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NO. 71103-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

King County Superior Court Cause No. 12-2-01364-1 SEA

FLIGHT SERVICES & SYSTEMS, INC.,

Defendant/Appellant

v.

AIR SERV CORPORATION,

Plaintiff/Respondent

BRIEF OF RESPONDENT AIR SERV CORPORATION

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INTRODUCTION

In April 2011, Appellant Flight Services and Systems, Inc. ("FSS") entered into a multi-million dollar contract with Delta Airlines, Inc. ("Delta") to provide cabin cleaning services to both domestic and international aircraft at Sea-Tac airport. However, when FSS entered into the contract with Delta, FSS knew it could not lawfully perform its obligations. Specifically, FSS did not have a compliance agreement required for removal of certain regulated garbage from Delta's international flights.[1] Without this compliance agreement FSS was not lawfully able to board any international flight to provide its cabin cleaning services as required by its contract with Delta.

Regardless, FSS illegally began servicing Delta's international flights at Sea-Tac on May 17, 2011. On May 28, 2011 (Saturday of Memorial day weekend) FSS and Delta were notified by the United States Customs and Border Protection ("CBP") that because FSS did not have approval to clean international flights it would not be allowed to board any inbound international flight without first obtaining a compliance agreement from the USDA.

After being notified that FSS did not have a compliance agreement and would not be allowed to board its international flights, Delta contacted the CBP to determine what steps were necessary to enable FSS to sub-

[1] Delta awards contracts through a bid process where a company bids on cleaning services for *both* domestic and international flights. Without being able to service the international flights, a company would not be awarded a contract for the domestic flights. In its bid, FSS failed to inform Delta that it could not legally provide services at Sea-Tac.

contract with a compliant company. Without Air Serv or another authorized company's supervision, FSS would have been unable to provide cleaning service to any of Delta's international flights at Sea-Tac airport (including flights that were scheduled for the next day).

After learning that FSS would need its services for an extended period of time, Air Serv informed FSS it expected payment for its services as it faced substantial risk.[2] After limited negotiation, on June 15, 2011, Air Serv informed FSS that the lowest price it would accept would be $175 per plane for these services. Indeed, soon thereafter the vice president of finance for Air Serv told the president of FSS that Air Serv would not accept any lower price for these services. Accordingly, Air Serv began invoicing FSS for its services rendered at the stated price.

FSS assured Air Serv that it would pay Air Serv's invoices. Specifically, FSS's general manager at Sea-Tac informed Air Serv's general manager that the invoices would be "paid in full." In total, Air Serv performed services for 476 flights. Although FSS never before objected to the $175 per plane price, after receiving its compliance agreement – no longer needing Air Serv's services – FSS's president objected to Air Serv's invoices and indicated that FSS would pay Air Serv little more than $7.00 per flight for the services Air Serv had provided.

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[2] Air Serv not only faced potential fines up to $250,000 but also faced the possibility of losing a multi-million dollar contract with United Airlines at Sea-Tac in the event its compliance agreement was revoked due to FSS's conduct. RP at 80:4-81:12. Unless otherwise indicated RP is meant to reference the trial report of proceedings and Ex is meant to reference trial exhibits.

The services Air Serv provided to FSS were necessary to ensure FSS met its obligations under its contract with Delta. Due to the services Air Serv provided – instead of being in breach of its contractual obligations to Delta – FSS profited by more than $400,000 during the time period in which Air Serv ensured FSS could fulfill its contract. Accordingly, the trial court's decision to award Air Serv less than half that amount ($200,000) due to FSS's liability under theories of unjust enrichment and/or *quantum meruit* is reasonable as a measure of damages and the award should be affirmed.

Furthermore, throughout the course of this matter FSS engaged in egregious misconduct which greatly affected this litigation. This misconduct included failing to properly respond to written discovery, failing to prepare for its 30(b)(6) deposition, using dilatory tactics to needlessly increase Air Serv's costs, submitting numerous affidavits in bad faith, failing to comply with the trial court's discovery order, failing to comply with numerous King County Local Rules and making misrepresentations to the trial court. The trial court did not abuse its discretion in awarding Air Serv sanctions, or in finding that reimbursement of Air Serv's attorneys' fees and costs was appropriate.

Moreover, this Court should award Air Serv its attorney fees and costs in responding to FSS's appeal. As attorney fees were levied as a sanction based on CR 11, CR 26(g), CR 37(b), CR 37(d) and CR 56(g) by the trial court, for these same reasons attorney fees and costs are appropriate under RAP 18.1. Additionally, as FSS makes numerous

misrepresentations to this Court, its appeal is frivolous and the Court should award fees on that basis pursuant to RAP 18.9.

STATEMENT OF ISSUES

1. Does the substantial evidence in the record to support the trial court's findings of fact?

2(a). Did the trial court abuse its discretion in awarding Air Serv $200,000 for its services provided to FSS which unjustly enriched FSS by more than $400,000?

2(b). Did the trial court abuse its discretion in determining that Air Serv should be awarded $200,000 for its reasonable value of services due to FSS's liability for *quantum meruit*?

3. Did the trial court abuse its discretion in finding that attorney fees and costs were appropriate as a sanction for FSS's numerous violations of the Civil Rules and King County Local Rules?

4. Did the trial court abuse its discretion in awarding $35,000 as a sanction against FSS for violating numerous court rules?

5. Did the trial court abuse its discretion in not allowing out of court testimony after it was established there was no good cause to do so?

6. Did the trial court abuse its discretion in not allowing FSS to designate a speaker "for the corporation" during the final day of trial?

7. Did any of the trial court's findings of law or conclusions of fact conflict with its prior orders, and if so, is the trial court bound by its prior orders where it is established that those orders were based on affidavits that contained false representations?

8. Should this Court award Air Serv its attorney fees and costs in responding to this appeal under RAP 18.1 and/or RAP 18.9?

STATEMENT OF THE CASE

I. EVIDENCE SUPPORTING THE TRIAL COURT'S DAMAGES AWARD

A. FSS'S INABILITY TO PERFORM ITS CONTRACT WITH DELTA

In January of 2011, FSS entered into a bid process with Delta in an effort to be awarded a three-year contract to provide cabin cleaning services for Delta's domestic and international aircraft at Sea-Tac airport.[3] FSS presented its bid knowing that Delta expected each bidding company to be able to perform the contract, *see* FSS Dep. at 31:9-18, however, when it provided its bid, FSS did not have a compliance agreement under which it could service Delta's international flights, *see id.* at 32:7-16. FSS did not inform Delta that it lacked a compliance agreement when it submitted its bid. *See id.* at 33:8-15.

On April 14, 2011, FSS then proceeded to contract with Delta to provide cabin cleaning services at Sea-Tac airport for Delta's domestic and international flights. *See* Ex 2 at 11. This contract would serve to provide FSS monthly revenues in excess of $130,000.[4] FSS's services for Delta were to begin on May 17, 2011. Ex 2 at 1. FSS was unable to procure a federal compliance agreement by the date the contract began,

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[3] *See* CP 2389 (Plaintiff's Amended Deposition Designations); RP at 102:24-103:20 (admitting designations); FSS Dep. at 27:13-18; 29:14-33:15 (*see* CP 2341-2388). As the deposition designations are in condensed form, "FSS Dep." is used for clarity.

[4] Exs. 3-10. The invoices from FSS to Delta show that FSS charged over $400,000 to Delta during the timeframe Air Serv made it possible for FSS to perform under its contract with Delta.

see FSS Dep. at 76:13-22, yet (illegally) still serviced Delta's aircrafts starting May 17, 2011, *see id.* at 90:19-25 & Ex 3.

On May 28, 2011, FSS was notified by the CBP that because it did not have approval to clean international flights it would not be allowed to board any inbound international flight without first obtaining a compliance agreement from the USDA. *See* Ex 65 at 3; *see also* CP 1-2 (Complaint) at ¶¶5-6 and CP 8 (Answer) at ¶¶5-6. Delta was informed that FSS did not have the proper compliance agreement on the same date and was informed of seven companies which did have a proper compliance agreement, including Air Serv. *See* Ex 65 at 3. Specifically the CBP explained:

> Please be advised, FSS does not have USDA approval to clean inbound international flights for Delta. FSS is only allowed to clean domestic aircraft. FSS is currently in violation of 7CFR330.400 (Regulation of Certain Garbage). FSS will not be allowed to board inbound international flights for Delta without first obtaining a compliance agreement with the USDA.

Id. After being notified that FSS would not be allowed to board its international flights, Delta contacted Air Serv and the CBP to determine what steps were necessary to enable "FSS [to] sub-contract with a compliant company to clean DL aircraft." *Id.* at 2. Of course, without Air Serv, or another authorized company's supervision, FSS would have been unable to provide cleaning service to any of Delta's international flights at Sea-Tac airport. *See* FSS Dep. at 37:15-38:11. Moreover, immediate action was necessary as Delta had international flights that needed to be cleaned that following day. *See* FSS Dep. at 89:14-19.

Due to Air Serv's efforts, FSS was able to provide cleaning services to 476 international Delta flights from May 28, 2011 through September 2, 2011. *See* Ex 17 at 4. However FSS never paid Air Serv for any of its services. CP 4 & CP 10 at ¶ 27 (FSS admitting "FSS has not paid Air Serv for any of its services"). This is true even though FSS has long admitted that Air Serv effectively supervised and ensured that FSS's employees complied with the necessary regulations for 476 flights. CP 3 & CP 9 at ¶16 (FSS admitting "Air Serv effectively supervised and ensured that FSS's employees complied with the necessary regulations"); *see also* Ex 17 at 4; RP at 392:11-13.

B. AIR SERV'S POTENTIAL LIABILITY FOR PROVIDING SERVICES TO FSS

In order to provide cabin cleaning services for international flights, a company must work under a federal compliance agreement. *See* Ex 65 at 3. A compliance agreement is applicable to a specific airport and must be renewed yearly. *See* FSS Dep. at 39:13-40:15. The compliance agreement provides that:

> Additionally, any person violating the PPA [Plant Protection Act] and/or the AHPA [Animal Health Protection Act] may be assessed civil penalties of up to $250,000 per violation or twice the gross gain or gross loss of any violation that results in the person deriving pecuniary gain or causing pecuniary loss to another, whichever is greater.

Ex 1 at 2. The agreement further explains:

> By signing this agreement, the signer certifies that his/her facility has met or will meet the requirements of all applicable environmental authorities prior to handling [regulated] garbage ... [and that] the company, its employees and **subcontractors**, and procedures covered by

> this compliance agreement are subject to unannounced inspections by CBP or APHIS personnel.

Id. The compliance agreement must be renewed yearly at each airport a company services. *See id.*; RP at 79:9-12. Accordingly, among other things, by allowing FSS to work as a **subcontractor** under its compliance agreement, Air Serv faced up to $250,000 per violation for work performed by FSS employees and faced losing its ability to service other international aircraft at Sea-Tac. *See* Ex 1 at 2. Mr. Toan Nguyen, Air Serv's vice president of finance specifically explained that:

> violation of the compliance agreement subjects Air Serv, or anyone that has a compliance agreement, of a fine up to $250,000 per occurrence. So it is [] a substantial financial liability, as well as from an operational business perspective. Depending on the seriousness of the violation, Air Serv or whoever holds the compliance agreement, could face having their compliance agreement revoked, in which case the $250,000 fine is [] can actually be much greater financially because we would then lose our license to operate that contract [] for the particular line. And actually for us it would have been for other clients as well.

RP at 80:4-20. Indeed, as explained by Air Serv's then general manager at Sea-Tac, Mr. Gilbert Green, Air Serv held a teleconference with company executives to discuss the potential consequences if Air Serv were to allow FSS to subcontract under its compliance agreement.[5] Moreover, Mr. Nguyen explained that Air Serv's concerns were magnified given FSS's willingness to service Delta illegally, *see* Trial at 82:5-15, as Air Serv has

[5] *See* RP at 274:19-276:19. This phone call was had on May 28th, *see id.*, the Saturday of Memorial day weekend.

never bid on a contract without first obtaining the compliance agreement at the respective airport.[6]

C. AIR SERV AGREES TO PROVIDE SERVICES

After a discussion with its senior management, Air Serv agreed that it would provide services to FSS. *See* RP at 276:20-277:14. As Delta's flights needed to be serviced the following day, Mr. Green informed CBP that it had agreed to supervise FSS for Delta's international flights. *See* RP at 277:18-278:21. CBP followed up with Mr. Green and requested that he come to CBP's offices to sign an amended compliance agreement. RP at 278:22-279:21. At that time, CBP specifically informed Mr. Green that Air Serv would be responsible for FSS's activities and Air Serv would be at risk of being fined if FSS did not follow the prescribed procedures. RP at 280:1-11. Mr. Green then signed the addendum to Air Serv's compliance agreement, allowing FSS to act as a subcontractor. Ex 29 at 2-10.

D. AIR SERV QUOTED FSS THE LOWEST PRICE IT WOULD ACCEPT

Mr. Green contacted the general manager of FSS at Sea-Tac, requested training records for FSS employees and informed him that Air Serv would charge $250 per plane for its services in this matter.[7] This

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[6] *See* RP at 81:1-12. During trial both FSS and Air Serv provided examples of violations that led to fines. RP at 360:19-361:25 (FSS being fined in Milwaukee); 162:1-163:2 (Air Serv being fined in Atlanta and Washington D.C.); *see also* RP at 160:20-25 (fines occur multiple times per year). Accordingly, FSS's new argument that fines were purely "hypothetical," *see* App. Br. at 25-27, was refuted by evidence provided by both parties at trial.

[7] RP at 280:14-281:12. At this time the general manager position at FSS was in flux as Mr. Jason Villanueva was leaving the position and Mr. John Kim was starting in the

price per plane was provided by Mr. Nguyen.[8] Shortly thereafter, Air Serv offered to provide its services to FSS for $175 per plane.[9] After this adjusted price for services was provided to FSS, FSS's president Mr. Robert P. Weitzel contacted Mr. Nguyen to discuss the price. *See* RP at 99:16-100:24. After Mr. Nguyen explained the price would not change, Mr. Weitzel did not object to Mr. Nguyen's stated price of $175 per plane. *See id.* Nor did Mr. Weitzel offer an alternative price or present any rate to Mr. Nguyen which he believed was standard in the market. *See id.* After the conversation, Mr. Weitzel requested that he be provided a contract for signature.[10]

E. FSS Represented That It Would Pay Air Serv Its Price

Pursuant to Mr. Nguyen's conversation with Mr. Weitzel, Air Serv provided FSS a contract containing the discussed price of $175 per flight. RP 101:22-102:12; Ex 67. This contract was provided to Mr. Kim who

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position. Ex 31; RP at 228:6-18. Indeed, Mr. Kim claims that by the time he was the general manager at FSS, he believed there was a deal already in place between his company and Air Serv. *See* RP at 227:23-228:4.

[8] *See* RP at 83:8-85:4; *see also* FSS Dep. at 92:15-94:3. Mr. Nguyen has been doing pricing for Air Serv since 2003 and is in charge of all pricing for Air Serv, including its cabin cleaning pricing. RP at 74:19-75:11.

[9] Mr. Nguyen explaining his initial charge of $250 was built on the assumption that Air Serv would be providing three employees to clean the aircraft, not just one to supervise the cleaning. RP at 82:16-85:23.

[10] *See id.*; Ex 55. To be clear, other companies at Sea-Tac could have performed the same services as Air Serv. Indeed, FSS contacted other companies to discuss such services, but provided Air Serv no information regarding those discussions (although requested throughout discovery). Accordingly, Air Serv can only presume that the other companies' stated prices were higher than the price quoted by Air Serv or that the other companies were entirely unwilling to take on the risk of providing FSS such services.

then forwarded it on to Mr. Robert P. Weitzel, among others. RP at 221:17-222:5; RP at 248:22-249:7.

After forwarding FSS the contract for signature, Air Serv began invoicing FSS for its services performed. *See* RP at 167:21-168:6. These invoices were generated by the division finance manager, Ms. Tessie Ong, and were emailed to numerous corporate officers at FSS.[11] Ms. Ong provided FSS invoices for $28,525.00 on July 7, for $13,749.75 on July 25, for $14,210.00 on August 5, for $13,321.88 on August 19, $13,321.88 on September 8, and for $888.13 on October 10, 2011. Ex 19. As invoices went unpaid, Ms. Ong additionally asked FSS when Air Serv could expect payment. RP 182:6-183:5. FSS never responded to Ms. Ong until after FSS had acquired a compliance agreement of its own and no longer needed Air Serv's services. RP at 182:17 – 183:5; 185:10-20.

Nor did Air Serv's general manager at Sea-Tac receive any objection regarding the invoices, or the price provided therein. RP at 284:1-8. Indeed, Mr. Green spoke with Mr. Kim on numerous occasions throughout the summer regarding FSS's open invoices and was assured by

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[11] *See* RP 166:19-185:9; Exs. 19, 35, 13, 25, 36, 26, 37, & 32. Moreover, Mr. Kim testified that he forwarded all of the invoices he was provided to Mr. Robert P. Weitzel. *See* RP 248:22-249:7. Although FSS's general manager admitted at trial to emailing Mr. Robert P. Weitzel Air Serv's invoices, in support of its prior motion for summary judgment, FSS provided the trial court a declaration from Robert P. Weitzel stating that Ms. Ong had the wrong email address for him. CP 1409. Although provided the opportunity to respond as to how this declaration could be anything other than an attempt to mislead the trial court into believing Mr. Weitzel did not know about the invoices, FSS provided no explanation whatsoever. *Cf.* CP 2189-2191 to CP 2344-45. Moreover, although Mr. Kim's testimony indicated numerous internal emails associated with Air Serv's invoices and contracts, such emails, though requested, were not provided to Air Serv throughout discovery. RP at 382:12-22; CP 2457 ¶4.

Mr. Kim that Air Serv's invoices would be paid in full. RP at 284:12-285:17. Indeed, at trial Mr. Kim admitted it was his understanding that FSS's corporate offices were paying Air Serv's invoices.

> THE COURT: Did you ever – did you just assume every time you were getting these invoices that they were getting paid and taken care of by corporate?
>
> [MR. KIM]: Yes.
>
> THE COURT: When did you find out that they hadn't been paid, Air Serv?
>
> [MR. KIM]: About, I want to say, a few months after we stopped using Air Serv services.
>
> THE COURT: So the whole time while Air Serv was providing services, you are under the impression that their bills are getting paid.
>
> [MR. KIM]: Well, as I forwarded the invoices on to corporate, I just assume that they were taking care of them.
>
> THE COURT: Okay. So – and nobody from corporate ever got back to you and said, "Hey, you better stop the services here, because we're in a fee dispute"
>
> [MR. KIM]: No. It was -- it wasn't until I secured the compliance agreement for FSS that I told Air Serv to stop.

RP at 225:14-226:9. Mr. Kim's testimony at trial was entirely inconsistent with the declaration FSS filed on his behalf, and relied upon, in support of its motion for summary judgment – less than a month earlier. *Cf.* CP 1411 at ¶ 5. Although it stated in his declaration that Mr. Kim "understood that Delta would be responsible for payment [for Air Serv's services]," *id.*, Mr. Kim admitted at trial that such a statement was not true, *see* RP at 242:2-243:3.

F. Air Serv Effectively Performed Its Services

FSS has long admitted that Air Serv effectively supervised and ensured that FSS's employees complied with the necessary regulations. CP 3 (Complaint) at ¶16 & CP 9 (Answer) at ¶16. Moreover, FSS admitted that "during the time period [in which Air Serv provided supervisory services] there were no notices by USDA of violations of Compliance Agreement processes." Ex 17 at 3. Additionally, although FSS was expected to clean the flights, Air Serv provided cleaning services as well. *See* Ex 53.

G. FSS Offers Its Price After Services Are Complete

Approximately a week after the parties' engagement had terminated due to FSS finally attaining its own compliance agreement, Mr. Robert P. Weitzel contacted Ms. Ong about the invoices she had provided FSS.[12] Ms. Ong explained that she was not in charge of pricing and was just involved in invoicing. *See id.* Yet, approximately two weeks later Mr. Weitzel for the first time informed Air Serv that FSS would pay little more than $7.00 per flight serviced by Air Serv, for a total of $3,511.10.[13]

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[12] RP 185:18-187:11. These invoices were for a total amount of well over $80,000. *See* Ex 19.

[13] Ex 17. The 10 minutes per flight allotted for Air Serv's services in Mr. Weitzel's "reconciliation" – is contrary to the time both companies explained it took to service the flights. *See* FSS Dep. at 53:15-23 (FSS stating it takes 30-40 minutes to clean each flight); RP at 315:6-15. Moreover, Air Serv was required to remain on the flight for the entire duration of the cleaning time, RP 315:16-316:3; Ex 65 at 3, which could be as long as 2 hours, RP 315:6-316:3. Additionally, the 20 minutes allotted for "travel time" in FSS's reconciliation was purely speculation made by FSS. *See* RP at 351:1-352:4.

H. FSS Provided No Evidence Of a "Market Rate"

Although FSS has argued throughout this matter that the hourly price Mr. Weitzel concocted is a "market analysis" or "market rate," it has not provided any evidence in support of such a contention. *See* FSS Dep. at 77:7-87:8. Moreover, even FSS admits when bidding on a contract for these services, the airline expects the cleaning company to have a compliance agreement, *see* FSS Dep. at 32:7-33:12, so it is extremely unusual for such a circumstance to exist, *see* CP 901 at 15-16 (FSS arguing that the "case is unique, one-of-a-kind private dispute"); 902 at 16-17 (referring to the relationship between the parties to be "atypical" and to be an "unusual situation"). Indeed, Air Serv was never even aware that it could provide such services before this instance, nor is it aware of any market rate.[14]

Indeed, FSS's CEO stated that $75 per plane would be an acceptable rate to pay Air Serv. *See* Ex 21 (Robert A. Weitzel indicating FSS should offer $75 per flight for the services). FSS failed to provide any evidentiary basis that there is any "industry standard" or "market rate" for the services provided by Air Serv exists. Indeed, the evidence it did provide demonstrated that FSS's CEO, who has long been involved in this industry, expected to pay some sort of per flight rate. In short, the

[14] *See* RP at 273:11-274:10 (Mr. Green explaining that in his 37-38 years of experience he had never heard of such a thing); 81:1-12 (Mr. Nguyen explaining he was shocked that a company would even bid on a contract without a compliance agreement); 190:23-191:22 (Ms. Ong explaining in her 13 years of billing for services she had never seen an hourly rate, all rates were by plane); *see also* Exs 3-10 & 62 (invoices from both FSS and Air Serv charging on a per plane basis); FSS Dep. at 149:22-150:2 (FSS admitted it never provided the sort of services that were involved in this matter).

evidence that FSS refers to as to "market value," "market evaluation," "market rate," or "market analysis" is nothing more than a lowball price concocted by Mr. Robert P. Weitzel after the parties' – competitors in the industry – engagement ended.[15]

II. EVIDENCE SUPPORTING THE TRIAL COURT'S SANCTIONS AWARD

A. FSS FAILED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS

FSS failed to comply with its discovery obligations in this matter by not producing responsive documents in its possession, by providing evasive answers to interrogatories, and by producing an unprepared 30(b)(6) witness for deposition. Moreover, FSS made numerous false representations regarding discovery matters throughout this litigation which only served to needlessly increase Air Serv's expense.[16]

1. FSS Failed to Properly Respond to Written Discovery

FSS failed to provide documents which were requested by Air Serv. CP 2420-24. Indeed, FSS admitted to having documents in its possession responsive to discovery requests made by Air Serv that went unproduced. *See, e.g.,* FSS Dep. at 52:2-20. Moreover, during trial FSS's

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[15] Indeed, although he was receiving invoices for tens of thousands of dollars, Mr. Robert P. Weitzel contended that the reason FSS did not actually pay Air Serv was because "Air Serv did not want to be paid," FSS Dep. at 138:2-12, however at trial FSS's counsel abandoned this unreasonable contention, *see* RP 407:5-408:7, 413:21-414:2.

[16] *See* CP 2186-2203 (Air Serv's Motion for Sanctions); 2204-2233 (declaration in support of same); CP 2284-2294 (reply in support of same). In opposition to Air Serv's motion for sanctions – which detailed FSS's disregard of numerous court rules – FSS decided not to address the evidence brought by Air Serv and instead disingenuously argued that there was not enough space left in its opposition to argue against Air Serv's motion for sanctions. *See* CP 2344-45. As such, a number of arguments raised by FSS in its appeal, are not found in the record before the trial court.

former employee admitted to sending numerous emails which were never produced to Air Serv. *Cf.* RP at 222:3-5, 223:6-14, & 248:22-249:7 to RP 382:12-22 & CP 2457 at ¶4.

Similarly, FSS failed to provide proper answers to interrogatories. Even after the trial court ordered FSS to supplement its interrogatory responses, *see* CP 336-37, FSS effectively failed to supplement these interrogatories by providing evasive answers, *see* CP 2421,

2. FSS Failed to Prepare For Its 30(b)(6) Deposition

FSS produced a CR 30(b)(6) designee that came to its deposition unprepared.[17] Not surprisingly, FSS was unable to answer questions related to numerous topics designated for examination. *See* CP 2658-2662 (Ex. P) (explaining the topics that FSS was unable to answer at deposition). FSS's failure to prepare for its deposition appropriately frustrated Air Serv's discovery efforts and caused Air Serv to incur additional expense.[18]

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[17] *See* FSS Dep. at 9:4-11 ("Q. How did you prepare for today's deposition? A. I didn't"). Although initially noted for deposition in early February, FSS delayed attending any deposition until near the end of April. *See* CP 342-344. Moreover, although further deposition of FSS was ordered by Judge Rogers, Robert P. Weitzel claimed he was unable to attend the deposition as noted, or any date that week, as he was on vacation. *See* CP 2724-2725 (Ex. E). Indeed, FSS refused to have any person other than Mr. Robert P. Weitzel to be designated as the 30(b)(6) designee. *See* CP 2730-33 (Ex. G). Ironically at trial and in its appeal, FSS argues that a number of its officers were intending on speaking on behalf of the company as a corporate designee (although, such designation – even if it were theoretically appropriate – was never provided to Air Serv). *See* RP at 261:22-264:21; 370:21 372:14.

[18] Furthermore, FSS's other dilatory litigation tactics only served to needlessly increase Air Serv's costs of litigation in this matter. FSS and its counsel provided Air Serv countless excuses in this litigation as to why discovery could not move forward. *See* CP 180-196 (Ex. A at 135-151) (FSS's current and former counsel providing various excuses why discovery could not be provided for many months); CP 145-150 (Ex. A at

B. FSS Submitted Numerous Affidavits in Bad Faith

Numerous declarations were provided to the trial court by FSS and its counsel that have proven to contain statements that were either false or misleading.

The declaration of Robert P. Weitzel, CP 2391-2413 (filed Jan. 10, 2012), CP 305-27 (filed again Mar. 15, 2013), contained numerous statements which later were either proven to be false or were unsubstantiated. First, Mr. Weitzel's statement that Gate Gourmet "had the proper Compliance Agreement at Sea-Tac," CP 2293 at ¶ 6, was false. *See* Ex 12 (list of compliant companies not including Gate Gourmet). Second, as the trial court found Mr. Nguyen's testimony credible – and as his testimony as to the two men's conversation completely differed from Mr. Weitzel's – as fact finder the trial court determined that Mr. Weitzel "deliberately misled Air Serv to believe it would be paid its reduced price of $175 per flight." CP 2184 at ¶9. Third, although Mr. Weitzel declared that there "was a custom and practice within the industry" and that FSS had worked out similar arrangements to subcontract under a compliance agreement at "various locations with other companies in the past." CP 2393 at ¶5, after such information was requested through discovery by Air Serv – and compelled by Court order (CP 336-38) – FSS could not verify Mr. Weitzel's statement. CP 2424-25. Finally, Mr. Weitzel's claim that

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101-106) (FSS's counsel reproducing the same documents already provided); CP 101 & 105 (Ex. A at 55 & 59) (counsel blaming assistant for not providing documents).

Ms. Ong "requested that [he] provide Air Serv what FSS believed was a reasonable rate for its services," was entirely refuted by Ms. Ong at trial.[19]

The declaration of John Kim, CP 1410-23, filed in support of FSS's motion for summary judgment, contained false statements. At trial Mr. Kim admitted he did not draft the declaration and he further admitted that it contained false statements. RP at 242:11-24. Specifically, although his declaration stated he "understood that Delta would be responsible for payment," CP 1411 at ¶5, during trial Mr. Kim admitted that such statement was entirely untrue.[20]

The declaration of Robert A. Weitzel (FSS's CEO), (CP 1622-24) contained false statements and was relied upon by the trial court in initially agreeing to allow Mr. Robert P. Weitzel (FSS's president) to testify via "Skype." Mr. Robert A. Weitzel's declaration stated that because Mr. Robert P. Weitzel would be traveling from June 24-26 he would be unavailable to attend trial on those dates. As Mr. Robert P. Weitzel testified he was in his office and had returned from his travel plans on June 23, Mr. Robert A. Weitzel's declaration was proven false.[21]

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[19] *Cf.* CP 2295 ¶13 to RP at 189:24-190:8. Mr. Weitzel's declaration – filed at the onset of this suit – caused Air Serv unnecessary cost in disproving numerous false statements.

[20] RP at 242:2-21; *see also* RP at 225:4-226:9 (Mr. Kim testifying he believed FSS was paying the invoices); 243:25-244:20 (showing another inconsistent statement).

[21] *Cf.* CP 1623 at ¶4 to RP at 335:22-342:9. Additionally troubling was that FSS's counsel also declared that the information provided in FSS's request for telephonic testimony was true, to the best of his knowledge. CP 1614. However, a reasonable inquiry into the evidence submitted by FSS would have shown that Mr. Robert P. Weitzel's vacation ended two days before trial. CP 1627-29. Moreover, during the substantial delay in his setting up the Skype connection, FSS's counsel should have been able to determine his client was in an office. *See* RP at 340:24 341:19. Moreover, FSS's counsel provided no further explanation to the trial court once he had opportunity to

Fourth, a declaration of Robert P. Weitzel filed in support of FSS's motion for summary judgment was entirely misleading. During trial, Mr. Kim testified that he provided all of the contracts and invoices sent to him by Air Serv to Robert P. Weitzel, as he received them. *See* RP at 223:6-12, 248:22-249:7. However, in support of its motion for summary judgment, FSS misled the trial court with Mr. Weitzel's declaration implying he never received Air Serv's invoices. *See* CP 2709 at ¶2.

C. FSS DID NOT OBEY THE TRIAL COURT'S DISCOVERY ORDER

On April 15, 2013, Judge Rogers granted Air Serv's motion to compel and ordered that FSS "supplement its answers to Interrogatory Nos. 7-12... [and that FSS] is ordered to produce all documents upon which it relies in the computation of its amended answers to Interrogatory Nos. 10-12" and that "to the extent that [FSS] has a specific factual contention of damages or of a contract, such documents should be specifically identified." CP 337. However, after FSS was compelled to produce its revenues and costs, it still refused to produce a single document relating to any cost it incurred or failed to provide a total as to revenues or costs.[22] Moreover, FSS supplemented its response to Interrogatory No. 12 (requesting cost information) to evasively state that

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further speak with Mr. Robert P. Weitzel, at trial, or in response to Air Serv's motion for sanctions. *See* CP 2244-45. Indeed, FSS's current explanation – indicating that Mr. Robert P. Weitzel was unavailable due to child care demands – is presented for the ***first time*** to this court. *See* App. Br. at 42 n. 32.

[22] Ironically, FSS – for the *first time in its appeal* – provides revenue figures pursuant to its calculation in its attached Appendix A. As such, FSS's refusal to provide these calculations previously must have been willful.

"FSS did not keep records on the total costs for providing services," CP 2175, which was refuted by FSS's testimony during its deposition.[23] FSS also evasively answered another interrogatory by vaguely answering that FSS provided similar services to a company in Boston, which again was refuted by FSS's testimony during deposition (taken less than two weeks before). *Cf.* CP 2170-71 to FSS Dep. at 149:22-150:2.

D. FSS VIOLATED NUMEROUS LOCAL RULES

Throughout the course of this litigation, FSS failed to comply with numerous Local Rules. Specifically, FSS failed to comply with Local Rules 4(g) and (j), 7(b)(4) and 10(C)(D) and 40(e)(1). *See* CP 2192-93. FSS failed to timely provide its primary witness disclosures, failed to provide all of the exhibits it expected to offer at trial, failed to timely serve certain papers filed with the trial court, failed to provide adequate advance notice for numerous motions to shorten time, and failed to timely address potential scheduling conflicts. *See id.*

E. FSS MADE MISREPRESENTATIONS TO JUDGE ROGERS

On June 7, 2013, the parties and Judge Rogers discussed the upcoming trial. During this discussion, the parties agreed that trial could be had the week of June 24 and Judge Rogers made it a point to have the

[23] *See* FSS Dep. at 52:2-20; 185:9-25; 196:6-25. FSS and its counsel's signatures on the supplemental discovery responses, dated May 3, 2013, were provided after FSS admitted during its deposition, on April 22, that FSS indeed did have documents relating to its costs. Accordingly the verifications of FSS and its counsel on the supplemental discovery responses did not comply with CR 26(g), as FSS failed to produce the documents it knowingly had in its possession. Moreover, Judge Rogers previously found that FSS "has provided statements in its discovery responses, under oath, which have proven, and should have been known by both [FSS] and its counsel, to be untrue." CP 336 at 3b.

trial set early in the week to avoid inconveniencing the numerous out-of-state witnesses for both parties. *See* RP at 58:6-23 (June 7, 2013 hearing). The following week, after the hearing on Air Serv's motion for summary judgment, FSS's counsel represented to Judge Rogers that he and Robert P. Weitzel (who at the time was requesting he not be made to testify pursuant to Judge Rogers' order on June 7) would be available the week of June 24. *See* RP at 371:21-372:14. Judge Spector later verified that indeed such representations had been made to Judge Rogers.[24]

III. FSS'S MISREPRESENTATIONS TO THIS COURT

A. FSS MISREPRESENTS THAT IT INDEMNIFIED AIR SERV

As the drafted contract went unsigned, FSS admitted it never did indemnify Air Serv. *See* RP at 317:12- 14 (Q. Did [FSS] ever indemnify Air Serv? A. No.).[25] Although FSS previously admitted that its willingness to indemnify Air Serv did not constitute an agreement to do so, FSS now argues in its appeal that FSS *did* indemnify Air Serv, *see* App. Br. at 7 ("**Assignment of Error 10.** The trial court erred when it found that AS 'never stopped the indemnity carried solely by plaintiff.' CP 2184. FSS had expressly agreed to indemnify AS if anything arose"),

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[24] CP 2181 ("Subsequently, the court learned that defense counsel made representations to the court (Honorable Jim Rogers) on June 14, 2013 that all witnesses would be made available during the week of June 24, 2013"). Indeed, as numerous representations during the first day of trial were made as to what Judge Rogers previously stated, Judge Spector spoke with Judge Rogers before the second day of trial started. *See* RP at 260:10-13. Moreover, although FSS must have long known about the inconveniences which prevented its CEO and president from obeying the trial notices properly served by Air Serv, *see* CP 1617 at ¶3 & CP 1623 at ¶3, FSS elected to wait until Judge Rogers transferred the case and filed its motion the day after he did so. *Cf.* 1607 to CP 1611-13.

[25] *See also* CP 1143 (FSS Dep. 103:18-104:9); CP 2418 (lns. 17-18, fn. 4).

11 ("FSS expressly agreed to indemnify Air Serv"), & 29 – 32. Moreover, at trial FSS's counsel agreed with the trial court that FSS never actually indemnified Air Serv.[26]

B. FSS Misrepresents That it Tendered Payment to Air Serv

FSS has long admitted that it never made any payment to Air Serv for the services that were at issue in this matter, *see* CP 4 & CP 10 at ¶27 (FSS admitting "FSS has not paid Air Serv for any of its services"), yet, in its appeal to this court it represents that it did tender payment to Air Serv, *see* App. Br. at 6 ("**Assignment of Error 7.** The trial court erred when it found that FSS never made any payment to AS. CP 2183. FSS undisputedly tendered payment of its fair market valuation shown in Tr. Ex. 17."). The only check provided by FSS, however, was made as an offer to settle this dispute, after litigation had been ongoing for nearly 9 months.[27]

C. FSS Relies Upon Evidence Not In the Trial Record

Much of the evidence that FSS relies upon in its appeal was not before the trial court to evaluate on the issue of damages. Primarily FSS relies upon a declaration of its president Robert P. Weitzel that was filed in support of its motion for summary judgment.[28]

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[26] *See* RP at 401:9-14. For the same reasons, FSS's Assignment of Error 3 is also frivolous. *See* App. Br. at 5-6.

[27] The trial court rightfully found that the settlement discussions between counsel, including FSS sum provided to settle the dispute, was inadmissible. *See* RP 358:5-359:9.

[28] *Cf.* CP 906-1038 (Weitzel Declaration) to App. Br. at 9-15, 37. Besides relying upon Mr. Weitzel's declaration, FSS also inappropriately relies upon its 30(b)(6) deposition for facts presented in its appeal. *Cf.* CP 1688-1714 (deposition testimony of FSS) to App. Br. at 10, 29, 30, 37. At no time did FSS ever provide reason under CR 32 to allow its

Furthermore, FSS's Appendix A attached to its brief was not presented to the trial court during trial, or any time before.[29] Indeed, nowhere in the trial record – or entire record presented to this court – is there any such break down of FSS's invoices, for the trial court to ever have considered. FSS's argument that the trial court erred by not applying FSS's figures – presented for the first time to this Court – is entirely frivolous. *See* App. Br. at 7 (**Assignment of error 12**).

D. FSS MISREPRESENTS JUDGE ROGERS' ORDERS

FSS's argument that Judge Rogers' summary judgment order contradicts Judge Spector's finding after trial that "FSS's failure to provide information related to its costs and revenues was intentional," *see* App. Br. at 7 (**Assignment of error 11**), is refuted by a plain reading of Judge Rogers' order, *see* CP 1584. Indeed, Judge Rogers' order makes absolutely no reference to FSS's egregious discovery misconduct. Nor does Judge Rogers' order in anyway refute the trial court's finding that "Mr. Green was told that Air Serv would be paid in full." *Cf.* CP 2184 at ¶ 8 to CP 1584 (**Assignment of error 8**).

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own corporate deposition to be admissible. Of course, pursuant to CR 32(a)(2) it is wholly proper for Air Serv to use FSS's deposition testimony "for any purpose."

[29] The revenue figures FSS provides to this court, which were never provided in discovery or at trial, should have been provided in response to Air Serv's Interrogatory No. 11, which specifically requested revenue information. *See* CP 2174. But FSS failed to provide the figure ($62,595.73), *see* Appellant's Br. at 7, even after being compelled to do so by Judge Rogers' discovery order. FSS either intentionally refused to provide Air Serv this revenue figure, or FSS has since derived the figures to mislead this Court.

Additionally, although FSS claims that Judge Rogers denied Air Serv's motion to compel (filed on March 11, 2013), *see* App. Br. at 48, the motion was granted, *see* CP 336-338.

E. FSS Misrepresents Its Price as a "Market Analysis"

Although both parties have admitted that the types of services provided at issue in this case are unique, and that neither of the companies had ever engaged in providing such services, *see* RP at 273:11-274:10, 81:1-12, 190:23-191:22; FSS Dep. at 149:22-150:2, FSS's attempts to mislead this Court by referring to its price as some sort of "market analysis" should be disregarded. *See* RP at 258:23-259:5. FSS failed to ever prove any market exists for the services at issue or that any price had ever been used before. *See* RP at 266:15-270:2.

ARGUMENT

I. The Trial Court's Damages Award Should Be Affirmed

Where, as here, a trial court has "weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports its findings of fact and, if so, whether the findings support the trial court's conclusions of law." *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn.App. 546, 555, 132 P.3d 789 (2006).

> Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person that a finding is true. We review only those findings to which appellants assign error; unchallenged findings are verities on appeal. On appeal, we view the evidence in the light most favorable to the prevailing party and defer to the trial court regarding witness credibility and conflicting testimony.

Id. at 555–56 (citations omitted).

Questions of law and conclusions of law are subject to *de novo* review. *Young v. Young,* 164 Wn.2d 477, 483, 191 P.3d 1258 (2008). However, "[b]ecause the trial court has broad discretionary authority to fashion equitable remedies, we review such remedies under the abuse of discretion standard." *SAC Downtown Limited Partnership v. Kahn,* 123 Wn.2d 197, 204, 867 P.2d 605 (1994); *see also Young*, 132 Wn.2d at 487-88 ("Within this range the trial court, reviewing the complex factual matters involved in the case, has tremendous discretion to fashion a remedy to do substantial justice to the parties and put an end to the litigation") (quotation omitted). An abuse of discretion occurs when the trial court's decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. *Gildon v Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006); *Cornish College of the Arts v. 1000 Virginia Ltd. Partnership,* 158 Wn.App. 203, 221, 242 P.3d 1 (2010).

Here the evidence substantially supported the trial court's findings of fact leading to its damages award of $200,000, which was within the trial court's discretion as a matter of law.

A. THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT THE TRIAL COURT'S FINDINGS OF FACT

Although FSS argues that the trial court committed numerous errors of fact, the trial record shows that the trial court's findings were reasonable. In total, FSS alleges 15 assignments of error made by the trial

court in relation to its damages award. *See* App. Br. 5-8. Thirteen of those alleged errors relate to findings of fact made by the trial court (1-5 & 7-14), the other two relate to whether the trial court abused its discretion in determining the award (6 & 15). *See id.* Below is a summary of just some of the facts that refute each of FSS's assignments of error as to the trial court's findings on the merits.

Assignment of Error 1: It has long been undisputed that Air Serv performed supervisory services on 476 flights flying into Sea-Tac from outside the United States. *See* Ex 17 at 5. Moreover, the evidence submitted by FSS to the trial court plainly shows that Air Serv performed cleaning services on some of these flights. *See* Ex 53; RP at 307:14-308:11. Accordingly there is substantial evidence to show that "plaintiff provided cleaning and/or supervision of cleaning 476 flights involving both domestic and international travel." CP 2180-81.

Assignment of Error 2: It is undisputed that Air Serv provided FSS services from May 28, 2011 through September 2, 2011. Ex 17 at 4-5. To any extent the trial court's order is read to include dates beyond September 2, the error is harmless as it was the number of flights serviced the trial court relied upon in fashioning its remedy.[30]

Assignment of Error 3: The evidence in the record clearly demonstrates that Air Serv "assumed the risk of liability should there be a

[30] *Cf.* CP 2183 at ¶ 4 to CP 2184 at ¶ 16; *see also State v. Campbell Food Markets, Inc.*, 65 Wn.2d 600, 605-608, 398 P.2d 1016 (1965) (finding assignment of error as to date which was "immaterial" required no further consideration and no reversal).

violation of the CBP rules ... and was required to do so under the regulations of CBP." CP 2183 at ¶3. First, the unrefuted testimony provided by Gilbert Green explained that the CBP specifically informed him that Air Serv was responsible for FSS's actions while FSS served as a subcontractor under Air Serv's compliance agreement.[31] Moreover, the plain language of the compliance agreement states that FSS was working as a subcontracted firm, *see* Ex 29 at 10, and that Air Serv agreed by signing the agreement that it would make sure all requirements would be met regarding the handling of regulated garbage, *see id.* at 2. As such, the trial court had substantial evidence to support its finding that Air Serv risked liability from the CBP by allowing FSS to work as a subcontractor.

FSS's new theory that Air Serv was not liable under the agreement because it did not "clean" the plane should be disregarded as it was not presented at trial. *See* App. Br. at 34. Nor did FSS argue at trial that the regulations referred to in the compliance agreement limit Air Serv's liability. *See id.* at 35, n. 25. As such, FSS's arguments should not be considered.[32]

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[31] *See* RP at 278:22 – 280:11. This testimony was admitted at trial without objection. *See id.* As such FSS's untimely objection to the admissibility of Mr. Green's testimony, *see* App. Br. at 34-35, should be disregarded, *see, e.g., Sepich v. Department of Labor and Industries*, 75 Wn.2d 312, 319, 450 P.2d 940 (1969) ("It is well settled that objections to evidence cannot be raised for the first time on appeal.").

[32] *See, e.g., Demelash v. Ross Stores, Inc.*, 105 Wn.App. 508, 527, 20 P.3d 447 (2001) ("We generally will not review an issue, theory or argument not presented at the trial court level. The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials."). Indeed, at trial, FSS's theory was that the fines issued by CBP were not substantial. *See, e.g.*, RP at 360:23-362:10.

Assignment of Error 4: There is substantial evidence to support the trial court's finding that Air Serv remained with each aircraft throughout the time as required by the CBP certification. CP 2183 at ¶5. First, Gilbert Green explained that it was his understanding that Air Serv was required to stay with flights, supervising the entirety of FSS's cleaning services and it was his understanding that Air Serv did so for every flight. *See* RP at 292:14-22, 315:6-316:3. Moreover, the evidence shows that FSS could not be aboard the aircraft without Air Serv being present. *See* Ex 65 at 3. Indeed, the testimony FSS relies upon in its appeal to discount the amount of time Air Serv remained with the flights (stating it was only 10 minutes per flight), *see* App. Br. at 36; RP at 354-355, was properly objected to, and sustained by the trial court, as hearsay, *see* RP at 354:14-356:9. Regardless, even if the trial court were in error on this finding it would be harmless.[33]

Assignment of Error 5: Mr. Kim, called by FSS at trial, admitted that FSS never interrupted Air Serv from providing service to FSS until FSS obtained its compliance agreement. *See* RP at 224:23-226:9. As such there is substantial evidence in the record to show that "FSS never interrupted plaintiff's supervisory role." CP at 2183 ¶5. Judge Rogers' prior summary judgment orders are in no way contradictory to such a finding.[34]

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[33] Air Serv charged on a per flight basis. It did not maintain hourly records for these services because it did not charge on an hourly basis for these, or any other cabin cleaning service it performed. *See* RP at 190:23-191:22.

[34] *Cf.* App. Br. at 6 to CP 1580-82 & 1583-84. Moreover, as the entire case was transferred from Judge Rogers to Judge Spector, Judge Spector was within her authority

Assignment of Error 7: As FSS has long admitted that it never paid Air Serv for its services, *see* CP 4 & CP 10 at ¶27 ("FSS has not paid Air Serv for any of its services"), FSS's contention on appeal that it "undisputedly tendered payment" is simply not true.

Assignment of Error 8: At trial, Mr. Green testified that Mr. Kim informed him that FSS would pay Air Serv in full. RP at 284:21-285:5. The trial court thus had substantial evidence to find the same. CP 2184 at ¶8. Indeed, the trial court found Mr. Green's testimony to be "highly credible." CP at 2184 at ¶8. In any event, Judge Rogers' prior order did not address representations made by Mr. Kim to Mr. Green.

Assignment of Error 9: The trial court had substantial evidence to find Mr. Robert P. Weitzel misled Mr. Toan Nguyen to believe Air Serv would be paid $175 per flight. CP 2184 at ¶9. Mr. Nguyen explained that he informed Mr. Weitzel that Air Serv would accept nothing less than $175 per flight, and after being informed of this, Mr. Weitzel emailed Mr. Nguyen requesting a contract. *See* RP at 100:5-24; Ex 55.

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to make rulings inconsistent with Judge Rogers' partial summary judgment orders. *See Washburn v. Beatt Equip., Co.,* 120 Wn.2d 246, 301, 840 P.2d 860 (1993) (order on *partial* summary judgment is not a final judgment and trial court has right to later modify it); *Zimny v. Lovric*, 59 Wn.App. 737, 739, 801 P.2d 259 (1990) ("The Washington courts have held that denial of a motion for summary judgment is not appealable. The courts have also stated that an order which is not appealable is not a final judgment and has no res judicata effect") (citations omitted). The cases relied upon by FSS to the contrary are not applicable to this instance as they all determined there was "law of the case" after final judgment was had. *See* App. Br. at 22, n.11. So even if Judge Spector's orders diverged from Judge Rogers – which they did not – she would have been well within the law to do so. This is even more true, given that Judge Rogers' rulings on partial summary judgment were based on declarations filed by FSS later determined to be false and/or misleading. *See, e.g., Mendenhall v. Mueller Streamline Co.*, 419 F.3d 686, 692 (7th Cir. 2005) ("the question is not whether the second judge should have deferred to the ruling of the first judge, but whether that ruling was correct.").

Assignment of Error 10: As FSS admitted it never indemnified Air Serv, *see* supra III. A, the trial court had substantial evidence to find that Air Serv was never indemnified. *See* CP 2184 at ¶10. Moreover, there is no dispute the contracts requiring FSS to indemnify Air Serv went unsigned and were unenforceable. FSS's new claim that it had "expressly agreed to indemnify Air Serv if anything arose" is false. App. Br. at 7.

Assignment of Error 11: FSS admitted it had information relating to costs and revenues that were not provided to Air Serv, *see, e.g.*, FSS Dep. at 52:2-20, 72:24-73:16, 185:9-25; *see also* CP 2420-2425, even though the trial court compelled such information be produced, *see* CP 336-338. As such, the trial court had substantial evidence to find that "FSS's failure to provide information related to its costs and revenues was intentional." CP 2184 at ¶12. As Judge Rogers' summary judgment orders had absolutely nothing to do with this discovery, FSS's argument this finding "directly contradicts Judge Rogers' order on partial summary judgment" is frivolous. *Cf.* App. Br. at 7 to CP 1580-82 & 1583-84.

Assignments of Error 12-14: FSS's invoices were submitted into evidence at trial. Those invoices present substantial evidence to support the trial court's findings FSS was paid "in excess $400,000 during the time Air Serv allowed FSS to work as a subcontractor," FSS "received $77,730.50 in direct revenue due to Air Serv's actions from June through August 2011," and "the fixed fees total $77,439.09 on the invoices, which include the dates on which Air Serv provided services." To arrive at these figures, only simple math is necessary to derive these figures from the

invoices. *See* CP 2427-31; Exs. 3-10. Moreover, the figure FSS provides this Court for consideration ($62,595.73) was never provided to the trial court, nor were the calculations leading to such a figure.[35]

B. THE FINDINGS OF FACT SUPPORT THE DAMAGES AWARD

FSS does not dispute liability under either unjust enrichment or *quantum meruit*. Accordingly, if the trial court's damages award is appropriate under either theory of liability, it should be affirmed.[36]

1. THE TRIAL COURT DAMAGES AWARD IS APPROPRIATE FOR LIABILITY UNDER UNJUST ENRICHMENT

Unjust enrichment is "founded on notions of justice and equity." *Young,* 164 Wn.2d at 486. As such, trial courts have tremendous discretion to fashion remedies for such liability.[37] In *Young*, the Washington Supreme Court explained that where a faultless claimant proves liability under unjust enrichment, an award may be:

> the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position. **[Or,] it may be measured by the extent to which the other party's property has been increased in value or his other interests advanced**.

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[35] *See, e.g., Becerra v. Expert Janitorial, LLC*, 176 Wn.App. 694, 730, 309 P.3d 711 (2013) (court did not consider material that was not properly before it).

[36] *See Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 344, 883 P.2d 1383 (1994) (it is appropriate to "sustain a lower court's judgment upon any theory established by the pleadings and supported by the proof").

[37] *See, e.g., Wright v. Dave Johnson Ins., Inc.* 167 Wn.App. 758, 773-74, 275 P.3d 339 (2012) (affirming court's order of a constructive trust as a remedy fashioned to be "fair"); *Olwell v. Nye & Nissen Co.*, 26 Wn.2d 282, 287, 173 P.2d 652 (1947) (awarding plaintiff profits made by defendant).

Young, 164 Wn.2d at 487 (emphasis added) (citations omitted). Here, although FSS admits that it discussed attaining the services performed by Air Serv with other compliant companies, it was unable to provide *any* price that *any* other company ever has charged for the services at issue.[38] Nor could Air Serv provide any rate beyond the figure it was willing to accept for payment.[39] Thus the trial court was left to determine by how much FSS benefited/profited.[40]

In its brief and under its analysis of *Young*, FSS focuses on one way in which a court may elect to fashion a remedy – that is to award an amount that it would have cost a well-informed buyer to pay to a well-informed seller. *See, generally*, App. Br. at 16-37. This approach indeed makes a lot of sense in numerous instances where services are provided and there is a marketplace for such services. However, in this instance, as no such market was ever identified the trial court using its discretion based its remedy from the benefit conferred on FSS (*i.e.* by the amount its interests were advanced). Indeed, the Washington Supreme Court in *Young* specifically followed the same approach as the trial court here finding that that the defendant must "disgorge the entire value of the benefit she received as determined by ***either*** the fair market value of the

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[38] *See* FSS Dep. at 82:11-87:8; Ex 65 at 3. So, there was no evidence for the trial court to evaluate as to what it would have cost FSS to attain the benefit provided by Air Serv.

[39] FSS takes great steps to discredit Mr. Nguyen's testimony, but fails to provide reason to show how the trial court abused its discretion in finding his testimony "credible." The trial court had substantial evidence to believe that Mr. Nguyen's pricing was appropriate.

[40] At trial FSS conceded that disgorgement of profits is an appropriate remedy for cases involving services. *See* RP at 389:4-393:23.

services rendered **or the amount the improvements enhanced the value of the property**." *Young*, 164 Wn.2d at 490.

The trial court found FSS made $400,000 during the time it serviced its contract with Delta by utilizing Air Serv's compliance agreement, CP 2184 at ¶13, and that at least $77,730.50 of that amount was direct revenue from the particular flights serviced by Air Serv, CP 2184 at ¶14. Accordingly, "under Washington law [Air Serv is] entitled to an award between [$77,730.50] and [$400,000]. Within this range the trial court, reviewing the complex factual matters involved in the case, has tremendous discretion to fashion a remedy to do substantial justice to the parties and put an end to the litigation." *Young*, 164 Wn.2d at 487-88. The trial court further found that FSS deliberately misled Air Serv to believe it would be paid its stated price (of $175 per plane) and that FSS intentionally failed to provide discoverable information, *see* CP 2184 at ¶¶8,9, & 11, which would allow Air Serv the ability to calculate the profit FSS received, due to Air Serv's services.

Using its discretion, the trial court, as a matter of equity, fashioned a remedy to make Air Serv "whole," *see* RP 412:4-7, and did so by awarding Air Serv its reduced price per plane along with *all associated* attorney's fees and costs in bringing this action.[41] The court's remedy was

[41] *See* CP 2184 at ¶16; *see also* CP 2300 at h. FSS argues that such an award contradicts the "American Rule" as an award of fees, *see* App. Br. at 49, however, as the trial court made clear the fees and costs were used as part of the remedy – not in addition to it. CP. 2300 at h; *cf.* CP 2302-04 to CP 2770. There is no reason to believe that the trial court using its "tremendous discretion" cannot fashion a remedy, within the allowable limits by law, to make Air Serv whole. *See, e.g., Roberts v. Safeco Ins. Co.*, 87 Wn.App. 604, 670, 941 P.2d 668 (1997) (explaining the equitable principle for a party to be "made whole" is

made to ensure that Air Serv was placed in no worse of a position than it would have been in had FSS honored its representations. *See* CP 2184 at ¶8. Such an equitable result is not "manifestly unreasonable, or exercised ... for untenable reasons." *Gildon,* 158 Wn.2d at 494.

The trial court ordered judgment in the amount of $200,000 against FSS for its liability under unjust enrichment. CP 2303. This amount is less than half of what FSS received as a direct consequence and benefit from Air Serv's supervision which allowed FSS to perform its contract with Delta. Without Air Serv's services, FSS most certainly would have breached its contract with Delta and been faced with liability to Delta.

FSS fails to address how the trial court abused its discretion in examining the amount FSS profited from Air Serv's services to determine the reasonable value of those services. Indeed, in arguing that the trial court's award was not a "reasonable market rate," not once does FSS address the trial court's ability to base its award on the benefit conferred by Air Serv to FSS. Of course, as "[t]he obligation to repay the debt or disgorge the value of the received benefit focuses on the *receiver* of the benefit, not on the *provider* of the benefit," *Young*, 164 Wn.2d at 489, FSS's argument solely focused on Air Serv being required to prove a "reasonable market rate" is not the law. "In short, justice requires [FSS]

"based on unjust enrichment"). Additionally, FSS argues that a proper lodestar analysis was not performed by the trial court, *see* App. Br. at 49, however the record shows that the trial court reviewed the fees and costs detailed by Air Serv from its actual billings and found that the amount was reasonable. CP 2300-01. Moreover, as this amount was not awarded as fees and costs, but used by the trial court in fashioning its remedy to make Air Serv whole, such an analysis is unnecessary as the court's *remedy* was for *all associated* costs and fees.

to pay for the benefit [it] received from these services." *Young*, 164 Wn.2d at 488, 191 P.3d 1258. The trial court did not abuse its discretion in fashioning a remedy to make Air Serv whole which was less than FSS's profit of $400,000.

2. THE TRIAL COURT DAMAGES AWARD IS APPROPRIATE FOR LIABILITY UNDER *QUANTUM MERUIT*

Additionally, the value of the services, under a theory of *quantum meruit*, can be determined given the value of the services conferred to the defendant.[42] Here the benefit received by FSS on its contract with Delta was worth more than $400,000. Moreover, if FSS could not perform due to lack of proper licensure, it faced the likelihood of losing the entirety of the contract.

FSS's argument that the "reasonable value" of Air Serv's services should be limited to a "fair market rate" makes absolutely no sense where there is no established market rate for the services at issue. Nor is Air Serv required to accept a rate lower than it ever agreed to charge for its services (*i.e.* the price FSS provided after the services were complete).[43]

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[42] *See Dragt v. Dragt/DeTray, LLC*, 139 Wn.App. 560, 577, 161 P.3d 473 (2007) ("Generally, a party relying on *quantum meruit* may recover the reasonable value of the benefit of the services conferred upon the defendant"); *Ducolon Mech., Inc. v. Shinstine/Forness, Inc.*, 77 Wn.App. 707, 712, 893 P.2d 1127 (1995) ("In *quantum meruit* and restitution cases, Washington courts measure the *reasonable value of the benefit conferred* to the defendant in a variety of ways.") (emphasis added).

[43] Moreover, FSS's reconciliation which wholly omits the value of having the proper licensure and the attendant liability thereto, which Air Serv explained was its reason for the price it charged. These liabilities of course are already included in the contracts between Air Serv and Delta, or FSS and Delta, so the "out-of-services" rate FSS derives its hourly assessment from, by no means encompasses Air Serv's largest concern in the services provided in this case – the potential for liability due to an act by FSS's staff.

FSS's analysis – leading to a faulty conclusion that a service provider cannot designate its own pricing – is based on a misinterpretation of the law. Indeed, the cases relied upon by FSS fail to state such a proposition.[44]

In relying upon *Young*, FSS fails to address key language in arguing that the focus need be on "similar providers of like services." *See* App. Br. at 18. Indeed, the court provides a clear alternative way for trial courts to determine "reasonable value."

> [W]here money is awarded to protect a claimant's restitution interest, it may, depending on what "justice requires," be measured either by the reasonable value of what the other party has received, *as viewed through the eyes of the recipient,* by looking to what the recipient would have had to pay someone in the claimant's position to obtain the goods or services, **or by the extent to which the other party's property has been increased in value....**

Young, 164 Wn.2d at 489-90 (quoting 26 Williston on Contracts § 68:35 (4th ed.)). Here, given that no market for similar services was ever proven to exist, the trial court could not base its "reasonable value of services" on what the recipient would have had to pay a third party. As FSS was provided in excess of $400,000 due to a contract that it could not fully perform but for the services provided by Air Serv, there is substantial evidence to support the trial court ruling that $200,000 is a reasonable

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[44] *See Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn.App. 553, 567, 825 P.2d 714 (1992) (where the stated price in the contract never being communicated to defendant, court finding that jury instruction as to expert testimony providing the value of services was harmless error); *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn.App. 265, 277, 135 P.3d 955 (2006) (affirming jury award explaining "[q]uantum meruit damages are measured by the ***reasonable value of the benefit conferred on the defendant***") (emphasis added).

value for such services. CP 2303; *see also* RP at 404:12-406:3 (discussion of value of Air Serv's compliance agreement allowing FSS to perform its contract with Delta). The trial court's judgment should be affirmed.

II. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN SANCTIONING FSS FOR ITS EGREGIOUS MISCONDUCT

The imposition and amount of sanctions under CR 11 are matters within the broad discretion of the trial court. *Bryant v. Joseph Tree, Inc.*, 119 Wn.2d 210, 222, 829 P.2d 1099 (1992); *Cascade Brigade v. Economic Dev. Bd.*, 61 Wn.App. 615, 619, 811 P.2d 697 (1991). Here, as FSS failed to address the merits of its egregious conduct to the trial court, *see* CP 2244-45, it argues that the trial court's order is deficient of clarity, *see* App. Br. at 50-54. However, after the trial court's order details numerous reasons for its sanctions, FSS's argument is unpersuasive. Indeed, a plain reading of the order, *see* CP 2298-2301, allows the "appellate panel [to] ascertain what reasons prompted a trial court's ruling." *Dexter v. Spokane Cnty. Health Dist.*, 76 Wn.App. 372, 377, 884 P.2d 1353 (1994). The trial court detailed the documents which were filed in violation of CR 11, made explicit findings that they "were not grounded in fact, were filed without any reasonable investigation, and/or were filed in bad faith and for an improper purpose," and detailed that the filings caused Air Serv unnecessary costs to refute the false statements made, while stating it was providing the least severe sanction. *Cf.* CP 2298-2299 to *Biggs v. Vail*, 124 Wn.2d 193, 202, 876 P.2d 448 (1994). Moreover, the trial court based its order on evidence presented in the record, *see* CP

2186-2233, 2284-2294, 2234-2251, 2159-77, RP at 378:4-385:3, so FSS's repeated, and new arguments made on appeal, provide no basis to find the trial court abused its discretion, *cf.* App. Br. at 49-52 to CP 2244-45.

Similarly, there is no reason to find that the trial court abused its discretion in finding FSS violated numerous rules of discovery.[45] First the record fully supports the trial court's finding that FSS failed to adhere and submit proper supplemental responses and produce documents requested by Air Serv, after being ordered by Judge Rogers to do so. *See, e.g.,* CP 2420-24, 2190-92, 2196-97, *cf.* CP 336-38 to CP 2159-77. Second, the record is entirely clear that FSS failed to prepare for numerous designated topics at its deposition.[46] Third, the record fully supports the trial court's finding that FSS and its counsel violated CR 26(g), as the record demonstrates that FSS and its counsel knew, or should have known, that their verifications to discovery responses were in violation of the rule. *See, e.g.,* CP 336, 2188, 2197. Fourth, FSS's witness, Mr. John Kim, admitted at trial that his previously filed declaration contained false statements and he provided testimony to demonstrate Mr. Robert P. Weitzel's declaration was misleading. Thus, there is certainly sufficient evidence to support the

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[45] FSS provides no authority to support its assumption that the trial court must detail its sanctions under the discovery rules with the same detail as required under CR 11. A trial court exercises broad discretion in imposing discovery sanctions and its determination will not be disturbed absent a clear abuse of discretion. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 582, 220 P.3d 191 (2009). Indeed, only "if a trial court's findings of fact are clearly unsupported by the *record, then an appellate court will find that the trial court abused* its discretion." *Id.* at 583.

[46] *See* CP 2188-2189, 2196, CP 2658-2662. Moreover, Judge Rogers recognized FSS's failure to come prepared to its deposition and ordered FSS to submit to another deposition, *see* CP 1514, which FSS refused to attend.

trial court's sanctions pursuant to CR 56(g). *See, e.g.*, CP 2189-2192, 2197-98. Finally, the record contains sufficient evidence to support the finding that FSS failed to comply with Local Rules throughout the course of this litigation, which FSS does not challenge on appeal. *See, e.g.,* CP 2192-2193.

FSS's critique of the trial court's order concerning its numerous violations of the court rules, does not provide reason for this Court to find the trial court abused its discretion in awarding monetary sanctions pursuant to 26(g), 37(b), 37(d), 56(g) or the local rules. *See Mayer v. Sto Industries, Inc.*, 156 Wn.2d 677, 684-691, 132 P.3d 115 (2006) (affirming trial court's award of fees for discovery abuse for a sum in excess of $500,000). In *Mayer*, the Supreme Court reversed the appellate court and held that when applying monetary sanctions for discovery abuses, the trial court need not provide detail as required for sanctions under CR 11. *See id.* at 684-691. Moreover, in *Mayer* the Supreme Court expressly stated that the *Burnet* test does not apply to monetary sanctions due to a party's discovery abuse. *Cf. id.* at 688-91 to App. Br. at 54. As such, the court's award of sanctions in the amount of $35,000 should be affirmed due to FSS's egregious abuse of the rules governing discovery.[47]

Moreover, these same abuses provide further reason to justify the trial court's equitable remedy, which the trial court took into account in

[47] This amount is less than FSS has admitted is appropriate for reasonable fees in this matter. *See* CP 2245 (FSS arguing that $35,273.26 is a reasonable award for fees in this matter).

limiting FSS's sanctions to $35,000. *See* CP 2300 at h. The trial court specifically explained that:

> [b]ut for the Court including plaintiff's attorney fees and costs as part of the remedy to make plaintiff whole in this matter under unjust enrichment and quantum meruit – a remedy fashioned to do substantial justice and put an end to the litigation – the Court alternatively awards all such attorney fees and costs due to defendant's and its counsel's numerous violations of the rules of the Court including, but not limited to, CR 11, CR 26(g), CR 37(b) & (d), CR 56(g), and the Court's local rules.

Id. Indeed, the trial court was well within its discretion to sanction FSS much more harshly than it did.

FSS also, for the first time on appeal, argues that the trial court "failed to follow the law governing the imposition of sanctions" as it had no advance notice of the sanctions pursuant to 26(i) or under CR 11. *See* App. Br. at 53. This new argument fails for several reasons. First, the Court should dismiss this argument because it was not presented to the trial court for consideration.[48] Second, Air Serv *did* provide FSS notice of many of its egregious violations. *See* CP 2658-2662, CP 2571-2579, CP 343-44, CP 2682, 2690-96 (Ex. A & B), CP 2420-24, RP at 378:4-385:2. Third, it was at trial Air Serv learned that certain declarations contained

[48] *Cf.* CP 2244-45; *see also Seattle First Nat'l Bank v. Shoreline Concrete Co.* 91 Wn.2d 230, 240, 588 P.2d 1308 (1978) ("Respondents, having failed to raise this issue before the trial court, are precluded from raising it for the first time on appeal."); *Smith v Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983) ("The reason for the rule is to afford the trial court an opportunity to correct an error").

false statements.[49] And fourth, FSS is incorrect. This Court has held that advance notice under 26(i) is not mandatory for a sanctions motion.[50]

There is no reason for the court to reverse the trial court's order of sanctions because FSS now claims it did not have appropriate notice. Although FSS represents to this court that it "is undisputed that FSS first became aware of AS's intention to request sanctions upon AS's filing [on August 8, 2013] of its combined fee and cost petition," *see* App. Br. at 54, such claim is not true as FSS and its counsel ***both*** attended trial where Air Serv clearly articulated its intent to seek sanctions. *See* RP at 378:4-385:3 (held on June 25, 2013). Because FSS's counsel objected to Air Serv making such argument, *see* RP at 378:18-19, and filed papers in response to the same (on July 11, 2013), *see* CP 2159-2177, there can be no doubt that FSS was fully aware that Air Serv intended on seeking sanctions for FSS's misconduct.[51]

FSS abused numerous civil rules and local rules throughout this litigation and the trial court's sanction of $35,000 was in no way an abuse of discretion. The award for sanctions should be affirmed.

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[49] *Cf.* RP at 223:6-12 & 248:22-249:7 to CP 2709, RP at 242:11-244:22 to CP 1410-11. So, FSS was provided general notice of these violations as Air Serv learned them. *See Biggs v. Vail*, 124 Wn.2d 193, 199, 876 P.2d 448 (1994). Moreover, the trial court provided FSS opportunity to provide briefing after trial on the CR 11 issues raised by Air Serv at trial. *See* CP 2159-2177 (FSS's attempt to justify its discovery responses).

[50] *See Amy v. Kmart of Washington LLC*, 153 Wn.App. 846, 852, 223 P.3d 1247 (2009) ("We hold that a court has authority to determine whether it shall hear a motion for sanctions notwithstanding allegedly deficient compliance with a CR 26(i) certification").

[51] Of course, this sort of misrepresentation – along with numerous others – provide reason for this court to award Air Serv its attorney fees and costs on appeal. *See infra.*

III. THE TRIAL COURT'S ORDERS DURING TRIAL WERE PROPER

A. AIR SERV'S MOTION IN LIMINE WAS PROPERLY GRANTED

Courts review a "trial court's ruling on motions in limine for abuse of discretion. If the trial court abuses its discretion, the error will not be reversible unless the appellant demonstrates prejudice." *Colley v. Peacehealth*, 177 Wn.App. 717, 723, 312 P.3d 989 (2013). Here, FSS fails to demonstrate any prejudice from the trial court granting Air Serv's motion in limine at trial.[52] Although FSS now claims that the ruling excluded "crucial evidence" of "industry standards" or "market rate," *see id.* at 47, during trial FSS informed the court that it did not intend to bring any evidence of industry standard or market rate before the court – making this a non-issue, *see* RP at 266:17-267:5. Moreover, because FSS argued at trial that it had no evidence of costs beyond what it provided in discovery, *see* RP at 265:12-15, the motion in limine precluding such additional evidence could not possibly have prejudiced FSS in presenting its case.[53]

In its brief, FSS misrepresents that Air Serv's motion in limine was the same as its previous motion to compel denied by Judge Rogers. *See*

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[52] *See* App. Br. at 47-49. Moreover, FSS's argument that the court did not have time to review the motion and its contents is misleading, *see* App. Br. at 47, as Air Serv's motion mirrored its trial brief filed the week before. *Cf.* CP 2420-2425 to 2434-2444.

[53] However, as FSS stated in its deposition that it indeed had evidence of costs and revenues not provided to Air Serv in discovery, *see* FSS Dep. at 52:2-20, 185:9-25, Air Serv wanted to ensure such evidence, if presented at trial, would not be allowed. Since it was not presented, the issue did not come up at trial.

App. Br. at 48. First, Judge Rogers granted Air Serv's motion to compel. *See* CP 336-38. Second, because FSS failed to produce any additional information during discovery after being compelled to do so, the motion in limine was to ensure that such information was not admitted at trial.

B. ROBERT P. WEITZEL WAS PROPERLY PRECLUDED FROM TESTIFYING OUTSIDE OF COURT

"Like other evidentiary rulings, a district court's decision to allow remote testimony pursuant to 43(a) is reviewed for abuse of discretion." *Eller v. Trans Union, LLC*, 739 F.3d 467, 477 (10th Cir. 2013). "[T]he rule is intended to permit remote testimony when a witness's inability to attend trial is the result of unexpected reasons, such as accident or illness, and not when it is merely inconvenient for the witness to attend the trial." *Id.* at 478 (court noting it was unaware of any instance where "trial court abused its discretion by *not* allowing remote testimony"). Although the trial court initially agreed FSS's CEO and president would be permitted to testify via Skype, once it was established that FSS made misrepresentations to the trial court as to the reason Mr. Robert P. Weitzel was not available to attend trial, there was no longer a compelling circumstance, or good cause, under CR 43(a)(1) to justify his testimony outside of the court.[54]

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[54] Both Mr. Robert P. Weitzel (FSS's President) and Robert A. Weitzel (FSS's CEO) were timely served notices to attend trial by Air Serv. *See* CP 1617 at ¶3 & CP 1623 at ¶3. Moreover, on June 14, 2014, before Judge Rogers, FSS's counsel represented his client's would be available for the trial. *See* RP at 371:21-372:14; CP 2181. However, the day after this matter was transferred from Judge Rogers and the day before trial was to begin, FSS requested that the trial court allow telephonic testimony. Air Serv objected to this testimony being had remotely. *See* RP 8:15-10:5.

Although FSS's CEO declared on June 20th that its president was unavailable for trial because he would "be traveling from June 24-26" (CP 1623 at ¶ 4), on June 25 when connected via Skype at trial it was learned that Mr. Robert P. Weitzel (FSS's president) was sitting in his corporate office in Cleveland, Ohio. *See* RP at 335:8-342:3. The claim that he was traveling was false. After being presented this conflicting information, and providing FSS's counsel the opportunity to explain the discrepancy between the filed declaration and the witness' apparent availability, the trial court found that it was obvious that Mr. Robert P. Weitzel chose not to attend trial only because it was inconvenient, which is not good cause under CR 43(a)(1). *See* RP at 366:11-372:14. There can be no plausible argument that the trial court abused its discretion by not allowing Mr. Robert P. Weitzel to testify outside of court. Nor does FSS provide any authority where any court ever found it was an abuse of discretion not to allow remote testimony, where it was merely inconvenient for a party to attend trial.

Instead, FSS wrongly argues that the witness's exclusion must be examined, as a sanction, under the *Burnet* test. *See* App. Br. at 37-44. However, even if the court were to overlook the misrepresentations made by FSS, which its counsel *never* attempted to explain to the trial court, FSS admitted that Mr. Robert P. Weitzel's testimony in this matter was not essential as to the damages claimed by Air Serv. *See* CP 1613 (arguing that Air Serv's claim for damages "relies in no manner at all on defendant's corporate executives"); CP 1623 at ¶5. So even if this court

were to apply the *Burnet* test, and were to conclude that the trial court's extensive findings on the record for not allowing the testimony to move forward did not meet such standard, the error would be harmless as the trial court. *See* Ex 17; *see also Jones v. City of Seattle,* 179 Wn.2d 322, 360, 314 P.3d 380 (2014) (holding error to exclude witness was harmless as "excluded evidence that was not irrelevant was instead cumulative and its exclusion was therefore harmless"). The trial court's ruling to not allow the out of court testimony should be affirmed.[55]

C. THE COURT DID NOT IMPROPERLY LIMIT MR. PRIOLA'S TESTIMONY

Although Mr. Priola testified at trial, FSS argues that it was improper for the trial court to exclude his testimony. *See* App. Br. At 44-47. However, contrary to FSS's assertion that the trial court needed to conduct a "meaningful *Burnet* inquiry" for each of the sustained evidentiary objections, it is FSS's burden to demonstrate that the trial court abused its discretion in making its rulings. *See Mut. of Enumclaw Ins. Co. v. Gregg Roofing, Inc.,* 178 Wn.App. 702, 728, 315 P.3d 1143 (2013), *review denied,* 180 Wn.2d 1011 (2014). "Therefore, we will overturn the trial court's ruling on the admissibility of evidence only if its

[55] Moreover, although FSS argues that the trial court could have provided a lesser sanction under *Burnet*, including continuing the trial, *see, e.g.*, App. Br. at 44 n. 33, FSS never argues that the trial court abused its discretion by denying FSS's motion for such a continuance. So that issue is not before this court. Furthermore, although FSS emphasizes the trial court's confusion as to Robert A. Weitzel and Robert P. Weitzel, *see* App. Br. at 40-44, this confusion was FSS's fault alone as neither man deemed it necessary to attend trial as required by Air Serv's notices to attend trial. Moreover, although Air Serv wished to call Robert A. Weitzel at trial, *see* CP 1633, it was unable to as he never complied with Air Serv's notice to attend.

decision [is] manifestly unreasonable, exercised on untenable grounds, or based on untenable reasons." *Id.* FSS fails to even attempt to meet this burden as to any specific evidentiary objection sustained by the trial court.

Moreover, Evidence Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Contrary to this basic principle, in its appeal FSS incorrectly argues that Mr. Priola should have been able to testify on behalf of the corporation and its knowledge.[56] However, there is no evidentiary basis for FSS's novel argument that Mr. Priola should have been allowed to vicariously testify on behalf of FSS. Moreover, as it is undisputed that Mr. Priola was only listed by Air Serv on its witness disclosures – for information solely relating to "FSS's dealings with Air Serv" – the court was well within its discretion in limiting his testimony to such topics.[57]

Finally, FSS fails to demonstrate any prejudice due to the trial court sustaining certain evidentiary objections made by Air Serv. *See Colley*, 177 Wn.App. at 723. Indeed, as FSS admitted there was no "market rate," Mr. Priola testifying about such a rate would have been

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[56] *See* App. Br. at 44-47. Although for purposes of discovery, CR 30(b)(6) allows discovery to be had from a company on designated topics via a corporate representative, there is no similar provision for a corporation's testimony at trial.

[57] *See Lancaster v. Perry*, 127 Wn.App. 826, 833, 113 P.3d 1 (2005) ("The purpose of the case management schedule and disclosure deadlines is to have an orderly process by which a case can proceed. Requiring parties to disclose witnesses allows the opposing party time to prepare for trial and conduct the necessary discovery in a timely fashion."); KCLR 26 comment (the "rule sets a minimum level of disclosure that will be required in all cases, even if one or more parties have not formally requested such disclosure in written discovery").

impossible. *Cf.* App. Br. at 45 to RP at 266:17-267:5. Furthermore, as FSS argues Mr. Priola was not going to add any additional facts, *see* App. Br. at 46 ("Priola was not expected to add any new facts"), the court's sustaining Air Serv's objections would only be harmless error, if there was any error at all.[58]

IV. THIS COURT SHOULD AWARD AIR SERV FEES AND COSTS INCURRED IN RESPONDING TO APPELLANT'S BRIEF

Reasonable attorney fees are recoverable on appeal if allowed by statute, rule, or contract, and the request is made pursuant to appellate rules governing attorney fees and expenses. *See* RAP 18.1(a); *Pierce County v. State,* 159 Wn.2d 16, 50, 148 P.3d 1002 (2006). As attorney fees in the underlying matter were awarded pursuant to CR 11, CR 26(g), CR 37 (b), CR 37(d), and CR 56(g), among other court rule violations, respondent should be awarded its costs in fees in responding to this appeal. *See* CP 2298-2301; *Washington Motorsports Ltd. Partnership v. Spokane Raceway Park, Inc.*, 168 Wn.App. 710, 719, 282 P.3d 1107 (2012) (where discovery sanction, which led to sanction under CR 26(g), was at issue, court found it appropriate to award fees in response to appeal); *Magaña v. Hyundai America*, 167 Wn.2d 570, 593, 220 P.3d 191 (2009) (awarding attorney fees on appeal where CR 37(d) was basis of awarding fees); *Eller v. East Sprague Motors & R.V.'s, Inc.,* 159 Wn.App. 180, 194, 244 P.3d 447 (2010) (awarding fees pursuant to CR 11 as it is a

[58] Furthermore, if Mr. Priola was to discuss topics designated in FSS's deposition, he would be bound to the 30(b)(6) witness testimony. *Cf.* RP at 346:6-11 to FSS Dep. at 84:16-85:12; *see also Casper v. Esteb Enterprises, Inc.*, 119 Wn.App. 759, 764, 82 P.3d 1223 (2004) (party bound to answer "did not know").

recognized ground in equity); *Tamari v. Bache & Co. S.A.L.*, 729 F.2d 469, 475 (7th Cir. 1984) ("awarding appellate expenses to ... is consistent with the mandate of Rule 37(b)"). "When the trial court has imposed sanctions for failure to comply with discovery and the order is appealed, as a general rule attorney's fees should be awarded where the discovery order is upheld." *Mickwee v. Hsu*, 753 F.2d 770 (9th Cir. 1985).

Here the Court should award Air Serv its fees and costs as FSS appeals the trial court's award of fees on issues relating to discovery and because the remedy fashioned by the trial court was due to FSS's intentional failure to provide basic information on costs and revenues.

Additionally, appellate courts have the authority to grant attorney fees under RAP 18.9 for a frivolous appeal. Here, FSS made numerous misrepresentations to this court regarding the facts in the record, including the substance of orders made by Judge Rogers, that Air Serv was indemnified by FSS, and that FSS paid Air Serv. Such continuing misrepresentations, making an appeal frivolous, warrant sanctions. *See Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 313-14, 151 P.3d 201 (2007) (misrepresentations made due to sloppy legal work warranted fees and costs on appeal and additional sanctions); *see also Smith v. Ricks*, 31 F.3d 1478, 1489 (9th Cir. 1991) (awarding attorney fees on appeal for "frivolous legal arguments"). Moreover, although FSS presents various arguments, in an attempt to discredit the facts presented at trial, many of

these arguments have never before been raised and for that reason find little or no citation in the trial record.[59]

V. THERE IS NO REASON FOR THE COURT TO REMAND THIS MATTER TO ANOTHER JUDGE

FSS's disagreement as to Judge Spector's rulings does not provide reason to find bias and to remand this matter to a different judge – causing an increase in costs to the parties and on the court system as a whole. The reasons for bias in the cases relied upon by FSS are not present here.[60] There is absolutely no evidence showing any reason for Judge Spector to prefer one airline servicing company over another. Nor did the trial judge demonstrate bias for one counsel over the other.

Moreover, this court should not even consider FSS's argument for bias as FSS failed to even attempt to articulate any bias. Instead, FSS merely claims that Judge Spector was "caustic" and "hostile." However, such "[a] skeletal argument, really nothing more than an assertion, does not preserve a claim. Especially not when the brief presents a passel of other arguments, as [FSS's does]. Judges are not like pigs, hunting for

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[59] Indeed, much of FSS's arguments focus on what Mr. Nguyen did or did not do in providing a price for the supervisory services. However, as the trier of fact specifically found Mr. Nguyen "credible," CP 2184 at ¶9, FSS's belated arguments against his credibility provide absolutely no basis for reversal. *See, generally*, App. Br. at 23-37.

[60] *See GMAC v. Everett Chevrolet, Inc.*, 179 Wn.App. 126, 153-54, 317 P.3d 1074 (2014) (explaining that there must be proof of actual or perceived bias); *United States v. Donato*, 99 F.3d 426, 439 (D.C. Cir. 1997) (finding that numerous statements made by the judge against defense counsel in criminal matter could have swayed the jury against defendant as defendant's credibility was a main issue). Additionally, although FSS represents that *Saldivar v. Momah*, 145 Wn.App. 365, 186 P. 3d 1117 (2008), stands for the proposition, that a trial court "may have difficulty setting aside her previously expressed opinions," is grounds for a new judge, *see* App. Br. at 55, such language or holding is not in the case.

truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). Judge Spector's demeanor at trial was nothing less than professional, FSS's conclusory remarks to the contrary are nothing more than sour grapes.

CONCLUSION

Without the services Air Serv provided to FSS, FSS would not have been able to perform its contract with Delta. FSS was unjustly enriched in an amount in excess of $400,000. The trial court did not abuse its discretion in fashioning a remedy which provided Air Serv roughly half of that amount. Moreover, FSS's substantial and egregious abuse of the court rules warranted it pay Air Serv's fees and costs in this matter and the award of $35,000 in sanctions is warranted. The trial court's judgment, as well as its ancillary orders leading to such judgment, should be affirmed and FSS should be made to pay Airs Serv's fees and costs in responding to this appeal.

Dated this 18th day of July 2014.

ROHDE & VAN KAMPEN

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that the following is true and correct:

On July 18, 2014, I arranged for service of the foregoing Respondents Brief, to the court and to the parties to this action as follows:

Office of the Clerk Court of Appeals – Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile _X_ Hand Deliv. ___ U.S. Mail ___ E-Mail ___ Messenger
Gregory McBroom Livengood Alskog, PLLC 121 Third Avenue P.O. Box 908 Kirkland, Washington 98033	___ Facsimile ___ Hand Deliv. _X_ U.S. Mail ___ E-Mail ___ Messenger

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

Executed at Seattle, Washington, on July 18, 2014.

E. Birch Frost