

74774-6

74774-6

No. 74774-6-I

IN THE COURT OF APPEALS, DIVISION I,  
OF THE STATE OF WASHINGTON

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CAMBRIDGE DECISION SCIENCE,

Plaintiff/Respondent,

v.

JON MARKMAN and ELLEN MARKMAN, husband and wife, and the marital  
community comprised thereof; and MARKMAN CAPITAL INSIGHT LLC,

Defendants/Appellants.

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MARKMAN CAPITAL INSIGHT LLC, a Washington limited liability  
company,

Counterclaimant and Third-Party Plaintiff/Appellant,

v.

TREYTON THOMAS, A/K/A TREY THOMAS A/K/A TRAY THOMAS  
A/K/A T.L. THOMAS A/K/A TRACY LEE THOMAS, an individual,  
CAMBRIDGE DECISION SCIENCE, a foreign entity or trade name of Trey  
Thomas and TREADSTONE, a foreign entity or trade name of Treyton Thom

Third-Party Defendants/Counterclaimant Defendant/Respondents.

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**BRIEF OF APPELLANTS**

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## I. INTRODUCTION

When parties engaged in contract negotiations do not agree on the same terms at the same time, there is no meeting of the minds. Without a meeting of the minds, there is no enforceable contract. An assent to a contract offer that simultaneously changes the offer's terms in any material respect may constitute a counteroffer, but it is not an acceptance and does not make a binding contract.

The trial court disregarded these fundamental rules when it granted plaintiff's motion for enforcement of an alleged agreement. Based solely on affidavits and sworn declarations, the court ruled that two individuals who had signed a so-called "'Settlement Agreement' and 'Mutual Release'" entered into an enforceable contract. The court failed to take into account testimonial and documentary evidence that showed (a) the second signatory conditioned his acceptance on modification of a material term in the proposed agreement; (2) the original signatory responded with counterproposals and stated that the parties had no agreement if the counterproposals were not accepted; and (3) the second signatory never accepted any of the counterproposals. The evidence also showed that a few days *after* the date on which the trial court determined an enforceable settlement had been reached, the parties exchanged emails about arbitrating their dispute. The objective evidence showed, at a minimum,

that there was a genuine dispute as to the existence and terms of the alleged agreement. The trial court erred in concluding otherwise, and then abused its discretion by granting plaintiff's motion for enforcement without an evidentiary hearing to resolve the disputed facts.

The trial court compounded its errors by entering a final judgment in favor of a plaintiff that lacked capacity to sue. Defendants advised the court that "Cambridge Decision Science" – the sole named plaintiff – appears to be nothing more than an unregistered trade name. Plaintiff did not dispute this characterization, nor did it provide any authority indicating that a trade name (registered or not) can bring suit in state court. Nevertheless, the court allowed Cambridge Decision Science not only to pursue a claim, but also to obtain a final judgment.

The trial court further compounded its errors by (1) entering judgment against an individual who was not a party to the alleged agreement and did not breach it; (2) entering a final judgment despite the presence of unresolved counterclaims and third-party claims; and (3) adding prejudgment interest, costs, and statutory attorney fees to a judgment that never should have been entered.

## II. ASSIGNMENTS OF ERROR

### A. Assignments of Error

1. The trial court erred in granting plaintiff's motion to enforce an alleged settlement agreement.
2. The trial court erred in denying defendants' motion for reconsideration.
3. The trial court erred in entering the final judgment.
4. The trial court erred in awarding prejudgment interest, costs, and statutory attorney fees.

### B. Issues Pertaining to Assignments of Error

1. Plaintiff moved to enforce an alleged bilateral agreement for settlement of an out-of-court dispute. Defendants submitted (a) a declaration stating that no final agreement ever was reached, and (b) documentary evidence showing (i) the parties' exchange of proposals and counterproposals to modify the alleged agreement's terms, (ii) the other party's written statement that if his counterproposal was not agreed to, "we have no settlement," and (iii) emails reflecting the absence of any acceptance of the other party's counterproposals, and the parties' subsequent communications about arbitrating their dispute. Did the evidence establish a genuine dispute of material fact as to the existence

and terms of the alleged settlement agreement? (Assignments of error nos. 1, 2, 3.)

2. Plaintiff moved for enforcement of an alleged agreement, relying on an affidavit from an individual who neither negotiated nor signed the alleged agreement. Defendants submitted evidence showing that no final agreement was reached. Did the trial court err in granting plaintiff's motion without first holding an evidentiary hearing to resolve the factual dispute over the alleged agreement's existence and material terms? (Assignments of error nos. 1, 2, 3.)

3. Does an unregistered trade name have the capacity to sue? (Assignments of error nos. 1, 3, 4.)

4. Was it error to enter a final judgment (a) on a breach of contract claim against an individual who was not a party to the alleged contract and did not breach it; (b) without ruling on a defendant's counterclaim and third-party claims; (c) awarding prejudgment interest despite the absence of an enforceable agreement; and (d) awarding costs and statutory attorney fees to a party that never should have been awarded judgment in its favor? (Assignments of error nos. 1, 2, 3, 4.)

### III. STATEMENT OF THE CASE

#### A. Statement of Facts

Markman Capital Insight LLC (“MCI”) is a Washington limited liability company that provides investment research to customers on a subscription basis. CP 166. The company does not offer, recommend, or provide advice on particular transactions, and does not receive transaction-based compensation. *Id.* Jon Markman (“Markman”) is MCI’s President. *Id.*

As part of its research efforts, MCI purchased trade signal feeds from T.L. Thomas (“Thomas”). *Id.* A dispute arose after MCI terminated the parties’ relationship in July 2015. *Id.* To resolve that dispute, Markman and Thomas communicated with each other about negotiating an agreed settlement, going forward with litigation, or participating in binding arbitration. CP 166-67, 320.

In mid-October 2015, Markman received from Thomas a three-page draft document entitled “‘Settlement Agreement’ and ‘Mutual Release’” (the “Agreement”). CP 167-68, 175-77. The draft, which appeared to bear Thomas’s signature, indicated that the proposed Agreement was to be “entered into on October 15, 2015” and was to be

between Markman and Thomas. CP 175.<sup>1</sup> After striking out a portion of the third paragraph and initialing his proposed modification of the Agreement, Markman signed the draft and sent it back to Thomas with a cover email pointing out his proposed modification. CP 167-68, 175-77, 182. Markman indicated he was rejecting the draft Agreement's requirement that he "make revisions" to a previously provided customer list if errors were discovered in the list and expressly stated that he was "not going to commit to tracking down" customer contact information "or doing any further research of any kind." CP 167, 182.

Instead of accepting Markman's modification of the proposed Agreement, Thomas sent a return email indicating he would add his initials to the strikeout if Markman would, among other things, agree to "correct any inadvertent typos that cause an email bounce ...." CP 181, 168. Markman rejected that counterproposal. CP 180-81. Thomas responded by stating that (a) he could verify the address list the next day, and (b) if Markman would agree, that day, to double check the addresses that failed the verification process, the parties would be "done" with their

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<sup>1</sup> The first page of the draft indicated that the Agreement would be "by and between Jon Markman, for himself and on behalf of Markman Capital Insight, LLC ('MCI') and all other entities owned or controlled by him (collectively, 'Markman'), on the one hand, and T.L. Thomas, individually and on behalf of himself and/or d/b/a Treadstone and Cambridge Decision Science ('CDS'), (collectively, 'Thomas'), on the other hand...." CP 175.

negotiations. CP 180. Thomas warned, however, that if Markman “won’t even agree to that, we have no settlement.” *Id.* In a further email, Thomas again asked Markman to agree to double check the addresses that “may fail a verification test,” and said that if Markman agreed, Thomas would “then” initial Markman’s strikeout on the Agreement. CP 179. Thomas expressly stated that the parties would “not have a settlement” if Markman did not reply that day with an acceptance of Thomas’s counterproposal. *Id.*; CP 168-69.

Based on Thomas’s emails, Markman understood that Thomas had set the end of that day (October 15, 2015) as a firm deadline for an agreement to be reached. CP 169. Markman decided not to accept Thomas’s counterproposal and therefore did not reply to the emails. *Id.* He understood this meant the parties had no contract. *Id.* That was his intention. *Id.*; *see also* CP 320.

On Friday, October 16, 2015, Thomas attempted to reengage Markman in contract negotiations, stating that he was “not going to wait” for the verification process to be finished in order “to conclude this one way or the other this morning.” CP 169-70, 186. Thomas emailed that he was unable to validate “quite a few” email addresses on the customer list, and proposed that Markman cross check two specific addresses that “got a complete fail....” CP 186. Thomas then wrote: “**Assuming you will do**

**that**, the Settlement Agreement and Mutual Release with the strikeout co-initialed is attached. The two email cross checks and the wire transfer confirmation will conclude this and there will be no further communication.” *Id.* (emphasis added).

Markman chose not to “do that.” CP 169-70, 320. Accordingly, he performed no address cross checks. CP 170. He also did not respond with any confirmation that cross checks would be performed or that funds would be wire transferred. *Id.*

On Sunday, October 18, 2015, Thomas sent another email. CP 170, 188. He asked Markman to either (a) agree to submit the parties’ dispute to binding arbitration, or (b) conclude the “private settlement option” by double checking the two email addresses and sending confirmation of the wire transfer of funds. CP 188. Thomas ended his communication with the statement that if Markman did not respond by 1:00 pm the next day, Thomas would assume that Markman was not agreeing to arbitration and was not “opting for the private settlement option.” *Id.*

On Monday, October 19, 2015, at 8:44 am, Markman responded:

*Tray,*

*Let’s go to binding arbitration. Let me know what you propose for place and forum.*

*Thanks,*

*Jon*

CP 171, 191.

Thomas wrote back that he would contact the American Arbitration Association for details and would get back to Markman “shortly.” CP 171, 194. Later that day, however, Thomas notified Markman that after “examining binding arbitration thoroughly,” he would not agree to arbitrate the parties’ dispute. CP 171-72, 197-98. He took the position that the parties had an “existing executed Settlement Agreement and Mutual Release” and arbitration would be “pointless.” CP 197.

Markman responded promptly, reminding Thomas:

*You declared the settlement void at 4:30 p.m. on Friday afternoon [October 15, 2015], and then again at 1 p.m. today.*

*So there is no settlement as far as I am concerned. You cancelled it. Twice actually.*

*Moreover, you offered binding arbitration twice. Once a few weeks ago, and again on Sunday. You should have considered the consequences before you offered it.*

*Binding arbitration is a smart way to settle our dispute....*

CP 172, 197.

## **B. Statement of Proceedings**

One month after the last exchange of emails between Thomas and Markman, Cambridge Decision Science (“CDS”) filed a complaint for damages against Markman, Markman’s wife, their marital community,

and MCI (collectively, “Defendants”). CP 1-4. CDS did not claim to be an entity authorized to enter into a legally binding agreement or to bring a legal action. Nonetheless, it alleged that on October 15, 2015, it had entered into a “complete and binding settlement agreement” with MCI that required MCI’s payment of \$95,000. CP 2, 3. According to CDS, the promised payment was “overdue.” CP 3. CDS requested entry of a judgment in the principal amount of \$95,000, plus prejudgment interest, attorneys’ fees, costs, and expenses. *Id.*

Defendants answered CDS’s complaint. CP 11-21, 48-58. They denied that an agreement had been made and asserted various affirmative defenses. *Id.* MCI also counterclaimed against CDS and brought third-party claims against “Treyton Thomas, aka Trey Thomas, aka Tracy Lee Thomas” and “Treadstone, a foreign entity or trade name of Treyton Thomas.” CP 13-20, 51-57.

CDS then filed a “Motion to Enforce Settlement” (the “Motion”). CP 25-29. The Motion was accompanied by an affidavit from an out-of-state attorney, CP 30-37; there was no affidavit or declaration from Thomas. CDS noted the Motion for hearing without oral argument and on less than 28 days’ notice. CP 22. Defendants objected, pointing out that the Motion was dispositive. CP 90-91, 149-50, 152-53. CDS refused to re-note the Motion, although it had previously reserved a hearing slot on

the trial court's summary judgment calendar. CP 90-91, 152-53, 5-7, 8-10.

In opposition to the Motion, Defendants submitted testimonial and documentary evidence of the interactions between Markman and Thomas that took place on October 15, 16, 18, and 19, 2015. CP 165-98. The evidence showed (a) Thomas's reiterated statement that the parties had "no settlement" if Markman refused to agree to Thomas's counteroffers, and (b) Thomas's October 18 request that Markman agree to submit their dispute to binding arbitration. CP 179-80, 194-95. Defendants filed an opposition brief arguing, among other things, that there was a genuine dispute as to the existence and terms of the alleged agreement, and that CDS was not a proper party to bring suit. CP 59-81.

"Third-Party Defendants and Counterclaim Defendant" filed a responsive pleading. CP 224-28.<sup>2</sup> In response to the allegation that CDS "is simply an unregistered trade name . . .," CP 51 (paragraph 2), the "answering defendants" – including CDS – asserted that they lacked "information sufficient to form a belief as to the truth thereof, and therefore deny the same." CP 225.

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<sup>2</sup> Later the same day, CDS filed an amended pleading purporting to withdraw the pleading filed by "Third-Party Defendants and Counterclaim Defendant." CP 229-33.

On January 21, 2016, the trial court entered an order granting CDS's Motion. CP 235-38. It ruled that "[t]he parties entered into a final, complete and signed settlement agreement on October 15, 2015," and ordered "Mr. Markman" to "pay plaintiff the principal sum of \$95,000 pursuant to the terms of the settlement agreement." CP 236. It entered the order (a) without having conducted an evidentiary hearing, despite Defendants' argument that there had been no meeting of the minds on all the material terms of the alleged agreement, CP 77-78, and the submission of evidence supporting that argument, CP 165-98, (b) without having heard oral argument, despite Defendants' request for argument, CP 59, and (c) despite CDS's prior scheduling of a summary judgment oral argument on January 29, 2016, CP 5-7, 8-11.<sup>3</sup>

Four days later, CDS moved for entry of judgment. CP 239. Defendants opposed that motion and filed a motion for reconsideration of the January 21 order, which the court denied. CP 240-45, 249-59, 263-78, 312-18, 319-22, 323-26, 327.

On February 17, 2016, the court entered a final judgment against Markman, Markman's wife, and MCI. CP 328-29. CDS was awarded the

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<sup>3</sup> On January 5, 2016, the trial court had entered an order reserving ruling on the Motion "until after oral argument on Jan. 29, 2016." CP 222-23. Two weeks later, the court struck the notice of hearing and then granted the Motion the next day. CP 234, 235-36.

principal sum of \$95,000, prejudgment interest, costs, and statutory attorney fees. *Id.* Defendants timely filed a notice of appeal. CP 330-39.

#### **IV. SUMMARY OF ARGUMENT**

When parties who are attempting to settle a dispute do not agree on the same terms at the same time, there is no meeting of the minds and no enforceable agreement is reached. The record is replete with evidence in this case that Thomas and Markman did not reach an agreement before they communicated on October 18, 2015, about submitting their dispute to arbitration. The trial court erred when it concluded as a matter of law that there was no genuine dispute as to the existence and terms of a settlement agreement, and abused its discretion when it granted plaintiff's motion without first holding an evidentiary hearing.

The trial court also erred in entering a final judgment in favor of a party that never proved it has capacity to prosecute a lawsuit. No person or entity with a recognized right to sue was ever joined or substituted as a party plaintiff, and Thomas never ratified the prosecution of this action. Accordingly, the trial court erred in entering judgment in favor of CDS. It compounded its errors by (1) entering judgment against an individual who was not a party to the alleged contract (Ellen Markman), (2) entering a final judgment despite the presence of unresolved counterclaims and third-

party claims, and (3) awarding prejudgment interest, costs and attorney fees to CDS.

## V. ARGUMENT

### A. **The Trial Court's Decision to Enforce the Alleged Agreement Between Markman and Thomas Is Subject to De Novo Review.**

When a moving party relies on affidavits or declarations to show that an alleged settlement agreement is enforceable, the trial court's decision to enforce the agreement is subject to de novo review.

*Brinkerhoff v. Campbell*, 99 Wn. App. 692, 696, 994 P.2d 911 (2000); *see also Condon v. Condon*, 177 Wn.2d 150, 161-62, 298 P.3d 86 (2013); *Kwiatkowski v. Drews*, 142 Wn. App. 463, 479, 176 P.3d 510 (2008).

Summary judgment procedures are applicable and this Court, as well as the trial court, "must read the parties' submissions in the light most favorable to the nonmoving party and determine whether reasonable minds could reach but one conclusion." *Brinkerhoff*, 99 Wn. App. at 697, 994 P.2d 911 (citing *In re Marriage of Ferree*, 71 Wn. App. 35, 44, 856 P.2d 706 (1993)); *see also Condon*, 177 Wn.2d at 161-62, 298 P.3d 86; *Cruz v. Chavez*, 186 Wn. App. 913, 915-16, 347 P.3d 912 (2015).

### B. **There Is a Genuine Dispute over the Existence and Material Terms of the Alleged Agreement.**

Contract formation requires an objective manifestation of mutual assent. *P.E. Sys., LLC v. CPI Corp.*, 176 Wn.2d 198, 207, 289 P.3d 638

(2012). Mutual assent is the modern expression ““for the concept of “meeting of the minds.””” *Multicare Med. Ctr. v. State, Dep’t of Soc. & Health Servs.*, 114 Wn.2d 572, 586 n.24, 790 P.2d 124 (1990) (citation omitted). The existence of mutual assent is ordinarily a question of fact. *Id.*; *P.E. Sys.*, 176 Wn.2d at 207, 289 P.3d 638.

““The acceptance of an offer is always required to be identical with the offer, or there is no meeting of the minds and no contract.”” *Sea-Van Invs. Assocs. v. Hamilton*, 125 Wn.2d 120, 126, 881 P.2d 1035 (1994) (quoting *Blue Mt. Constr. Co. v. Grant Cty. Sch. Dist.* 150-204, 49 Wn.2d 685, 688, 306 P.2d 209 (1957)); accord *Steadman v. Green Tree Servicing, LLC*, No. C14-0854JLR, 2015 WL 2085565, at \*5 (W.D. Wash. May 5, 2015). A purported acceptance that changes the terms of the offer in any material respect generally “operates only as a counteroffer, and does not consummate the contract.” *Sea-Van*, 125 Wn.2d at 126, 881 P.2d 1035; accord, e.g., *City of Roslyn v. Paul E. Hughes Constr. Co.*, 19 Wn. App. 59, 63-66, 573 P.2d 385 (1978).

The evidence shows that Markman never accepted an agreement on terms identical to those offered by Thomas. Nor did Thomas ever accept an agreement on terms identical to those offered by Markman. The proposed Agreement that Markman received on October 15, 2015, contained a provision stating: “Markman has previously provided Thomas

on May 7, 2015, with a copy of the Gemini customer list that he attests was accurate to the best of his knowledge at the time *and will make revisions if errors are found within 10 days of the wire of funds in paragraph 1.*” CP 167 (emphasis added). Intending not to commit to tracking down further customer information, Markman struck the promissory language and initialed the proposed change before returning the signed counteroffer to Thomas. CP 167-68, 175, 182. Although the materiality of a proposed modification is generally a question of fact, *see Sea-Van*, 125 Wn.2d at 126, 881 P.2d 103, in this instance, the materiality of Markman’s proposed modification is proved by Thomas’s response – instead of accepting the proposed modification, Thomas sent back a counteroffer with the statement that if Markman would not agree to the counteroffer, “we have no settlement.” CP 168, 180.

The record is devoid of any evidence suggesting that Markman accepted Thomas’s counteroffer. The lack of response to Thomas’s demand that Markman agree to double check addresses indicates that Thomas’s counteroffer was unacceptable to Markman. *See Howard v. Dimaggio*, 70 Wn. App. 734, 740, 855 P.2d 335 (1993) (“[H]er silence and her failure to return the documents indicated they were unacceptable to her.”). It is apparent that Thomas understood Markman had rejected the

counteroffer because Thomas made another counteroffer the next day. CP 185-86, 169-70.

There is no evidence that Markman accepted the modified counteroffer, either. Rather, the evidence shows that on October 16, 2015, Thomas sent the Agreement back to Markman with “the strikeout co-initialed,” but also with Thomas’s statement that he was “[a]ssuming” that Markman would agree to perform an address cross check. CP 169-70, 185-86. That assumption was incorrect. Markman never agreed to perform a cross check. CP 170.

Thomas acknowledged the absence of an agreement two days later when he asked Markman to either (a) agree to submit their dispute to binding arbitration or (b) choose the “private settlement option.” CP 191-92. The latter would have required Markman to perform the address cross check – an obligation Markman had already rejected. Markman responded by suggesting the parties go to arbitration. CP 171, 191.

In sum, the evidence plainly does not support the trial court’s legal conclusion that Thomas and Markman “entered into a final, complete and signed settlement agreement on October 15, 2015.” CP 236. The emails showed that Thomas on October 15 had *twice* indicated the parties had no settlement if Markman did not accept Thomas’s counterproposals and there was no evidence that Markman accepted any of Thomas’s

counterproposals. Had the court read the parties' submissions in the light most favorable to the nonmoving parties, as it was required to do, *see Brinkerhoff*, 99 Wn. App. at 697, 994 P.2d 911, at a minimum, it should have found that there was a genuine dispute as to the existence and terms of the alleged agreement. The court's contrary conclusion is reversible error.

**C. The Trial Court Abused Its Discretion by Failing to Hold an Evidentiary Hearing Before Granting Plaintiff's Motion.**

When a party moves for enforcement of an alleged settlement agreement and there are unresolved issues of material fact, the trial court must hold an evidentiary hearing before deciding whether to grant the motion. *See Cruz*, 186 Wn. App. at 920-22, 347 P.3d 912; *Brinkerhoff*, 99 Wn. App. at 697, 994 P.3d 911. Failure to do so is an abuse of discretion. *Brinkerhoff*, 99 Wn. App. at 697, 994 P.3d 911.

The issues of material fact surrounding the existence and terms of the alleged agreement between Thomas and Markman should have been resolved at a fact-finding hearing. *See id.*; *Lavigne v. Green*, 106 Wn. App. 12, 21, 23 P.3d 515 (2001). By enforcing the alleged agreement without first holding an evidentiary hearing to resolve the disputed issues, the trial court abused its discretion. *See Brinkerhoff*, 99 Wn. App. at 697, 994 P.2d 911. The judgment can be reversed on this ground alone.

**D. The Trial Court Erred by Entering Judgment in Favor of a Party That Lacked Capacity to Sue.**

Capacity to sue is a fundamental requirement of civil procedure. *See Worthington v. WestNET*, 182 Wn.2d 500, 514, 341 P.3d 995 (2015) (Yu, J., dissenting). A person or an entity that lacks capacity to sue “cannot be a party in a court action.” 14 Karl B. Tegland, *Washington Practice: Civil Procedure* § 11.7 (2d ed. 2015). While natural persons are assumed to have the capacity to sue, and certain entities, such as corporations, limited liability companies, and partnerships, have statutory authority to sue, *see id.*, there is nothing in the record establishing that “Cambridge Decision Science” is a natural person or an entity with the legal capacity to sue.

Defendants challenged CDS’s capacity to bring suit, both in their pleading, CP 50, and in response to the Motion, CP 79-81. In light of Defendants’ challenge, it was CDS’s burden to prove it had the capacity to bring this action. *See Nat’l Bus. & Prop. Exch., Inc. v. Shinolt*, 52 Wn.2d 71, 76, 323 P.2d 12 (1958). It failed to meet its burden. In responsive pleadings, CDS claimed that it “lacked information sufficient to form a belief as to the truth” of the allegation that it “is simply an unregistered trade name.” CP 51, 225, 230. And in response to Defendants’ opposition to the Motion, CDS replied that it was “entitled to reasonable time to cure

in the event the wrong plaintiff is named,” citing CR 17. CP 202  
(emphasis omitted).

CDS never advised the trial court of its legal status and never made any showing that it possessed the legal capacity to maintain this lawsuit. Nor did it ever attempt to cure the problem by substituting or adding a person or an entity that did possess legal capacity to sue. Thomas, the individual for whom CDS is purportedly a “d/b/a,”<sup>4</sup> and who allegedly signed the draft Agreement, *see* CP 35-37, never offered to substitute himself as plaintiff or to ratify CDS’s action in bringing suit. In fact, CDS has asserted that Thomas “may or may not be subject to jurisdiction in Washington,” CP 230, which means that the trial court granted judgment in favor of a trade name for a person who has (a) declined to accept the court’s jurisdiction,<sup>5</sup> and (b) never submitted a declaration either authenticating his alleged signature on the proposed Agreement<sup>6</sup> or avowing that he and Markman had reached a meeting of the minds.

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<sup>4</sup> *But see* CP 91-92, 156-64 (no registration for the CDS trade name in Florida or Massachusetts).

<sup>5</sup> This may not be surprising given a \$26 million default judgment entered against Thomas for investor fraud and racketeering, and the fact that the U.S. Commodity Futures Trading Commission was searching for Thomas as part of a separate fraud investigation. CP 90, 122-24, 144-45; *see also* CP 147, 149-50.

<sup>6</sup> CDS never submitted any evidence proving that it was Thomas’s signature on the proposed Agreement. The only evidence CDS submitted in support of the proposition that Thomas signed the draft Agreement was an affidavit from an out-of-state attorney who asserted that he had “received and reviewed an  
(...continued)

Under these circumstances, the trial court erred in granting the Motion and entering a final judgment in CDS's favor. *See Nat'l Bus.*, 52 Wn.2d at 76, 323 P.2d 12 (vacating judgment entered in favor of foreign corporation that failed to prove it had capacity to bring suit and failed to prove it owned the contract on which the action was based); *cf. Perry v. Rado*, 155 Wn. App. 626, 641-42, 230 P.3d 203 (2010) (affirming dismissal of claims asserted against medical center's staff, holding it was not an entity capable of being sued); *Rinke v. Johns-Manville Corp.*, 47 Wn. App. 222, 227-28, 734 P.2d 533 (1987) (observing that dismissal under CR 17 is appropriate when plaintiff has been allowed a reasonable time to bring the real party in interest into the suit, and joinder, substitution, or ratification cannot be effected); *James S. Black & Co. v. F.W. Woolworth Co.*, 14 Wn. App. 602, 544 P.2d 112 (1975) (affirming decision to allow trial to proceed while plaintiff obtained authorizations to prosecute the action from real parties in interest, where authorizations were submitted *before the case went to the jury*). When the trial court

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(...continued)

October 15, 2015 email transmission identified as being sent by Jon Markman to Cambridge's principal, which attached a signed copy of the Settlement Agreement and the Mutual Release..." CP 30-37. The attorney did not purport to authenticate Thomas's signature, nor did he identify Thomas as "Cambridge's principal." *See id.*

entered final judgment in this case, no party with legal capacity to sue had been joined or substituted, or had ratified the prosecution of the suit.

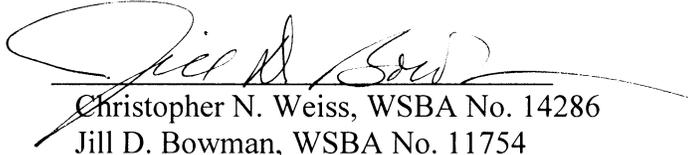
**E. The Trial Court Committed Further Errors in Entering a Judgment Not Supported by the Record.**

The final judgment entered by the trial court reflects several additional errors. First, the court entered judgment against Ellen Markman in her individual capacity although there was no evidence that she was a party to the alleged agreement or that she had breached it. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed. 2d 755 (2002) (“It goes without saying that a contract cannot bind a nonparty.”). Second, a final judgment was entered even though MCI’s counterclaim and third-party claims against Thomas were unresolved. Third, the trial court’s award of prejudgment interest was based on the unsustainable proposition that an enforceable agreement was made between the parties on October 15, 2015. And fourth, the award of costs and statutory attorney fees to CDS was based on the unsustainable proposition that the underlying judgment was properly entered. Each of these actions was reversible error.

## VI. CONCLUSION

For all the reasons stated in this brief, the trial court's judgment should be reversed and the action remanded for trial of the factual matters in dispute.

Respectfully submitted this 8th day of June, 2016.



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**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the state of Washington that on the date indicated below, a true and correct copy of the foregoing **Brief of Appellants** was caused to be served upon the following parties in the manner indicated below:

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