

NO. 74045-8-1

IN THE COURT OF APPEALS FOR THE STATE OF
WASHINGTON DIVISION 1 AT SEATTLE

STI AMERICA, INC.,

Plaintiff

vs.

AVALON LEASING, INC.,

Respondent (defendant)

and

LEYEN FOODS, LLC.,

Appellant (defendant)

RESPONDENT AVALON LEASING OPENING BRIEF

This appeal arises from an interpleader lawsuit regarding the parties' respective rights in a fund of monies. Appellant Leyen Foods appeals from the orders and judgment against it made by the Honorable Catherine Schaffer, in King County Superior Court case of of *STI America, Inc. vs. Avalon Leasing, Inc. and Leyen Foods, LLC*, case number 13-2-05393-4

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2016 MAR 14 PM 1:31

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I. INTRODUCTION and ARGUMENT SUMMARY

The issues in this case center on Appellant Leyen's failure to permit discovery despite three (3) orders to compel. (CP 18-21, CP 162-164, and CP 114-117). Each of these orders directed Leyen Foods, LLC ("Leyen") to provide "full and complete answers" and to "produce all documents" (at CP 18, CP 162 and 114).

When Leyen disobeyed these orders, the trial court then entered its fourth order compelling discovery and judgment. This order included an order in limine barring the Appellant Leyen from introducing certain evidence at trial (CP 370-375, at 374). The order in limine portion of the "fourth" order to compel is the subject of this appeal. The Appellant Leyen has not appealed the trial court order reducing the prior monetary sanctions to judgments due to Leyen's failure to pay over **\$31,982** in previously awarded sanctions (CP 370-375 at 374).

In concluding that Appellant Leyen should not be able to introduce evidence at trial relating to the subject matters of the unanswered discovery the trial court expressly considered, followed and applied the three step procedure and guidance of the Supreme Court decision of *Burnet v. Spokane Ambulance*, 933 P.2d 1036, 131 Wn.2d 484 (Wash.

1997). In this regard, the trial court expressly considered whether the Appellant Leyen's conduct was intentional and willful, prejudicial, and imposed the least severe sanction.

The trial court correctly found that Appellant Leyen's conduct and disobedience of the three prior discovery orders was intentional. The trial court entered a series of Findings of Fact and Conclusions of Law to that effect (CP 370-375 at 371-373). Without limitation, these include:

Finding of Fact 4.

"Leyen Food's failure to produce source records and other documents was intentional." (CP 372)

Finding of Fact 5.

"Leyen Food's failure to fully answer interrogatories was also intentional." (CP 372)

Conclusion of Law B.

"Defendant Leyen Food's has intentionally and willfully disobeyed the aforementioned Court Orders of March 31, April 27 and June 8, 2015."

(CP 372)

In part, these findings and conclusion were fully supported by related findings including that Leyen's answers were materially incomplete and non-responsive (Finding 2 at CP 371), that Leyen had not produced the alleged loan agreements, security agreements, factoring

agreements, finance statements, documents of title or bills of sale, (Finding 1 at CP 371), that Leyen had failed to produce over 62 source records without any explanation as to why (Finding 2 at CP 372, and Finding 3 at CP 372), that all but one electronic record was reported deleted without explanation (Finding 3 at CP 372), that the Appellant Leyen had gone so far as denying the existence of records which “clearly exist.” (Finding 3 at 372).

The trial court then found that Appellant Leyen’s disobedience and “failure to answer interrogatories and to produce records [had] prejudiced and prevented Avalon Leasing from preparing for trial or taking depositions of Leyen’s witnesses, who themselves were not disclosed until June of 2015.” (CP 372, at Findings of Fact 6, see also Conclusion of Law D at CP 373). As of that time this case had been pending for approximately 18 months and trial was scheduled for the end June. It’s late disclosure of a few witnesses was literally on the “eve of trial” and failed to include numerous persons employed or associated with Leyen who had knowledge of material matters.

After making these findings and conclusions, the trial court then expressly considered whether to exclude evidence or whether a lesser

sanction would suffice (CP 372-373). In doing this analysis the lower court made the following conclusions of law.

Conclusion of Law C.

Among the sanctions available for violations of this rule is "[a]n order refusing to allow the disobedient party to support ... designated claims ... or prohibiting him from introducing designated matters in evidence" CR 37(b)(2)(B). *Burnet v. Spokane Ambulance, id.* The court may also exclude witnesses when a party fails to disclose them. *Allied Fin. Servs. v. Mangum*, 72 Wash.App. 164, 168, 864 P.2d 1 (1993). *Dempere v. Nelson*, 76 Wash.App. 403, 405, 886 P.2d 219 (1994), review denied, 126 Wash.2d 1015, 894 P.2d 565 (1995). The court may also dismiss the action or strike of pleadings. *Saar v. Weeks*, 105 Wash. 628, 178 P. 819 (1919).

(CP 372-73)

Conclusion of Law D.

The least restrictive remedy for Defendant Leyen Food's failure to comply with discovery is to prohibit the introduction of any testimony or evidence on issues which were the subject of the discovery (detailed explanation of omitted items is attached).

(CP 373)

The trial court interlined into the proposed order additional conclusions regarding the court's consideration of less sanctions and noted that lesser sanctions in the prior orders to compel had not been effective (CP 373, Conclusion E).

Appellant Leyen does not challenge these Findings of Fact nor Conclusions of Law, nor does it challenge the court's other findings (such as Finding of Fact 1, 2 and 3 at CP 371-372) or other conclusions (such as Conclusion E at lines 11-13, CP 373) relating to the deficiencies with the Appellant Leyen's discovery answers and its failure to provide any reasonable explanation as to "why" it had failed to comply with three (3) prior discovery orders plus its failure to comply with the case scheduling orders relating to disclosure of witnesses. (See also CP 2, CP 371-372.)

In this appeal the Appellant Leyen argues that it produced all records. This simply is not the case and is a frivolous argument. Leyen's non-compliance is evident from the trial court's uncontested findings and Leyen's own inchoate discovery answers. In view of the Appellant Leyen's argument, this brief will spend considerable time pointing out some of the deficiencies with its discovery answers.

Appellant Leyen's failure to comply with discovery is also why Appellant Leyen's claim to the funds long held in the court's registry was frivolous and why this appeal is frivolous. As noted by the trial court:

"Leyen Food has made no effort to supplement its production of documents or provide any explanation as to why (over 62) source records (many of multiple pages) were not produced"

(CP 372 at Lines 2-3).

Leyen has also failed to produce other records such as exhibits 4-9 to Avalon's Fourth Motion To Compel and Motion for Contempt (CP 371-372, Finding of Fact 2, examples of documents not produced at the exhibits CP 171-185). Digital records, inclusive of those in a manager laptop and other computers containing relevant records, were never produced as requested (CP 372 at Lines 7-8).

Respondent Avalon Leasing, Inc. ("Avalon") requests the court to affirm the Order Compelling Discovery and Judgment (CP 370-375) and to award Avalon reasonable attorney fees under RAP 18.9 and RCW 4.84.185 on the basis that this appeal is frivolous.

II. STATEMENT OF ISSUES.

A. Whether the trial court abused its discretion in entering its Order On Fourth Motion To Compel (CP 370-375) which prohibited the Appellant Leyen's from introducing certain evidence at trial which the Appellant Leyen had intentionally failed to provide or produce in discovery after three (3) prior Orders To Compel.

B. Whether Avalon should be awarded its reasonable attorney fees on appeal pursuant to RAP 18.9(a) and RCW 4.84.185 on the basis that this appeal is without legal merit and frivolous.

III. SUPPLEMENTAL STATEMENT OF THE CASE

This is an interpleader lawsuit to determine whether Appellant Leyen or Respondent Avalon are entitled to certain funds deposited into the King County Superior Court's registry. The funds at issue arise from Avalon's sale of salmon roe (caviar) to STI America, Inc ("STI"). STI commenced this lawsuit and deposited the funds with the court after receiving conflicting demands from Respondent Avalon and then subsequently from the Appellant Leyen. (See generally, declarations of E. Weigelt, CP 10-14, CP 37-47, and CP 58-61.)

During the lawsuit Appellant Leyen failed to comply with its discovery obligations resulting in four (4) discovery motions to compel and to exclude evidence.(motions at CP 1-9, 22-36, 50-57, 267-287 inclusive of attachments, orders at CP 18-21, CP 162-164, CP 114-117, and the forth order which is at the center of this appeal is at CP 370-375).

The fourth discovery order (CP 370-375) includes an order excluding certain evidence from being introduced at trial by Appellant's

Leyen due to its' failure to comply with the three (3) prior orders to compel and case scheduling orders. In view of the lower court's decision to exclude evidence, the parties then agreed to a stipulated Order On Claims (CP 397-400). Under this stipulation the parties agreed that Respondent Avalon's right, title, and interest to the funds would be found by the trial court to be superior to any claim which the Appellant Leyen could make at trial. (CP397-400). Under the stipulation the Appellant reserved the right of appeal. Appellant Leyen then filed this appeal on September 30, 2015 (CP 376-387, and an amended notice at CP 401-406).

IV. STATEMENT OF FACTS

In October 2012 Avalon entered into a purchase and sale contract with STI America for the purchase and sale of salmon roe (caviar). Under the roe purchase and sale agreement, Avalon sold \$82,000 worth of roe to STI on short term credit terms. STI America is a Japanese trading company which had a 20 plus year relation with Avalon. STI is not a party to this appeal. (The history of the case is set forth in the Declarations of E. Weigelt, including at CP 10-14, 37-47, 142-153, 154-164 exhibits.)

Prior to payment being received from STI by Respondent Avalon, Appellant Leyen made a claim against the ("STI") monies payable to

Avalon on the basis that Leyen was a “partner” of one of Avalon’s suppliers, Voyager Seafoods, Ltd (“Voyager”). The two entities, Leyen and Voyager, are each owned and managed by close relatives of Chinese ancestry. Confronted with conflicting demands for the funds, STI then commenced this interpleader lawsuit to determine the validity and priority of the two competing claims to the money. The money was ultimately deposited into the court’s registry and remains there as of today, over three years later. Avalon and Leyen answered the complaint and each asserted claims to the funds. *Id.*

As an unsecured creditor of Voyager Seafoods, the Appellant Leyen had no claim, lien or interest in the roe sold by Voyager to Avalon, nor any claim, lien or interest in Voyager’s account receivables from Avalon, if any. When Voyager apparently defaulted on its loans from Appellant Leyen, Leyen then attempted to change its “unsecured creditor” status to something more and Leyen represented that it was Voyager’s partner. This was the basis of its demand upon STI (CP 173). (This was also one of the documents not produced in discovery by Leyen.)

Leyen’s relation with Voyager has been a matter in dispute and the subject of discovery. They share a common “manager”, Lester Zhou,

who is also related to Leyen's principal, Mr. H.Y. Liang. Mr. Zhou's conduct is at the center of the discovery problems in this case. It was also at the center of discovery problems in the companion case brought by Avalon against Voyager, Ltd. its principal, Lester Zhou. (CP 78-88) The companion case was for an accounting and for monies owed to Avalon. (Avalon ultimately obtained a judgment for well over \$223,000 against Voyager and Lester Zhou for monies due, none of which has yet been paid.) The judgment was entered after Defendants and Mr. Zhou had disregarded four (4) discovery orders. (CP 78-88) In view of this judgment, Leyen disavowed its prior position of being "Voyager's partner" and then claimed an interest in the STI funds on other grounds. (See generally, declarations of Weigelt CP 10-14, CP 37-47, CP 58-86 at CP 61-62, Orders against Voyager at CP 75-76, and CP 78-96.)

Leyen next claimed to be a "secured creditor" of Voyager Seafoods, Ltd. (Avalon's supplier). When Avalon filed a summary judgment in the present case demonstrating that Leyen was NOT a secured creditor (of either Voyager or Avalon), Leyen then claimed to be an "assignee" and "owner" of the roe. Appellant Leyen's shifting characterization of the basis of its claims to the funds and to Leyen's

relation with Voyager became the subject of the discovery in the present case. (The history of discovery set forth generally in declarations of Weigelt at CP 10-14, CP 37-47, CP 58-62 plus exhibits, CP 142-153, plus exhibits at CP 154-248, and generally in Findings 1, 2 and 3 CP 371-373.)

In the present case, Avalon sought discovery in the form of requests for admissions, the attempted deposition of Lester Zhou (Leyen regional manager), interrogatories and requests for production of documents. The Requests for Admissions asked Appellant Leyen to admit that it did not have an interest in the roe or roe sale proceeds because: (a) Leyen did not have any liens or security interests in monies owed to it by Voyager or Avalon; (b) Leyen was not the supplier, seller, or owner of the roe (caviar) (c); Leyen was not a factor of/for Voyager or Avalon, and that it did not have any assignments of inventory or account receivables; (d) Leyen was not the seller of the roe to STI; and (e.) Leyen did not have a sales contract with STI America. *Id.*

Appellant Leyen denied each and every request for admission. (Admissions at CP 193-201) In denying the admissions Leyen was substantively claiming an interest in the funds on numerous alternative grounds. To flush out Appellant Leyen's "position", Respondent Avalon

then sought discovery by way of two sets of interrogatories, two sets of requests for production of records, and the deposition of Lester Zhou. *Id.*

Appellant did not honor its discovery obligations and repeatedly failed and refused to fully and completely answer the discovery. Appellant barely responded at all. In summary, and without limitation, it:

- (a) Failed to fully answer interrogatories;
- (b) Failed to produce the records which it had alleged were the basis of its claim to the funds including alleged loan agreements, security agreements, promissory notes, finance statements, factoring agreements, assignments and other business records;
- (c) Withheld more than 63 or more relevant source documents which were actually referenced in the few records it did produce;
- (d) Failed to produce other records which were known to exist and obtained from third parties;
- (e.) Destroyed or failed to produce the many electronic records known to exist with the possible exception of a single email, i.e., it produced one (1) email;
- (f.) Known digital records, inclusive of those in a manager laptop and other computers, each known to contain important relevant records, were never produced as requested;
- (g) Failed to make its regional manager Mr. Zhou available for deposition for over one year.

The Appellant also failed to file a disclosure of witnesses pursuant to the Case Scheduling Order and Amended Case Scheduling Order until literally the eve of trial, past court deadlines, which other than being long

past court mandated deadlines, was also much too late to schedule out-of-state depositions.

Leyen's discovery answers to Avalon's second set of interrogatories and requests for production of documents is at CP 203 to 247 including its entire production of documents, which consists of a single email, a Card transaction report, chum salmon transaction list and an invoice. (no source records, no digital records, and NO documents which were the basis of Leyen denying Avalon's requests for admissions).

Overall, the inadequacy of Leyen's discovery responses was he subject of four discovery motions to compel. The trial court granted each of the motions and entered three (3) orders to compel Appellant Leyen to provide full and complete discovery answers, to produce all records, and to make Mr. Zhou available for his deposition by a date certain. (Orders at CP 18-21. 114-117. Copy of second order is attached as exhibit to declaration of E. Weigelt 154-248 at CP 161-164.) The order on the fourth motion, Order Compelling Discovery and Judgment, is the subject of the present appeal. (Motion at CP 267-287, Order CP 370-375.) The orders provided for increasing monetary sanctions and assessment of attorney fees. These sanctions were not effective and Appellant Leyen

continued to disregard its discovery obligations and the court's orders. More specifically, the following motions were brought and orders issued:

March 20, 2015 Avalon First Motion To Compel. (First Set of Discovery) (CP 1-9)

Respondent Avalon, after numerous unanswered discovery requests, filed its first Motion To Compel on March 20, 2015. (CP 1-9). Appellant Leyen Foods requested additional time (CP 15-17). On March 31, 2015 the court granted Avalon's first Motion To Compel and ordered Leyen to provide full and complete answers and to produce all records by a specific date (CP 18-21). The court also assessed sanctions against Leyen for a portion of Respondent's detailed attorney fees incurred to bring the motion. (These first nominal sanctions were the only ones paid.)

The Court's order of March 31, 2015 (CP 18-21) related to the Respondent Avalon's first set of discovery. Relevant to the present motion is that the order admonished Leyen Foods to comply with discovery and indicated that: More specifically the court ordered:

ORDERED, the Defendant Leyen Foods shall fully and completely answer the Defendant Avalon Leasing's First Set of Interrogatories to it by April 3, 2015; and it is further,

ORDERED, the Defendant Leyen Foods shall fully and completely answer the Defendant Avalon Leasing's First Set of Requests For Production to it by April 3, 2015; and it is further,

ORDERED, the Defendant Leyen Foods' manager Zester Zhou to appear for his deposition by April 6, 2015, or such later date as agreed upon in writing and consented to by Avalon Leasing; and it is further

(CP 20-21). The court added to the proposed order the following admonishment;

“Failure to fully comply with this order may in the future, if sufficient showing is made under relevant case law, result in even more sanctions.”

(CP 20-21). The Appellant Leyen did not comply with this order. When Appellant failed to fully answer the interrogatories and failed to produce responsive records, the Respondent Avalon filed its Second Motion To Compel on April 7, 2016 (CP 22-36).

April 7, 2015 Avalon Motion To Compel. (CP 22-36)

On April 27, 2015, the lower court granted Avalon's Second Motion To Compel and again admonished Appellant Leyen to provide “full and complete answers” and to produce all records. (Docket at 57, copy of order attached at CP 162-164.) With the June trial date rapidly approaching, the court imposed still modest daily sanctions and awarded Avalon a portion of its attorney fees. The court's order is clear:

ORDERED, the Defendant Leyen Foods shall fully and completely answer the Defendant Avalon Leasing's First Set of Interrogatories by April 18, 2015; and it is further,

ORDERED, the Defendant Leyen Foods shall fully and completely answer the Defendant Avalon Leasing's First Set of Requests For Production by April 18, 2015; and it is further,

ORDERED, Avalon Leasing is awarded attorney fees and costs against Leyen Foods in the amount of \$1,360.49 which shall be paid by 4:00 p.m. of April 18, 2015, and if not so paid, Avalon Leasing shall be entitled to reduce this award to Judgment against Leyen Foods and shall be entitled to additional reasonable attorney fees to do so; and it is further,

ORDERED, Defendant Leyen Foods is assessed daily sanctions of \$250 per day after April 15, 2015 for each day that Defendant Leyen Foods fails to fully, accurately and completely answer Avalon Leasing's First Set of Interrogatories PLUS \$250 per day after April 15, 2015 for each day it fails to produce at Mr. Weigelt's office any and all records subject of the Avalon Leasing's First Set of Requests For Production.

(CP 162-163). Instead the court added:

Ordered, further, **much** more serious sanctions will be considered if Defendant Leyen Foods does not very soon come into compliance with this Court's discovery orders and case schedule."

(CP 163, see also Dec. *Weigelt, May 27, 2015, Ex 2 Order 4.27.15, page 2, emphasis in original order.*)

Thereafter Appellant Leyen partially "answered" the discovery. However, its answers were incomplete and the core documents were not produced. Leyen also had failed to answer Avalon's second set of discovery. This prompted the third motion to compel.

May 28, 2015 Avalon Motion To Compel (CP 50-57).

Avalon then filed its third discovery motion. (CP 50-57) The inadequacies of the answers to Avalon's first set of discovery is discussed in the Declarations of Mr. Weigelt, including at CP 58-65, and again in connection with the forth motion at CP 142-153, and exhibits at CP 154-248)

Also relevant to this motion was Avalon had sought Mr. Lester Zhou's deposition for over one (1) year. He is Leyen's regional manager. Mr. Lester Zhou deposition had originally been noted for **April 14, 2014, over a year before the scheduled June, 2015, trial date, but he never appeared, and was never available after that date.** (CP 62). The depositions of other potential witnesses were also linked to Respondent's Avalon's ability to first take Mr. Zhou's deposition. Leyen's failure to present Mr. Zhou for deposition badly impaired and prejudiced Respondent's Avalon's ability to obtain important information and documents critical to its' case in trial court. This, along with so many other issues before the trial court, and to now be considered by this court, relate directly to Leyen's willful non-compliance with required discovery Leyen

simply ignored. It is also a good example of Leyen's disregard of required discovery and several related Court Orders never complied with.

The court granted Avalon's Third Motion To Compel and again ordered Appellant Leyen to provide full and complete answers and to produce all records (CP 114-117). The court then imposed higher daily sanctions. The court's order stated:

ORDERED, the Defendant Leyen Foods shall fully and completely answer the Defendant Avalon Leasing's First Set of Requests For Production by June 10, 2015; and it is further,

ORDERED, Defendant Leyen Foods shall pay to Avalon Leasing the sum of \$3,500 as sanctions relating to Leyen Foods failure to, and if not so paid, Avalon Leasing shall be entitled to reduce this award to Judgment against Leyen Foods and shall be entitled to additional reasonable attorney fees to do so; and it is further,

ORDERED, Defendant Leyen Foods is assessed daily sanctions of \$500 per day after June 5, 2015 for each day that Defendant Leyen Foods fails to fully, accurately and completely answer Avalon Leasing's First Set of Interrogatories PLUS \$500 per day after June 5, 2015 for each day it fails to produce at Mr. Weigelt's office any and all records subject of the Avalon Leasing's Second Set of Requests For Production, and it is further,

(CP 115-116). The court also added one more admonishment. Appellant Leyen still, though, failed to fully answer discovery. This led to the fourth motion to compel.

June 22, 2015 Motion In Limine-- Motion To Compel. (CP 267-287)

On June 26, 2015, the trial court granted Avalon's fourth discovery motion and entered the subject order in limine (CP 370-375). In response to Avalon's motion the Appellant Leyen tried to claim it had complied with the prior orders and answered the discovery. The lower court was not persuaded and granted Avalon's fourth discovery motion to compel and issued the order in limine (motion CP 267-287, order CP 370-375). The court issued its order excluding evidence at CP 374 and a judgment for unpaid sanctions at CP 374. (Full order at CP 370-375). The order excluding evidence states at CP 374:

ORDERED ADJUDGED AND DECREED that the Defendant Leyen Food's may not introduce any evidence or testimony at trial relating to any claim to the STI funds held by this court, including any claim it has based on it allegedly being a secured party, owner, seller, partner, joint venture owner with Voyager, a purchaser of the salmon or roe who resold it, or otherwise; and it is further,

It should be noted that the lower court declined to order more harsh sanctions which had been requested Respondent such as for an order striking Appellant Leyen's pleadings, an order of default and finding of contempt (CP 374). The harsher sanctions to strike pleadings, default and contempt were denied.

As part of the fourth Order (CP 370-375), the lower court also, however, made specific findings (at CP 371, 372) and conclusions (CP 373, 374). Of particular relevance are Findings of Facts 4, 5 and 6 (CP 372). These findings were that Appellant Leyen had failed to produce source records and that its failure to produce all documents was intentional (Finding 4), that its failure to fully answer interrogatories was also intentional (Finding 5), and that its failure to answer interrogatories and to produce records prejudiced and prevented Avalon Leasing from preparing for trial or taking depositions of Leyen's witnesses, who themselves were not disclosed until June of 2015 (CP 372 at Finding 6).

The court also found that Leyen had not made its witnesses available for deposition despite the Court's order of March 31, 2015 ordering that its witnesses appear for deposition by April 6, 2015. (CP 372, Finding 6). The court also found that Leyen's answers to interrogatories do not disclose any persons who have any knowledge of, or involvement with, the transactions or relations at issue (CP 372, Finding 6).

Appellant did not assign error to these findings. The court also made Conclusions of Law. Conclusions B, C, D reflect the court's analyses (CP 372-374). The court concluded that Leyen's conduct was intentional

and willful (Conclusion B), that it had disobeyed the court's three prior orders to compel (Conclusion B), that Avalon has been prejudiced (Finding 6, Conclusion E), and that the least restrictive remedy is to exclude evidence (Conclusion C, D and E).

B. Defendant Leyen Food's has intentionally and willfully disobeyed the aforementioned Court Orders of March 31, April 27 and June 8, 2015.

C. Among the sanctions available for violations of this rule is "[a]n order refusing to allow the disobedient party to support ... designated claims ... or prohibiting him from introducing designated matters in evidence" CR 37(b)(2)(B). *Burnet v. Spokane Ambulance, id.* The court may also exclude witnesses when a party fails to disclose them. *Allied Fin. Servs. v. Mangum*, 72 Wash.App. 164, 168, 864 P.2d 1 (1993). *Dempere v. Nelson*, 76 Wash.App. 403, 405, 886 P.2d 219 (1994), review denied, 126 Wash.2d 1015, 894 P.2d 565 (1995). The court may also dismiss the action or strike of pleadings. *Saar v. Weeks*, 105 Wash. 628, 178 P. 819 (1919)

D. The least restrictive remedy for Defendant Leyen Food's failure to comply with discovery is to prohibit the introduction of any testimony or evidence on issues which were the subject of the discovery. The main focus of the discovery in this case was related to Leyen Food's claim to the funds held by the Court. The discovery sought the underlying basis of Leyen's claim to the funds in the context of it being a secured creditor, owner, factor, partner, joint venture, purchaser of the salmon and roe and re-seller. Leyen food should be precluded from entering any evidence or calling any witness on these subject matters, and/or any other basis for which it claims an interest in the STI funds held by this court. Leyen has no claim to the funds.

E. The appropriate remedy is to prohibit Defendant Leyen Food from introducing any testimony or evidence regarding any alleged

claim it has to the funds held by the court. Leyen Foods has not produced any security agreements, finance agreements, loan agreements, UCC-1's, fish tickets, bills of sale, warehouse receipts, documents of title, sales records, or other evidence to support any claim that it has any interest in the funds as a lender, factor, buyer, owner of the salmon or roe, or that it purchased it. Leyen Foods may not introduce any evidence relating to these matters.

Leyen's answers to discovery were materially incomplete. These will be discussed in more detail in the argument section of this brief. Of import was that Leyen failed to produce any of the core business agreements which were the basis of its claim to the funds such as the alleged loan agreements, security agreements, assignments, etc. (Finding 1 at CP 371) and it also failed to produce the "source" records (Finding 2 at CP 372) and failed to produce electronic records (Finding 3 at CP 373), and did so without any explanation (Finding 2 and 3 at 372).

V. STANDARD OF REVIEW

A trial court has broad discretion as to the choice of sanctions for violation of a discovery order. *Phillips v. Richmond*, 59 Wash.2d 571, 369 P.2d 299 (1962). Such a "discretionary determination should not be disturbed on appeal except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Associated Mortgage Investors v. G.P. Kent*

Constr. Co., 15 Wash.App. 223, 229, 548 P.2d 558, review denied, 87 Wash.2d 1006 (1976).

When the trial court "chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed," and whether it found the disobedient party's refusal to obey a discovery order willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. *Snedigar v. Hodderson*, 53 Wash.App. 476, 487, 768 P.2d 1 (1989) (citing due process considerations) rev'd in part, 114 Wash.2d 153, 786 P.2d 781 (1990).

It is not an abuse of discretion to exclude testimony as a sanction for noncompliance with a discovery order when there is any showing of intentional nondisclosure, willful violation of a court order, or other unconscionable conduct.' " *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wash.2d 693, 706, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.*, 39 Wash.App., 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, review denied, 103 Wash.2d 1041 (1985). *Burnet v. Spokane Ambulance*, 933 P.2d.

A finding of fact entered by the trial court will not be reversed when the finding is supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959).

VI. ARGUMENT— DISCOVERY SANCTIONS

The trial court did not abuse its discretion by excluding evidence as a sanction because the Appellant Leyen's repeated failures to comply with three (3) discovery orders were intentional violations of those orders and also centered on willful nondisclosure and concealment of relevant evidence. The trial court's order barring evidence was a reasonable sanction based on tenable grounds. Underlying the trial court's decision was the Appellant's failure to comply with three (3) prior court orders which had commanded the Appellant to provide full and complete answers to interrogatories, to produce all records; and make the primary witness in the case, the Appellant's regional manager Lester Zhou, available for his deposition. Appellant Leyen did not obey these orders despite the imposition of increasing monetary sanctions, assessment of attorney fees, and daily monetary sanctions (which ultimately amassed to over \$32,000 in sanctions).

Before ordering the exclusion of evidence, the trial court duly considered whether the Appellant Leyen's conduct was intentional or willful and whether Appellant Leyen's failure to comply with discovery prejudiced the Respondent Avalon.

The trial court correctly concluded that the Appellant's conduct was an intentional and willful violation of the court's discovery orders and such disobedience had prejudiced the Respondent Avalon. The trial court's decision was fully supported by specific findings of willful disobedience of the prior court orders and also supported by the court's conclusions of law and its findings. The trial court found and concluded that Appellant Leyen's failures to comply with the three (3) prior orders to compel were (a) willful, (b) intentional, and (c) without any adequate excuse or explanation. Appellant Leyen did not assign error to the lower court's findings and conclusions. Moreover, the trial court's findings are supported by the undisputed evidence including Appellant Leyen's failure to produce identified source records, failure to produce the alleged core documents which go to the heart of its claims to the funds in dispute, and Leyen's withholding/destruction of records such as emails.

Prior to excluding evidence the lower court fully considered whether less harsh sanctions would suffice and concluded they would not. The court also found and concluded that the Appellant's misconduct prejudiced the Respondent. The trial court's order was thus in full compliance with the requirements adopted by the Supreme Court in *Burnet v. Spokane Ambulance*, id., and not an abuse of discretion. The order barring the introduction of evidence (CP 370-375) was the least punitive sanction left available to the court.

1. *The Appellant Leyen Failed To Comply
With Three Prior Discovery Orders.*

The trial court correctly found that Appellant Leyen had not complied with prior three (3) discovery orders. This is apparent when we consider a party's discovery obligations and Appellant's non-compliance with that standard. The court's findings and conclusions that Leyen had failed to fully answer interrogatories and failed to produce the core documents and source records was supported by the undisputed facts.

A party's discovery obligations are derived from the purpose of discovery. The purpose of discovery is to provide a mechanism for making relevant information available to the litigants since "[m]utual

knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451] (1947). Given this fundamental purpose it is well established Washington law that a party responding to discovery requests has an affirmative duty to respond in accordance with the purpose and intent of the court rules. *Peacock v. Piper*, 81 Wa.2d 731, 504 P.2d 1121 (1973).

A responding party has an affirmative duty to disclose facts to the "fullest practical extent" and not to engage in a "game of blind man's bluff." *Taylor v. Cessna Aircraft Co., Inc.*, 39 Wash. App. 828, 696 P.2d 28 (1985). Civil Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 341-342, 858 P.2d 1054, (Wash. 1993).

In disregard of these duties, Appellant Leyen did not disclose facts to the fullest practical extent but engaged in a shell game and a game of blind man's bluff. In granting the Respondent's Fourth Discovery Motion the lower court made a series of findings of fact regarding the inadequacy

of Leyen's discovery responses. Appellant has not assigned error to the lower court's findings of fact and conclusions of law.

The inadequacies with Leyen's discovery answers are noted in the lower court's order granting Avalon's fourth motion. The order, at CP 371, finds that Avalon had sought discovery of, and Leyen had failed to produce, the core documents at issue. Without limitation, the court found at Finding 1 and 2 that Leyen had not complied with its three prior Orders to Compel entered on March 31, 2015, April 27 and June 8. In Finding 1 the court found:

“Leyen Food has not produced a security agreement, finance statement, loan agreement, security agreement, factoring agreement, or documents of title indicating that it purchased the salmon or roe, such as, fish tickets, warehouse receipts, bills of sale, or even purchase invoices” (CP 371, Finding 1).

The court also found that: “Its [Leyen's] answers were materially incomplete and non-responsive” (CP 371, Finding 2), and it then found that Leyen had also failed to explain why its answers were deficient. The court found:

“Leyen has made no effort to supplement its deficient answers to interrogatories or provide any explanation as to why it could not do so” (CP 371-372 Finding 2).¹

While Appellant Leyen produced some “fluff and filler” type of documents, it failed to produce any of the required source records including the (62+) source records referenced in the few documents it actually produced. **None of the underlying core source documents which were identified were produced. The following 53 source records were referenced but not produced:**

Document reference numbers: 854309, 7499, 7498, 7515, 7516, 7521, 7517, 7513, 854310, 7523, 7520, 7514, 7593, 7522, 7518, 854311, 854312, 7525, 7526, 7524, 7519, 854313, 7566, 7565, 7562, 7599, 7561, 7560, 854315, 85314, 7572, 7573, 854316, 7579, 7580, 854317, 7589, 854318, 854318, 853420, 7615, 7617, 7613, 7618, 854321, 7614, 7616, 854322, 7624, 7623, 7626, 7625, 854323.

¹ Findings of Fact 2: “On March 31, 2015, Leyen Food was ordered to fully and completely answer all interrogatories and produce all records pursuant to Avalon’s first and second set of interrogatories and requests for production of documents. Leyen partially answered the first set of discovery on or about April 8, 2015. However, its answers were materially incomplete and non-responsive. On April 27 and again on June 8, 2015 the Court ordered Leyen Food to provide full and complete answers and to produce all documents. Leyen Food has made no effort to supplement its deficient answers to interrogatories or provide any explanation as to why it could not do so. Leyen Food has made no effort to supplement its production of documents or provide any explanation as to why over 62 source records were not produced. It also failed to produce other records such as exhibits 4-9 to Avalon’s Fourth Motion To Compel and Motion For Contempt.”

Leyen also failed to produce underlying source records, including those with reference numbers **10206, 207, 10209, 210, 211 10284, 285, 286, 287, 288, 10289 & 290 10295, 296.**

The trial court expressly found that Leyen had failed to produce these records and that it had also failed to give any explanation as to why:

“Leyen Foods has made no effort to supplement its production of documents or provide any explanation as to why (over 62) source records were not produced”. It also failed to produce other records such as exhibits 4-9 to Avalon’s Fourth Motion to Compel and Motion For Contempt) (CP 372, Finding 2 lines 2-3) ²

The court also found that: “The source records were not produced” (CP 372 Finding 3, line 6). “Electronic copies were not produced” (CP 372, Finding 3, Line 7). Electronic records were reported as being deleted without explanation of why or whether any attempt to recover them was made” (CP 372, Finding 3, lines 8-9).

² Finding of Fact 3. “On June 8, 2015 this Court also ordered Leyen Food to answer Avalon’s second set of discovery. This was answered, but again, the answers were not complete, lacked details such as identification of persons having knowledge of the subject matter of the interrogatory, and description of documents. A few additional documents were produced, however, the production was incomplete. The source records were not produced. Electronic copies were not produced. Electronic records were reported as being deleted without explanation of why or whether any attempt to recover them was made. Leyen failed to produce records and even went so far as to having denied the existence of several records relevant to determining the relation between Voyager Seafood and itself, which clearly exist, as suggested by exhibits 4-9 of Avalon’s current motion.”

The court found that Leyen had concealed records: “Leyen failed to produce records and even went so far as having denied the existence of several records relevant to determining the relation between Voyager Seafood and itself, which clearly exist, as suggested by exhibits 4-9 of Avalon’s current motion” (CP 372, Finding 3, line 8-10). The referenced exhibits include documents identifying Mr. Zhou being *assistant manager of Leyen Food, LLC*.... (CP 171 Dec exhibit 4, page 1—document was not produced in discovery by Leyen).

The Appellant did not assign error to the court’s findings and are verities on appeal. However, even it had, the finding of fact entered by the trial court will not be reversed when the finding is supported by substantial evidence. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959). The trial court’s findings are supported by undisputed evidence.

Leyen’s answers to first and second set of interrogatories were inadequate and provided little information and were non- responsive. (See generally, declarations of Weigelt, CP 58-86, CP 142-153, and exhibits.) The deficiencies with Leyen’s answers to Avalon’s first set of interrogatories and requests for production of documents

For example: Interrogatory No. 2 and Request For Production 2 sought information about the terms of the business relation between Leyen Food and Lester Zhou and/or Debbie Liang, including any partnership, Mr. Zhou's employment or other relation with Leyen, the dates of the relation, its purpose, and identification of persons who were involved in an ownership or managerial capacity. Leyen's answer was to deny having any relation with them.

However, as noted *Lester Zhou was Appellant Leyen's regional manager.* (CP 171) Likewise Interrogatory No. 3 and Request For Production 3 sought information and records related to any communications between Leyen and STI as that: "We have no direct contact with STI. We obtain purchase order from Voyager Seafood." It should be noted that Leyen's very communications with STI demanding money is the event which triggered this very lawsuit. It now denies having communications with STI.

Fundamentally Avalon's Interrogatory No. 5 and Request for Production 5 of the first set of discovery go to the heart of the Appellant's claim to the being the "owner" and "seller" of the roe. Leyen's answers are discussed generally in the declarations of E. Weigelt, including at CP 142-153, at 147-153. Leyen's answer is unresponsive. The interrogatory,

requests, and Leyen's answers were as follows:

INTERROGATORY NO. 5 Please provide a full and complete itemization of all salmon, salmon roe, fish, and fish productions which you purchased or otherwise acquired from Voyager Seafood, Ltd., Lester Zhou, or from K & W Food, LLC, in 2012, and identify all records relating to or evidencing those transactions. A complete answer would identify and describe any and all monies/property paid by you to Voyager Seafood, Ltd or Lester Zhou, the dates paid, and identification of all records related to these transactions.

ANSWER: **“Voyager Seafood will bring it.”**

REQUEST FOR PRODUCTION NO. 5: All documents relevant to, evidencing, substantiating, or identified in your answer to Interrogatory Number 5.

ANSWER: **“Voyager Seafood will prove it.”**

(CP 142-153 at 147-149) These answers not responsive. They are disingenuous since Voyager (Leyen's one time alleged partner) and Zhou (Leyen's regional manager) did not produce the records in the companion lawsuit despite four (4) orders to compel. The discovery problems in both cases center on the conduct of the same persons, and principally Mr. Lester Zhou.

Appellant's other answers were equally non-responsive and evasive.

It did not provide business structure information such as the names of the corporate officers and managers because “it is confidential” (Interrogatory No. 8). It did not provide the names of persons who may have relevant information (Interrogatory No. 9). In Leyen’s words: “No, there is no one else has knowledge of this case.” In answer to the second set of discovery Leyen indicates it deleted the emails. There is no statement of any efforts made to recover or produce these documents (CP 142-153, at 148 to 152).

Likewise, Appellant failed to produce any of the core business records supporting its claims as a secured creditor, factor, owner, seller and assignee. The court’s findings are not appealed and, even if appealed, they are supported by overwhelming evidence.

2. *Leyen’s Failure To Comply With Discovery Requests Was Intentional and Wilful Disobedience of Three Discovery Orders*

The trial court correctly concluded that the Appellant’s actions were intentional and willful. Non-compliance with discovery is deemed intentional in the absence of a reasonable excusing explanation. In the context of the present case three (3) prior orders to compel and the imposition of over \$32,000 in sanctions had not been sufficient to obtain

Leyen's compliance with discovery. It continued to ignore the court's orders without any explanation.

A violation of a court order without reasonable excuse will be deemed willful. *Allied Fin. Servs v. Mangum*, 72 Wash.App. 164,168, 864 P.2d 1, 871 P.2d 1075 (1993), citing *Lampard v. Roth*, 38 Wash.App. 198, 202, 684 P.2d 1353 (1984); *Anderson*, 24 Wash.App. at 574, 604 P.2d 181. See also *Snedigar v. Hoddersen*, 114 Wash.2d 153, 169, 786 P.2d 781 (1990), *Taylor v. Cessna Aircraft Co.*, 39 Wash.App. 828, 836, 696 P.2d 28 (a violation of the discovery rules is willful if done without a reasonable excuse). A party's failure to comply with a court order will be deemed willful if it occurs without reasonable justification. *Magaña v. Hyundai Motor Am.*, 167 Wn.2d 570, 584, 220 P.3d 191 (2009) (citing *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 686-87 & n.54, 41 P.3d 1175 (2002)).

Leyen did not give any explanation as to why is had failed to fully and completely answer interrogatories or produced records, or why Leyen failed to pay substantial sanctions levied against it. Leyen's actions follow on the heels of its partner, Voyager, i.e., failing to comply with discovery in the companion case. The discovery problems center on the

conduct of the same persons—Lester Zhou, as well as others at Leyen, including its principals. Close relatives of both firms, Leyen and Voyager, are directly involved. Leyen answers that “Voyager would provide it” or “Voyager will bring it” is non responsive, evasive, and disingenuous at best. It shows contempt for the court’s orders and its discovery duties in both the present and companion cases.

The lower court found that Leyen’s failures to comply with discovery were intentional. Without limitation, the court entered the following findings and conclusions:

Finding of Fact 4.

“Leyen Food’s failure to produce source records and other documents was intentional.”

Finding of Fact 5.

“Leyen Food’s failure to fully answer interrogatories was also intentional.”

Conclusion of Law B.

“Defendant Leyen Food’s has intentionally and willfully disobeyed the aforementioned Court Orders of March 31, April 27 and June 8, 2015.”

(CP 370-375 at 372)

Appellant has not assigned error to these findings or conclusion.

3. The trial court's decision to bar evidence was the least severe remedy available to the court and is supported by uncontested findings of fact and conclusions of law

The lower court did not error in awarding sanctions. "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense." *Cascade Brigade v. Economic Dev. Bd.*, 61 Wash.App. 615, 619, 811 P.2d 697 (1991); see generally, *Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (Wash. 1993) The lower court's decision to bar evidence was the least punitive sanction left available to the court, and less than Respondent's alternative requested remedy that the court strike Appellant's pleadings. In ordering the exclusion of evidence the trial court expressly followed the procedure and guidance of the Supreme Court decisions of *Burnet v. Spokane Ambulance*, 933 P.2d 1036, 131 Wn.2d 484 (Wash. 1997).

The sanctions available to a court for violations of discovery is "[a]n order refusing to allow the disobedient party to support ... designated claims ... or prohibiting him from introducing designated matters in evidence" CR 37(b)(2)(B). *Burnet v. Spokane Ambulance*, *id.* The court may also exclude witnesses because when a party fails to disclose them.

Allied Fin. Servs. v. Mangum, 72 Wash.App. 164, 168, 864 P.2d 1 (1993).
Dempere v. Nelson, 76 Wash.App. 403, 405, 886 P.2d 219 (1994), rev.
denied, 126 Wash.2d 1015, 894 P.2d 565 (1995). As a last resort the court
may also dismiss the action or strike pleadings. *Saar v. Weeks*, 105 Wash.
628, 178 P. 819 (1919) (responding party effectively answered only 2 of
44 interrogatories).

In assessing the sanctions, the lower court considered whether the
failure to permit discovery prejudiced Avalon. The trial court expressly
found that Avalon was prejudiced. (Finding 6 at CP 372). Appellant did
not assign error to this finding. The finding states:

6. Leyen Food's failure to answer interrogatories and
to produce records prejudiced and prevented Avalon
Leasing from preparing for trial or taking depositions of
Leyen's witnesses, who themselves were not disclosed until
June of 2015. Leyen has not made its witnesses available
for deposition despite this Court's order of March 31, 2015
ordering that its witnesses appear for deposition by April 6,
2015. The trial is scheduled for June 29, 2015. Leyen
Food's answers to interrogatories do not disclose any
persons who have any knowledge of or involvement with
the transactions or relations at issue.

This finding was supported by the facts. The fourth order was
entered on the eve of trial. Discovery had been closed a month before.

Leyen's known witnesses had not appeared for depositions. Leyen has still not produced core documents at issue. At the time this case has been pending for over two years. It is impossible for Avalon to investigate Leyen's claims and depose unknown persons whose whereabouts are also unknown. Leyen's failure to answer discovery precluded Avalon from being able to evaluate its claims to the funds or determine its liability.

In weighing the possible sanctions the court also made findings that it deemed the exclusion of evidence as the least punitive. The prior orders imposed monetary sanctions, including assessments of attorney fees, and daily sanctions. These were not effective. As of June, 2015, the sanctions had amassed to over \$31,982 (CP 370, 373) as follows.

Dailey sanctions Order of April 27, 2015	\$24,000.00
Sanctions pursuant to Order of June 8, 2015:	3,500.00
Attorney Fees pursuant to Order of June 8, 2015:	3,082.49
Dailey sanctions Order June 8, 2015	1,400.00

Given the ineffectiveness of monetary sanctions, the court considered the next least sanction of excluding evidence. The court concluded:

Conclusion of Law C.

Among the sanctions available for violations of this rule is "[a]n order refusing to allow the disobedient party to support ... designated claims ... or prohibiting him from introducing

designated matters in evidence" CR 37(b)(2)(B). *Burnet v. Spokane Ambulance*, *id.* The court may also exclude witnesses when a party fails to disclose them. *Allied Fin. Servs. v. Mangum*, 72 Wash.App. 164, 168, 864 P.2d 1 (1993). *Dempere v. Nelson*, 76 Wash.App. 403, 405, 886 P.2d 219 (1994), review denied, 126 Wash.2d 1015, 894 P.2d 565 (1995). The court may also dismiss the action or strike of pleadings. *Saar v. Weeks*, 105 Wash. 628, 178 P. 819 (1919).

Conclusion of Law D.

The least restrictive remedy for Defendant Leyen Food's failure to comply with discovery is to prohibit the introduction of any testimony or evidence on issues which were the subject of the discovery. (Detailed explanation of omitted.)

Conclusion E.

The appropriate remedy is to prohibit Defendant Leyen Food from introducing any testimony or evidence regarding any alleged claim it has to the funds held by the court. Leyen Foods has not produced any security agreements, finance agreements, loan agreements, UCC-1's, fish tickets, bills of sale, warehouse receipts, documents of title, sales records, or other evidence to support any claim that it has any interest in the funds as a lender, factor, buyer, owner of the salmon or roe, or that it purchased it. Leyen Foods may not introduce any evidence relating to these matters, and its claims to the funds should be stricken.

(CP 372-373)

Appellant has not assigned error to any of these findings or conclusions. It is not an abuse of discretion to exclude testimony as a sanction for noncompliance with a discovery order when there is any showing of (a) intentional nondisclosure, (b) willful violation of a court order, or (c) other unconscionable conduct. *Fred Hutchinson Cancer*

Research Ctr. v. Holman, 107 Wash.2d 693, 706, 732 P.2d 974 (1987) (quoting *Smith v. Sturm, Ruger & Co.*, 39 Wash.App., 740, 750, 695 P.2d 600, 59 A.L.R.4th 89, review denied, 103 Wash.2d 1041 (1985)).

In the present case the Appellant disregarded three prior orders to compel, plus the case scheduling orders. Appellant's answers to interrogatory were incomplete and failed to disclose potential witnesses. The repeated violation of three orders to provide "full and complete answers", and failure to produce documents which are themselves identified from the few records produced, and failure to produce core records which are the basis of Leyen's claims is unconscionable conduct. The trial court did not err in excluding evidence.

VII. ARUGMENT – FRIVOLOUS APPEAL AND ATTORNEY FEES.

1. *This appeal and Appellant's erroneous claims that it had complied with its discovery obligations are made in bad faith, unsupported by the facts or law, and are frivolous.*

An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, *Kearney*, 95 Wn.App. at 417 (citations omitted), and it is so devoid of merit that there is no

reasonable possibility of reversal. *Matheson v. Gregoire*, 139 Wn.App. 624, 639, 161 P.3d 486 (2007); *Fay v. N.W. Airlines, Inc.*, 115 Wash.2d 194, 200-01, 796 P.2d 412 (1990). The present appeal is frivolous and is a continuation of the Appellant's allegations of unfounded and unsupported claims to funds it has no interest in or right to receive. Appellant repeatedly disobeyed orders, and refused to produce the core documents which it claimed were the basis of its claims, (loan agreements, security agreements, sale records, factoring agreements, assignments, etc.) and the source records which it identified but refused to produce.

The Appellant's appeal is frivolous because reasonable minds could not differ that the Appellant willfully and intentionally disobeyed three court orders to fully and completely answer all interrogatories and produce all records. The deficiencies in its discovery answers go to the central issue in dispute, that being the basis of Leyen's alleged claim to the funds in dispute. Leyen has tied up the funds for over three years on the basis of frivolous and contradictory claims of having an interest in the funds. In discovery, Leyen did not produce any of the alleged core agreements (Finding 1, CP 371), nor did it produce source records. (Finding 2 and 3, CP 372-373).

Reasonable minds could not differ on the conclusion that the Appellant ignored its discovery obligations and then disobey three orders. There are no reported decisions which the undersigned counsel could find, nor identified by the Appellant itself, that have reversed a trial court's discovery sanction based on multiple violation of prior orders. The trial court's findings of intentional and willful disobedience are verities on appeal. As such this appeal is so devoid of merit that there is no reasonable possibility of reversal. Fees should be awarded in this circumstance. *Matheson v. Gregoire, Id.*

2. Avalon should be awarded its attorney fees on appeal against the Appellant Lyeen Foods pursuant to RAP 18.9 and RCW 4.84.185

Appellant requests attorney fees and costs for defending against this frivolous appeal pursuant to RAP 18.1, RAP 18.9 (a) and RCW 4.84.185,

RAP 18.9(a) authorizes an award of compensatory damages against a party who files a frivolous appeal. *Kearney v. Kearney*, 95 Wn.App. 405, 417, 974 P.2d 872 (1999), review denied, 138 Wn.2d 1022 (1999). RCW 4.84.185 also provides that the "prevailing party . . . receive

expenses for opposing frivolous action or defense” and provides guidance as to when an appeal is frivolous. The statute states:

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the non prevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense.

The thrust of this statute is to assess costs and attorney fees when a party advances a claim or defense without reasonable cause. In this appeal the Appellant has advanced a single issue relating to the trial court’s discretionary decision to exclude evidence. The trial court undisputedly followed both the spirit and intent of law by considering and then imposing an appropriate sanction. The Appellant’s arguments on appeal lacks any factual basis or law to support this appeal. The appeal presents no debatable issues and is hence frivolous and attorney fees should be assessed against the Appellant.

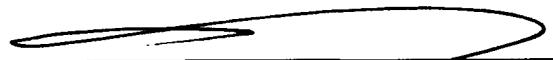
VI. CONCLUSION

The trial court’s orders and judgment in this case should be affirmed. Lesser sanctions had not been effective to obtain Appellant’s compliance with discovery. The exclusion of evidence was the least

severe sanction left available to the court since the prior sanctions of fixed monetary amounts, attorney fees, and then the imposition of “daily” monetary sanctions for each day of continued non-compliance had each been ineffective in getting Appellant to comply with its discovery obligations. Underlying the sanctions were the Appellant Leyen’s repetitive failures to comply with discovery requests and responding with incomplete and evasive, unresponsive interrogatory, failure to produce its main witness and regional manager, Lester Zhou, for deposition for over one year, and failure to produce the core documents and source records. The trial court did not error by excluding evidence which was not disclosed or provided in discovery.

Respondent Avalon should be awarded its reasonable attorney fees and costs on appeal pursuant to RAP 18.9(a) to which this court can award fees for a frivolous appeal and also under RCW 4.84.185.

Respectfully submitted and dated this 11th of March, 2016.



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