

Judge Linda G. Tompkins

**FILED**

SEP 18 2013

THOMAS R FALLQUIST  
SPOKANE COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF SPOKANE

CARYL HELLER,

Plaintiff,

v.

VESTUS, LLC, a Washington Limited  
Liability Company; BRIAN SANDUSKY and  
JANE DOE SANDUSKY, individually and the  
marital community comprised thereof; and  
AARON CUNNINGHAM and JANE DOE  
CUNNINGHAM, individually and the marital  
community comprised thereof,

Defendants.

NO. 13-2-00611-6

DEFENDANT VESTUS, LLC'S FIRST  
MOTION FOR SUMMARY  
JUDGMENT

**I. RELIEF REQUESTED**

Defendant Vestus, LLC ("Vestus") by and through their attorneys of record, Lars E. Neste and Demco Law Firm, P.S., move this Court for an Order of Summary Judgment pursuant to CR 56 dismissing all causes of action against them with prejudice. Plaintiff purchased the subject property located at 23909 East 1<sup>st</sup> Ave., Liberty Lake, WA 99019 in 2010 using services and information provided by Vestus, who specializes in advising investors on properties available at foreclosure auctions. Plaintiff alleges that Vestus improperly estimated the fair market value of the property and that she was damaged when she sold the property almost a year later for less than the estimated value. Plaintiff's only claims are for violations of the Consumer

DEFENDANT VESTUS, LLC'S FIRST MOTION FOR SUMMARY  
JUDGMENT - 1

---

DEMCO LAW FIRM, P.S.

5224 WILSON AVE. S., SUITE 200  
SEATTLE, WASHINGTON 98118  
(206) 203-6000  
FAX: (206) 203-6001

1 Protection Act, Chapter 19.86 RCW, which should be dismissed since Plaintiff previously filed a  
2 claim in Spokane County District Court and an appeal in Spokane County Superior Court  
3 concerning the same issues and circumstances involved in this case. Her claims were dismissed  
4 with prejudice; as such, Plaintiff should be barred from re-litigating her claims under the doctrine  
5 of *collateral estoppel*. Additionally, Plaintiff cannot maintain her claims for violation of the  
6 Consumer Protection Act as there is no evidence that any of the Defendants acted deceptively or  
7 that she was induced into acting by their alleged deceptive behavior and Plaintiff was not  
8 damaged by the alleged actions of the Defendants.

## 10 II. STATEMENT OF THE FACTS

11 Vestus is a group of real estate brokers who affiliate with various real estate firms  
12 throughout the Northwest. "Vestus" is a licensed assumed name of Windermere Real Estate/East,  
13 Inc. ("Windermere East"), as permitted under Washington licensing law. Vestus and their  
14 representatives assist investors and other prospective buyers in researching and finding  
15 properties that are coming up for foreclosure auction, and in concluding the purchase of  
16 properties at foreclosure sales. Vestus created an online portal through which information on up-  
17 coming foreclosure auctions is compiled and made available for clients to use.

18 Vestus allows brokers from different firms to affiliate with them and act as  
19 representatives, in order to give clients outside of the Windermere Real Estate/East, Inc. area  
20 (King County) access to their website and to the weekly investor meetings, which highlight  
21 upcoming sales and potentially good investment deals. The commission paid by any of these  
22 clients is paid directly to Windermere East who then pays a referral fee back to the affiliated  
23 broker(s). None of the brokers affiliated with Vestus are licensed through Vestus as an entity but  
24 through their respective firms. In Spokane, Vestus is affiliated with Windermere Real  
25 Estate/City Group, LLC ("Windermere City Group") and Defendants Aaron Cunningham  
26 ("Cunningham") and Brian Sandusky ("Sandusky") are or were licensed through that firm. The



1 only connection between Windermere City Group and Windermere East is that they are both  
2 franchisees of Windermere Real Estate. All real estate brokerage services provided to Plaintiff in  
3 the subject transaction were provided by Cunningham and Sandusky in their capacity as real  
4 estate brokers licensed with Windermere City Group.

5 The Compensation/Confidentiality Client Agreement which Vestus requires all clients to  
6 sign, including Plaintiff, contains a provision in paragraph one which specifically states that  
7 Vestus is not acting as an agent for the client. "No Agency Relationship. The parties agree that  
8 they shall have no agency relationship unless otherwise agreed in writing." Exhibit 1,  
9 Declaration of Christina Cowin. During the events which gave rise to Plaintiff's claims, Vestus  
10 was operating under the name "The Foreclosure Group". However, Plaintiff testified that she  
11 believed she was working with Defendants Cunningham and Sandusky in their capacity as  
12 brokers for Windermere City Group and was unsure of what Vestus was or how it was affiliated  
13 with Windermere City Group. Exhibit 2, pg 80-81, ln. 22-25 and 1, Declaration of Cowin.

14 Plaintiff utilized the Defendants' services and information and successfully bid on the  
15 subject property on February 13, 2009 for \$192,001.00, which was one dollar over the opening  
16 bid. As a condition of her contract with Vestus, she paid a commission in the amount of  
17 \$6,945.00, which was 3% of the assessed value of the property. The previous evening, on  
18 February 12, 2009, Plaintiff attended Vestus' weekly Thursday night investor meeting at the  
19 office of Windermere City Group, put on by Defendants Cunningham and Sandusky, where she  
20 was provided with information about a number of properties up for foreclosure sale the following  
21 day, including the subject property. Plaintiff was provided with an information packet which  
22 included details about the subject property and a Comparative Market Analysis ("CMA") sheet  
23 which estimated the fair market value of the property at roughly \$300,000.00. The information  
24 detail sheet included the tilde "~" symbol in front of the current market value, a mathematical  
25 symbol which indicates that the value was an approximation. Exhibit 3, Declaration of Cowin.  
26 Plaintiff admitted in her deposition that she understood that the estimated value meant the fair

1 market value of the property in "good" condition and that the subject property would need  
2 renovation in order to be considered in good condition. Exhibit 2, pg. 56 ln. 8-14, Declaration of  
3 Cowin.

4 Plaintiff spent more than five months renovating the property, doing much of the work  
5 herself. The subject property was first listed for sale in August of 2009 and finally sold on or  
6 about February 1, 2010 for \$267,000.00. At some point during the renovation and listing of the  
7 property, Plaintiff decided that the fair market value estimate provided by Defendants was  
8 inaccurately high and that she was somehow damaged by the information. She initially  
9 approached Defendant Cunningham and designated broker for Windermere City Group, Joe  
10 Garst, about obtaining a refund of the commission paid to Vestus. Defendant Cunningham and  
11 Mr. Garst referred her to the contract Plaintiff signed with Vestus which clearly stated in  
12 paragraph two:

13 TFG and Broker do not have physical access into the properties and do not  
14 guarantee the accuracy or completeness of the information it makes available.  
15 TFG and Broker do not make any representations about the quality or condition of  
16 properties or the fitness of any property for Client's needs. Client will  
independently assess any properties and will seek independent advice from the  
appropriate professionals.

17 Exhibit 1, Declaration of Cowin. Plaintiff testified in her deposition, that despite signing this, or  
18 a substantially similar, agreement at least twice during her relationship with Defendants that she  
19 never really read the agreement and made no attempts to consult outside professional advice.  
20 Exhibit 2, pg. 30-34, Declaration of Cowin. Plaintiff's primary complaint is that she believes that  
21 Defendant Sandusky put together the CMA snap-shot improperly and that he should have used  
22 different homes as a comparison to come up with the estimated fair market value. Exhibit 2, pg.  
23 36-37, Declaration of Cowin

24 After her attempts at obtaining a refund were denied, Plaintiff filed a Department of  
25 Licensing complaint against Vestus regarding their licensing status. As discussed previously,  
26 Vestus was an assumed name for Windermere East and it was not required to be independently



1 licensed as such until RCW 18.85.221 was amended in 2010. Her complaint was dismissed by  
2 the Department of Licensing. Then Plaintiff filed a claim in Spokane County District Court  
3 Small Claims Division against Windermere City Group on February 10, 2012 and then amended  
4 on February 14, 2012 for \$5,000.00 in damages. Vestus was not listed as a defendant. The small  
5 claims trial was held on April 18, 2012 and Judge John O. Cooney ruled in favor of Windermere  
6 City Group and dismissed Plaintiff's claims. Joe Garst and Defendant Sandusky appeared as  
7 witnesses for Windermere City Group. At trial, both sides entered into evidence a graph  
8 produced by the Spokane Association of Realtors. Exhibit 4, Declaration of Cowin. This graph  
9 shows both the average and median sales price trends for home sales in Spokane from 2009 to  
10 2011. At the time of Plaintiff's purchase of the subject property in February of 2009, the average  
11 sales price of homes in Spokane was \$197,016.00; in February of 2010 the average was  
12 \$169,936.00, a decline of 13.75%. Windermere City Group argued at trial that with a  
13 \$300,000.00 improved value at the time of purchase and a 13.75% decline in home prices over  
14 the course of the year, the fair market value of the subject property in February of 2010 would  
15 have been \$258,750.00, or \$8,250.00 *less* than what Plaintiff was able to sell the property for.  
16 Exhibit 5, Declaration of Cowin. After the District Court ruled in favor of Windermere City  
17 Group, Plaintiff filed a Notice of Appeal with Spokane County Superior Court on May 18, 2012.  
18 During the course of her appeal, Plaintiff agreed to a stipulation and order of dismissal with  
19 prejudice of all claims. Exhibit 6, Declaration of Cowin

20 Despite being unsuccessful in her two previous attempts at obtaining a judgment in her  
21 favor, Plaintiff decided to file this lawsuit against Vestus, Cunningham and Sandusky. In her  
22 Complaint, Plaintiff paints herself as an inexperienced real estate purchaser. However, by her  
23 own admission she had previously purchased five investment properties prior to purchasing the  
24 subject property and two personal residences. Exhibit 2, pg. 101 – 102 and Exhibit 1 thereto,  
25 Declaration of Cowin. Additionally, she had personally attended between ten and fifteen  
26 foreclosure auctions prior to the auction at which she purchased the subject property. Exhibit 2,

1 pg. 100, ln. 17-22, Declaration of Cowin. In fact, Plaintiff first encountered Defendant  
2 Cunningham at a foreclosure auction and became interested in using his services after that initial  
3 meeting. After Plaintiff successfully purchased a property using Vestus' services in January of  
4 2008 she wrote a glowing letter to Joe Garst praising Defendant Sandusky and Vestus' work.  
5 Exhibit 7, Declaration of Cowin. Not only had Plaintiff previously flipped five houses, but she  
6 also remodeled each of them herself with some assistance from contractors.

7 In her responses to interrogatories propounded in this action, Plaintiff estimates that her  
8 remodeling costs, including labor and materials, were \$59,512.00. Plaintiff includes her own  
9 time spent working on the house in this figure, which she values at \$25.00 per hour. In her  
10 deposition, Plaintiff testified that she spent 1400 hours of her own time remodeling the subject  
11 property, which would have contributed \$35,000.00 to that figure, making her actual materials  
12 and contractor costs only \$24,512.00. Exhibit 2, pg. 113, ln. 12-14, Declaration of Cowin.  
13 Additional listed expenses included \$12,707.00 for carrying costs and the \$6,945.00 Vestus  
14 commission. Exhibit 8, Declaration of Cowin. Without factoring in what Plaintiff decided to pay  
15 herself, the total cost of purchasing and renovating the property was \$236,165.00; at a sales price  
16 of \$267,000.00, Plaintiff was able to sell the subject property for \$30,835.00 more than her  
17 investment. The property was at all times worth more than she paid for it at auction and sold for  
18 more money than she expended renovating it. Had she not renovated the property at all, Plaintiff  
19 testified that she believed it was worth between \$210-\$220,000.00 at the time of her purchase.  
20 Exhibit 2, pg. 111-112, ln. 14-16 and 1-5, Declaration of Cowin. Plaintiff cannot demonstrate  
21 that she suffered any damages as a result of what she alleges was an inflated estimate of fair  
22 market value by the Defendants. At best, her only "damages" are that she spent too much money  
23 renovating the property and did not turn the kind of profit she had hoped when she first  
24 purchased the subject property.  
25  
26



### III. STATEMENT OF ISSUES

1. Whether or not Plaintiff's claims are barred by the doctrine of collateral estoppel as they have already been litigated?
2. Whether Plaintiff presents sufficient evidence to maintain her claim for violation of the Consumer Protection Act?

### IV. EVIDENCE RELIED UPON

1. Declaration of Christina A. Cowin and attachments thereto;
2. Table of Authorities; and
3. The court files and records therein.

### V. LEGAL AUTHORITY

Summary judgment shall be granted on an issue only where the "pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56(c). A defendant may move for summary judgment on the ground that the plaintiff lacks competent evidence to establish an essential element of the plaintiff's claim at trial. *Young v. Key Pharmaceutical*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). It is not sufficient for a party to rely on speculation, argumentative assertions, and claims in an affidavit to make a bare assertion of a fact to prevent summary judgment. The assertion must be supported by evidence. *Cranwell v. Mesec*, 77 Wn.2d 1004 (1995).

#### 1. Plaintiff's Claims Should be Barred by the Doctrine of Collateral Estoppel.

Plaintiff previously attempted to litigate the exact issues and facts of this case when she filed her claim in District Court. While originally she filed her claim against Windermere City Group, who is not present as a defendant in the present litigation, the key parties and events are identical to those which were raised in her previous suit and subsequent appeal. Plaintiff should not be allowed to file a new claim for damages against essentially the same parties just because

1 she failed in her first attempts. The small claims division of the Spokane County District Court  
2 had appropriate jurisdiction over the claim and "small claims court possesses all inherent powers  
3 that are essential to its existence and the due administration of justice" and are therefore capable  
4 of rendering a final judgment on the merits. *State Farm Mut. Auto. Ins. v. Avery*, 114 Wash.App.  
5 299, 307, 57 P.3d 300 (2002). While in the present case Plaintiff alleges a different theory of  
6 recovery for her loss, a Consumer Protection Act violation, the issues which give rise to that  
7 claim were already litigated and Plaintiff's claims were dismissed with prejudice.  
8

9 In general, plaintiffs are barred from re-litigating the same cause of action or the same  
10 issues under the doctrines of *res judicata* and *collateral estoppel*.

11 "Res judicata and collateral estoppel, kindred doctrines designed to prevent  
12 relitigation of already determined causes and curtail multiplicity of actions and  
13 harassment in the courts, are at times indistinguishable and frequently  
14 interchangeable. If the differences must be noted, it could be said that res judicata  
15 is the more comprehensive doctrine, identifying a prior judgment arising out of  
16 the same cause of action between the same parties, whereas collateral estoppel  
17 relates to and bars relitigation on a particular issue or determinative fact."

18 *Bordeaux v. Ingersoll Rand Co.*, 71 Wash.2d 392, 395-396, 429 P.2d 207 (1967). In order to  
19 apply *collateral estoppel* to a claim or issue, "the party asserting the doctrine must prove: (1) the  
20 issue decided in the prior adjudication is identical with the one presented in the second action;  
21 (2) the prior adjudication must have ended in a final judgment on the merits; (3) the party against  
22 whom the plea is asserted was a party or in privity with the party to the prior adjudication; and  
23 (4) application of the doctrine does not work an injustice." *Thompson v. State Dept. of Licensing*,  
24 138 Wash.2d 783, 790, 982 P.2d 601 (1999), citing *Nielson v. Spanaway Gen. Med. Clinic, Inc.*,  
135 Wash.2d 255, 262-63, 956 P.2d 312 (1998).

25 In the present case, the issue of whether or not Plaintiff was misled by the conduct of  
26 Sandusky and Cunningham (and therefore, by extension, their firm) was conclusively decided;



1 the small claims court trial and subsequent appeal by the Plaintiff rendered a final decision on the  
2 merits. In his decision, Judge Cooney framed the issue to the Plaintiff as:

3 So then the question is, was it so absurd, the price so absurd that [the defendant]  
4 mislead you into purchasing the property?... I think the contract is clear that the  
5 information might be reliable, it's not guaranteed and that you're required to seek  
6 independent assistance to try and determine what risks are there. And also there  
7 isn't a fiduciary relationship according to the contract. So based on all those  
8 factors, I'm going to enter a judgment in favor of the defendant.

9 Exhibit 9, Declaration of Cowin. It is clear from the transcript that the court took into  
10 consideration whether the defendants acted deceptively and concluded that they did not; that the  
11 estimated fair market value was not absurd; that the contract signed by the Plaintiff specifically  
12 warned her of the risks; and that the Defendants were not guaranteeing the accuracy of the  
13 information provided. Judge Cooney further noted that, "And it sounds to me like you're  
14 dissatisfied with the service because you didn't make money on this, but it also sounds like  
15 you're trying to transfer some of the risk back over to them." Exhibit 9, Declaration of Cowin.  
16 Plaintiff then appealed the decision to Spokane County Superior Court where she agreed to  
17 dismiss all her claims *with prejudice*, acknowledging that she could not bring them again.  
18 Plaintiff is simply trying to re-litigate the same issues that have already been decided against her  
19 by merely raising a new theory of recovery; the only thing different in the current litigation is  
20 that Plaintiff is alleging that the general public could be harmed by the Defendants' actions, even  
21 though the District Court found that Plaintiff herself was not harmed.

22 **2. Plaintiff Fails to Present Sufficient Evidence to Support a Claim for**  
**Violation of the Consumer Protection Act, Chapter 19.86 RCW.**

23 As noted above, summary judgment may be granted if Plaintiff fails to present sufficient  
24 evidence to prove essential elements of her claim. "For a private individual to initiate an action  
25 under the Consumer Protection Act, "the conduct complained of must: (1) be unfair or deceptive;  
26 (2) be within the sphere of trade or commerce; and (3) impact the public interest." *McRae v.*  
*Bolstad*, 101 Wash.2d 161, 165, 676 P.2d 496 (1984), citing *Anhold v. Daniels*, 94 Wash.2d 40,

1 45, 614 P.2d 184 (1980). Additionally, in order for the requirement of public interest to be met a  
2 plaintiff must show that, "(1) the defendant by unfair or deceptive acts or practices in the  
3 conduct of trade or commerce has induced the plaintiff to act or refrain from acting; (2) the  
4 plaintiff suffers damage brought about by such action or failure to act; and (3) the defendant's  
5 deceptive acts or practices have the potential for repetition." *Anhold v. Daniels*, supra 94  
6 Wash.2d at page 46, 614 P.2d 184. In the present case, Plaintiff fails to present any evidence that  
7 Vestus acted deceptively, that she was induced into acting by these allegedly deceptive acts, or  
8 that she suffered any real damages.

9 **A. Plaintiff Acknowledges that She Has No Evidence that Vestus or Other**  
10 **Defendants Acted Deceptively**

11 Plaintiff's only basis for her allegations that Vestus or any of the Defendants acted  
12 deceptively is that they advertise as being experts in foreclosures and that the CMA they gave to  
13 all investors at the February 12, 2010 meeting, which listed an estimated fair market value for  
14 the subject property at approximately \$300,000.00, was inaccurate and improperly put together.  
15 In her opinion, although she has not based it on anything other than personal research, the CMA  
16 produced by Defendant Sandusky did not include the best possible properties for comparison.  
17 She provides no specific methodology for why these properties would be more appropriate  
18 versus the ones selected by Defendant Sandusky, nor does she claim to know what criteria was  
19 used by Defendant Sandusky in selecting the houses that he did. Plaintiff claims that Defendant  
20 Cunningham represented to her that she could rely on the information provided to her. However,  
21 she never alleges that he told her that directly, instead she alleges she was lead to believe that  
22 because Defendants market themselves as experts, recommended various properties, and did not  
23 constantly remind her that the contract she signed indicated that the information was not  
24 guaranteed and clients should seek expert advice. Exhibit 2, pg. 94-95, Declaration of Cowin.

25 More importantly, Plaintiff admits several times in her deposition that she does not know  
26 if the Defendants intentionally mislead her about the estimated fair market value and that she



1 does not know if the Vestus business strategy included providing false information to clients.  
2 She also does not know whether the houses included in the CMA may have been selected as a  
3 mistake. Exhibit 2, pg. 86-88, 90-91, Declaration of Cowin.

4 The Washington Consumer Protection Act "does not define the term 'deceptive', but  
5 implicit in that term is 'the understanding that the actor misrepresented something of material  
6 importance.'" *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 166, 159 P.3d 10 (2007), citing  
7 *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wash.App. 722, 730, 959 P.2d 1158 (1998). Plaintiff  
8 has failed to demonstrate that an estimated fair market value of the property *when repaired* was a  
9 misrepresentation of a material issue. Plaintiff does not even allege in her deposition or  
10 pleadings that she would not have purchased the property had the estimated fair market value  
11 been lower than \$300,000.00. In order to prove that an act was deceptive, "[t]he question is  
12 whether the conduct has the capacity to deceive a substantial portion of the public." *Hangman*  
13 *Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 785-86, 719 P.2d 531  
14 (1986). Given that a decision was already rendered against the Plaintiff stating that she was not  
15 mislead or deceived by Defendants' actions, it is difficult to see how the general public could be  
16 deceived.

17 Moreover, what Plaintiff's allegations amount to is at best a claim that Defendants  
18 negligently produced a CMA with an inaccurate estimated fair market value, but negligent acts  
19 are not cover by the Consumer Protection Act. In *Short v. Demopolis*, the Washington Supreme  
20 Court held that "[s]ince these claims are directed to the competence of and strategy employed by  
21 plaintiffs' lawyers, they amount to allegations of negligence or malpractice and are exempt from  
22 the CPA." *Short v. Demopolis*, 103 Wash.2d 52, 61-62, 691 P.2d 163 (1984). The case at hand is  
23 analogous to that of *Ramos v. Arnold*, where the plaintiffs sued the home appraiser used by their  
24 lender for negligence and violations of the Consumer Protection Act. "The [plaintiffs']  
25 complaint is targeted at the alleged inadequacy of the actual appraisal rather than the  
26 entrepreneurial aspect of Arnold's business. Since this claim amounts to an allegation of

1 negligence, the trial court properly dismissed the Consumer Protection Act claim on summary  
2 judgment." *Ramos v. Arnold*, 141 Wash.App. 11, 20-21, 169 P.3d 482 (2007). The Plaintiff in  
3 this case is trying to do exactly what the plaintiff in the *Ramos* case attempted, to claim a  
4 violation of the Consumer Protection Act when the acts alleged really constitute a claim for  
5 negligence. There is no evidence that Defendants' entrepreneurial practices are deceptive and  
6 therefore could be remedied under the Consumer Protection Act.

7 Plaintiff has not provided any evidence whatsoever that Vestus acted deceptively. As  
8 noted *supra* in *Cranwell v. Mesec*, mere speculation is not enough to defeat a motion for  
9 summary judgment and that is all Plaintiff can provide. Plaintiff was unable to sell her  
10 investment property, in a declining real estate market, for what she was told the year before that  
11 it might be worth when renovated. She decided that the estimated fair market value therefore  
12 must have been inaccurate and that the CMA provided by the Defendants was improperly  
13 prepared. She has no specific evidence to support this, only that she believes other houses could  
14 have been used. She acknowledges she doesn't know how or why the properties selected were  
15 included by the Defendants, only that in her unqualified opinion, other homes should have been  
16 used for comparison.

17 Judge Mooney considered the fair market value estimate at the small claims court trial  
18 and dismissed Plaintiff's claims because he did not find that the estimated value was so  
19 unreasonable that Plaintiff was misled into purchasing the property based on that figure. He  
20 also found that given the decline in the real estate market and the trends submitted into evidence  
21 that the decline in value experienced by the Plaintiff was within that range. Exhibit 9,  
22 Declaration of Cowin. There is no deception at work here. Defendants provided a CMA with  
23 comparable local homes and provided an approximate fair market value of the property when  
24 renovated. The CMA specifically designated the value as approximate by using the tilde symbol  
25 and Plaintiff's contract with Vestus clearly states that the information provided is not guaranteed  
26 and experts should be consulted. Plaintiff is upset at not making a higher profit on the property



1 and that is understandable, but none of the Defendants did anything to mislead her into  
2 purchasing the property.

3  
4 **B. Defendants Did Not Commit the Alleged "Additional" Unfair or Deceptive**  
5 **Acts or Practices**

6 Plaintiff alleges the following "additional" deceptive acts or practices in paragraph 5.3 of  
7 the Complaint, many of which are verifiably false:

8 (a) Defendant Vestus, LLC was not a licensed real estate firm at all times relevant hereto;

9 (b) Defendant Vestus LLC advertised itself as a real estate licensee, when in fact they  
10 were not licensed as advertised;

11 (c) The Defendant's property appraisal reports were conducted by an individual who was  
12 unsupervised and licensed less than two years; and,

13 (d) Defendants charged an unreasonable fee for foreclosure buying services, while  
14 afterwards maintaining that customers should not rely on the information provided as those  
15 services.

16 Subsections (a) and (b) are plainly untrue. Vestus is a licensed assumed name of  
17 Windermere East as allowed by RCW 18.85.221. Vestus has a valid license under this assumed  
18 name, as required by the change to 18.85.221 which became effective July 1, 2010. Exhibit 10,  
19 Declaration of Cowin. Prior to this legislative change, licensed firms were allowed to operate  
20 under trade names without a separate license for that trade name. Moreover, Windermere East  
21 has had a valid real estate firm license at all times material to this action and Vestus principles  
22 Christopher Hall, Hugh Stewart, and Christopher Nelson are licensed real estate brokers through  
23 Windermere East. Exhibit 10, Declaration of Cowin.

24 Subsection (c) is not applicable to this action because, one, a CMA sheet is not a property  
25 appraisal, the brokers do not have access to the properties to perform any sort of appraisal and  
26 they specifically disclose this fact to their clients within their contract; and two, the applicable

1 Washington State Administrative Code provision, WAC 308-124C-125, which requires  
2 heightened supervision of brokers with less than two years experience, was not implemented  
3 until July of 2010, after all of the events relative to this action. The provision was not retroactive.  
4 Further, nothing in the WAC provision states that the compilation of a CMA report *requires*  
5 supervision, let alone heightened supervision. The Code only states that, in general, designated  
6 brokers must give more heightened supervision to new licensees.

7 Subsection (d) alleges that the fee charged by Vestus is unreasonable for the service they  
8 provide. Plaintiff has not alleged any facts or cited any case law to support such an allegation.  
9 Moreover, there is no statute or case law which regulates the amount that a service provider or  
10 brokerage can charge their clients. The controlling statute section on broker compensation, RCW  
11 18.86.020, does not limit the amount of compensation a broker can receive, nor do any of the  
12 relevant Washington Administrative Code provisions. Plaintiff was free to not use the service if  
13 she felt the fee was too high, as are all potential Vestus clients.

14 **C. Plaintiff Did Not Suffer Any Recoverable Damages**

15 As noted above, Plaintiff did not suffer any damages as a result of the supposed deception  
16 on the part of Vestus. Plaintiff chooses to include into her accounting of costs her own time and  
17 labor at a value she established herself, however, if she merely accounted the potential profit as  
18 her compensation for renovations, then she still made money on the renovation and sale of the  
19 property. By her own admission in her deposition, other real estate professionals valued the  
20 property at \$220,000.00 the day she purchased it, in poor condition, which was more than what  
21 she paid for it. Plaintiff spent months renovating the property as the real estate market continued  
22 to decline by nearly 14%. When she finally sold the property nearly a year after her purchase, it  
23 was not worth what she hoped it would be worth. However, the time and money that she spent  
24 renovating the property were in no way attributable to the Defendants. She did not seek their  
25 advice or services on how to remodel the property and did not consult with them during the  
26 process at all. The time and expense factor are completely independent of Plaintiff's relationship



1 with Vestus. Could she have cut costs? Used contractors instead of doing the labor herself to cut  
2 down on the time it took to renovate? There is no way to know, but those elements factor heavily  
3 into what the Plaintiff considers "damages" although those choices are in no way attributable to  
4 Vestus' supposedly deceptive acts.

5 In any way you do the math on the costs of buying and selling this property, Plaintiff  
6 either made a modest amount of money with which to compensate herself for her efforts, or she  
7 lost money after she paid herself fully at \$25.00 per hour for 1400 hours. Losing a small amount  
8 of money on an investment property during a year when the real estate market in the area  
9 declined nearly 14% cannot be directly attributable to Vestus providing an approximate fair  
10 market value nearly a year prior. Plaintiff did not purchase a property which was worth less than  
11 she bought it. At all times the property was worth more than the \$192,001.00 that she paid for it  
12 at auction. If Plaintiff was damaged it was not by the actions of Vestus, only by her own  
13 expensive renovations and the worst real estate market in years.

#### 14 IV. CONCLUSION

15 The real issue in this case is that Plaintiff did not make as much money as she hoped on  
16 her purchase and sale of an investment property. Because of this, she prosecuted an action in  
17 small claims court where the judge ruled in favor of the defendants and dismissed her claims.  
18 Her appeal to the Superior Court was also dismissed with prejudice. Plaintiff should not be  
19 allowed to re-litigate these same issues and facts simply because she re-categorizes her claim as  
20 one for a violation of the Consumer Protection Act. These are the same allegations that the small  
21 claims court decided and found that the Defendants did not act deceptively and did not mislead  
22 the Plaintiff. Plaintiff's claims are barred by the doctrine of *collateral estoppel*.

23 Further, Plaintiff fails to provide sufficient evidence to establish her claims. In fact she  
24 provides no evidence other than her own speculation and opinion that she feels Defendants did  
25 not provide her with accurate information. Speculation is not sufficient to support a claim for  
26

1 violation of the Consumer Protection Act. As such, Defendant Vestus respectfully requests that  
2 all claims against them be dismissed on summary judgment.  
3

4 DATED this 12 day of September, 2013.

5 DEMCO LAW FIRM, P.S.

6  
7 By 

8 Lars E. Neste, WSBA #28781

9 Christina A. Cowin, WSBA #42701

10 Attorneys for Defendant Vestus, LLC  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26