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No. 68521-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GLOBAL EDUCATION SERVICES, INC., on behalf of itself and all
others similarly situated,

Respondent/Appellees

vs.

MOBAL COMMUNICATIONS, INC.,

Petitioner/Appellant.

APPELLANT'S OPENING BRIEF

Curt Roy Hinline, WSBA #16317
Robert M. Crowley, WSBA #37953
Carolyn Robbs, WSBA #41913
Bracewell & Giuliani LLP
701 Fifth Avenue, Suite 6200
Seattle, WA 98104
Phone: 206.204.6200
Facsimile: 206.204.6262
Curt.Hinline@bgllp.com
Robert.Crowley@bgllp.com
Carolyn.Robbs@bgllp.com

Attorneys for Appellant Mobal Communications, Inc.



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I. INTRODUCTION

This is an appeal of the trial court's erroneous orders (1) holding Appellant Mobal Communications, Inc. ("Mobal") in contempt for allegedly disobeying a prior court order compelling answers to discovery requests propounded by Respondent Global Education Services, Inc. ("Global"), and (2) awarding attorney fees to Global for costs allegedly incurred in bringing the motion to compel.

In late 2005, Global filed a class action complaint against Mobal. Global's complaint was based on a single, allegedly unsolicited fax received more than two years earlier. In late 2006, Global obtained a default judgment against Mobal, as well as certification of a class of still-to-be-identified plaintiffs.¹

In late 2009, Global propounded post-judgment discovery on Mobal, and on November 28, 2011, the trial court entered an order directing Mobal to provide full and complete responses to certain of Global's discovery requests ("November 28th Order"). Mobal timely provided responses as well as a five-page, detailed, sworn declaration from its president explaining the steps Mobal took to search for the

¹ When Mobal finally learned of the judgment that had been entered against it, Mobal moved to vacate the default judgment as void because, absent effective service, the trial court lacked jurisdiction over Mobal. The trial court denied Mobal's motion and allowed Global's default judgment to stand. An appeal of the trial court's denial is fully briefed and pending separately before this Court.

responsive information and documents. However, because Mobal's searches did not result in any information or documents that would support a case for Global's otherwise unknown and unsupported "class," Global refused to accept the sufficiency of Mobal's answers and filed an incendiary motion for contempt with the trial court.

Global's motion essentially asserted that Mobal was in contempt of the November 28th Order because (1) Mobal would not provide Global with *unfettered* access to two of its computers, (2) Mobal had not contacted all of its *former* employees during its search inquiries, and (3) Mobal did not provide Global with contact information for all of those former employees. Lost amidst Global's sound and fury, however, was the fact that not one of the discovery requests that Mobal was directed to answer by the November 28th Order required Mobal to provide this information or take those actions. Despite (1) Global's inability to point to any discovery request or civil discovery rule in support of its position, (2) Mobal's detailed explanation for why the documents that Global requested did not now exist—if they ever did, and (3) Global's failure to put forth any evidence to controvert Mobal's sworn, detailed declaration, the trial court granted Global's motion and held Mobal in contempt for intentional disobedience of the November 28th Order.

One week later, Global filed a request for attorney fees for having to bring its contempt motion. Despite originally requesting an award of \$2,000.00 in its contempt motion and of just \$1,000.00 in its proposed order, Global sought to recover from Mobal multiples of those sums, or \$10,174.50. Indeed, the sum sought was more than five (or ten) times the amount Global originally sought—for, at least in theory, the very same legal work.

Although Washington law unequivocally requires the submission of contemporaneous billing records in support of a fee request, Global submitted only perfunctory declarations containing general descriptions of legal work with a grand total of hours allegedly worked. Further, Global sought to recover fees for (1) routine tasks (e.g., reading Mobal's discovery responses) that Global would have performed regardless of whether it submitted its motion and (2) communications with Mobal's counsel about withdrawing Global's motion. Moreover, *all* of the tasks related to Global's motion were performed by highly experienced, senior attorneys instead of delegating tasks like basic research and initial drafting to junior or mid-level associates, despite the fact that one of the law firms representing Global in the matter had a large stable of associates in its Seattle office. Despite these insufficiencies, the trial court entered an

order granting Global's motion for award of attorney fees in the amount of \$1,000.

The trial court's orders holding Mobal in contempt and awarding Global's attorney fees were an abuse of its discretion because they were manifestly unreasonable, based on untenable grounds, or based on untenable reasons. This Court should reverse the trial court's erroneous rulings.

II. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in entering its order of February 21, 2012, holding Mobal in contempt due to its alleged disobedience of the trial court's November 29, 2011 order directing Mobal to provide full and complete responses to Global's first discovery requests.
2. The trial court erred in granting Global's motion for award of attorney fees by order entered on March 12, 2012.

Issues Pertaining to Assignments of Error

1. Contempt order was not warranted on the facts: Where Mobal was ordered by the trial court to provide "full and complete responses" to Global's first discovery requests, and Mobal responded by providing for every request either the information requested or a detailed explanation as to why, despite a diligent search, no responsive information was located, did the trial court abuse its discretion when it found that Mobal had not complied with the trial court's order? (Assignment of Error 1.)
2. Contempt order did not contain requisite findings of fact: Where a contempt order must contain specific findings of fact that the party violated a previous court order, did the trial court enter a lawful contempt order where it incorporated by reference the arguments for contempt made in Global's motions instead of making its own specific

findings of fact? (Assignment of Error 1.)

3. Attorney fees awarded without contemporaneous records: Where Global requested attorney fees and costs for its motion to hold Mobal in contempt, but Global failed to submit contemporaneous records of its time billed on that motion, did the trial court abuse its discretion when it granted Global's request and ordered Mobal to pay attorney fees in the amount of \$1,000? (Assignment of Error 2.)

III. STATEMENT OF THE CASE

A. Procedural History of *Global v. Mobal*.

Global filed suit against Mobal on October 27, 2005, seeking injunctive relief and incidental damages against Mobal for sending allegedly unsolicited faxes. CP 1-5. Global also sought certification of a class of similarly situated, but as yet unidentified, persons. *Id.* In support of its claims and request for class certification, Global submitted a single fax it received more than two years prior and asserted that it had been unsolicited. *Id.* Due to Global's insufficient service of the summons and complaint, however, Mobal did not timely learn of the claims against it, and the trial court entered a default judgment against Mobal on October 5, 2006. *Id.*

Three years later, in October 2009, Global propounded on Mobal its first set of interrogatories and requests for production. CP 8, 18-35. In response, Mobal moved to vacate Global's default judgment on the basis of insufficient service of process. CP 6-7. After multiple motions on the issue, on October 6, 2011, the trial court denied Mobal's motion to vacate.

Id. Mobal timely appealed the trial court's denial on October 17, 2011, and that fully-briefed appeal is pending separately with this Court.²

B. Global's First Discovery Requests and Mobal's Responses Thereto.

On October 13, 2011, Global moved to compel Mobal to respond to its first discovery requests, which primarily sought information about to-date-unknown "class" members and Mobal's financials (for collection purposes). CP 8-13. Mobal's opposition asserted that it was improper for Global to seek discovery that related to enforcement of the judgment (e.g., Mobal's financial information), because judgment had been stayed under RAP 8.1(b)(1). CP 41-54. Global conceded this point on its reply. CP 56:24-57:3. On November 28, the trial court entered an order directing Mobal to "provide full and complete responses" only to those discovery requests aimed at identifying potential class members, specifically "[Global's] First Interrogatories Nos. 1 through 13 and Requests for Production A through N[.]" CP 98-99.

² The trial court's order declining Mobal's Motion to Vacate Global's default judgment is on appeal before Division I, in the matter captioned *Global Education Services, Inc. v. Mobal Communications, Inc.*, Cause No. 67823-8. For all the reasons stated in Mobal's briefing on that appeal, should the trial court's decision not to vacate be reversed, then the certified class based on that void judgment will fail, and Mobal's current appeal of the trial court orders holding Mobal in contempt and awarding Global's attorney fees should be granted. See CR 60(b)(5) (stating that a court may relieve a party from final orders or proceedings where the underlying judgment is determined to be void).

On January 6, 2012, following the lifting of a temporary stay by the Court of Appeals, Mobal timely provided full responses to Global's first set of interrogatories and requests for production. CP 112-35, 152:4-5. Mobal's responses asserted no objections to any of the discovery requests, and identified eight individuals who provided information for the responses. CP 112-35. In response to Global's various interrogatories and requests for production seeking information in support of Global's to-date-unsupported allegation that Mobal sent "hundreds, if not more" of unsolicited faxes to various recipients prior to filing its complaint in late October 2006, Mobal's response consistently stated that after a diligent search, no responsive information or documents were found to be in its possession, custody, or control. *Id.*

Although not required by the civil discovery rules, statute, or case law, in order to avoid further unnecessary motions practice, and to better explain why Mobal had no more information or documents than it provided, Mobal supported its discovery responses with a detailed, five-page declaration of Mobal's President Andrea Clough in lieu of the standard CR 33(a) and 26(g) certifications. CP 175-80. In that Declaration, Ms. Clough explained under penalty of perjury: (1) that the single facsimile that Global received in early 2003 apparently originated from Mobal's US-based sales and marketing department, which was shut

down in early 2004 due to financial losses; *id.* at ¶¶ 4, 7; (2) that none of the employees of that department had worked for Mobal since 2005, *id.* at ¶ 8; (3) that because that department was deemed a business failure, its records were deemed useless for future sales and marketing activity and destroyed as of August 2005 (almost three months before Global filed its complaint against Mobal), with the sole surviving possible exception of files contained on two dormant, password-protected computers that had been kept in storage in New York since 2004, *id.* at ¶¶ 11-13, 15; (4) that although Mobal had taken affirmative steps to access those computers (including using an IT employee and contacting a former employee for possible passwords), it had been unable to do so; however, Global was welcome to engage the services of an IT expert to attempt to access and image the drives, *id.* at ¶ 16; (5) that Mobal had not disposed of any relevant documents since first becoming aware of Global's lawsuit in January 2007, *id.* at ¶ 22; (6) that Mobal had conducted a extensive search of its US and UK offices for potentially responsive information and documents, and found none, *id.* at ¶ 14; and (7) that these results were consistent with the practice of Mobal's US-based sales and marketing department, which was to send facsimiles only to entities and persons with whom Mobal already had established a relationship, *id.* at ¶ 5.

C. Global's Extensive Efforts to Supplement its Responses to Mobal's First Discovery Requests.

By emails and telephone conversations spanning January 9 to February 2, 2012, Global repeatedly accused Mobal of not sharing responsive information and documents allegedly within its control. In turn, Mobal voluntarily provided multiple responses and updates that neither Global's discovery requests nor the civil discovery rules required it to provide. CP 137-45; 186-96. Specifically, Global's counsel demanded that Mobal give it unfettered access to inspect the entirety of both of Mobal's dormant computers, despite the fact that no discovery request identified in the November 28th Order sought access to any of Mobal's computers. CP 140, 164:18-165:9, 186. Global also asserted that Mobal was legally required to interview all of its *former* employees prior to responding to Global's discovery requests, even though Global could not point to any authority for this position. CP 165:9-13, 186-87. Then, later, Global changed its mind and demanded that Mobal provide Global with the contact information for all former employees so that Global could contact all these former employees itself. CP 145, 165:9-13, 195. Putting aside Global's shifting demands, most importantly, none of the discovery

requests listed in the November 28th Order asked for the identities of all of Mobal's former employees.³ *Id.*

Although Mobal disagreed with Global's contentions about Mobal's discovery obligations, Mobal nevertheless made the following efforts to provide additional information to Global in the spirit of cooperation and, again, in an attempt to avoid additional rounds of aggressive and unnecessary motions practice.

With regard to the former employee issue, on January 13, 2012, responding to Global's demand, Mobal advised Global that it had "sent written correspondence by United States Mail to former employees of Mobal from the pertinent period ... [and stated that to] the extent that [Mobal] obtain[s] additional information, Mobal will supplement its discovery responses in accordance with the discovery rules." CP 186. Mobal reiterated its desire for a meet and confer at 2 p.m. that afternoon to

³ Indeed, only two of Global's discovery requests asked for anyone's identity:

- Interrogatory No. 6: "Please identify all employees, consultants, or third party vendors hired by [Mobal] to send out copies of facsimiles identical to or similar to the facsimile attached as Exhibit A to the Complaint," and
- Interrogatory No. 8: "Identify any persons with knowledge concerning the development, use or maintenance of your database or other list used to send facsimiles identical or similar to the facsimile attached as Exhibit A to the Complaint."

CP 117-20. Mobal responded that no individuals were hired for the purpose stated in Interrogatory No. 6, and that Mobal was not aware of any such database or list in response to Interrogatory No. 8. *Id.* Nevertheless, and in the spirit of cooperation only, Mobal identified eight individuals who were "employed" by its New York office at the time the single facsimile at issue allegedly was sent. *Id.*

discuss Global's concerns. *Id.* Global responded that "[t]here is no need, now, for the conference. We ... await for [sic] your supplemental discovery." *Id.* Mobal later reaffirmed that it would supplement its responses "within the next two weeks" if it learned responsive information from its former employees. CP 144. Bafflingly, after weeks of demanding that Mobal contact its former employees, Global turned 180° and asserted that it was somehow *improper* for Mobal to talk with its former employees. Now Global demanded that Mobal instead must provide Global with *all* former employees' contact information. CP 145.

Within the promised two weeks, Mobal emailed Global as follows:

As we have previously informed you, we reached out by US Mail to individuals formerly employed in Mobal's US-based sales and marketing department, which was eliminated in early 2004. We received back a number of the letters we sent out, indicating that the contact information Mobal had for certain of its former employees is no longer current. Only a few of Mobal's former employees responded to Mobal's letters. The individuals we were able to reach, we interviewed. At this point, Mobal has no information requiring supplementation of its prior discovery requests.

CP 195.

In regards to the dormant computers issue, Mobal sent multiple status updates to Global by emails spanning January 9 to February 1, 2012. Specifically, after initially failing to access the computers due to former employees' password protections, Mobal was able to image one of

the two dormant computers' hard drives. CP 188. Mobal promptly searched all files on that first computer using search terms reasonably designed to yield all files discussing, referencing, or resembling facsimiles or databases of same consistent with Global's specific discovery requests, and no responsive documents were located. *Id.* Accordingly, Mobal advised Global that it would not be supplementing its document production at that time because it had nothing to supplement. *Id.* Global responded that it wanted its own expert to inspect both computers. *Id.* Even though no pending discovery request required it to do so, Mobal repeated its offer to work with Global to facilitate an inspection of both computers, including by Global's own expert. CP 186-88. Mobal requested only that prior to the inspection, Global provide the name and qualifications of the expert it proposed to use, along with a written protocol, so that Mobal could ensure that the integrity of the data on the dormant computers' hard drives would be preserved. *Id.* Global rejected these proposed terms on multiple occasions. CP 164:18-165:9, 186.

D. Global's Motion for Entry of Contempt.

On January 30th, Global filed a Motion for Order Holding Defendant in Contempt of Court ("Motion for Contempt") for Mobal's alleged failure to comply with the trial court's November 28, 2011 order to provide "full and complete responses" to Global's first discovery

requests. CP 100-47. In alleged support of its motion, Global argued, first, that Mobal's responses contained only a "lengthy, self-serving statement which justifies the failure of Defendant to provide any information whatsoever," CP 103, as if the voluntary, five pages of sworn testimony by Mobal's president⁴ regarding the company's office closure, lawful disposal of unneeded documents, and diligent search of current files carried no evidentiary weight.

Second, Global falsely asserted that Mobal had not made "any effort" to contact its former employees or to provide Global with their contact information, *id.*, even though (1) Global could not identify *any* authority or discovery request that required such action or information, CP 165:10-13, 405-06 and (2) Mobal in fact had sent Global multiple emails regarding its voluntary efforts to locate its former employees, CP 144, 186-87, 194-95.

⁴ CR 26(g) and CR 33(a) require only short certifications by parties responding to discovery requests. They respectively provide, in pertinent parts, the following:

Every request for discovery or response ... made by a party represented by an attorney shall be signed by at least one attorney of record *** The signature of the attorney or party constitutes a certification that he has read the ... response ... and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is [compliant with the Civil Rule].

Each interrogatory shall be answered separately and fully in writing under oath The answers are to be signed by the person making them, and the objections signed by the attorney making them.

Third, Global argued that Mobal “has not tried to analyze” two computers that “may have relevant information,” CP 103, despite (1) Ms. Clough’s sworn declaration that her small company initially had not been able to bypass the old computers’ unknown passwords, CP 177:19-22, and (2) Global’s receipt of multiple subsequent emails apprising Global that Mobal ultimately was able to image one of the computers’ hard drives, that it had been searched using search terms reasonably designed to yield all responsive documents, and that *no* such documents were located, CP 138-39, 141, 188. Global’s motion also suggested Mobal was in contempt because it had not allowed Global personally to inspect both of Mobal’s computers,⁵ CP 105:11-15, even though (1) Global could not identify a single discovery request that would entitle it to such unfettered access of Mobal’s business property, CP 405, and (2) Global previously had rejected Mobal’s voluntary offers to allow a Global IT-expert to image and search both computers provided only that reasonable precautions were set in place first, CP 186-87, 412-13.

⁵ Tellingly, on February 20th and in direct contradiction to Global’s prior position that its existing discovery requests somehow already warranted direct, unfettered access to “inspect” Mobal’s computers, Global served Mobal with a Request for Inspection of the very same computers under CR 34(a)(2). CP 409-10. Mobal moved for a protective order that would require Global to provide the very same information on its proposed expert and inspection protocol that Mobal previously had proposed via email. CP 375-86. On March 30, 2012, the trial court *granted* Mobal’s proposed protective order and the detailed search and review protocol Mobal suggested therein. CP 546-49.

On February 21, 2012, without hearing oral argument on the issue, the trial court entered Global's proposed order holding Mobal in contempt. CP 218-19. In alleged support of its finding that Mobal had disobeyed the November 28th order, the court stated: "As illustrated by the plaintiff, defendant's answers are either opaque or confusing. Either the steps for due diligence are not given, or incomplete information is given in the answers. Sanctions begin on February 28, 2012, thereafter, \$2,000 will be assessed." *Id.* The trial court further ordered that Mobal pay Global's attorney's fees and costs for having to bring its motion in an "amount to be submitted [by Global's attorneys] within 7 days." *Id.*

On February 27, 2012, Mobal served Global with Mobal's Supplementary Response to Global's First Interrogatories and Requests for Production. CP 450-530. The supplementary responses simply restated what Global had written before, including the information already shared with Global via email regarding the additional voluntary steps Mobal had taken to provide Global with substantially more information than either Global's first discovery requests or the civil discovery rules required. *Id.* Tellingly, even though the supplementary responses simply reiterated information Global already had received from Mobal, Global has not since moved the trial court to hold Mobal in further contempt.

On March 7, 2012, Mobal timely filed its notice of appeal of the trial court's contempt order. CP 369-74.

On March 8, 2012, Mobal served Global with Mobal's Second Supplementary Response to Global's First Interrogatories and Requests for Production. CP 532-537. The second supplementary responses affirmed Mobal's belief that it already had provided complete and accurate responses to Global's first discovery responses. *Id.* However, in the spirit of cooperation and in hopes of avoiding further motions practice, the responses also provided an update on Mobal's ongoing attempts to voluntarily contact its former employees about the issues central to this lawsuit. *Id.* Because Global had expressed specific interest in Mobal's two former employees working out of California, these responses included a detailed summary of Mobal's counsel's conversations with one of the former employees, as well as all of the contact information for the other former employee that Mobal had made extensive efforts to locate on the internet. *Id.*

E. Global's Award of Attorney Fees.

One week after receiving the trial court's contempt order, Mobal filed a Motion for Award of Attorney Fees ("Motion for Award") requesting \$10,174.50. CP 222-24. This number was noteworthy for several reasons, including the fact that in the original Motion for

Contempt, Global had requested an award of “attorney fees and costs for having to bring this Motion in the amount of **\$2,000.00**.” CP 102, 108 (emphasis added). Moreover, elsewhere in the very same Motion, as well as in the proposed order that Global submitted to the trial court, Global sought just **\$1,000.00**—presumably for the same legal work. CP 107:22-23, 146:24-25. Accordingly, Global’s Motion for Award sought five (or ten) times what Global contended was appropriate compensation for its time and effort when it first sought relief from the court.

In addition, despite the radical jump in the amount Global sought, Global submitted *no contemporaneous records* to inform the court about the nature or breakdown of the legal work for which Global sought compensation. Instead, Global submitted two conclusory declarations by its counsel Mark A. Griffin and Rob Williamson. CP 225-30. Both attorneys’ declarations contained only the *total* number of hours alleged worked, the attorneys’ hourly rates, and a sentence-long description of the alleged tasks completed. *Id.* These declarations show that Global sought compensation for routine litigation tasks, such as reviewing discovery and communicating with Mobal’s counsel, which surely would have been performed regardless of whether Global had submitted its Motion for Contempt. CP 225:23-226:1. Global also sought compensation for time spent negotiating the potential withdrawal of its Motion for Contempt,

even though those negotiations were unnecessary for Global to prevail on the Motion itself.⁶ CP 229:21-23. The declarations further showed that all of Global's legal work, including whatever research and drafting was done on the Motion for Contempt, was performed only by the high-priced senior partners at Global's two law firms, rather than by any associates. CP 225-30. Indeed, the Keller Rohrback firm alone had forty-eight attorneys in its Seattle office, including a good number of attorneys who were associates. CP 224:20-22.

On March 7, 2012, the trial court entered an order Granting Plaintiff's Motion for Award of Attorney Fees ("Fee Award"), and directing Mobal "to pay attorney fees in the amount of \$1,000 within 10 days of the date of this Order." CP 437. The order also stated that "[l]odestar rates are not usually used in discovery motions." On March 15, 2012, Mobal timely amended its notice of appeal to include the trial court's award of attorney fees. CP 538-45.

⁶ In addition to being unnecessary for Global to prevail on its Motion for Contempt, these negotiations were not genuinely related to the discovery requests that were the subject of Global's Motion for Contempt.

IV. ARGUMENT

A. **The Trial Court Erred When it Found Mobal in Contempt of the November 28th Order.**

1. *Standard of Review*

An appellate court reviews a trial court's finding of contempt using an abuse of discretion standard. *King v. Dep't of Soc. & Health Services*, 110 Wn.2d 793, 798, 756 P.2d 1303 (1988). An abuse of discretion exists where "there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons." *Moreman v. Butcher*, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

2. *Washington Law Requires a Showing of Intentional Disobedience of a Court Order in order to Hold a Party in Contempt*

Under Washington law, contempt is defined to include "intentional ... [d]isobedience of any lawful ... order of the court." RCW 7.21.010(1)(b). When deciding whether the party accused of contempt has intentionally disobeyed an order, the court must strictly construe the order and determine whether "[t]he facts found constitute a plain violation of that order." See *Johnston v. Beneficial Mgmt. Corp.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982) (overruling affirmance of contempt order). An "order will not be expanded by implication beyond the meaning of its terms when read in light of the issues and the purposes for which the suit

was brought.” *Id.* The purpose of this “strict construction” rule is to protect persons from contempt proceedings based on violation of court orders “that are unclear or ambiguous, or that fail to explain precisely what must be done.” *See Int’l Longshoremen’s Ass’n v. Philadelphia Marine Trade Ass’n*, 389 U.S. 64, 74 (1967) (“unintelligible” decree “defie[d] comprehension”); *State v. Int’l Typographical Union*, 57 Wn.2d 151, 356 P.2d 6 (1960) (act complained of not specifically prohibited by decree); *see also Johnston*, 96 Wn.2d at 713, 638 P.2d 1201 (restricting contempt proceedings to plain violations of strictly construed court orders “since the results are severe”).

Importantly, “exercise of the contempt power is appropriate only when ‘*the court finds that the person has failed or refused to perform an act that is yet within the person’s power to perform.*’” Thus, a threshold requirement is a finding of a *current* ability to perform the act previously ordered.” *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005) (emphasis in original) (reversing contempt order). “[I]nability to comply is an affirmative defense.” *Id.* at 933, 113 P.3d 1041; *see also Moreman*, 126 Wn.2d at 40-41, 891 P.2d 725 (a party will not be held in contempt where, at the show cause hearing, it offers credible evidence as to its ability to comply with the court order).

Civil Rule 34 provides that a party may serve a request to produce relevant documents that are “in the possession, custody, or control of the party upon whom the request is served.” CR 34(a) (citing CR 26(b)). Washington Courts have defined “control” to mean “the legal right to obtain the documents requested upon demand ... [or] where an entity has access to and the ability to obtain the documents.” *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 265 P.3d 956 (2011) (internal quotation marks and citations omitted). “The burden of demonstrating that the party from whom discovery is sought has the practical ability to obtain the documents at issue lies with the party seeking discovery.” *Id.* at 78, 265 P.3d 956 (citation omitted).

3. ***Mobal Made Extensive Efforts to Comply With the November 28th Order***

In the present case, the evidence establishes that Mobal made not only reasonable, but extensive efforts to comply with the November 28th Order to “provide full and complete responses” to Global’s first discovery requests. Faced with no other instructions on how to proceed, Mobal reasonably interpreted the phrase “full and complete” to mean giving diligently researched and reasoned answers to those inquiries ***actually made*** by formal discovery request. Accordingly, Mobal answered each of the discovery requests at issue without stating any objections thereto, CP

112-35, provided Global with all responsive, relevant documents and information within Mobal's possession, custody, and control, *id.*, and submitted sworn testimony regarding both its diligent searches and *why* it could not produce (and indeed was not even aware of) any additional documents or information responsive to Global's requests. CP 175-80. Documents that no longer exist—indeed, if they ever did exist—simply are beyond the practical ability of anyone to produce, and no amount of additional searching or inspection would have enabled Mobal to produce documents that were disposed of before Global even began its lawsuit. Mobal's lack of intent to disobey the court's order was further evidenced by its extensive communications with Global, including Mobal's multiple follow-up emails and phone calls with Global, Mobal's efforts to accommodate Global's ever-shifting demands, and Mobal's submission of two supplementary responses to Global's first discovery requests.

In light of these circumstances, Global's Motion for Contempt utterly failed to establish that Mobal intended to disobey the November 28th Order. Global did not submit any evidence to controvert or even question the sworn testimony in the Clough Declaration, nor evidence that Mobal was "hiding" information or documents responsive to Global's requests. Indeed, the Motion for Contempt appeared to be based entirely on Global's refusal to accept that its theory of Mobal as an unsolicited fax

blasting machine might not be true. In short, there was no evidence in the record that Mobal was anything but extremely reasonably and diligent, not to mention thorough in its obvious attempts to comply with the trial court's November 28th Order.

Plainly dissatisfied by Mobal's failure to produce the smoking-gun evidence Global imagined existed, Global's Motion for Contempt tried to create the appearance of Mobal's noncompliance with discovery requests that, in fact, had not been made, much less incorporated by reference into the November 28th Order. Regarding Global's assertion that Mobal was legally obligated to contact all of its *former* employees prior to responding to discovery requests, and subsequent demand that Mobal provide the contact information for all of Mobal's former employees, Global cited neither a specific discovery request covered by the November 28th Order, nor to any other authority that would require Mobal to do either.⁷ Simply put, Mobal cannot be found in contempt for not doing something it has not been ordered to do. *See Britannia Holdings*, 127 Wn. App. at 933-34, 113 P.3d 1041. If Global wanted general contact information regarding Mobal's former employees, it was free to have submitted a formal

⁷ After conducting its own diligent searches, Mobal was and remains unaware of any authority that would require it to consult its former employees prior to responding to discovery nor to produce names and contact information for its former employees absent a discovery request *specifically* asking for same.

discovery request, but it did not. Global should not have been allowed to leverage the November 28th Order to demand new, previously unrequested information from Mobal under an improper threat of contempt, but that is exactly what the trial court appeared to allow.

The same was true of Global's demand for unfettered access to inspect and search two of Mobal's dormant computers. The November 28th Order directed Mobal to respond only to specified discovery requests Global had propounded previously. CP 168-69. As Global implicitly conceded in its February 20, 2012 Request for Inspection under CR 34(a)(2), none of the discovery requests Mobal was directed to answer in the Court's November 28th Order contemplated giving Global direct access to Mobal's computers. CP 409. Pursuant to the November 28th Order, in addition to interrogatory answers, Global was entitled to responsive *documents* only. Mobal searched the one dormant computer and found no responsive documents. The other computer was not reasonably searchable,⁸ and Mobal offered to allow Global to search the computer with an expert with reasonable restrictions. *See, e.g.*, CP 186. However, complete, unfettered access to the computers was not required under the discovery requests, let alone part of the November 28th Order,

⁸ A party need not provide discovery of electronically-stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. CR 26(b)(1)(C).

and a party cannot be found in contempt for not doing something it has not been ordered to do. *See Britannia Holdings*, 127 Wn. App. at 933-34, 113 P.3d 1041. This is especially true where, as demonstrated, Mobal made reasonable and diligent efforts to provide all that actually *was* requested and ordered.

Accordingly, the trial court abused its discretion when it found Mobal had not complied with the November 28th Order, and its order holding Mobal in contempt should be reversed.

B. The Order Holding Mobal in Contempt Did Not Contain the Requisite Findings of Fact.

1. *Argument and Authority.*

It is well established in Washington that for a court order holding an individual or entity in civil contempt to withstand appeal, it must contain findings of fact describing the “*specific acts*” upon which the court held the individual or entity to be guilty of contempt. *See Dunn v. Plese*, 134 Wash. 443, 449, 235 P. 961 (1925) (emphasis added), *cited in Hildebrand v. Hildebrand*, 32 Wn.2d 311, 314, 201 P.2d 213 (1949) (“In this state, findings of fact must be made by the trial court in either civil or criminal contempt cases”). Simply referencing facts or arguments made in other papers filed with the court is insufficient because it does not satisfy a court’s personal obligation to make and record the “specific findings” warranting the contempt holding. *Dunn*, 134 Wash. at 449-50, 235 P. 961

(holding that findings of fact were not made where the trial court's contempt order stated that the court "finds the said defendant guilty of contempt of court as charged in the affidavit filed [by plaintiff] in this case").

Here, the trial court failed to make the required findings of fact of the "specific acts" Mobal took in violation of the November 28th Order. Instead, the contempt order generally references all arguments made in Global's Motion for Contempt by beginning its order with "As illustrated by plaintiff," and then concludes that *all* of Mobal's answer "are either opaque or confusing. Either the steps for due diligence are not given, or incomplete information is given in the answers." CP 218-19. Such "findings of fact" neither satisfied the trial court's obligation to identify the specific ways in which a previous court order was violated nor gave Mobal sufficient guidance on how to remedy its alleged contempt. *King*, 110 Wn.2d at 800, 756 P.2d 1303 ("the purpose of a civil contempt sanction is to coerce future behavior that complies with a court order"); *see also Britannia Holdings*, 127 Wn. App. at 934, 113 P.3d 1041 (reversing contempt order where "the trial court failed to make a finding that the Greers had a *present* ability to pay the purge amount ... because without this finding, the contempt was not coercive but impermissibly penal").

In situations like this, some Washington courts have remanded the case to the trial court with instructions to enter specific findings of fact and enter a new order from which a party may appeal. *See Dunn*, 134 Wash. at 450, 235 P. 961; *Hildebrand*, 32 Wn.2d at 314-15, 201 P.2d 213. In the present case, however, remand is neither necessary nor appropriate. Based on the arguments set forth in Section IV.A. *supra*, this Court has the facts and authority necessary to determine that Mobal “fully and completely” responded to Global’s first discovery requests in compliance with the trial court’s November 28th Order, or at the very least acted without the intent required to find Mobal in contempt. Accordingly, this Court may simply reverse the trial court’s order holding Mobal in contempt.

C. The Trial Court Erred When it Awarded Global’s Fee Request Because Global Had Not Submitted Any Contemporaneous Records in Support Thereof.

1. *Standard of Review*

An appellate court reviews a trial court’s award of attorney fees using an abuse of discretion standard. *See Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 595, 675 P.2d 193 (1983). An abuse of discretion exists where “there is a clear showing that the exercise of discretion was manifestly unreasonable, based on untenable grounds, or based on untenable reasons.” *Moreman*, 126 Wn.2d at 40, 891 P.2d 725.

2. *Legal Standard for Fee Submissions and Awards*

The Washington Supreme Court has directed that our courts “should be guided in calculating fee awards by the lodestar method in determining an award of attorney fees” *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998) (citing *Scott Fetzer Co. v. Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990)). The lodestar method “affords trial courts a clear and simple formula for deciding the reasonableness of attorney fees in civil cases and gives appellate courts a clear record upon which to decide if a fee decision was appropriately made.” *Mahler*, 135 Wn.2d at 433, 957 P.2d 632.

Under the lodestar methodology, “the party seeking fees bears the burden of proving the reasonableness of the fees.” *See id.* at 433-34, 957 P.2d 632 (citing *Fetzer*, 122 Wn.2d at 151, 859 P.2d 1210). The first step in the lodestar methodology requires the court to determine how many reasonable hours counsel spent “in securing a successful recovery for the client. Necessarily, this decision requires the court to exclude from the requested hours any wasteful or duplicative hours and any hours pertaining to unsuccessful theories or claims.” *See id.* Time spent doing legal work that was not necessary to accomplish the specific favorable result is not recoverable. *See id.*; *see also Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 744, 733 P.2d 208 (1987) (requiring segregation of work

performed to achieve favorable result on one claim from work done for other purposes in litigation).

When submitting an attorney fee request, “[c]ounsel *must* provide contemporaneous records documenting the hours worked.” See *Mahler*, 135 Wn.2d at 434, 957 P.2d 632 (emphasis added); accord *Sutherland v. Kitsap County*, No. C05-5462, 2007 WL 639786, at *2 (W.D. Wash. Feb. 23, 2007) (fee applicant bears the burden of documenting the appropriate hours expended in the litigation and must submit evidence in support of those hours worked); *Gates v. Gomez*, 60 F.3d 525, 534-35 (9th Cir. 1995) (same). The contemporaneous documentation counsel must submit “need not be exhaustive or in minute detail, but must inform the court, in addition to the number of hours worked, of the type of work performed and the category of attorney who performed the work (*i.e.*, senior partner, associate, etc.)” See *Mahler*, 135 Wn.2d at 434, 957 P.2d 632. “**Where the documentation of hours is inadequate**, courts may reduce the award [sought] accordingly.” See *Sutherland*, 2007 WL 639786, at *2 (emphasis added) (quoting *Hensley v. Eckertart*, 461 U.S. 424, 434 (1983)); *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1121 (9th Cir. 2000). Poor documentation, inadequate descriptions, and practices such as block billing leave courts “without a reasonably precise manner in which to determine the time and labor required.” See *Sutherland*, 2007 WL

639786, at *4. Absent the required documentation, it “follows that the court is not able to determine a ‘lodestar’ amount with any accuracy.” *Id.*

In addition to establishing the reasonableness of the hours expended, the court must determine the reasonableness of the hourly rates charged by counsel. *See Mahler*, 135 Wn.2d at 434, 957 P.2d 632. An “attorney’s usual fee is not, however, conclusively a reasonable fee and other factors may necessitate an adjustment.” *See Bowers*, 100 Wn.2d at 597, 675 P.2d 193. Beyond the usual billing rate asserted, a “court may consider the *level of skill required* by the litigation, *time limitations* imposed on the litigation, the *amount of the potential recovery*, the attorney’s reputation, and the undesirability of the case. The reasonable hourly rate should be computed for each attorney, and each attorney’s hourly rate *may well vary with each type of work involved in the litigation.*” *See id.* (emphasis added).

The lodestar fee ultimately is “calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred in obtaining the successful result....” *Mahler*, 135 Wn.2d at 434, 957 P.2d 632. This procedure is not purely mechanical, however. Washington’s Supreme Court has stated that “[c]ourts must take an *active* role in assessing the reasonableness of fee awards, rather than treating cost decisions as a litigation afterthought. *Courts should not simply accept*

unquestioningly fee affidavits from counsel.” See id. at 434-35, 957 P.2d 632 (citing Nordstrom, 107 Wn.2d at 744, 733 P.2d 208 (1987)) (italics original, bold italics added).

3. ***Global’s Fee Request Should Have Been Rejected Outright.***

In the present case, the trial court’s award of fees that Global allegedly incurred in bringing its Motion for Contempt should be reversed because the contempt order itself warrants reversal. However, in the event that this Court does not reverse the trial court’s contempt order, it still should reverse the Fee Award because Global utterly failed to carry its affirmative burden to demonstrate the reasonableness of the hours it allegedly spent or that the work performed was assigned to attorneys at the appropriate skill and billing level. Moreover, the order was based on the trial court’s assertion that the lodestar method was not required for fee awards on discovery motions, even though the Washington Supreme Court has held that trial courts should be guided by the lodestar method in determining an award of attorney fees. *Mahler*, 135 Wn.2d at 433, 957 P.2d 632. Accordingly, the trial court’s award of even \$1,000 was a speculative decision based on untenable grounds that should be reversed.

a. **Global presented no evidence that its hours allegedly worked were reasonable**

Global’s Fee Award should be reversed because neither of the two

law firms representing Global provided contemporaneous records, as required by Washington law, to document the reasonableness of the time those firms expended on Global's Motion for Contempt. *See Mahler*, 135 Wn.2d at 433, 957 P.2d 632 ("Counsel must provide contemporaneous records documenting the hours worked."); *see also Sutherland*, 2007 WL 639786, at *2. The court may not "simply accept unquestioningly fee affidavits from [Global's] counsel" in making its reasonableness determinations. *See Mahler*, 135 Wn.2d at 434-35, 957 P.2d 632.

Because Global failed to provide the required contemporaneous documentary evidence, the trial court had no information on how much time was devoted to each of the tasks on the undifferentiated lists (i.e., block billing) for which Global seeks to recover. Accordingly, the trial court did not have the ability to "exclude from the requested hours any wasteful or duplicative hours" as required. *See Mahler*, 135 Wn.2d at 434, 957 P.2d 632. Based on the few descriptions that Global's counsel did provide, no fee award should have been given for tasks such as "reviewing [Global's] discovery responses," because such tasks would have been done regardless of whether Global filed a discovery motion. *Id.* at 433-35, 957 P.2d 632. Correspondingly, communications with Global's counsel about **withdrawing** Global's already-filed Motion were hardly necessary for Global to prevail on that Motion. Because the trial court had no way to

determine how much of the time for which Global sought to recover was devoted to such non-recoverable tasks, the court's ultimate decision to grant any fee award was based on pure speculation.

b. Global's claimed billing rates were unreasonable for the legal work at issue

Mobal does not challenge the assertion that Global's senior counsel may have had the effective hourly rates they claimed for work on other cases approved by other courts pursuant to settlements. However, Mobal disagrees that that the bulk of the work Global's counsel claims to have performed, including basic legal research and cursory motions, was appropriate for billing at the highest rates available at both of Global's law firms. There was nothing complicated about deciding that Global was not satisfied with Mobal's discovery responses and preparing a motion to that effect. As a result, that work, presumably the vast majority of the work for which Global seeks to recover, should have been performed by far less senior lawyers (i.e., junior or mid-level associates)⁹ at correspondingly far lower and more appropriate billing rates. *See, e.g., Bowers*, 100 Wn.2d at 597, 675 P.2d 193 ("each attorney's hourly rate may well vary with each type of work involved in the litigation").

⁹ As were Mobal's oppositions to Global's Motion for Contempt and Request for Fees.

Global's counsel had access to associates at the Keller Rohrback firm, but, for reasons of their own, chose not to use them. Moreover, Global's decision to submit only block billing descriptions prevented the trial court from making a reasoned discount for more junior-level work where appropriate. As such, the trial court's Fee Award was based on additional speculation about the reasonableness of counsel's rates, and should be reversed as based on untenable grounds.

V. CONCLUSION

For the foregoing reasons, the trial court's orders holding Mobal in contempt and awarding attorney fees to Global were an abuse of its discretion. Mobal responded fully to the discovery actually propounded in a reasonable and diligent way. It was required by law to do no more, and the trial court failed to direct otherwise. Accordingly, Mobal's request that this Court reverse both of the trial court's orders at issue should be granted.

Respectfully submitted this 21st day of May, 2012.

BRACEWELL & GIULIANI LLP



Curt Roy Hine (WSBA #16317)
Robert M. Crowley (WSBA #37953)
Carolyn Robbs (WSBA #41913)
701 Fifth Avenue, Suite 6200
Seattle, Washington 98104
Curt.Hine@bgllp.com
Robert.Crowley@bgllp.com
Carolyn.Robbs@bgllp.com
Telephone: (206) 204-6200
Fax: (206) 204-6262

***Counsel for Appellant
Mobal Communications, Inc.***

PROOF OF SERVICE

I caused a copy of the foregoing APPELLANT'S OPENING BRIEF to be served today, on the following via the method indicated:

Rob Williamson (WSBA #11387) Via Messenger
Williamson & Williams Via Fax
17253 Agate Street, NE Via U.S. Mail
Bainbridge Island, WA 98110 Via ECF Notification
robilin@williamslaw.com Via E-mail
Phone: (206) 780-4447 Via Overnight Delivery
Fax: (206) 780-5557

Mark A. Griffin (WSBA #16296) Via Messenger
Harry Williams IV (WSBA #41020) Via Fax
Benjamin Gould (WSBA #44093) Via U.S. Mail
Keller Rohrback, LLP Via ECF Notification
1201 Third Avenue, Suite 3200 Via E-mail
Seattle, WA 98101-3052 Via Overnight Delivery
mgriffin@kellerrohrback.com
hwilliams@kellerrohrback.com
bgould@kellerrohrback.com
Phone: (206) 623-1900
Fax: (206) 623-3384

*Attorneys for Respondent/Appellees
Global Education Services, Inc.*

DATED this 21st day of May, 2012.



Serita Smith
Assistant to Curt Roy Hine
and Robert M. Crowley

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