the parties and directed that judgment be entered against CPI Corp. even though P.E. Systems made no dispositive motion. That finding is in direct conflict with the record. CPI Corp. expressly: (a) denied that it took information from P.E. Systems and used it, and (b) denied P.E. Systems’ causes of action for breach of contract and covenant of good faith and fair dealing. CP 14-15.

In light of these serious errors in the Court of Appeals’ published Opinion, CPI Corp. respectfully requests that this Court accept review and reverse the Court of Appeals’ Opinion.

1. **The Court of Appeals Made a Fundamental Error of Law When It Concluded That The Purported Contract Was Not Part of “the Pleadings.”**

The Court of Appeals held that the Trial Court improperly considered the alleged agreement in addition to the pleadings, and thus “considered evidence outside of the pleadings.” Opinion, p. 6. The Court of Appeals also concluded that “[t]he contract is not part of the ‘pleadings.’ And you do not make it so by simply attaching it to an answer or complaint.” *Id.* These pronouncements are wrong in light of the express provisions of the Civil Rules. Under the Civil Rules, an answer is a “pleading.” CR 7(a). And, under CR 10(c), “[a] **copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.**” (emphasis supplied); *see also Mosbrucker v. Greenfield Implement, Inc.*, 54 Wn. App. 647, 652 (1989) (“[g]enerally, a copy of a written instrument referred to in a pleading must be annexed thereto. CR 10(c)”); *North Coast Enters., Inc. v. Factoria P’ship*, 94 Wn. App. 855, 858 (1999) (considering contract, but not declarations, in affirming grant of 12(c) motion on appeal).

Thus, there was no legal basis for the Court of Appeals’ holding that “[t]he contract is not part of the ‘pleadings.’ And you do not make it

so by simply attaching it to an answer or complaint.”<sup>3</sup> The Trial Court properly considered the alleged contract on the CR 12(c) motion because it was attached to CPI Corp.’s Answer and authenticity was not questioned. CP 20; RP 20.<sup>4</sup> The Opinion of the Court of Appeals will leave litigants with conflicting messages between our courts and our court rules. This issue alone warrants review because consistent and correct application of the Civil Rules is of substantial public interest under RAP 13.4(b)(4), and the remainder of the Court of Appeals’ Opinion is predicated upon this fundamentally-flawed foundation.

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<sup>3</sup> The Court of Appeals cited to *Yurtis v. Phipps* for the statement that “a contract is not part of the ‘pleadings’”. Opinion, p. 6 (citing 143 Wn. App. 680, 181 P.3d 849 (2008)). *Yurtis* does not stand for this proposition. *Yurtis* merely found that “[a] motion to dismiss based on CR 12(b)(6) is a motion on the pleadings, and **extraneous** evidence is not considered.” *Id.* at 692 (emphasis supplied). *Yurtis* does not apply to the case before the Court, as the purported contract in the record *is* part of the pleadings per CR 10(c).

<sup>4</sup> Documents specifically referred to in a complaint, though not physically attached to the pleading, may be considered where authenticity is unquestioned. See CR 10(c); *Daly v. Viacom, Inc.*, 238 F. Supp.2d 1118, 1121-22 (N.D. Cal., 2002); *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 966 (C.D. Cal. 2007); *Branch v. Tunnell*, 14 F.3d 449, 454 (9th Cir. 1994) (separate holding overruled on other grounds); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 (1st Cir. 1991) (superseded by statute on other grounds); *Fudge v. Penthouse Intern. Ltd.*, 840 F.2d 1012, 1015 (1st Cir. 1988).

2. **The Court of Appeals’ Opinion Unilaterally Requires the Trial Court to Consider Evidence Outside the Pleadings on a Rule 12(c) Motion When the Trial Court Has Discretion to Exclude Such Evidence and the Berg Rule Does Not Allow Extraneous Evidence to Modify or Add Terms to the Written Agreement.**

The Court of Appeals held that the Trial Court should have considered the extraneous evidence offered by P.E. Systems – a PowerPoint presentation of P.E. Systems’ unilateral price proposal – and should have treated the proceedings as summary judgment proceedings under this Court’s opinion in *Berg v. Hudesman*. Opinion, p. 7 (citing 115 Wn. 2d 657 (1990)). Yet, the Court of Appeals erroneously applied the “context rule” articulated by this Court in *Berg*, in conflict with *Berg* and CR 12(c). This issue warrants review under RAP 13.4(b)(2).

CR 12(c) provides that “[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to **and not excluded by the court**, the motion shall be treated as one for summary judgment ....” (emphasis supplied). The Trial Court has broad discretion to decide whether it will consider evidence outside the pleadings on a 12(c) motion, and the Trial Court’s decision is reviewed for an abuse of discretion.<sup>5</sup> Here, the Trial Court used its discretion to exclude the

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<sup>5</sup> See *Marquez v. Cable One, Inc.*, 463 F.3d 1118, 1120 (10th Cir. 2006) (“We review for an abuse of discretion a district court’s decision to consider evidence beyond the pleadings and convert a motion to dismiss to a motion for summary judgment.”); *Gulf Coast Bank & Trust Co. v.*

extrinsic evidence offered by P.E. Systems (the PowerPoint presentation representing P.E. Systems' price offer). RP 32-33 ("... I only considered the pleadings and the issue for their motion on Judgment on the pleadings and not the exhibits [provided by P.E. Systems' counsel] at that time. ... I struck [the exhibits] at the time."). The Opinion usurped the discretion of the Trial Court and essentially mandates that, as a matter of law, trial courts must **always** consider extrinsic evidence presented by a party opposing a CR 12(c) motion. The Court of Appeals' conclusion is incorrect, renders CR 12(c) meaningless, and should be remedied.

Additionally, the PowerPoint presentation, which embodied a "sales pitch" by P.E. Systems, is immaterial and inadmissible evidence that represents the unilateral and subjective intent of P.E. Systems.<sup>6</sup> Such evidence is **not allowed** to modify or add to a writing under the *Berg* rule, and the Court of Appeals' Opinion vitiates *Berg* and the precedent

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*Reder*, 355 F.3d 35, 38 (1st Cir. 2004) (the trial court has "broad discretion" either to include or to exclude evidence offered on a Rule 12(c) motion); *Homeowner Options for Massachusetts Elders, Inc. v. Brookline Bancorp, Inc.*, 754 F. Supp. 2d 201, 206 (D. Mass. 2010) ("If materials outside the pleadings are presented to the Court, the Court has broad discretion to choose whether to exclude those materials..."); *Stearns v. Veterans of Foreign Wars*, 500 F.2d 788, 791 (D.C. Cir. 1974) (trial court has discretion to exclude matters outside the pleadings in response to a Rule 12(c) motion).

<sup>6</sup> As previously argued by CPI Corp., the PowerPoint was also unauthenticated and hearsay. CPI Corp.'s Appellate Response Brief, pp. 13-14.

interpreting it. *See Seaborn Pile Driving Co., Inc. v. Glew*, 132 Wn. App. 261, 270 (2006) (extrinsic evidence cannot be used to import an unexpressed intention of one of the parties into a writing); *Spectrum Glass Co., Inc. v. Pub. Utility Dist. No. 1 of Snohomish County*, 129 Wn. App. 303, 311 (2005) (extrinsic evidence will not be allowed to show a party's unilateral or subjective intent, or to vary, contradict, or modify the written word); *Bort v. Parker*, 110 Wn. App. 561, 574 (2002) (extrinsic evidence cannot convert a written contract into a partly written, partly oral, contract); *Hollis v. Garwall, Inc.*, 137 Wn. 2d 683, 695 (1999) (evidence of unilateral and subjective intent is not admissible under the *Berg* rule, and cannot be used to redraft or add to the language of the contract).<sup>7</sup>

Here, when the Court of Appeals ruled that *Berg* allows the consideration of the PowerPoint, it allowed evidence of P.E. Systems' unilateral and subjective intent as to the price it proposed for the contract, which modifies and adds to the written document, without any meeting of the minds. The PowerPoint presentation was not evidence that the parties

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<sup>7</sup> Additionally, the purported contract contains a clause that it is the entire agreement and cannot be amended except in writing. The PowerPoint was not a signed writing and cannot be used to amend the alleged contract. CP 20 ¶ 8.

agreed upon a price figure; it was merely an offer – an offer that was rejected.<sup>8</sup> CP 21.

Further, the issue before the Trial Court was an issue of law – whether, even assuming alleged and hypothetical facts to be true, the writing was unenforceable as an “agreement to agree.” This was a purely legal question decided on the pleadings, and extrinsic evidence as to P.E. Systems’ later proposal for the price of the contract was immaterial. The Court of Appeals’ Opinion conflicts with other divisions on this issue as well. *See Hanson Industries Inc. v. Kutschkau*, 158 Wn. App. 278, 292 (2010) (on appeal of a CR 12(c) motion, where issues were decided as a matter of law, declarations were unnecessary and the trial court did not err in striking them); *Parrilla v. King County*, 138 Wn. App. 427, 432 (2007) (when documents submitted to the trial court are not material to the question at hand, the submission of such documents is not sufficient to convert a motion for judgment on the pleadings to a motion for summary judgment); *North Coast Enters., Inc. v. Factoria P’ship*, 94 Wn. App. 855, 858 (1999) (information contained in declarations was not material to the legal issue before the court on a 12(c) motion). Review is important for this reason as well.

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<sup>8</sup> The Court of Appeals even recognized in its Opinion that the PowerPoint only *suggested* a price figure. Opinion p. 4. The PowerPoint cannot be used to fill in a material term.

3. **The Court of Appeals Unilaterally Severed the Addendum Without Any Trial Court Finding That the Severability Clause Was Applicable.**

The Court of Appeals unilaterally severed Addendum A in order to find an enforceable contract. Opinion, p. 9-10. The Court of Appeals wrongly severed Addendum A for three reasons.

A. *Addendum A Was Severed in Conflict With Supreme Court Precedent.*

Washington courts “will give effect to severability clauses if [the courts] can easily excise an unconscionable provision without essentially rewriting the contract.” *McKee v. AT&T Corp.*, 164 Wn. 2d 372, 403 (2008); *see also Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 359 (2004) (courts will sever a provision if it does not disturb the primary intent of the parties).

The severability provision in the proposed contract states:

Should any provision of this agreement be held to be **void**, **invalid**, **unenforceable** or **illegal** by a court of competent jurisdiction, the validity and enforceability of the other provisions will not be affected.

CP 20 ¶ 8 (emphasis supplied). The Court of Appeals found, *sua sponte*, that the entire Addendum A was severable. Opinion, p. 10. This finding severs the signature page of the contract, required under the Statute of Frauds, and severs the material term of the price of the contract. However, the Trial Court made no finding, and no argument was raised by P.E.

Systems, that Addendum A was void, invalid, unenforceable, or illegal. Indeed, there is no basis in the record why Addendum A would be void, invalid, unenforceable, or illegal.

Contract provisions are usually severed as void or illegal when the provision represents an illegal contract, one against public policy, or an unconscionable provision. *Scott v. Cingular Wireless*, 160 Wn. 2d 843, 851 (2007) (*quoting King v. Riveland*, 125 Wn. 2d 500, 511 (1994) and *citing* Restatement (Second) of Contracts § 178 (1981)); *see also Red Devil Fireworks Co. v. Siddle*, 32 Wn. App. 521, 525 (1982) (discussing illegal contracts that violate public policy); *McKee*, 164 Wn. 2d at 403 (discussing unconscionability). By taking away CPI Corp.'s ability to review and agree upon the price proposed by P.E. Systems, the Court of Appeals rewrote the contract and forced CPI Corp. to accept P.E. Systems' offer, in conflict with Washington Supreme Court precedent. The Court of Appeals usurped the legal requirement for a meeting of the minds as to the price of the contract, and inserted its own.

B. *The Price of the Offer Was Never Agreed Upon – the Proposed Contract Contains No Consideration.*

The Court of Appeals found that “the parties did not agree on the Historic Cost figure” (Opinion, p. 9), but also found that the payment structure “is clearly set out in the body of the agreement.” (Opinion p. 10).

However, without a meeting of the minds on a “Historic Cost” figure, there is no figure to plug into the proposal’s formula and thus, the proposal lacks the material term of price.<sup>9</sup> When the Court of Appeals filled in a material term, its Opinion conflicted with precedent.

C. *Even Without Addendum A the Writing Is An Unenforceable Agreement to Agree.*

Even severing Addendum A, which CPI Corp. vigorously objects to, the writing is still an “agreement to agree” and unenforceable. The Court of Appeals did not analyze the remainder of the agreement after it severed the Addendum, and its Opinion is in conflict with this Court’s decision in *Keystone Land & Development v. Xerox Corporation* and the Court of Appeals for Division II’s Opinion in *16th Street Investors, LLC v. Morrison*.

“[A]n intention to do something ‘is evidence of a future contractual intent, not the present contractual intent essential to an operative offer.’” *Keystone Land & Dev. v. Xerox Corp.*, 152 Wn. 2d 171, 179 (2004) (quoting *Pac. Cascade Corp. v. Nimmer*, 25 Wn. App. 552, 556, review

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<sup>9</sup> Price is a material term. See, e.g., *Browning v. Howerton*, 92 Wn. App. 644, 650, 966 P.2d 367, 371 (1998); *Sea-Van Investments Assoc. v. Hamilton*, 125 Wn. 2d 120, 129, 881 P.2d 1035, 1040 (1994); *Swanson v. Holmquist*, 13 Wn. App. 939, 943, 539 P.2d 104, 107 (1975) (“The document signed by the parties did not reflect a common understanding of the essential terms of a contract and therefore, no contract existed between them”).

denied, 93 Wn. 2d 1030 (1980)). The first (unsevered) page of the proposed contract is riddled with language indicative of future intent:

- “**Client retains the right not to implement a program** or cost savings proposed .....” CP 20 ¶ 3 (emphasis supplied).
- “**Should Client decide to go forward** and implement any part of PES Cost Savings Program....” CP 20 ¶ 3 (emphasis supplied).
- “**Should Client elect to implement** any portion of PES’ Cost Savings Program....” CP 20 ¶ 4 (emphasis supplied).

In *16th Street Investors, LLC v. Morrison*, the Court of Appeals for Division II found the *Keystone* case and its prohibition against “agreements to agree” instructive. 153 Wn. App. 44, 54-55 (2009) (citing *Keystone*, 152 Wn. 2d at 179). There, the court found that a formula for price and language evidencing a future intent rendered a writing an unenforceable “agreement to agree.” *Id.* The writing at issue in *16th Street Investors*:

Detailed some provisions pertaining to Morrison’s option to purchase, including the size and location of the residential unit Morrison would have the option to purchase and a **formula for calculating the price** of the residential unit Morrison would have the right to a purchase.

153 Wn. App. at 49. The writing also stated:

Mr. Morrison **would like** an option to purchase a condominium **if Buyer, at Buyer’s election, decides to**

**include** residential units in the construction and development of the property.

*Id.* at 55. The court found that the use of this language “manifested an intention to negotiate [the] option further.” *Id.* at 54-55. Just as in *16th Street Investors*, here the price of the contract is based on a formula (although this one requires even further input), and the language is indicative of future intent. The use of terms such as “in the event” and “should client elect” manifest an intention to negotiate the services further. There is no enforceable written and signed contract here, and the Court of Appeals’ failure to analyze the remaining language of the proposed contract is inconsistent with this Court and the Court of Appeals for Division II.

4. **CPI Corp. Did Not Admit That It Took P.E. Systems’ Information and Used It.**

The Court of Appeals *sua sponte* found that CPI Corp. breached the agreement because “the complaint alleges, **and apparently no one disputes**, so we accept as true that CPI Corp. ‘took the information provided [by P.E. Systems] and ... used it.’” Opinion, p. 11. However, **CPI Corp. specifically denied that it took P.E. Systems’ information and used it.** CP 14 ¶ 11, 13-17. In CPI Corp.’s Answer, it denied this allegation outright, *Id.*, and never admitted it. Further, CPI denied any

breach of contract and breach of the covenant of good faith and fair dealing. CP 14-15, ¶¶ 11-21.

P.E. Systems' Complaint (CP 5):

5 | 11. Shortly thereafter, a dispute arose regarding Defendant CPI's Cost Savings,  
6 | specifically, PIN Debit Implementation savings. Defendant CPI contended that it would not  
7 | pay PES for any PIN Debit Implementation savings realized and took the information  
8 | provided and wrongfully used it to the detriment of PES. Defendant CPI owes PES a  
9 | consulting fee as stated in the Agreement.  
10 |

CPI. Corp.'s Answer (CP 14-15):

19 | 11. Denied. *See Exhibit A.*

20 | 12. Denied. *See Exhibit A.*

21 | **FIRST CAUSE OF ACTION**

22 | **(Breach of Contract)**

23 | 13. This paragraph does not require a response.

24 | 14. Denied. *See Exhibit A.*

25 | 15. Denied.

26 | 16. Denied.

1 | 17. Denied.

2 | **SECOND CAUSE OF ACTION**

3 | **(Breach of the Implied Covenant of Good Faith and Fair Dealing)**

4 | 18. This paragraph does not require a response.

5 | 19. Denied. *See Exhibit A.*

6 | 20. Denied.

7 | 21. Denied.

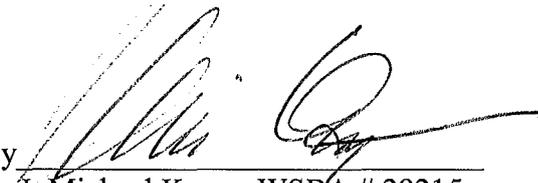
Despite these denials, the Court of Appeals *sua sponte* directed that judgment be entered on the merits of the case against CPI Corp., and ruled that CPI Corp. breached the agreement, without any finding of fact. Based on this alone, this Court should accept review to correct the highly prejudicial errors on the record. “The function of a summary judgment proceeding, or a judgment on the pleadings is to determine whether or not a genuine issue of fact exists, not to determine issues of fact.” *State ex rel. Zempel v. Twitchell*, 59 Wn. 2d 419, 425 (1962).

V. **CONCLUSION AND RELIEF SOUGHT**

This Court should accept review, reverse the Court of Appeals’ decision, and reinstate the judgment on the pleadings granted by the Trial Court.

RESPECTFULLY SUBMITTED this 19th day of January, 2012.

K&L GATES LLP

By   
\_\_\_\_\_  
J. Michael Keyes, WSBA # 29215  
Whitney J. Baran, WSBA # 41303  
Attorneys for Petitioner  
CPI Corp.

**CERTIFICATE OF SERVICE**

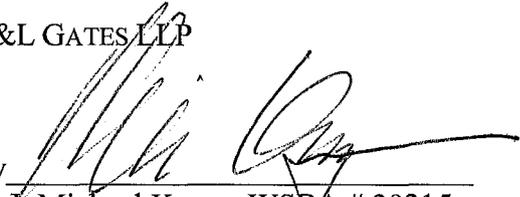
I hereby certify that on the 19th day of January, 2012, I caused to be served a true and correct copy of the foregoing **CPI CORP.'S PETITION FOR DISCRETIONARY REVIEW** to the parties below and in the manner indicated:

Mr. Nicholas D. Kovarik  
Mr. Kevin W. Roberts  
Dunn & Black  
111 North Post, #300  
Spokane, WA 99201

*Via Hand Delivery*

DATED this 19th day of January, 2012.

K&L GATES LLP

By 

J. Michael Keyes, WSBA # 29215  
Whitney J. Baran, WSBA # 41303  
Attorneys for Appellant  
CPI Corp.

# **Appendix A**

**FILED**

OCT 18 2011

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>P.E. SYSTEMS, LLC, a Delaware</b>	)	<b>No. 29411-1-III</b>
<b>limited liability company,</b>	)	
	)	
<b>Appellant,</b>	)	
	)	<b>Division Three</b>
<b>v.</b>	)	
	)	
<b>CPI CORP., a Missouri corporation,</b>	)	
	)	<b>PUBLISHED OPINION</b>
<b>Respondent.</b>	)	

SWEENEY, J. — This appeal follows the summary dismissal of a vendor’s suit for breach of contract. The vendee refused to pay for the vendor’s services. The vendee moved to dismiss pursuant to CR 12(c) (plaintiff can show no set of facts to justify recovery on the pleadings alone). The court concluded that the agreement in this commercial transaction amounted to nothing more than an agreement to agree and was therefore unenforceable and the court dismissed the vendor’s suit. We conclude that the matter was not resolved on the pleadings because the disputed agreement was entered into evidence and considered by the court. But we also conclude that whether this agreement rose to the level of a valid and binding contract is properly decided as a matter of law and that the agreement is a binding contract. We therefore reverse the judgment in

No. 29411-1-III  
P.E. Systems, LLC v. CPI Corp.

favor of the vendee/respondent and remand for entry of a judgment in favor of the vendor/appellant and remand for further proceedings on the question of damages.

#### FACTS

P.E. Systems LLC sued CPI Corp. for damages; it claimed breach of contract and breach of the implied covenant of good faith and fair dealing.

P.E. Systems and CPI Corp. agreed in writing that P.E. Systems would analyze CPI Corp.'s credit card processing costs and develop a plan to reduce those costs. They also agreed that CPI Corp. would pay P.E. Systems a consulting fee equal to half of any savings realized. P.E. Systems performed the agreed-upon services and developed a plan that could save CPI Corp. \$280,329 over one year and \$560,568 over two years. CPI Corp. used the information P.E. Systems provided but refused to pay any fees. CPI Corp. took the position that the agreement was unenforceable because the parties never agreed to the price it would pay for P.E. Systems' services and ultimately, then, the agreement amounted to nothing more than an agreement to agree. CPI Corp. attached the one-page agreement with its one-page addendum to CPI Corp.'s answer to P.E. Systems' complaint.

Paragraph 4 of the agreement says if CPI Corp. implements the plan produced by P.E. Systems, P.E. Systems' consulting fee would be half the program cost savings

realized, which is half the difference between CPI Corp.'s Historic Cost and its new merchant services costs:

Should Client elect to implement any portion of PES' [(P.E. Systems')] Cost Savings Program, or Cost Savings solutions provided during the agreement term, either by itself, by a third party or by using PES services, Client will pay PES a consulting fee at a rate of 50% of all Program Cost Savings realized by Client. Program Cost Savings are determined by taking the difference between Client's Historic Cost (baseline) and Client's new merchant services costs obtained by Client.

Clerk's Papers (CP) at 20. CPI Corp.'s Historic Cost would be determined "by taking [CPI Corp.'s] total Visa and MasterCard credit and debit card costs divided by [CPI Corp.'s] total Visa and MasterCard credit and debit card revenue." CP at 20. And CPI Corp.'s "Historic Cost will be set forth and mutually agreed to by the parties in Addendum 'A' which is incorporated by reference herein." CP at 20. Addendum A is blank. It reads that "Client and PES hereby agree that Client's Historic Cost Percentage as referenced in the Agreement for Services executed on \_\_\_\_\_, \_\_\_\_\_ is \_\_\_\_\_%." CP at 21. The parties signed the agreement but never completed or signed Addendum A.

CPI Corp. moved for judgment on the pleadings pursuant to CR 12(c) and argued that the agreement was nothing more than an agreement to agree on CPI Corp.'s Historic Cost figure and ultimately P.E. Systems' consulting fee. P.E. Systems responded that the provision requiring the parties to mutually agree on Historic Cost was not an agreement

to agree on Historic Cost but an opportunity for CPI Corp. to ensure that P.E. Systems properly calculated the Historic Cost figure. P.E. Systems also argued that an August 12 PowerPoint presentation to CPI Corp. would have added context to the agreement by explaining the circumstances leading to the agreement and the related CPI Historic Cost figure. It attached that presentation and a copy of the agreement to a declaration that accompanied its response to CPI Corp.'s motion to dismiss.

The presentation spells out that "PE Systems has been retained by CPI Corp. to find opportunities to reduce [its] credit card processing fees. This presentation is a specialized cost saving analysis prepared for CPI Corp. based on the credit card processing statements [it] provided." CP at 52. The presentation suggests CPI Corp.'s Historic Cost was 1.655998 percent. And it states that CPI Corp.'s Program Cost Savings would be \$280,329 over one year and \$1,401,645 over five years.

The court considered the agreement, which both parties produced, but refused to consider the PowerPoint presentation and limited its review and consideration to what it considered to be the "pleadings." CP at 117. It ultimately concluded that the agreement was an unenforceable agreement to agree, granted CPI Corp.'s CR 12(c) motion, and dismissed P.E. System's complaint. P.E. Systems moved to amend its complaint to allege causes of action for unjust enrichment, quantum meruit, Consumer Protection Act (ch. 19.86 RCW) violations, and various torts. The court denied the motion to amend

because the proposed causes of action were based on facts inconsistent with the facts asserted in P.E. Systems' original complaint.

## DISCUSSION

### DISMISSAL OF THE COMPLAINT ON THE PLEADINGS

P.E. Systems first contends that the trial court should have considered CPI Corp.'s CR 12(c) motion as a CR 56 motion for summary judgment. Whether the court properly applied CR 12(c) is a question of law that we will review *de novo*. *Nw. Animal Rights Network v. State*, 158 Wn. App. 237, 241, 242 P.3d 891 (2010).

When passing on a motion to dismiss on the pleadings, we review the pleadings to decide whether the nonmoving party can prove any set of facts consistent with the complaint that would entitle the plaintiff to relief. *Id.* And so the factual allegations contained in the complaint are accepted as true. *Burton v. Lehman*, 153 Wn.2d 416, 422, 103 P.3d 1230 (2005). Our review is *de novo*. *Parmelee v. O'Neel*, 145 Wn. App. 223, 231-32, 186 P.3d 1094 (2008), *rev'd in part on other grounds*, 168 Wn.2d 515, 229 P.3d 723 (2010). A motion to dismiss for failure to state a claim (CR 12(b)(6)) and a motion for judgment on the pleadings (CR 12(c)) raise identical issues. *Id.* "Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff cannot prove any set of facts to justify recovery. In making this determination, a trial court must presume that the

plaintiff's allegations are true and may consider hypothetical facts that are not included in the record." *Id.* (citations omitted).

But here the court considered the agreement in addition to the pleadings. So it considered evidence outside of the pleadings. P.E. Systems also offered, but the court refused to consider, evidence of circumstances that surrounded the formation of the agreement, specifically, the PowerPoint presentation. The court cannot exclude evidence simply to avoid tainting the pleadings in a way that trips the matter into a summary judgment proceeding. And simply attaching the contract to an answer does not avoid the conclusion that the court considered matters outside of the pleadings. The contract is not part of the "pleadings." *Yurtis v. Phipps*, 143 Wn. App. 680, 692, 181 P.3d 849 (2008). And you do not make it so by simply attaching it to an answer or complaint.

The question is whether the case can be resolved on the pleadings considering even hypothetical factual scenarios accommodated by the pleadings. *Parmelee*, 145 Wn. App. at 231-32. It cannot. And more significantly the trial court did not resolve the matter on the pleadings. P.E. Systems tried to show through affidavits and exhibits that the contract when put in context was a complete agreement and not an agreement to agree. This approach has been accommodated here in Washington since *Berg v. Hudesman*. *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990). And so the court should have considered the offer and then treated the proceedings as a summary

judgment proceeding. CR 12(c) (“**Motion for Judgment on the Pleadings**. . . . [A]ny party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by rule 56.”). The pleadings here are perfectly adequate to support a cause of action for breach of contract.

CPI Corp. confuses the process of resolving a dispute as a question of law with the process of resolving a dispute on the pleadings. The latter requires that the moving party show that the pleadings alone show that there is no cause of action even considering hypothetical scenarios. *Parmelee*, 145 Wn. App. at 231-32. The former requires that the moving party show that the nonmoving party’s factual showing does not support the cause of action alleged. *Martinez v. Kitsap Pub. Servs., Inc.*, 94 Wn. App. 935, 943, 974 P.2d 1261 (1999). Here the pleadings alleged breach of contract and breach of good faith and fair dealing. The complaint sets out causes of action that are legally cognizable and, if proved, warrant a remedy.

CPI Corp.’s answer denied the existence of an enforceable contract and, specifically, alleged that the document at issue was not a binding contract, but rather merely an agreement to agree. So the pleadings here also clearly frame the legal issue: Is

No. 29411-1-III  
P.E. Systems, LLC v. CPI Corp.

the agreement a legally binding contract or is it instead an agreement to agree in the future and therefore not enforceable? Ultimately our review is from the grant of a motion for summary judgment. We then sit in the same position as the superior court. *Skinner v. Holgate*, 141 Wn. App. 840, 847, 173 P.3d 300 (2007).

#### CONTRACT AS A MATTER OF LAW

The litigants here do not dispute the evidence—both introduced a copy of the same agreement. The question before the court, and necessarily before us, is whether the agreement rises to the level of an enforceable contract. And whether it does or not is a question of law. *Paradise Orchards Gen. P'ship v. Fearing*, 122 Wn. App. 507, 517, 94 P.3d 372 (2004).

P.E. Systems contends that the agreement here is a valid, enforceable contract and that the addendum was not an essential term but only spelled out the details of what these companies had already agreed upon. Br. of Appellant at 22-23.

“Generally, a plaintiff in a contract action must prove a valid contract between the parties, breach, and resulting damage.” *Lehrer v. Dep't of Soc. & Health Servs.*, 101 Wn. App. 509, 516, 5 P.3d 722 (2000). A valid contract requires that parties objectively manifest their mutual assent to all material terms of the agreement. *Keystone Land & Dev. Co. v. Xerox Corp.*, 152 Wn.2d 171, 177-78, 94 P.3d 945 (2004). And whether mutual assent exists is usually a question of fact. *Id.* at 178 n.10. But that question can

be determined as a matter of law here because the undisputed evidence is the agreement.

*Id.*

CPI Corp. maintains, and convinced the trial court, that the agreement is an unenforceable agreement to agree because one of its provisions states the parties will mutually agree to CPI Corp.'s Historic Cost. And they did not agree on the Historic Cost figure.

An agreement to agree is an agreement that the parties will mutually agree on something in the future and without which the agreement would be incomplete. *Id.* at 175. Paragraph (3) of the agreement states that "Client's Historic Cost will be . . . mutually agreed to by the parties." CP at 48. But the essential terms of this agreement, including P.E. Systems' fees for their services are set out in the body of the agreement. The addendum spelled out only the details of that fee; it is not therefore an essential term of this agreement and, moreover, is easily severable, as we shall see. The addendum does not add a material term to the agreement. Again, the payment structure is clearly set out in the body of the agreement. And so the provision for P.E. Systems' agreed-upon fee is easily ascertainable.

We would also conclude that, regardless, the addendum is severable without doing violence to the essential agreement between these companies. Whether a contract is severable depends on the intention of the parties. *Mut. of Enumclaw Ins. Co. v. Cox*, 110

Wn.2d 643, 649, 757 P.2d 499 (1988). Here the parties agreed that the agreement would be severable: “Should any provision of this agreement be held to be void, invalid, unenforceable or illegal by a court of competent jurisdiction, the validity and enforceability of the other provisions will not be affected.” CP at 48. Of course, the terms that remain after severance must be complete and reasonably certain; they must provide a basis to determine breach and remedy. *See Keystone Land*, 152 Wn.2d at 178 (the terms assented to must be sufficiently definite to be enforceable).

When we sever this addendum from the agreement, the remaining terms provide that CPI Corp.’s Historic Cost is calculated by dividing CPI Corp.’s “total Visa and MasterCard credit and debit card costs . . . by [its] total Visa and MasterCard credit and debit card revenue,” that “Historic Cost will be automatically increased or decreased from time to time to reflect any changes in the Visa or MasterCard fee structure,” and that CPI Corp. will provide the necessary documents to determine costs, revenue, and processor fee structures. CP at 48. This agreed-upon method for calculating Historic Cost easily provides the certainty necessary to calculate P.E. Systems’ fee. The addendum then can be severed and the remainder of the agreement remains an enforceable contract. The trial court erred by concluding that the agreement is unenforceable. We then reverse that order.

The complaint alleges, and apparently no one disputes, so we accept as true that CPI Corp. “took the information provided [by P.E. Systems] and . . . used it,” and that it failed to pay P.E. Systems its consulting fee. CP at 5. This breaches the agreement. CPI Corp. agreed to pay P.E. Systems a consulting fee if it used any portion of the plan produced by P.E. Systems:

Should Client elect to implement any portion of PES’ Cost Savings Program, or Cost Savings solutions provided during the agreement term, either by itself, by a third party or by using PES services, Client will pay PES a consulting fee at a rate of 50% of all Program Cost Savings realized by Client.

CP at 48. The resulting damages would, of course, be the lost consulting fee or half “the difference between Client’s Historic Cost (baseline) and Client’s new merchant services costs obtained by Client.” CP at 48. P.E. Systems’ damages remain a question of fact. The trial court, then, erred by entering judgment on the pleadings. We remand for further proceedings on the question of damages.

#### MOTION TO AMEND PLEADINGS

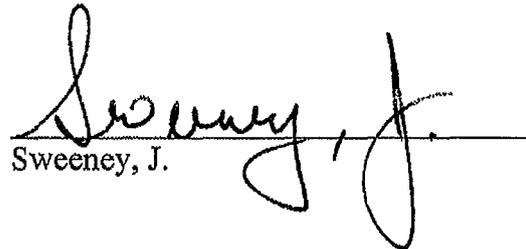
P.E. Systems next contends the court should have granted its motion to amend its complaint. We review an order denying a motion to amend pleadings for abuse of discretion. *Wilson v. Horsley*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999). The single most important factor is *prejudice*. *Id.*; CR 15(a). But we need not address this question given our disposition here.

No. 29411-1-III  
P.E. Systems, LLC v. CPI Corp.

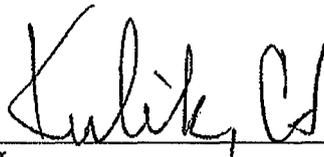
ATTORNEY FEES

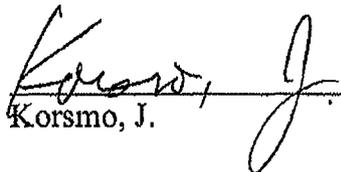
Both parties request fees and costs under the agreement's attorney fees provision. RCW 4.84.330 entitles the prevailing party in an action on a contract with an attorney fees provision to attorney fees (even if the contract is invalidated in whole or in part). *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). P.E. Systems is the prevailing party and therefore entitled to fees.

We reverse the judgment in favor of CPI Corp. and remand for entry of a judgment in favor of P.E. Systems and we remand for further proceedings on the question of damages.

  
Sweeney, J.

WE CONCUR:

  
Kulik, C.J.

  
Korsmo, J.

# **Appendix B**

FILED

DEC 20 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON

**COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON**

<b>P.E. SYSTEMS, LLC, a Delaware</b>	)	
<b>limited liability company,</b>	)	<b>No. 29411-1-III</b>
	)	
<b>Appellant,</b>	)	
	)	
<b>v.</b>	)	<b>ORDER DENYING</b>
	)	<b>MOTION FOR</b>
<b>CPI CORP., a Missouri corporation,</b>	)	<b>RECONSIDERATION</b>
	)	
<b>Respondent.</b>	)	

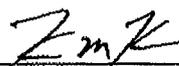
THE COURT has considered respondent's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's opinion of October 18, 2011, is denied.

PANEL: Judges Sweeney, Kulik, Korsmo

DATED: December 20, 2011

FOR THE COURT:

---

KEVIN M. KORSMO  
Acting Chief Judge

# **Appendix C**

P.E. Systems, LLC - Agreement for Services

RECEIVED  
PACIFIC NORTH WEST

This Agreement is made by and between CPI Corp, 1706 Washington Ave., St. Louis, MO 63103, ("Client"), and P.E. Systems, LLC, located at 245 West Main Avenue, Suite 400, Spokane, Washington 99201-0111 ("PES").

(1) PES is engaged in the business of providing proprietary analysis of Merchant Processing Services costs. Client and PES agree that during the term of this Agreement, PES will analyze Client's (including all subsidiaries and merchant locations) payments for Merchant Processing Services costs and provide Client with its proprietary analysis to facilitate reductions in fees and chargebacks, capture refunds and the associated cost structure applicable to Client's Merchant Processing Services ("Consulting Services"). For purposes of this Agreement, Merchant Processing Services includes debit and credit card processing and their associated equipment expenses.

(2) To facilitate PES performance of Consulting Services and calculation of Client's Historic Cost, within 14 days of execution of this Agreement, Client will provide PES with (a) A current copy of their Merchant Processing Agreement(s) and any documentation or applicable agreements that may affect their Merchant Processing Services Costs; and (b) Copies of Client's last 12 months of Merchant Processing Services Statements for all merchant accounts. Within 20 days of the close of Client's monthly Merchant Processing Services billing cycle, Client will provide monthly Merchant Processing Services billing statements to PES. Prior to PES calculating Client's Historic Cost and developing its proprietary "Cost Savings Program" for Client, Client warrants that it will give PES all information necessary for PES to perform its analysis and calculations.

(3) Client's Historic Cost will be determined, based upon the data provided by Client, by taking Client's total Visa and MasterCard credit and debit card costs divided by Client's total Visa and MasterCard credit and debit card revenue which reflects Client's accurate Historic Cost. Once Historic Cost is calculated PES will analyze the specific Merchant Processing services cost and create a proprietary Cost Savings Program. Client's Historic Cost will be set forth and mutually agreed to by the parties in Addendum "A" which is incorporated by reference herein. Historic Cost will be automatically increased or decreased from time to time to reflect any changes in the Visa or MasterCard fee structure. Client retains the right not to implement a program or cost savings proposed by PES for Client's good faith business reasons. Should Client decide to go forward and implement any part of PES Cost Savings Program, either by itself, by a third party or by using PES services, this Historic Cost becomes the baseline which the parties will use to measure "Program Cost Savings".

(4) Should Client elect to implement any portion of PES' Cost Savings Program, or Cost Savings solutions provided during the agreement term, either by itself, by a third party or by using PES services, Client will pay PES a consulting fee at a rate of 50% of all Program Cost Savings realized by Client. Program Cost Savings are determined by taking the difference between Client's Historic Cost (baseline) and Client's new merchant services costs obtained by Client. In the case of refunds, Program Cost Savings are determined by the total amount of the refund received by Client. Client will pay the Consulting Fee for a period of 24 months following the first invoice. Payment by Client shall be due upon receipt of invoice. Unpaid balances will accrue interest at the monthly rate of 1.5%. PES does not guarantee that savings will be realized by Client in any given month or at all. However, if no savings are realized, no payment will be due and owing to PES by Client. In no case will PES owe client for any work performed.

(5) In the event Client decides not to implement PES' proprietary Cost Savings Program, Client will so notify PES in writing. Client will provide PES with monthly Merchant Processing Services billing statements for a period of 24 months following the date of such notice. If during that 24-month period, Client realizes any Program Cost Savings, Client will pay PES its Consulting Fee on those Savings. In the event PES determines that there are no Program Cost Savings, PES will notify client in writing that client is not required to send its Merchant Processing Services billing statements for the 24 month period.

(6) In performing their respective duties under this Agreement, each party will disclose to the other, certain confidential, proprietary and trade secret information. For purposes of this Agreement, "Confidential Information" means any and all information created by PES not otherwise in the public domain prior to the execution of this Agreement, as well as information that was derived from the public domain but was subsequently collected into a list or other document of any kind, or has been fashioned, manipulated, sorted, organized, categorized, and/or filtered by PES. This shall specifically include but not be limited to PES' Cost Savings Program given to Client. The parties agree that each will hold all Confidential Information exchanged in strictest confidence and that such Confidential Information will not be used by either party nor revealed to any third party, including any subsidiaries or affiliates, for any purpose other than to facilitate the performance of the parties' respective obligations under this Agreement. This clause shall survive the termination of this Agreement.

(7) For any controversy, dispute, or claim arising out of or relating to this Agreement, jurisdiction and venue shall be in Spokane County Superior Court, Spokane, Washington. The laws of the State of Washington will control. The prevailing party shall be entitled to attorney fees and costs.

(8) The undersigned hereby warrants that he/she has the authority to enter into this Agreement on behalf of Client. This Agreement (together with Addendum A hereto) represents the entire agreement between the parties and shall supersede any prior proposals, offers, negotiations, revisions, unincorporated written communications or oral discussions, statements, representations or agreements. This Agreement may not be altered, amended or extended except by a writing signed by an authorized representative of each party. Should any provision of this agreement be held to be void, invalid, unenforceable or illegal by a court of competent jurisdiction, the validity and enforceability of the other provisions will not be affected. Failure by PES to enforce any provision of this agreement will not constitute or be construed as a waiver of such provision of the right to enforce such provision.

By: P.E. Systems, LLC.  
Print Name: ROBERT S. SKATTUM  
Signature: [Signature]  
Its (title): VP OPERATIONS  
Date: 07-08-09

By: CPI Corp  
Print Name: Philip J. DeLuca  
Authorized Signature: [Signature]  
Its (title): DIRECTOR - TREASURY SERVICES  
Date: 7/10/09

Addendum A

Client and PES hereby agree that Client's Historic Cost Percentage as referenced in the Agreement for Services executed on \_\_\_\_\_ invoice is \_\_\_\_\_%. As outlined in the Agreement, Client will pay the consulting fee for a period of 24 months following the first invoice.

By: P.E. Systems, LLC.  
Print Name: \_\_\_\_\_  
Signature: \_\_\_\_\_  
Its (title): \_\_\_\_\_  
Date: \_\_\_\_\_

By: CPI Corp  
"Client"  
Print Name: \_\_\_\_\_  
Authorized Signature: \_\_\_\_\_  
Its (title): \_\_\_\_\_  
Date: \_\_\_\_\_

— Downgrades —

(1) OVER THE LAST 12 MONTHS WE HAVE REPLACED EVERY CREDIT CARD MACHINE WITH A NEW ONE (HAD PROBLEMS CLOSING ALL TRANSACTIONS TIMELY)

(2) WE DO NOT USE PIN-PADS FOR DEBIT (PLAN IS TO DETERMINE IF THERE WOULD BE ECONOMIC PAYBACK TO DO THIS)