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SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS  
OF THE STATE OF WASHINGTON,  
DIVISION III

Case No. 29411-1-III

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P.E. SYSTEMS, LLC, a Delaware limited liability company,

Plaintiff/Respondent,

v.

CPI Corp., a Missouri corporation,

Defendant/Petitioner.

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**P.E. SYSTEMS, LLC'S SUPPLEMENTAL BRIEF**

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## TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION .....	1
II. IDENTITY OF RESPONDENT .....	1
III. ISSUES PRESENTED.....	1
IV. STATEMENT OF THE CASE.....	2
V. ARGUMENT .....	6
A. While Judgment Against CPI Should Be Reversed, The Court Of Appeals Decision On Other Grounds Should Be Affirmed.....	6
B. The Reversal Of The Trial Court’s Application Of The Incorrect Legal Standard For CPI’s CR 12(c) Motion Should Be Affirmed.....	6
C. The Court Of Appeals Correctly Found That The July 10, 2009 Consulting Agreement Is Valid And Enforceable. ....	11
D. PES’s Motion For Leave To Amend Its Complaint Should Have Been Granted.....	17
VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS .....	19
VII. CONCLUSION.....	19

## TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases</u>	
<u>16th Street Investors, LLC v. Morrison,</u> 153 Wn. App. 44 (2009).....	14
<u>Bell Atlantic v. Twombly,</u> 500 U.S. 544 (2007) .....	9
<u>Bloom v. Christensen,</u> 18 Wn.2d 137 (1943) .....	14
<u>Chandler v. Washington Toll Bridge Authority,</u> 17 Wn.2d 591, 137 P.2d 97 (1943) .....	18
<u>Fondren v. Klickitat County,</u> 79 Wn. App. 850, 905 P.2d 928 (1995) .....	7
<u>Gaspar v. Peshastin Hi-Up Growers,</u> 131 Wn. App. 630, 128 P.3d 627 (2006) .....	6
<u>Hoffer v. State,</u> 110 Wn.2d 415 (1988) .....	9
<u>Honan v. Ristorante Italia, Inc.,</u> 66 Wn. App. 262, 832 P.2d 89 (1992) .....	17
<u>Johnson v. Whitman,</u> 1 Wn. App. 540, 463 P.2d 207 (1969) .....	18
<u>Keystone Land &amp; Development Company v. Xerox Corporation,</u> 152 Wn.2d 171 (2004) .....	11, 12, 13
<u>Kinney v. Cook,</u> 159 Wn.2d 837 (2007) .....	8
<u>Lane v. Brown &amp; Haley,</u> 81 Wn. App. 102, 912 P.2d 1040 (1996) .....	7
<u>McCurry v. Chevy Chase Bank,</u> 169 Wn.2d 96 (2010) .....	8, 9
<u>Morris v. Maks,</u> 69 Wn. App. 865 (1993).....	14
<u>P.E. Sys., LLC v. CPI Corp.,</u> 164 Wn. App. 358 (2011).....	10, 11

<u>Quality Rock Products, Inc. v. Thurston County,</u> 126 Wn. App. 250, 108 P.3d 805 (2005) .....	17
<u>Schneider v. Allis-Chalmers Mfg. Co.,</u> 196 Wis. 56, 219 N.W. 370 (1928) .....	18
 <b><u>Rules</u></b>	
CR 12 .....	6, 10
CR 12(b)(6) .....	8
CR 12(c) .....	1, 7, 8, 11
CR 15(a) .....	17
CR 56 .....	7, 11
Fed. R. Civ. P. 12(b)(6) .....	9
RAP 18.1 .....	19
 <b><u>Other Authorities</u></b>	
Restatement (Second) of Contracts § 29, comment a (1981) .....	13

## **I. INTRODUCTION**

P.E. Systems, LLC (“PES”) requests that the Court of Appeals Decision reversing the Trial Court’s CR 12(c) dismissal of this action be affirmed. PES agrees that it appears the Court of Appeals’ entry of judgment against Petitioner CPI Corp. (“CPI”) lacks specific support in the record and the entry of judgment against CPI should be vacated. Nonetheless, this matter should be remanded to Spokane County Superior Court for a determination on the merits.

## **II. IDENTITY OF RESPONDENT**

Respondent P.E. Systems, LLC, by and through its attorneys, Dunn & Black, P.S., files this Supplemental Brief.

## **III. ISSUES PRESENTED**

1. Under CR 12(c), is a Plaintiff allowed to present evidence in response to documents attached by the Defendant to its Answer?
2. Under CR 12(c), when evidence is presented to the Trial Court in response to a motion for judgment on the pleadings, should the Trial Court convert the motion to a motion for summary judgment?
3. When an agreement provides a formula to calculate a baseline for the purposes of determining the consulting fee under that agreement, do genuine issues of material fact exist with regard to the parties’ intent?

4. Is the July 2009 Consulting Agreement a valid and enforceable contract?
5. Where a Trial Court finds a contract is unenforceable, does justice require a Plaintiff be entitled to amend its complaint to assert claims for quantum meruit/unjust enrichment, Consumer Protection Act violations and tort theories if there is no prejudice to the Defendant?

#### **IV. STATEMENT OF THE CASE**

The credit and debit card industry is large and highly competitive. (C.P. 54-55, 68). When a merchant desires to accept debit and credit card payments, it will contract with a processor to process those transactions. Each processing agreement is different, but the fees a merchant must pay are generally similar. The total debit and credit card processing fees paid by the merchant are broken up into three categories: (1) Assessment; (2) Interchange; and (3) Mark-up. (C.P. 53, 59). Assessment is a fee charged by Visa and MasterCard to merchants and issuers as a condition of membership. (C.P. 60). Interchange fees are paid by the merchant to the bank that issued the credit card used in the transaction. (C.P. 61). Interchange fees are primarily positioned as compensation to the issuing bank for the risk of fraud and as an incentive to the issuing bank. (C.P. 61). Mark-up is the fee charged

by the processor to process the transaction. (C.P. 67-68). Processing is a commodity industry because there exists thousands of vendors that offer the same service. (C.P. 67).

PES is an independent, highly specialized consulting firm that analyzes debit and credit card processing costs for clients. (C.P. 4, 48, 52). In order to be compensated for its services, PES enters into binding Consulting Agreements with its clients. These Consulting Agreements provide that PES will analyze the previous 12 months of merchant processing costs and determine if the amount the client is being charged can be reduced. (C.P. 4, 48). The results of PES's analysis are provided to the client in a confidential report. (C.P. 50-75). Should the Client elect to implement PES's recommendations to lower the client's debit and credit card processing costs, PES is paid by receiving a consulting fee of 50% of any savings realized. (C.P. 48).

In order to determine a baseline to measure the amount of any savings, PES needs to determine the client's historic cost. (C.P. 48). Because the client's historic cost is unknown to PES at the time it enters into the Consulting Agreement, the Consulting Agreement

itself sets forth a formula to calculate historic costs. (C.P. 48). The historic cost formula, as set forth in the Consulting Agreement, is the total Visa/MasterCard processing costs divided by the total Visa/MasterCard revenue. (C.P. 48, 50-75).

The result of that historic cost calculation is then set forth and agreed upon in Addendum A simply as a procedure to allow the clients an opportunity to double-check the calculations. (C.P. 48). Importantly, however, the historic cost formula is set forth in the Consulting Agreement and is not susceptible to further negotiation. Therefore, when PES enters into its Consulting Agreements, there is no further agreement to be made in the future. Rather, the client has the opportunity to agree that the math was performed correctly and pursuant to the formula contained in the Consulting Agreement. (C.P. 48).

On or about July 10, 2009, CPI and PES entered into a Consulting Agreement. (C.P. 4, 48). PES then obtained CPI's merchant processing statements and performed the analysis. (C.P. 4). On August 12, 2009, PES delivered its proprietary cost

savings program to CPI demonstrating that it could save over \$280,000 a year. (C.P. 4-5, 50-75).

Upon performing the analysis of CPI's processing environment, PES took the total Visa/MasterCard processing costs and divided it by the total Visa/MasterCard revenue, just as the Consulting Agreement provides. (C.P. 48, 58). The result of the calculation showed CPI's historic cost baseline was 1.655998%. (C.P. 58). Pursuant to the terms of the Consulting Agreement, CPI was to pay PES 50% of the savings actually realized. (C.P. 4-5, 48). The savings realized are determined by looking at the merchant processing statements and comparing those effective rates against the historic cost baseline of 1.655998%. (C.P. 4-5, 48, 50-75).

However, CPI breached the Consulting Agreement by refusing to produce its merchant processing statements and refusing to pay PES its consulting fee earned despite the clear and unequivocal language in the Consulting Agreement to the contrary. (C.P. 4-6, 48).

## V. ARGUMENT

### A. While Judgment Against CPI Should Be Reversed, The Court Of Appeals Decision On Other Grounds Should Be Affirmed.

When the Court of Appeals decision is analyzed, it appears that CPI did in fact deny that it utilized PES's confidential and proprietary information. (C.P. 5, 14-15). Therefore, PES agrees that the judgment against CPI should be reversed. However, the reversal of the Trial Court's erroneous decision dismissing the action should be upheld. As explained below, the Agreement is enforceable, and genuine issues of fact exist regarding CPI's breach. Therefore, the Court of Appeals' decision should be affirmed, and this matter should be remanded to the Superior Court to be determined on its merits.

### B. The Reversal Of The Trial Court's Application Of The Incorrect Legal Standard For CPI's CR 12(c) Motion Should Be Affirmed.

A CR 12 motion, including a motion for judgment on the pleadings, should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits. Gaspar v. Peshastin Hi-Up Growers, 131 Wn. App. 630, 635, 128 P.3d 627 (2006);

Fondren v. Klickitat County, 79 Wn. App. 850, 854, 905 P.2d 928 (1995). This is because it is a general policy to decide cases on the merits. See Lane v. Brown & Haley, 81 Wn. App. 102, 106, 912 P.2d 1040, 1042 (1996).

CR 12(c) states:

*After the pleadings are closed but within such time as not to delay the trial, any 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.***

CR 12(c) (emphasis added).

Thus, the Trial Court was required to treat CPI's motion as a motion for summary judgment, because material outside the pleadings were presented to and not excluded by the Trial Court as inadmissible. PES submitted the Declaration of Nicholas D. Kovarik in opposition to CPI's motion for judgment on the pleadings. (C.P. 45-75). This declaration contained two exhibits. (C.P. 45-75). Exhibit A was a copy of the July 2009 Consulting Agreement. (C.P. 45-75). Exhibit B was a copy of the August 2009

presentation that showed CPI the historic cost calculation referred to in the Consulting Agreement. (C.P. 45-75) This evidence reaffirmed and established the intent of the parties.

Even if the motion was considered without reference to extraneous materials, the Court of Appeals decision must still be affirmed. Motions under CR 12(c) apply the same standard as motions under CR 12(b)(6). A plaintiff states a claim upon which relief can be granted “*if it is possible that facts could be established to support allegations in the complaint.*” McCurry v. Chevy Chase Bank, 169 Wn.2d 96, 101 (2010) (emphasis in original). Thus, dismissal under CR 12(b)(6) “*is warranted only if the court concludes, beyond a reasonable doubt, that the plaintiff cannot prove ‘any set of facts which would justify recovery.’*” Kinney v. Cook, 159 Wn.2d 837, 842 (2007) (citations omitted) (emphasis added). The court presumes all facts alleged in plaintiff’s complaint as true and may consider hypothetical facts supporting the plaintiff’s claims. Id. Such motions should be granted “*only in the unusual case in which plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.*” Id.,

citing Hoffer v. State, 110 Wn.2d 415, 420 (1988) (emphasis added). As a result, CR 12 motions to dismiss are rarely granted.

In McCurry v. Chevy Chase Bank, 169 Wn.2d 96 (2010), plaintiff borrowers brought a class action against the defendant home lender alleging fax and notary fees charged as a result of the payoff of the loan violated the loan contract and Washington's Consumer Protection Act. The Trial Court granted the defendant's motion to dismiss and the Court of Appeals affirmed. Id. When plaintiffs appealed to this Court, defendant urged the court to adopt the stricter federal standard for a motion to dismiss. Id. at 101.

In reversing the Trial Court and Court of Appeals' dismissal of plaintiffs' claims, the McCurry court specifically declined to adopt the heightened pleading standard under Fed. R. Civ. P. 12(b)(6) adopted in Bell Atlantic v. Twombly, 500 U.S. 544 (2007). The McCurry court reaffirmed the longstanding dismissal standard in Washington that a plaintiff's complaint will withstand a motion to dismiss if it sets forth a "conceivable" set of facts to the support the claims. McCurry, 169 Wn.2d at 102.

Here, the Trial Court erred when it did not consider any conceivable set of facts that could justify recovery because the Trial Court admitted that it did not consider the August 12, 2009 presentation, which confirmed the actual historic cost calculation and the fact that the Consulting Agreement was valid and enforceable. (C.P. 45-75) (R.P. 31-33). In taking the allegations in the Complaint as true and then considering any set of conceivable facts that could justify recovery, the Trial Court simply should not have granted CPI's motion.

The allegations in the Complaint clearly allege that a valid contract exists and that contract was breached causing damages. If the August 12, 2009 presentation was considered as a conceivable fact, it shows that the historic cost was calculated for CPI. Thus, that presentation supplied the result of the math formula that was in the Consulting Agreement, and there was nothing left to negotiate.

As the Court of Appeals correctly noted, the Trial Court was confused about whether the issue is being resolved on the pleadings (CR 12) versus being decided as a question of law (summary judgment standard). See P.E. Sys., LLC, 164 Wn. App. 358 (2011)

at 365. If a Trial Court is deciding an issue of law, it must give the non-moving party the opportunity to present all material made pertinent to such a motion by Civil Rule 56. CR 12(c). The Court of Appeals' decision correctly found that the Trial Court erred when it decided a question of law without giving PES any opportunity to present its evidence and refusing to consider the evidence that was presented. P.E. Sys., LLC, 164 Wn. App. at 365-66. As such, the reversal of the Trial Court for failure to utilize the proper legal standard justifies affirming the Court of Appeals' decision.

**C. The Court Of Appeals Correctly Found That The July 10, 2009 Consulting Agreement Is Valid And Enforceable.**

The issue of extrinsic evidence aside, the Trial Court erred, and the Court of Appeals correctly reversed the ruling as a matter of law that the July 10, 2009 Consulting Agreement was unenforceable. CPI and PES made a fully binding agreement and agreed upon all material terms. (C.P. 48).

CPI claimed that the July 10, 2009 Consulting Agreement was an unenforceable "agreement to agree." CPI argued Keystone Land & Development Company v. Xerox Corporation, 152 Wn.2d 171 (2004). However, CPI's application of Keystone is misguided.

The Keystone holding actually points to three types of agreements, only one of which is unenforceable.

In Keystone, the Court went to great lengths to categorize the different types of agreements and associated legal rules governing contractual reliability. Parties have made a fully binding contract when they have agreed on all material terms and realized their agreement in a final written document. Id. However, if the parties have not yet reached a fully binding contract, their negotiations will fall into one of three categories. First, an agreement with open terms exists where all material terms are supplied and the parties intended to be bound to the key points provided, in which case any remaining terms may be supplied by a court or another authoritative source, such as the Uniform Commercial Code. Id. at 176. Second, an agreement to negotiate exists where the parties exchange promises to conform to a specific course of conduct during negotiations. This is an enforceable contract, and a party will be liable for breach where it fails to conform to the course of conduct agreed upon. Id. Third is an agreement to agree. This agreement is the only type of agreement that is unenforceable. Id. at 175-76.

The Keystone court addressed the issue of whether an exchange of letters between a potential buyer and seller of real property which communicated offers, counter-offers, and acceptances could give rise to an enforceable agreement when both parties expressly agreed in the correspondence that they would have to negotiate, draft and sign a formal purchase and sale contract. Id. at 174-175. The court correctly noted that this was an unenforceable “agreement to agree” requiring “*a further meeting of the minds of the parties and without which it would not be complete.*” Id. at 175.

On the other hand, where negotiations are to the point where the parties have definitely agreed to the terms but have not yet executed a final written instrument, an enforceable contract exists. See Restatement (Second) of Contracts § 29, comment a (1981). Where mutual manifestations of assent of the parties are present, a contract will not be prevented from forming on the basis of intent to later formalize the agreement or supply a non-material term. Id.

Washington courts have held that an open term contract is enforceable as long as there is reasonable certainty of terms in order for the court to provide a basis for determining breach and the

appropriate remedy, and there is a manifestation of assent. See 16th Street Investors, LLC v. Morrison, 153 Wn. App. 44, 55 (2009); see also Morris v. Maks, 69 Wn. App. 865 (1993) (a valid and enforceable contract exists so long as the subject matter is agreed upon, the terms are stated in informal writings, and the parties intended to have a binding agreement). The court may test the contract based on the surrounding circumstances to determine if it is complete and therefore valid. Bloom v. Christensen, 18 Wn.2d 137 (1943).

Here, there are no facts to support the conclusion that any future meeting of the minds was necessary between the parties for the Consulting Agreement to be complete. The Consulting Agreement stated:

*(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.*

\*\*\*

*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." [PES receives 50% of all Program Cost Savings as a consulting fee].*

(C.P. 48) (emphasis added).

This provision, which CPI relies upon in support of the proposition it entered into just an "agreement to agree," only provided CPI with the opportunity to verify PES's calculations based on the contractually agreed-upon formula. (C.P. 48, at ¶¶ 3-4). The sole purpose of Addendum A is to provide a mechanism for the client to verify PES's mathematical calculations. It did not provide for a future "agreement" or negotiation.

CPI and PES made a fully binding agreement and agreed upon all material terms. (C.P. 48). The Consulting Agreement is sufficiently definite such that, under the most basic contract interpretation principles, CPI's acceptance resulted in an enforceable contract and the ability of a court to fix exactly the legal liability of the parties. The "historic cost" that CPI argued required further agreement is, in fact, fully provided in a mathematic formula that

was expressly agreed to by CPI in the Consulting Agreement. (C.P. 48). Indeed, under CPI's argument, any contract that relied upon a formula to set its terms would be unenforceable as an "agreement to agree." Obviously, such a result would bring about chaos to several industries. Furthermore, PES performed the calculation and provided it in PES's cost savings presentation on August 12, 2009. (C.P. 50-75). This presentation demonstrated that the historic cost was 1.655998%. (C.P. 50-75).

Even if the Consulting Agreement between PES and CPI is construed as an open term agreement, it is valid and enforceable, because all material terms were provided and assented to such that it provides a basis for determining the existence of a breach and giving an appropriate remedy. (C.P. 48, 50-75).

The Trial Court erred by failing to presume the truth of the allegations in the Complaint, i.e., that the parties entered into a valid and binding contract. (C.P. 4-5). Judgment on the pleadings was improper at the stage in the proceedings that the case was in because nothing established, as a matter of uncontested fact, that the Consulting Agreement was an unenforceable agreement to agree.

As such, the Trial Court erred when it found the July 10, 2009 Consulting Agreement to be unenforceable. Thus, the Trial Court should be reversed and the Court of Appeals' decision affirmed.

**D. PES's Motion For Leave To Amend Its Complaint Should Have Been Granted.**

The Court of Appeals' decision did not reach the question of whether the Trial Court erred by denying PES's motion to amend. Should this Court reach that issue, PES requests that the Trial Court's denial of the motion to amend be reversed.

Leave to amend should be freely given except where prejudice to the opposing party would result. Honan v. Ristorante Italia, Inc., 66 Wn. App. 262, 272, 832 P.2d 89 (1992). CR 15(a)'s purpose is to "*facilitate proper decisions on the merits;*" however, "*[t]he touchstone for the denial of a motion to amend is the prejudice such an amendment would cause to the nonmoving party.*" Quality Rock Products, Inc. v. Thurston County, 126 Wn. App. 250, 273, 108 P.3d 805 (2005).

Here, the Trial Court erroneously ruled that PES's contract was unenforceable. As a result, PES immediately requested leave to amend the Complaint to allege causes of action for quantum

meruit/unjust enrichment, Consumer Protection Act Violations and tort theories. (R.P. 22).

These causes of action were not included in the original Complaint, because the existence of a valid contract precludes tort claims and claims for quantum meruit/unjust enrichment. See Chandler v. Washington Toll Bridge Authority, 17 Wn.2d 591, 604, 137 P.2d 97 (1943) (citing Schneider v. Allis-Chalmers Mfg. Co., 196 Wis. 56, 219 N.W. 370 (1928)); see also Johnson v. Whitman, 1 Wn. App. 540, 463 P.2d 207 (1969)). Thus, since the Trial Court dismissed the contract claims, the quantum meruit, unjust enrichment and tort claims could then properly be asserted. However, the Trial Court abused its discretion and denied leave to amend.

Justice required that PES be able to bring an action for quantum meruit/unjust enrichment, CPA violations and other tort theories. The Trial Court abused its discretion when it did not allow this amendment. There was no prejudice to CPI in allowing the amendment. The case was only 94 days old. No discovery had taken place, and the facts that supported the proposed amended

claims were known by the defendant. Thus, if this Court reaches this issue, the Trial Court's refusal to allow the amendment should be reversed.

**VI. RAP 18.1 MOTION FOR ATTORNEY FEES AND COSTS**

Respondent PES respectfully requests an award of the reasonable attorney fees and costs incurred based on RAP 18.1 and the valid and enforceable contract between PES and CPI.

**VII. CONCLUSION**

Pursuant to the foregoing, the Court of Appeals' Decision should be affirmed in all respects, except for the entry of judgment against CPI.

DATED this 6<sup>th</sup> day of July, 2012.

Respectfully Submitted,

DUNN & BLACK, P.S.



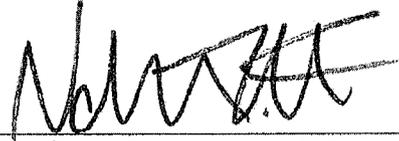
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th day of July, 2012, I caused to be served a true and correct copy of the foregoing document to the following:

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NICHOLAS D. KOVARIK

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**Subject:** 86936-7 - P.E. Systems, LLC v. CPI Corp.

Attached for filing is P.E. Systems, LLC's Supplemental Brief in the above-referenced matter. This Supplemental Brief is filed by Nicholas D. Kovarik, WSBA #35462, on behalf of P.E. Systems, LLC in the case of P.E. Systems, LLC v. CPI Corp., Case No. 86936-7. Our address and phone number are listed below. Mr. Kovarik's email address is [nkovarik@dunnandblack.com](mailto:nkovarik@dunnandblack.com).

Thank you in this regard.

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