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

No. 320201

THE COLLECTION GROUP, LLC, a Washington Limited Liability Company,

*Plaintiff / Respondent*,

v.

DAVID R. COOK and JANE DOE COOK, husband and wife, and their marital community composed thereof,

*Defendants/Appellants.*

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On Appeal from the Superior Court of Spokane County
Hon. Michael P. Price
Superior Court Docket Number 06-2-04075-3

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# BRIEF OF RESPONDENT

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## I. RESTATEMENT OF THE ISSUES

1. Has Mr. Cook proven by clear and convincing evidence that service upon him was invalid on July 2, 2006? Answer: ***No.***

2. Has Mr. Cook proven by a preponderance of the evidence that service upon him was invalid on July 2, 2006? Answer: ***No.***

3. Did the trial court abuse its discretion when it denied Mr. Cook's motion to vacate the judgment that was entered against him? Answer: ***No.***

4. Should the Court affirm the trial court's order denying Mr. Cook's motion to vacate the judgment that was entered against him? Answer: ***Yes.***

## II. STATEMENT OF THE CASE

This case arises from a default judgment on a Citibank revolving charge account that Plaintiff /Respondent The Collection Group, LLC ("**TCG**") obtained against Defendant/Appellant David Cook on August 30, 2006 in Spokane County District Court. CP 105 - 113. TCG subsequently transferred this judgment to the Spokane County Superior Court. CP 1-5.

In support of his motion to vacate TCG's judgment against him that Mr. Cook filed in the trial court (*i.e.*, the Spokane County Superior Court), Mr. Cook submitted a declaration dated June 14, 2013 that stated Mr. Cook "never learned there was a lawsuit at all until some papers seeking supplemental proceedings were delivered [to the 1515 Lilac Lane

address at issue in this case] in August 2012[.]" CP 15. Mr. Cook further declared he "did not get notice [of this lawsuit] until long after the default judgment was entered" in August of 2006. CP 15.

However, as TCG pointed out to the trial court, the record reflects that Mr. Cook was served with TCG's supplemental proceedings pleadings in this case on June 10, 20**09**. CP 39-40. The date of the supplemental proceedings was set for June 19, 2009. CP 39-40. The declaration of service regarding the supplemental proceedings reflects that Mr. Cook was served with the supplemental proceedings pleadings by way of his "brother/co-resident" Richard Cook, who was "residing at the respondent's usual place of abode[.]" CP 40. The declaration of service reflects the address where Mr. Cook was served was the 1515 S. Lilac Lane address in Liberty Lake, Washington 99019. CP 40.

Further, on June 16, 2009, attorney Ralph Van Camp called TCG and spoke with Robin Inman, one of TCG's employees. CP 40. During this call, Mr. Van Camp put in a verbal notice of appearance for Mr. Cook. CP 40. TCG's case notes from that conversation evidence this call. CP 40. These notes do not reflect that Mr. Van Camp claimed during the aforesaid telephone call that TCG did not effectuate good service on Mr. Cook back on July 2, 2006. CP 40.

On June 17, 2009, attorney Dustin Deissner called TCG and spoke with Ms. Inman. CP 40. During this call, Mr. Deissner put in a verbal notice of appearance for Mr. Cook. CP 40. Ms. Inman informed Mr.

Deissner during this call that Mr. Deissner's law partner, Mr. Van Camp, had also called TCG. CP 40. These notes do not reflect that Mr. Deissner claimed during the aforesaid telephone call that TCG did not effectuate good service on Mr. Cook back on July 2, 2006. CP 40.

Ms. Inman telephoned Mr. Van Camp on June 17, 2009 regarding the notice of appearance, at which time Mr. Van Camp told Ms. Inman that he would not be submitting a formal notice of appearance and that TCG should tell the judge that TCG received a call with a verbal notice of appearance. CP 40. TCG's long distance phone records evidence this call. CP 40.

On July 28, 2011 TCG's attorney, Brad L. Williams, caused to be mailed to Mr. Cook a letter and an enclosed Notice of Withdrawal and Substitution of Counsel at the 1515 S. Lilac Lane address. CP 40. This letter was not returned as undeliverable. CP 41.

On August 23, 2011, the declaration of service that reflects the service of TCG's summons and complaint on Mr. Cook was faxed to Mr. Deissner pursuant to his request. CP 41. TCG's records reflect the transmission of this facsimile. CP 41.

On May 4, 2006 and June 5, 2006 TCG sent letters to Mr. Cook at the 1515 S. Lilac Lane address. CP 41. Neither of these letters was returned as undeliverable. CP 41. TCG still has a copy of these letters. CP 41.

Per the Spokane County Assessor's website, as of April 27, 2006, the owners of 1515 S. Lilac Lane were David R. Cook and Richard W. Cook. CP 41. Their mailing address that was on file with the Assessor as of the aforesaid date was the 1515 S. Lilac Lane address. CP 41. A copy of a printout from the Spokane County Assessor's website that TCG obtained on April 28, 2006 that reflects such is part of the record. CP 41.

The owners of the 1515 S. Lilac Lane property provided the Assessor on or prior to April 2, 2009 with a new mailing address of P.O. Box 621. CP 41. A copy of a printout from the Assessor's website that TCG obtained on April 2, 2009 that reflects such was presented to the trial court. CP 41.

Although Mr. Cook's wife, Marti Mortensen, submitted testimony to the trial court to the effect that her divorce was finalized in 2006, the fact is her divorce was not final until June 9, 20**10**. CP 41. A copy of the court docket from Ms. Mortensen's divorce proceeding is part of the record. CP 41. Said docket also reflects that Mr. Deissner was Ms. Mortensen's attorney in the divorce proceeding. CP 41.

TCG submitted to the trial court a Westlaw CLEAR comprehensive investigative report that TCG obtained regarding Marti Mortensen. CP 41. Page 2 of this report lists 1515 S. Lilac Lane as a possible address of Ms. Mortensen from October 1, 2005 through June 5, 2007. CP 42. Said report also lists Ms. Mortensen's date of birth as being 12/16/59. CP 42. Thus, according to this report, Ms. Mortensen was

about 46.5 years old at the time that "Jane Doe" Cook was served with TCG's summons and complaint on July 2, 2006 at the 1515 S. Lilac Lane address. CP 42. As seen from the declaration of service at issue in this case, TCG's process server listed the approximate age of "Jane Doe" as being mid-to-late 40s. CP 42.

TCG also submitted to the trial court a Westlaw CLEAR comprehensive investigative report that TCG obtained regarding Vernon Mortensen. CP 42. In their pleadings filed with the trial court, Mr. Cook inferred that Mr. Mortensen was living at the 1515 Lilac Lane address at the time of service on Mr. Cook. CP 42. That address is listed nowhere in this report on Mr. Mortensen. CP 42.

TCG also submitted below a Westlaw CLEAR comprehensive investigative report that TCG obtained regarding David R. Cook. CP 42. This report lists Mr. Cook's address from January 1, 1996 to February 23, 2013 as being 1515 S. Lilac Lane. CP 42.

TCG previously informed the trial court that it ardently believes Mr. Cook and those close to him submitted false and inaccurate testimony in support of Mr. Cook's motion to vacate TCG's judgment. CP 42. TCG's research demonstrates that Marti Mortensen is the current spouse of David R. Cook, and that she lived at the 1515 S. Lilac Lane address on July 2, 2006, the date that she was served with TCG's summons and complaint in this lawsuit. CP 42. TCG's research also shows that Vernon Mortensen never lived at 1515 S. Lilac Lane. CP 42.

On August 23, 2013, Mr. Cook obtained an order to show cause as to why TCG's judgment against him should not be vacated due to defective service of process back in 2006. CP 25. After hearing argument from counsel during the September 27, 2013 hearing on Mr. Cook's motion to vacate TCG's judgment, the trial court determined TCG's declaration of service is good on its face, and is therefore entitled to a presumption of validity. *See* Verbatim Report of Proceedings at 23, line 12; VRP at 25, lines 8-9. The trial court also noted it appeared that Mr. Cook was aware of TCG's judgment for at least four years and apparently took no steps to do anything about it until fairly recently. *See* VRP at 24, lines 14-17. Additionally, the trial court recognized Mr. Cook "is clearly showing as an individual who has I'll call it just an ownership interest in this Liberty Lake property" and that "it is not unusual in this day and age for folks to have several places of usual abode even in the same town." VRP at 23-24.

The trial court denied Mr. Cook's motion to vacate TCG's judgment on September 27, 2013, and Mr. Cook filed his notice of appeal concerning this ruling on October 22, 2013. CP 102, 103.

## III. ARGUMENT

### A. The Trial Court Did Not Abuse Its Discretion By Denying Mr. Cook's Motion To Vacate The Judgment.

An appeal from the denial of a motion for relief from judgment is not a substitute for an appeal, and is limited to the propriety of the denial, not the impropriety of the underlying order. *In re Dep. of J.R.M.*, 160 Wn.

App. 929, 939 n.4, 249 P.3d 193 (2011) (citing *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450-51, 618 P.2d 533 (1980)). The court of appeals reviews a trial court's decision "under CR 60(b) for abuse of discretion." *Dep. of J.R.M.*, 160 Wn. App. at 939 n.4.

Division Three of the Washington Court of Appeals has repeatedly recognized that affidavits of service are entitled to a presumption of correctness in cases where a party seeks to vacate an existing judgment. *E.g., Farmer v. Davis*, 161 Wn. App. 420, 250 P.3d 138 (2011), *review denied at* 172 Wn.2d 1019, 262 P.3d 64 (2011). Thus, when a judgment is entered based on an affidavit of service, it should only be set aside upon clear and convincing evidence that the return of service was incorrect. *Id.*

This rule is rooted in sound public policy. As seen from *Farmer*, "Washington cases have long held that considerations of the regularity and stability of judgments entered by the court require that, 'after a judgment has been rendered upon proof made by the sheriff's return, such judgment should only be set aside upon convincing evidence of the incorrectness of the return." *Id.* at 428 (quoting *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918); *see also McHugh v. Conner*, 68 Wash. 229, 231, 176 P. 2 (1918) ("To avoid the judgment, the burden devolved upon appellants to show that no valid service had been made"); *Vukich v. Anderson*, 97 Wn. App. 684, 687, 985 P.2d 952 (1999) (on motion to set aside order of default and judgment, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular).

As was further explained in *Farmer*:

> Applying a presumption and higher evidentiary burden in cases where a party seeks to vacate an existing judgment accords with the development of the common law of judgments. It was a rule in common law courts that a judgment appearing to be valid on its face could not be shown to be invalid by proof contradicting the record of the action in which the judgment was rendered. Restatement (Second) of Judgments § 77, cmt. a (1982). The purpose of the common law rule was to "constitute the judgments to which it applied incontestable muniments of the rights they purported to determine." *Id.* The modern rule is that a judgment may be impeached by evidence that contradicts the record in the action. *Id.* However, to protect judgments from contrived attack at a time when the attack may be hard to contradict if the memory of the plaintiff's witness to the service has faded, the party challenging a judgment must produce clear and convincing evidence. *Id.* at § 77(2) & cmt. b.

161 Wn. App. at 429.

This rule is in place to prevent people like Mr. Cook from vacating a judgment that was properly entered against him some eight (8) years ago. There is no doubt that Mr. Cook has failed to show by clear and convincing evidence that TCG's service upon him on July 2, 2006 was invalid. This is because there is evidence in the record that reflects Mr. Cook's wife was properly served with TCG's summons and complaint at his house of usual abode (or at one of them), the address in question was a good address for Mr. Cook from January 1, 1996 to February 23, 2013, there is evidence that shows Mr. Cook knew about TCG's judgment for some four (4) years before he filed his motion to vacate, and Mr. Cook previously put forward admittedly false declaration testimony in support of his fated position.

Mr. Cook's claim that the heightened burden of proof does not apply here because "the affidavit of service does not say anybody told the process server that David Cook was living at the Lilac Lane address" is flat-out wrong. The declaration of service states TCG's summons and complaint were served on a "Jane Doe" Cook by delivering these pleadings to "a white female, who would not give her name...who stated she lived there[.]" Mr. Cook has failed to point to any statute, court rule, or case that requires a declaration of service to state that someone must tell the process server that the defendant lives at the address in question in order for the declaration of service to enjoy presumptive validity.

The trial court rightly determined the declaration of service is good on its face and is therefore entitled to a presumption of validity. Verbatim Report of Proceedings at 23, line 12. The trial court also rightly noted it appeared that Mr. Cook was aware of TCG's judgment for at least four years and apparently took no steps to do anything about it until fairly recently. *See* VRP at 24, lines 14-17. The trial court was also right to conclude Mr. Cook "is clearly showing as an individual who has I'll call it just an ownership interest in this Liberty Lake property" and that "it is not unusual in this day and age for folks to have several places of usual abode even in the same town." VRP at 23-24.

This case brings to mind *Commercial Courier Serv., Inc. v. Miller*, 13 Wn. App. 98, 533 P.2d 852 (1975), which noted a defendant should not be relieved of a judgment taken against her due to her willful disregard of

process, or due to her inattention or neglect where there has been no more than a prima facie showing of a defense on the merits

The reality is that Mr. Cook failed to prove invalid service because he failed to disprove by clear and convincing evidence that TCG's process server left a copy of the summons and complaint at his house of usual abode with a person of suitable age and discretion then resident therein. While Mr. Cook claims that he did not reside at the 1515 S. Lilac Lane address on the date in question by way of his own self-serving declaration, the record does not support such an assertion. Further, it is the party who asserts a change of residence in connection with attempted service of process that has the burden of proof. *Sheldon v. Fettig*, 77 Wn. App. 775, 779, 893 P.2d 1136 (1995). Mr. Cook has noticeably failed to carry his burden.

While Mr. Cook has asserted on page 14 of his Brief of Appellants that the process server didn't ask if David Cook lived at the address at issue, he has failed to cite to the record in support of this assertion. In fact, there is no evidence in the record in support of this assertion, yet there is ample evidence in the form of public records and Westlaw investigative CLEAR reports that show the address in question did in fact belong to Mr. Cook from January 1, 1996 to February 23, 2013, a span of over seventeen (17) years. The Westlaw CLEAR report for Ms. Mortensen reflects the address in question was a good address for Ms. Mortensen at the time of service.

Evidence Rule 201(b) provides this Court can take judicial notice of the accuracy and contents of the public records and Westlaw CLEAR reports that TCG submitted to the trial court. ER 201(b) provides that a judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. [1]

Given that Westlaw is a very widely-used, established service that is utilized by individuals, businesses, law enforcement, law firms, and government agencies, the accuracy and validity of the Westlaw CLEAR reports that TCG submitted to the trial court cannot reasonably be questioned. *Cf. Massachusetts v. Westcott*, 431 U.S. 322 (1977) (records of merchant vessel documentation division of Coast Guard could be judicially noticed); *U.S. v. Esquivel*, 88 F.3d 722 (9th Cir. 1996) (Court of Appeals would take judicial notice of census data submitted by government); *In re Avista Corp. Securities Litigation*, 415 F.Supp.2d 1214 (E.D.Wash. 2005) (taking judicial notice of well-publicized stock prices and general market trends is permissible).

The Westlaw CLEAR reports that TCG submitted to the trial court are also admissible as business records or third party business records

[1] Information regarding Westlaw's CLEAR reports is available online from the company that provides them at http://legalsolutions.thomsonreuters.com/law-products/solutions/clear (last visited June 30, 2014). This website reflects CLEAR reports are available to law enforcement, government agencies, companies and organizations, and law firms.

under Evidence Rule 803(a)(6) and as market reports or commercial publications under Evidence Rule 803(a)(17). ER 803(a)(17), Market Reports, Commercial Publications, provides the hearsay rule does not exclude "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." This includes published compilations like the Westlaw CLEAR reports. *Cf. Kohn v. Georgia-Pacific Corp.*, 69 Wn. App. 709, 724, 850 P.2d 517 (1993) (upholding trial court's admission of a chart of Whatcom County wages for secretarial positions prepared by the State pursuant to ER 803(a)(17)); *State v. Shaw*, 120 Wn. App. 847, 86 P.3d 823 (2004) (affirming trial court's admission of Kelley Blue Book value under ER 803(a)(17) in case involving market value of stolen automobile). After all, the Westlaw CLEAR reports are "published compilations" that are "generally used and relied upon by the public[.]" Said CLEAR reports are also relied upon by "persons in particular occupations" such as law enforcement, government agencies, law firms, and debt buyers like TCG.

Regarding Mr. Cook's reliance on the *John Hancock Mut. Life Ins. Co. v. Gooley* case, 196 Wn. 357, 83 P.2d 221 (1938), the fact is this case does not provide any support for his position. The affidavit of service at issue in *Gooley* stated the process server left a true copy of the summons and complaint with Mrs. August Gooley [the Gooleys' daughter-in-law] at the Englehorn hotel and that Mrs. August Gooley was a person of suitable

age and discretion then resident therein. *Id.* at 359, 83 P.2d 222-23. On appeal, the Washington Supreme Court noted "[i]t appears beyond question" that Mrs. August Gooley has at no time lived at the Englehorn hotel, and that it "clearly appears that the room in the Englehorn hotel was not the house of usual abode of Mr. and Mrs. Gooley." *Id.* at 369, 83 P.2d 226. The Washington Supreme Court also determined that service at the hotel was defective because the affidavit of service "failed to state that a copy of the summons and complaint had been left with Mrs. August Gooley for defendant Edward Gooley, and a copy for defendant Pauline Gooley." *Id.* at 360, 83 P.2d 223.

Thus, in contrast to this case, in *Gooley*, ample evidence was introduced to show that neither the Gooleys nor their daughter-in-law resided at the Englehorn hotel. Further, the affidavit of service in *Gooley* was defective on its face because it did not reflect that a copy of the summons and complaint had been provided for each and every one of the named defendants. Moreover, unlike the creditor in *Gooley*, TCG has provided reliable independent evidence such as public records and Westlaw CLEAR reports that shows the Lilac Lane address at issue in this case was a house of usual abode for Mr. Cook at the time in question. As such, Mr. Cook's reliance on *Gooley* is misplaced.

Mr. Cook's reliance on *Woodruff v. Spence*, 88 Wn. App. 565, 945 P.2d 745 (1997) and *Lee v. Western Processing Company, Inc.*, 35 Wn. App. 466, 667 P.2d 638 (1983) is similarly misplaced. After holding an

evidentiary hearing as to the validity of service, the trial court in *Woodruff* concluded service was good, and Division Three of the Washington Court of Appeals affirmed this ruling by concluding the party who sought to vacate the default judgment failed to meet its burden of showing by clear and convincing evidence that service was irregular. In reaching its ruling, the *Woodruff* court cited a Washington Supreme Court case that notes a constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice; what is essential is that the method of attempted service be reasonably calculated to provide notice to the defendant. *Id.* at 570-71, 945 P.2d 745 (citing *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991)).

As for *Lee*, in that case, an order vacating a default judgment due to defective service was upheld on appeal where (1) the only three individuals who could have received service of the summons and complaint filed affidavits asserting they were not personally served; (2) the affidavit of service erroneously stated the complaint was served on September 17, but the complaint wasn't even signed until September 18; and (3) the affidavit of service failed to comply with CR 4(g)(2) because it was not endorsed upon or attached to the summons. *Id.* at 469-70, 667 P.2d 638. On these facts, the *Lee* court determined the trial court did not abuse its discretion by vacating the judgment. *See id.* In contrast, the testimony of Mr. Cook and Ms. Mortensen that was submitted to the trial court is of questionable veracity and is contradicted by public records and

Westlaw CLEAR reports that show both of these individuals had links to the subject property at the time of service. Moreover, unlike the declaration of service in *Lee*, TCG's declaration of service herein does not contain any incorrect dates or other inaccuracies, and no one has claimed said declaration does not comport with CR 4. Thus, *Lee* is distinguishable.

In sum, the trial court did not abuse its discretion when it denied Mr. Cook's motion to vacate TCG's judgment. The trial court rightly recognized that a person can have more than one house of usual abode and that ample evidence in the record reflects Mr. Cook was tied to the property at issue on the date that TCG effectuated abode service upon him. After all, the record reflects that the Lilac Lane address at issue was a good address for Mr. Cook for over seventeen (17) years. The fact is Mr. Cook failed to meet his burden by proving by clear and convincing evidence that service upon him back in 2006 was defective. As such, this Court should affirm the trial court's ruling.

### B. This Court Should Affirm The Trial Court's Ruling On Both Legal And Equitable Grounds.

The record reflects that Mr. Cook's initial claims that he "never learned there was a lawsuit at all until some papers seeking supplemental proceedings were delivered [to the 1515 Lilac Lane address] in August 2012" and that he "did not get notice [of this lawsuit] until long after the default judgment was entered" in 2006 are blatantly false. Mr. Cook's belated admissions regarding these false statements are simply not enough

to rehabilitate his credibility or otherwise lend support to his position. As seen above, TCG and its attorneys have repeatedly mailed documents to Mr. Cook at the 1515 S. Lilac Lane address since 2006, there has been no returned mail, *and* two (2) of Mr. Cook's attorneys contacted TCG back in 2009 regarding this lawsuit and the declaration of service, which declaration shows TCG effectuated abode service on Mr. Cook back in 2006.

TCG finds it telling that neither of Mr. Cook's two attorneys who contacted TCG in 2009, Messrs. Van Camp and Deissner, argued then that service was not good or moved to vacate the judgment. TCG also finds it telling — and disturbing — that Mr. Deissner previously prepared a declaration for Marti Mortensen that states Ms. Mortensen's divorce from Jerry Mortensen was finalized in August 2006 when the divorce was not actually finalized until June 9, 2010, some four (4) years later, *in a case where Mr. Deissner represented Ms. Mortensen.* Mr. Deissner did not try to set the record straight regarding Ms. Mortensen's divorce until his declaration of September 12, 2013, after he received correspondence from TCG's attorney that explained the numerous reasons why the judgment should not be vacated.

Approximately eight (8) years have passed since judgment was entered in this case, and said judgment remains wholly unsatisfied. However, instead of making payment arrangements with TCG, Mr. Cook has instead moved to vacate TCG's judgment with prejudice based on

self-serving and false declaration testimony. At the end of the day, however, there is simply no doubt that Mr. Cook has failed to prove by *clear and convincing evidence* that service upon him back on July 2, 2006 was not good.

The record amply reflects that Mr. Cook's two (2) attorneys knew all about this case back in 2009, and that TCG provided them with a copy of its declaration of service at that time. Nevertheless, Mr. Cook took no action to vacate the default judgment then, and he instead waited for over four (4) years from that time until the six-year statute of limitations on TCG's claim for breach of contract had run before taking action. Mr. Cook obviously seeks to sandbag TCG by moving to vacate the judgment after the statute of limitations on TCG's claim has run. As such, TCG submits there is no question that Mr. Cook's hands are unclean, and the judgment against him cannot properly be vacated as a result. *See Leschner v. Dep't. of Labor & Indus.*, 27 Wn.2d 911, 185 P.2d 113 (1947) (equity aids the vigilant, not those who slumber on their rights).

Moreover, it was the trial court that raised the issue of laches during the September 27, 2013 hearing, and TCG submits this doctrine could properly be invoked here to prevent the vacation of TCG's judgment against Mr. Cook. The purpose of laches is to prevent injustice and hardship. *Johnson v. Schultz*, 137 Wn. 584, 243 P. 644 (1926). The elements of laches are (1) knowledge or reasonable opportunity for discovery of the cause of action; (2) an unreasonable delay in commencing

the action; and (3) damage to the defendant resulting from the unreasonable delay. *E.g., Lopp v. Peninsula School Dist. No. 401*, 90 Wn.2d 754, 585 P.2d 801 (1978). The trial court rightly noted that Mr. Cook apparently knew about TCG's judgment for four years before taking action, so the first element above is readily satisfied. Waiting four years to take action in order to "run out" the six year statute of limitations on TCG's claim is an "unreasonable delay" in commencing action. If this Court was to vacate TCG's judgment at this juncture, TCG would be damaged as a result of Mr. Cook's unreasonable delay because instead of having a judgment and judgment lien on real property in place that TCG might be able to enforce, it would instead be left with a worthless, time barred claim against Mr. Cook because the statute of limitations on this claim has run. Thus, each and every one of the elements of laches is present here. As such, TCG submits the trial court's ruling can also be affirmed on equitable grounds.

### C. TCG Should Receive An Award Of Attorney's Fees On Appeal If It Prevails Herein.

Attorney fees on appeal can be awarded if law, contract, or equity permits an award of fees. RAP 18.1(a). The last sentence in the first paragraph of the written terms and conditions regarding the revolving charge account at issue (the "**Agreement**") provides the Agreement is binding on Mr. Cook because he did not cancel his Account within 30 days after receiving the credit card for the Account and he has used or authorized the use of his Account. CP 118. Page 7 of the Agreement

provides that if the Account is referred to a lawyer who is not a salaried employee of the creditor, Mr. Cook "will have to pay [TCG's] attorney's fees plus court costs or any other fees, to the extent permitted by law." CP 122.

The Washington Supreme Court has held that when attorney fees are provided for by agreement, they are allowed when an appeal is required to gain a final judgment for breach of the agreement. *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn.2d 799, 314 P.2d 935 (1957). In *Lillions*, the parties agreed that attorney fees would be paid if the particular mortgage at issue was foreclosed. *Id.* at 839, 713 P.2d 1133. The court construed this agreement to mean that the parties intended that the mortgagee recover all legal fees necessary to prosecute the foreclosure to its "ultimate conclusion." *Id.* The mortgagee creditor obtained a foreclosure decree, but the mortgagor debtors appealed from the trial court's decision. *Id.* Since an appeal was taken, the Washington Supreme Court held that the foreclosure decree entered by the trial court was not final until affirmed on appeal, and therefore, the mortgagee was entitled to recover a fee for prosecuting the appeal. *Id.* at 839, 713 P.2d at 1136; *see also Caine & Weiner v. Barker*, 42 Wn. App. 835, 839, 713 P.2d 1133 (1986) (citing *Lillions* and noting "this case does not fall within the rule that, where attorney's fees are provided for by agreement, they are allowed when an appeal is required to gain a final judgment.").

TCG submits that if it prevails in this forum, it can recover its

attorney's fees and costs incurred on appeal from Mr. Cook despite the fact that judgment was entered on the Agreement back in 2006. Moreover, given that TCG's judgment against Mr. Cook cannot fairly be deemed final until this appeal has been resolved, in the event it prevails in this forum and TCG's judgment is upheld, TCG should be able to recover its attorney's fees incurred on appeal under *Lillions*.

## IV. CONCLUSION

The trial court did not abuse its discretion by denying Mr. Cook's motion to vacate TCG's judgment against him. Accordingly, TCG asks this Court to affirm the trial court's ruling, dismiss Mr. Cook's appeal, and award TCG the attorney's fees and costs that it has incurred on appeal.

RESPECTFULLY SUBMITTED this 2nd day of July, 2014.

EISENHOWER CARLSON PLLC

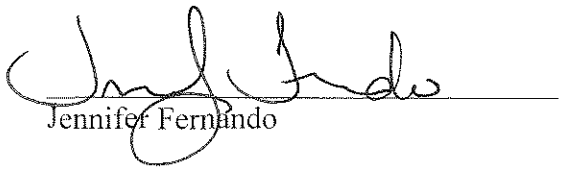
By: _____
Alexander S. Kleinberg, WSBA # 34449
Attorneys for The Collection Group, LLC

I, Jennifer Fernando, am a legal assistant with the firm of Eisenhower Carlson PLLC, and am competent to be a witness herein. On July 2, 2014, at Tacoma, Washington, I caused a true and correct copy of The Collection Group, LLC's Brief of Respondent to be served upon the following in the manner indicated below:

| | | |
|---|---|---|
| Counsel for Appellant<br>**Dustin Deissner**<br>Deissner Law Office<br>1707 W. Broadway Ave.<br>Spokane, WA 99201 | ☐ | U.S. Mail, postage prepaid |
| | ☐ | Hand Delivered via Messenger Service |
| | ☒ | Overnight Courier |
| | ☒ | Electronically via email |
| | ☐ | Facsimile |
| Counsel for Respondent<br>**Robert Sealby**<br>37 S. Wenatchee Ave., Suite F<br>Wenatchee, WA 98807<br><br>**Andrea Asan**<br>522 West Riverside Ave., Suite 560<br>Spokane, WA 99201 | ☐ | U.S. Mail, postage prepaid |
| | ☐ | Hand Delivered via Messenger Service |
| | ☐ | Overnight Courier |
| | ☒ | Electronically via email |
| | ☐ | Facsimile |

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 2nd day of July, 2014, at Tacoma, Washington.



Jennifer Fernando