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No. 68521-0

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

GLOBAL EDUCATION SERVICES, INC.,

Respondent,

v.

MOBAL COMMUNICATIONS, INC.,

Appellant.

BRIEF OF RESPONDENT

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INTRODUCTION

The question in this appeal is whether the Superior Court was within its discretion to hold Mobal Communications (“Mobal”) in contempt for failing to obey an earlier court order.

The Superior Court had granted a motion to compel discovery responses. Despite that order on the motion to compel, Mobal subsequently provided inadequate responses, and Global Education moved for contempt against Mobal. The Superior Court held that Mobal had disobeyed the order compelling Mobal to respond to discovery because Mobal’s responses were incomplete and opaque. After Mobal was found in contempt, it disclosed critical information that it surely could have, and should have, disclosed earlier.

The contempt order was proper because it was based on disobedience of a court order; and it was effective, because it caused Mobal to comply with that earlier court order. Because the contempt order was proper, the modest award of attorney’s fees for bringing the contempt motion was also appropriate. The Superior Court did not abuse its discretion in finding Mobal in contempt, and this Court should affirm the Superior Court’s orders.

STATEMENT OF THE CASE

I. Facts

Little background is needed to decide the issue in this appeal.

Global Education sued Mobal for sending junk faxes in violation of state and federal law. Mobal failed to appear. A default judgment was entered and a class was certified. After the entry of judgment, Mobal eventually appeared and discovery began.

II. Procedural history

A. Global Education serves discovery requests on Mobal.

In October 2009, Global Education served discovery requests on Mobal, requesting routine information. CP 18-35.

B. Mobal does not respond to the discovery requests.

Mobal did not respond to these requests; indeed, it refused to respond even more than two years after they were served. CP 14-15 (citing email from Mobal stating its refusal to respond to discovery requests); CP 37-40 (presenting emails from Mobal stating its refusal to answer discovery requests).

C. The Superior Court orders Mobal to provide “full and complete responses” to Global Education’s discovery requests.

Global Education moved to compel responses. CP 8-10. Mobal opposed that motion. CP 41-54, 61-81 (surreply and related papers). Part of

Mobal's opposition was well taken, and Global Education withdrew the requests that related to whether and how the judgment could be enforced. CP 56-57. Global Education noted, however, that this issue could have been worked out if Mobal had engaged in the pre-motion meet and confer process. CP 57. The Superior Court granted Global Education's motion to compel, and ordered Mobal to reply to discovery relating to the merits of the claims and the identity of class members. CP 98-99. The Court's order required Mobal to "provide full and complete responses" to the requests. CP 98.¹

D. Mobal responds to the discovery requests.

Mobal's discovery responses were, in Global Education's view, deficient. For instance, one interrogatory requested that Mobal

[p]lease identify all employee, consultants, or third party vendors hired by defendant to send out copies of facsimiles identical to or similar to the facsimile attached as Exhibit A to the Complaint.

CP 22 (Interrogatory Six). Exhibit A was the junk fax sent to Global Education. See CP 207 (copy of Exhibit A). "Identify" was defined in an unobjectionable way: it meant "to state full name and last known address

¹ On December 27, 2011, this Court denied Mobal's motion to stay enforcement of this order. This Court's denial of Mobal's motion to stay is included as an Appendix to this brief.

and telephone number, as well as present or last known employment status.” CP 19-20.

In response to this interrogatory, Mobal referenced a “New York Office” and then listed eight former employees. CP 117-119. Mobal failed to provide any addresses or phone numbers, as the interrogatories’ definition of “identify” had required. Nor did Mobal explain why it could not provide addresses or phone numbers. Nor, finally, did Mobal acknowledge, as it later did, that it had employees in California as well as in New York. CP 472-73 (supplemental answers served after contempt).

Global Education had also propounded a number of interrogatories and requests for production about whether Mobal had sent faxes similar to the one that Global Education had received—i.e., the fax that had prompted this lawsuit. While Mobal admitted that the junk fax that Global Education had received was sent “from a number used by Mobal’s US-based sales and marketing department in 2003,” CP 114-115, it provided no information about that department. While Mobal stated repeatedly that it searched for responsive materials from its New York office, the fax was

sent from area code 310, a Southern California prefix.² CP 207 (upper-right corner of fax).

Mobal repeatedly claimed to have no access to information about faxes it sent because its marketing department was closed in 2004. *See, e.g.*, CP 114-115 (answering interrogatory 2); CP 115-116 (answering interrogatory 3); CP 116-117 (answering interrogatory 4). Yet Mobal claimed to know—in the apparent absence of any files that were produced to plaintiffs or identifying individuals who had relevant information—that “it was the standard practice of [Mobal’s] sales and marketing department to send facsimiles only to persons and entities with which Mobal had established a relationship.” CP 117 (answering interrogatory 5). In other words, the only facts available to Mobal were exculpatory facts—a situation made possible, in large part, by Mobal’s failure to contact even the former president and manager of the department that sent out the offending fax to Global Education. *Compare* CP 113-14 (disclosing whom Mobal contacted in preparing the responses), *with* CP 119 (disclosing that Therese Yagy, whom Mobal had not contacted, had been “President/Sales & Marketing” at Mobal).

² *See* FCC, *Numbering Resource Utilization in the United States* (2011), available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303900A1.pdf.

Finally, Mobal's discovery responses stated that only two of its computers contained information that was potentially relevant to this lawsuit. CP 114-15. According to Mobal, both of these computers were inaccessible. CP 115. When counsel for Global Education sought to learn how Mobal had determined that only those two computers contained potentially responsive information, Mobal stated that it had run a key word search on its computers. CP 211. Mobal, however, refused to disclose the search terms it had used to search its computers, claiming that they were protected by the work-product privilege. CP 211.

E. The Superior Court finds Mobal in contempt and orders it to pay attorneys' fees.

Noting these deficiencies, Global Education moved for contempt. CP 102-108 (Motion for Contempt). Mobal opposed the motion and moved for Rule 11 sanctions, calling Global Education's motion "baseless and improper." CP 160.

The Superior Court, however, saw it differently and found that Mobal had not followed the "Court's November 28, 2011 order to answer discovery." CP 218-219. Failure to follow that order meant that Mobal was in contempt, and the Court so held. *Id.* In a companion order, and after extensive briefing separate from the briefing on contempt, *see* CP 222-368, the Superior Court ordered Mobal to pay \$1,000 toward the attorney's

fees required to bring the contempt motion. CP 437. Subsequent negotiations by the parties failed to head off this appeal.

ARGUMENT

The Superior Court did not abuse its discretion in finding contempt. Mobal intentionally disobeyed a court order that it could have complied with, and thus was properly held in contempt. Mobal appears to make two arguments against the Superior Court's order, but neither shows an abuse of discretion.

First, Mobal argues that the Court's underlying order was not specific enough to provide a basis for contempt. That argument fails because the meaning of the Superior Court's order that Mobal to provide "full and complete" discovery responses is comprehensible by any attorney—indeed, attorneys have a responsibility to provide such responses under the civil rules. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 345 (1999) (holding that discovery "[c]onduct is to be measured against the spirit and purpose of the rules" and failure to conform conduct to the spirit and purpose of the rules is grounds for sanctions). Mobal's incomplete and misleading responses failed to measure up to the spirit and purpose of the civil rules or the Superior Court's order, and thus those answers were subject to contempt.

Second, Mobal argues that it could not comply with the discovery requests. But that argument is defeated by—among other things—its actions subsequent to the contempt order, when it produced important new information that it could have, and should have, produced earlier.

I. Applicable standards of review

The power to find a party in contempt lies “within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion.” *In re Marriage of Mathews*, 70 Wn. App. 116, 126, 853 P.2d 462 (1993). To prevail, therefore, Mobal must show that the trial court exercised its discretion based on untenable grounds or reasons.

Moreman v. Butcher, 126 Wn.2d 36, 40, 891 P.2d 725 (1995).

The findings of fact underlying the Superior Court’s contempt order are reviewed for substantial evidence. *In re Marriage of Rideout*, 150 Wn.2d 337, 350-52, 77 P.3d 1174 (2003); *In re Marriage of Myers*, 123 Wn. App. 889, 893, 99 P.3d 398 (2004). “Substantial evidence is that sufficient to persuade a fair-minded person of the truth of a premise.” *Dixon v. Crawford, McGilliard, Peterson & Yelish*, 163 Wn. App. 912, 921, 262 P.3d 108 (2011).

II. Mobal was in contempt of the Superior Court's order.

A. Contempt is the plain and intentional violation of a court order.

Civil contempt means the “intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court.” RCW 7.21.010(1)(b). Civil contempt is remedial and is “imposed for the purpose of coercing performance when the contempt consists of the omission or refusal to perform an act that is yet in the person’s power to perform.” RCW 7.21.010(3). When a court is determining contempt based on disobedience of an order, the “facts found must constitute a plain violation of the order.” *Johnston v. Beneficial Mgmt. Corp. of Am.*, 96 Wn.2d 708, 713, 638 P.2d 1201 (1982).

The “burden of showing one’s inability to comply is on the one alleging the inability.” *State v. Mecca Twin Theater & Film Exch., Inc.*, 82 Wn.2d 87, 92, 507 P.2d 1165 (1973); *Moreman*, 126 Wn.2d at 40 (“[T]he law presumes that one is capable of performing those actions required by the court . . . [and the] inability to comply is an affirmative defense.” (citation and quotation marks omitted)).

B. Mobal’s discovery responses were a plain violation of the Superior Court’s order.

The Superior Court ordered Mobal to provide “full and complete” discovery responses to Global Education. CP 98. The Superior Court, in

other words, ordered Mobal to provide discovery responses that were consistent with the rules governing civil discovery. In Mobal's responses, there were four principal violations of those rules. Any *one* of these deficiencies justifies the Superior Court's finding that Mobal was in plain violation of its earlier order.

1. Mobal plainly violated the order by failing to follow the interrogatories' definition of "identify."

First, in "identifying" eight persons who had been employed at Mobal's New York office when the facsimile that prompted this lawsuit was transmitted, Mobal failed to include these persons' last known address and telephone number as well as present or last known employment status. This failure ignored the run-of-the-mill definition of "identify" used in Plaintiff's interrogatories—a definition that required Mobal to include last known addresses and telephone numbers and present or last known employment status. CP 19-20 (defining "identify").

This failure was a plain violation of the Superior Court's order. Without identifying information for Mobal's former employees, Global Education would be greatly impeded in contacting them in order to determine whether they had evidence or testimony relevant to this case. As a practical matter, then, Mobal's failure to provide the identifying information made its responses neither "full" nor "complete." CP 98.

In addition, Mobal’s failure to provide identifying information flunked the basic legal rules governing discovery itself. For this reason, too, Mobal plainly violated the Superior Court’s earlier order. In *Fisons*—perhaps the most important precedent governing discovery in this State³—the plaintiff served discovery requests on the defendant drug company. 122 Wn.2d at 347. These requests defined the term “product” and asked for information and documents about that “product” as well as about an ingredient in that product. *Id.* at 347-48. Rather than objecting to these requests or to their definition of “product,” the drug company simply failed to comply with the requests “as written.” *Id.* at 349. This failure, said our Supreme Court, was wrong: “The rules are clear that a party must *fully* answer all interrogatories and all requests for production, unless a specific and clear objection is made.” *Id.* at 353-54. Here, Mobal did not object to Global Education’s definition of “identify,” CP 112-24, and yet failed to comply with that definition. Under *Fisons*, this was a plain violation of the discovery rules.

³ 14 Karl B. Tegland, *Washington Practice, Civil Procedure* § 21:3 (2011) (“No discussion of discovery would be complete without some mention of *Washington State Physicians Insurance Exchange & Association v. Fisons Corporation*, commonly known as *Fisons*.”).

Mobal's later discovery responses, CP 472-73, 480-81, show that it was able to comply with this definition of "identify"—but even if Mobal were not able, it had an obligation to *explain* why it was unable to comply. Long-standing case law on the analogous federal discovery rules makes it clear that if a party lacks information responsive to a discovery request, it must explain why.⁴ See *Fisons*, 122 Wn.2d at 341 (relying on analogous federal rules). Here, however, Mobal's responses contained no such explanation. CP 118-19, 120.

Contrary to Mobal's argument, Mobal Br. 23, the question here is not whether Mobal needed to contact its former employees. The question,

⁴ See, e.g., *FDIC v. Halpern*, 271 F.R.D. 191, 196 (D. Nev. 2010) (if litigant could not admit or deny the request for admission, it had to "provide reasonable explanations, in adequate detail, as to why it cannot respond"); *Diederich v. Dep't of Army*, 132 F.R.D. 614, 620 (S.D.N.Y. 1990) (if requested information was within the knowledge of nonparties, then the litigant was required "to so specify, rather than merely express a conclusory assertion"); *Miller v. Doctor's Gen. Hosp.*, 76 F.R.D. 136, 140 (W.D. Okla. 1977) ("If the answering party lacks necessary information to make a full, fair and specific answer to an interrogatory, it should so state under oath and should set forth in detail the efforts made to obtain the information." (citing *Int'l Fertilizer & Chem. Corp. v. Brasileiro*, 21 F.R.D. 193 (S.D.N.Y. 1957))); *Harlem River Consumers Co-op., Inc. v. Associated Grocers of Harlem, Inc.*, 64 F.R.D. 459, 463 (S.D.N.Y. 1974) ("If plaintiff knows of no further information it is required to so state."); *Pilling v. Gen. Motors Corp.*, 45 F.R.D. 366, 369 (D. Utah 1968) ("If the respondent is unable to answer for lack of information or for other reason he should indicate the reasons rather than ignore the inquiry in whole or in part . . .").

rather, is whether Mobal needed to abide by the interrogatories' definition of "identify" and thus disclose its former employees' contact information—or, at the very least, explain why it could not abide by that definition. Because Mobal neither abided by that definition nor explained why it was unable to abide by that definition, the Superior Court was right to find that Mobal plainly violated its earlier order, which directed Mobal to provide full and complete answers to the interrogatories.

2. ***Mobal plainly violated the order by failing to disclose whether it had searched the telephone number that is at the heart of this case.***

Mobal's second plain violation of the Superior Court's order was its failure to say anything at all about the telephone number that sent the junk fax at the heart of this lawsuit. In its interrogatories and requests for production, Global Education propounded numerous interrogatories and requests that should have turned up information about that telephone number. These interrogatories and requests asked about how many others had received faxes similar to the one that Mobal transmitted to Global Education. CP 21, 29. They asked about the times when those faxes were sent. CP 21-22, 29. And—what is most significant for present purposes—they asked about the outgoing telephone lines that had been used to send those faxes. CP 24.

As disclosed on the facsimile attached as Exhibit A to the complaint, the telephone number that sent the crucial fax to Global Education was 310-312-9972. CP 207. The 310 prefix is for Southern California. *See supra* p. 5 n.2.

Accordingly, one would expect that Mobal would have said *something* about that Southern California telephone number in its discovery requests. But Mobal did not even *mention* the Southern California number. CP 121. Instead, it mentioned only its New York office: it claimed that it had searched the two telephone numbers installed in its New York office and that it could not find any instance in which those phone numbers were used to transmit any faxes other than the fax that is the subject of this litigation. CP 121.

Mobal again fails to come to grips with the nature of its discovery violation. The problem is not necessarily that Mobal failed to disclose any information about faxes that the Southern California telephone number had sent. *Cf.* Mobal Br. 2 (claiming, without citation to the record, that Global Education filed its motion for contempt because “Mobal’s searches” did not “result in any information or documents that would support [Global Education’s] case”). Even if Mobal was unable to find or to search the records for the Southern California number, it was under an

obligation to *explain* the steps it had taken to determine whether it was able to find or to search those records and why it was unable to find or search them. For as has been noted, *see supra* p. 12 & n.4, a party that lacks information responsive to a discovery request must at least explain *why* it lacks that information. Especially after *Fisons*, this is a matter of common sense; discovery answers must be full and forthright and cannot be evasive. *Id.* at 342. Because Mobal's failure to explain why it did not search the Southern California phone number was evasive, that failure plainly violated the Superior Court's earlier order.

3. *Mobal plainly violated the order by concealing the manner in which it had searched its computers.*

Mobal's discovery responses initially stated that only two computers stored information that was potentially relevant to this lawsuit, and that these computers were inaccessible. *E.g.*, CP 114-15. Later, Mobal's counsel disclosed that Mobal had "run a key word search on its computers to locate documents and other information responsive to Global [Education]'s discovery requests." CP 211. Mobal's counsel, however, "refuse[d] to provide" the specific key word searches that had been run, claiming that that information "was protected by the work product privilege." CP 211.

Like Mobal's failure to explain why it did not search the Southern California telephone number, Mobal's failure to disclose its key word searches violated the principles of disclosure and forthrightness affirmed by *Fisons* and much other case law. *See supra* p. 12 & n.4. For this reason, Mobal's failure to disclose its key word searches constituted a plain violation of the Superior Court's earlier order requiring "full and complete" discovery responses. CP 98.

Mobal once more ignores the nature of its discovery violation. To begin with, Mobal's key word searches are not privileged work product. *Smith v. Life Investors Ins. Co. of Am.*, No. 07-681, 2009 WL 2045197, at *7 (W.D. Pa. July 9, 2009) (finding that search terms are not work product and that "Defendant has a burden to demonstrate that its search for documents was reasonable. A thorough explanation of the search terms and procedures used would be a large step in that direction."); *accord Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 262 (D. Md. 2008) (discussing The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery, 8 Sedona Conf. J. 189). Mobal also claims that the contempt finding was based on its refusal to grant "unfettered access" to its computers. Mobal Br. 24. Mobal misses the point. The Superior Court's contempt order was

based not on what Mobal did or failed to do, but simply on what Mobal failed to *disclose* about what it had done or had failed to do. *See* CP 542-543 (“[E]ither the steps for due diligence [were] not given, or incomplete information [was] given.”).

4. *Mobal plainly violated the order by failing to explain why it had not contacted its former president and the manager of its marketing department.*

In its initial discovery responses, Mobal admitted that the fax sent to Global Education “appears to have been sent from a number used by Mobal’s US-based sales and marketing department in 2003.” *E.g.*, CP 114-15. Mobal also disclosed that the former head of its sales and marketing department was someone named Therese Yagy. CP 120. Yagy, however, was not among the persons whom counsel for Mobal contacted in preparing the initial discovery responses. CP 113-14.

Given that Yagy was President and the Manager of the department that sent the fax, Mobal should either have contacted Yagy or explained why it could not or did not contact Yagy. Preparing the discovery responses with the help of only those persons who had no reason to know about the fax, CP 113-14, allowed Mobal to evade the Superior Court’s earlier order as well as its core discovery obligation to “*fully* answer all interrogatories and all requests for production.” *Fisons*, 122 Wn.2d at 353-

54. At the very least, Mobal was under an obligation to *explain* why it did not or could not reach Yagy.

In sum, the Superior Court's order compelling discovery was clear: Mobal was required to comply with the ground rules of discovery and give "full and complete" answers to Global Education's interrogatories and document requests. Because Mobal violated some of the most basic rules of discovery, it plainly violated the Superior Court's order.

C. The Superior Court had substantial evidence from which to find that Mobal's violation was intentional.

Mobal violated the Superior Court's order by violating basic discovery principles. These principles of "cooperation and forthrightness" are by now well-established. *Fisons*, 122 Wn.2d at 342. They are principles of which every attorney should have actual knowledge, and of which every attorney does have constructive knowledge. For this reason alone, the Superior Court's finding of intentional disobedience is supported by substantial evidence. *See In re Estates of Smaldino*, 151 Wn. App. 356, 365, 212 P.3d 579 (2009) (affirming finding of intentional disobedience because lawyer had constructive knowledge of temporary restraining order).

There are other considerations that also support the finding that Mobal's disobedience was intentional. Global Education served its

discovery requests on Mobal in October 2009. *See* CP 14. The Superior Court’s order compelling discovery was issued over two years later, on November 28, 2011. CP 98-99. Mobal’s discovery responses were issued more than a month after issuance of the order compelling responses, on January 6, 2012. CP 134; Mobal Br. at 7 (noting that this Court denied Mobal’s motion to stay the Superior Court proceedings). Mobal had ample time to prepare its discovery responses and deliberate on them. The Superior Court thus had substantial evidence from which to find that Mobal’s failure to make disclosures consistent with the discovery rules was an intentional decision rather than an inadvertent mistake.

D. Mobal has not shown that it was unable to comply with the Superior Court’s order.

The Supreme Court has squarely held that the burden of showing one’s inability to comply with a court’s order is on the one alleging it.

Moreman, 126 Wn.2d at 40; *Mecca Twin Theater*, 82 Wn.2d at 92.⁵ Mobal

⁵ Mobal cites a case from Division III stating that “[t]he 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.” *Diaz v. Wash. State Migrant Council*, 165 Wn. App. 59, 78, 265 P.3d 956 (2011). At issue here, however, is not whether Mobal was able to obtain documents, but whether it was able merely to make disclosures consistent with the discovery rules. If a party claims it cannot obtain documents, it may make sense to put the burden of showing otherwise on the opposing party. But if—as here—a party claims that it

has not shouldered—and cannot shoulder—that burden, for two independent reasons.

First, Mobal violated the Superior Court’s earlier order not because of what it did or did not do, but because of what it failed to *disclose*. It refused to state whether certain information was available to it, and if not, why not. Making this disclosure would not have required Mobal to do anything it could not have done: it simply would have required its attorneys to write a few more words in their discovery responses.

Second, Mobal’s improved responses after the contempt order are proof positive that it was able to comply with the Superior Court’s order compelling discovery. These responses followed the definition of the word “identify,” disclosed more information about Mobal’s due diligence, and disclosed some information about Mobal’s California employees and its California telephone number at issue in this case. *See* CP 454-57, 472-73, 480-81, 534-35.

cannot make a disclosure about *why* it cannot obtain documents or information, then it certainly makes sense to put the burden of supporting that claim on the party making it. Finally, to the extent *Diaz* conflicts with the Supreme Court’s rulings in *Mecca Twin Theater* and *Moreman*, the Supreme Court’s rulings must control. *State v. Schmitt*, 124 Wn. App. 662, 669 n.11, 102 P.3d 856 (2004).

E. The Superior Court’s contempt order contained sufficient factual findings.

In holding Mobal in contempt, the Superior 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.” CP 219. These findings were sufficient to support the contempt order. The Superior Court found that Mobal had not explained what “steps for due diligence” it had taken—i.e., that Mobal had not explained how it made a reasonable inquiry to respond to Global Education’s interrogatories and document requests. The Superior Court also found that Mobal had given “incomplete information”—i.e., had not given the information that Global Education had requested.

These findings point to exactly the deficiencies that Global Education explained above. *See supra* Argument, Part II.B. Mobal gave “incomplete information” because it failed to “identify” its former employees as required by Global Education’s interrogatories. Mobal omitted its “steps for due diligence” by failing to explain why it had no information about the Southern California telephone number that sent the fax to Global Education, by concealing how it had searched its computers, and by failing to state whether or how it had tried to contact former

employees with relevant information. Even if more “precise findings are preferred,” *Mecca Twin Theater*, 82 Wn.2d at 92, the Superior Court’s findings here are enough to support its ruling. *See id.* at 92-93 (upholding contempt finding where contemnor entered no evidence that he lacked the ability to comply with the court’s earlier ruling).

Mobal, however, argues that the Superior Court’s factual findings were not specific enough—that those findings did not give “Mobal sufficient guidance on how to remedy its alleged contempt.” Mobal Br. 26. Perhaps the best answer to this argument is Mobal’s own supplementary responses, in which Mobal corrected many of the deficiencies in their initial responses. *See* CP 450-528. The Superior Court’s order was specific enough for Mobal to improve its responses.

Mobal’s reliance on *Dunn v. Plese*, 134 Wash. 443, 235 P. 961 (1925) and *Hildebrand v. Hildebrand*, 32 Wn.2d 311, 201 P.2d 213 (1949) is unavailing. In *Dunn*, the trial court’s findings apparently consisted entirely of the recitation that the court “finds the said defendant guilty of contempt of court as charged in the affidavit filed in this case.” 134 Wash. at 449. Here, however, the Superior Court made its own findings in its own handwriting that “steps for due diligence [were] not given,” and that “incomplete information [was] given in the answers.” CP 219. By saying

that Mobal's deficiencies had been "illustrated by the plaintiff," CP 219, the Superior Court was simply noting its agreement with Global Education's argument; it was not silently incorporating Global Education's pleadings by reference. As for *Hildebrand*, the trial court there made no findings of fact or conclusions or law at all, 32 Wn.2d at 314—a situation far removed from the Superior Court's explicit findings of fact here.

III. The modest attorneys' fee award was proper.

The Superior Court is authorized to award attorneys' fees and costs when a party is found to be in contempt of Court. As RCW 7.21.030(3) provides: "The court may . . . order a person found in contempt of court to pay . . . any costs incurred in connection with the contempt proceeding, including reasonable attorney's fees." Because the finding of contempt was justified, the attorneys' fees were also justified.

Mobal, however, complains that the fee application lacked detailed time records and that Global Education had partners, rather than associates, working on this issue. Neither objection is well taken.

The overriding fact is that only \$1,000 in attorneys' fees were awarded. This figure represents less than one-tenth of the lodestar amount that Global Education requested. CP 222. The Superior Court did not

simply credit the declarations of Global Education’s counsel, but instead “weigh[ed] that evidence (or lack thereof) accordingly.” CP 437. In other words, the Superior Court did precisely what Mobal says it should have done: it did “not simply accept unquestioningly [the] fee affidavits” from Global Education’s counsel. *Mahler v. Szucs*, 135 Wn.2d 398, 435, 957 P.2d 632 (1998), *partial abrogation on other grounds recognized by Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 659, 272 P.3d 802 (2012). Instead, the Superior Court gave those affidavits the markedly decreased evidentiary weight that it thought they deserved.

To the extent Mobal is arguing that declarations submitted by counsel do not qualify *at all* as “contemporaneous records” on which courts may rely to award attorneys’ fees, *Mahler*, 135 Wn.2d at 434, that argument should be rejected. The declarations that Global Education’s counsel submitted stated, under oath, that they were based on itemized billing records—and identified, under oath, exactly the number of hours that had been spent on seeking the contempt order. CP 225, 229. This is sufficient. *Cf. Int’l Union of Operating Engineers, Local 286 v. Port of Seattle*, 164 Wn. App. 307, 326, 264 P.3d 268 (2011) (rejecting an estimate of how many hours were worked). Mobal does not identify any authority stating that counsel’s declarations may not be considered at all. Indeed, the fact

that *Mahler* cautions against “accept[ing] unquestioningly” the declarations of counsel, *id.* at 435, implies that such declarations may be accepted *with reservations*—just as the Superior Court did here.

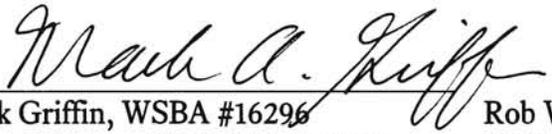
In light of the size of the Superior Court’s fee award, it makes no difference that Global Education used partners rather than associates to secure a contempt order. Translated into a lodestar amount, the Superior Court’s award of \$1,000 is easily equivalent to associates’ hourly rates. An award of \$1,000 is equivalent, for example, to five hours of work at \$200 per hour or four hours of work at \$250 per hour.⁶ Those rates are less than half of what the partners working on this case have been awarded by courts in other matters. CP 226-28, 230.

CONCLUSION

Because Mobal’s actions plainly violated an earlier order, the Superior Court was within its discretion to find Mobal in contempt. Nor did the Superior Court abuse its discretion in its modest award of attorneys’ fees. The Superior Court’s orders should be affirmed.

⁶ To secure the contempt order, Global Education had to engage in a lengthy meet-and-confer process, CP 186-96, 214-16, and prepare a motion and a reply and compile supporting declarations, CP 102-10, 197-205, 210-12. Purely as a matter of common sense, it is unlikely that all of this work could have been completed in less than four or five hours.

Respectfully submitted this 20th day of June, 2012.

By: 

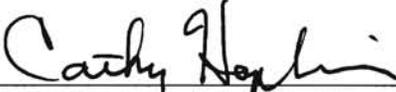
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CERTIFICATE OF SERVICE

I certify under penalty under the laws of the State of Washington that on June 20, 2012, I caused a true and correct copy of the foregoing BRIEF OF RESPONDENT to be delivered as follows:

Robert Michael Crowley, WSBA #37953	<input checked="" type="checkbox"/> Hand Delivered
Curt Roy Hinline, WSBA #16317	<input type="checkbox"/> Facsimile
Bracewell & Giuliani, LLP	<input checked="" type="checkbox"/> Email
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Seattle, WA 98104-7018	<input type="checkbox"/> Priority Mail
Phone: (206) 204-6200	<input type="checkbox"/> Federal Express,
Fax: (206) 204-6262	Next Day
email: robert.crowley@bgllp.com	
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Cathy Hopkins, Legal Assistant

APPENDIX

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December 27, 2011

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CASE #: 67824-8-1

Global Education Services, Inc., Respondent v. Mobal Communications, Inc., Appellants

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on December 27, 2011:

"On November 30, 2011, defendant/appellant Mobal Communications, Inc. filed an emergency motion to stay further trial court proceedings, specifically a November 28, 2011 order requiring Mobal to respond to certain interrogatories and requests for production within 20 days of the order. Plaintiff/respondent Global Education Services, Inc. filed an answer, Mobal filed a reply, and I heard oral argument on December 9, 2011. On December 20, 2011, I granted a temporary stay to allow time to consider the parties' arguments and enter a ruling. The temporary stay is lifted, and Mobal's motion to stay discovery pending appeal is denied.

In October 2005, Global filed a class action lawsuit against Mobal seeking an injunction and incidental damages for sending unsolicited facsimile advertisements in violation of the Telephone Consumer Protection Act of 1991, 47 U.S.C. section 227, the Washington Unsolicited Telefacsimile statute, RCW 80.36.540, and the Washington Consumer Protection Act, chapter 19.86 RCW. In October 2006, the trial court entered a default judgment for Global, awarding it damages of \$3,840.00 and enjoining Mobal from further unsolicited advertisements to facsimile machines. The court also certified a class under CR 23(b)(2) and retained jurisdiction to enforce the injunction and consider further requests for damages that class members may bring.

In October 2009, Global sought discovery for several purposes, including to identify potential class members and ascertain Mobal's ability to pay damages. One month later Mobal filed a motion to vacate the default judgment, arguing Global did not comply with service of process statutes and the trial court therefore lacked jurisdiction. The trial court denied Mobal's motion to vacate.

October 17, 2011, Mobal timely filed a notice of appeal and posted a bond of \$7000.00 to supersede the judgment. The record has been perfected, and Mobal's opening brief is currently due January 5, 2012.

In late October 2011, Global filed a motion to compel Mobal to answer interrogatories and produce documents. Mobal opposed the motion. On November 28, 2011, the trial court granted the motion to compel and ordered Mobal to respond to interrogatories 1 through 13 and requests for production A through N within 20 days. Mobal then filed the current motion to stay discovery.

I conclude as follows. Mobal has the right to stay enforcement of the money judgment pending appeal. RAP 8.1(b). Mobal posted a supersedeas bond double the amount of the money judgment. Global did not timely object to the amount of the bond. Enforcement of the judgment is stayed under RAP 8.1(b)(1), and any effort to enforce the judgment would be improper.

A stay of the injunction is governed by RAP 8.1(b)(3) and 8.3. In evaluating whether to stay enforcement of such a decision, the court considers whether the moving party can demonstrate that debatable issues are presented on appeal and compares the injury that would be suffered by the moving party if a stay were not granted with the injury that would be suffered by the nonmoving party if a stay were imposed. RAP 8.1(b)(3). RAP 8.3 also gives this court "authority to issue orders, before or after acceptance of review . . . to insure effective and equitable review, including authority to grant injunctive or other relief to a party." In this setting RAP 8.3 involves similar considerations as RAP 8.1(b)(3). Purser v. Rahm, 104 Wn.2d 159, 177, 702 P.2d 1196 (1986) (court considers whether the appeal presents debatable issues, whether a stay is necessary to preserve the fruits of a successful appeal, and the equities of the situation). Mobal has raised a debatable issue regarding whether service of process was sufficient under the applicable statutes. Balancing the equities, there is frankly little showing of harm to either party. Global has not demonstrated a basis to conduct discovery directed to enforcement of the injunction, and Mobal has not demonstrated that the discovery is directed to enforcement of the injunction. Moreover, ordinarily this court would condition a stay under RAP 8.1(b)(3) and/or 8.3 upon posting appropriate security. Mobal has not proposed to do so.

To the extent Global seeks discovery directed to identifying additional class members, Global's concerns regarding fading memories appear overstated, given that the judgment was entered in October 2006 and Global did not act until three years later. It is true that if Mobal succeeds on appeal, there will be no discovery, but requiring Mobal to answer interrogatories directed to identifying potential class members does not appear to be unduly burdensome. As the trial court observed, both parties have been slow to act in this case. The trial court retains authority to act in the part of the case that is not the subject of appeal. RAP 7.2(l). If the discovery results in a trial court determination that changes the decision on appeal, the moving party must seek this court's permission prior to formal entry of the trial court decision. RAP 7.2(e). And if the trial court were to enter an additional judgment, Mobal will have the right to stay enforcement by posting a supersedeas bond, cash, or other security.

Therefore, it is

ORDERED that the temporary stay is lifted; and it is

ORDERED that Mobal's motion to stay discovery pending appeal is denied."

Sincerely,

A handwritten signature in black ink, appearing to read 'R.D. Johnson', with a long horizontal flourish extending to the right.

Richard D. Johnson
Court Administrator/Clerk

ssd