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Case No. 41890-8-II

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WASHINGTON STATE COURT OF APPEALS, DIVISION II

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Donald R. Earl  
(Appellant/Plaintiff)

v.

Menu Foods Income Fund  
The Kroger Company  
(Respondents/Defendants)

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APPELLANT'S REPLY TO RESPONDENTS' BRIEF

---

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*US Priority Mail 7/20/11*

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I. INTRODUCTION

1. The Appellant, Donald R. Earl, hereby respectfully replies to Brief of Respondents Menu Foods Income Fund and The Kroger Co. (hereinafter referred to collectively as "Respondents", or individually as "Menu Foods" or "Kroger"). Due to page length constraints, Mr. Earl will not specifically address the lengthy, unsupported, legally and factually inaccurate "Introduction" in the Respondents' brief, but will limit the focus of this reply to issues in the arguments sections of the Respondents' Brief.

II. STATEMENT OF THE CASE

**A. Respondents make numerous false and misleading statements in violation of RPC 3.1(a)(1-4).**

2. At page 20, Respondents misleadingly claim their expert, Ms. Van Cleave, stated there is a market for cats of the same variety as Mr. Earl's cat. Mr. Earl's cat was 6 1/2 years old. Ms. Van Cleave makes clear she is describing a market value for kittens, not adult cats, stating, "*In my store, we sell domestic short-hair, long-hair, or medium-hair kittens for \$69.99.*" (emphasis added, CP 846)

3. At page 21, Respondents falsely claim Mr. Earl's affidavit (CP 848-854) is opinion based. It is not. Mr. Earl's affidavit is based exclusively on facts known to Mr. Earl personally and, facts supported by substantial, admissible evidence, the sources of which Mr. Earl is able to authenticate.

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4. At page 22, Respondents falsely claim the trial court considered ExperTox test results in spite of a lack of authenticity and foundation by Mr. Earl. The truth is it was Dr. Hall and the Respondents that originally introduced the test results into evidence in support of the summary judgment motion, which Dr. Hall refers to at CP 801, 811, 839-842 and, submits as evidence by reference to the record at CP 1314. The ExperTox test results are part of the record at CP 78-79 and CP 1162-1165. The trial court states, "*With regard to the ExperTox report... Dr. Hall refers to it in his report... for the purpose of summary judgment motion I'm not going to exclude the ExperTox report because it looks like Dr. Hall at least considered them*" (RP 24, 1/14/11). The Respondents are asking this Court to reject, as legal error on the part of the trial court, documents the Respondents, themselves, asked the trial court to consider. Respondents did not cross appeal the ruling.

5. At page 22, Respondents misleadingly claim the trial court found there was no issue of fact concerning the value of Mr. Earl's cat. On the contrary, the trial court first found that Mr. Earl's value claims are supported by settled law, then rejected the law, stating,

*"Now, Mr. Earl comes back and says I'm Chuckles' sole owner entire life [sic]. Chuckles was exclusively bonded to me and exhibited fear of all other persons. Therefore, Chuckles' got no fair market value. Therefore, you can hear evidence about what I believe is the intrinsic value of Chuckles... Does that create a*

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*genuine issue of fact?... that would satisfy, almost I think, under the Sherman opinion... Does that create a genuine issue of material fact? I don't believe it would because I don't think that's a true statement of the law. Although when you read the Sherman opinion I could certainly see how you would say that."*  
(RP 36, 1/14/11)

6. At page 26, Respondents falsely claim Mr. Earl did not assert express warranties claims against Menu Foods. Mr. Earl's complaint, on its face, demonstrates the falsity of this statement. At paragraph 53 of the amended complaint (CP 70), Mr. Earl states, "*The Defendants expressly warranted that the pet food was safe, healthy, balanced and nutritious for consumption by companion pets.*". At paragraph 32 (CP 65), Mr. Earl quotes the "nutrition statement" that forms part of the basis for statutory warranty claims against Menu Foods. Menu Foods admits to being the author of these representations.

7. At page 29, the Respondents falsely claim the trial court, this Court and the Supreme Court ruled the unorganized inventory was irrelevant to this action. The trial court stated it did not understand the relevance of the unorganized inventory (RP 27, 2/15/08). In the ruling filed on 3/10/08 in 37376-9-II, this Court's commissioner makes no mention of relevance. Related, subsequent motions were denied without comment. Likewise, the Supreme Court's Commissioner's ruling filed 7/29/08 in 81674-3 makes no mention of relevance and subsequent motions were

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denied without comment.

8. At page 30, the Respondents falsely claim Mr. Earl asserts the trial court lacks authority to impose sanctions. Mr. Earl has never made such an assertion. Mr. Earl asserts the trial court has no legal authority to authorize the destruction of evidence, that Mr. Earl was factually and legally justified in opposing the destruction of evidence and, that there is no cognizable factual or legal basis for sanctions against Mr. Earl.

9. At page 31, Respondents misleadingly claim Mr. Earl's motion to produce discovery did not state the motion was contingent on the trial court's vacation of the evidence destruction order. The truth is Mr. Earl's statement to that effect was in his motion to vacate (CP 282), where Mr. Earl states,

*"Concurrent with this Motion, the Plaintiff is filing a motion to obtain discovery on the body of evidence known as unorganized inventory.... The Plaintiff respectfully requests the February 15, 2008 order permitting destruction of evidence material to this action be vacated and that the Plaintiff be allowed to conduct limited discovery on the body of evidence known as unorganized inventory."*

10. At page 33, Respondents falsely claim Mr. Earl has not and cannot demonstrate bias on the part of Judge Verser. Mr. Earl's motion to remove Judge Verser contains 5 pages of concisely stated facts, which are a matter of record, demonstrating the extreme prejudice Judge Verser has displayed toward Mr. Earl and this action and, the double standard Judge

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Verser has applied throughout the course of litigation in the application of court rules. (CP 521-525) (Appendix 1-5)

11. At page 33, Respondents falsely claim the record contains the statement by Judge Verser, as noted by the court's clerk, that Mr. Earl must file an amended complaint of not over three pages. The quote cited by Respondents is an illegally altered portion of the record where Judge Verser tampered with his oral ruling from ordering Mr. Earl's claims against the Defendants be not over a half page each, to three pages each, and deleted the order that the complaint could not be over three pages, total. The court's clerk, a highly trained, highly experienced, and highly competent observer of court proceedings, noted in the clerk's minutes, "*Plaintiff to file a new complaint within 20 days (not to exceed 3 pages).*" The portion of the record to which the court's clerk refers was altered through illegal tampering and is no longer a part of the record.

12. At page 34, Respondents falsely claim the GR 14.1 violations complained of were not designated unpublished opinion. The record demonstrates the falsity of the statement at CP 237, 408 and 490, all of which are designated with language synonymous with unpublished.

13. At page 36, Respondents falsely claim Mr. Earl does not show the trial court erred in failing to recognize ExperTox as a protected CR

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26(b)(5&6) expert. As previously stated, CP 701 (Appendix 6) shows Mr. Earl was in discussions with ExperTox regarding retaining ExperTox as an expert witness and, that all testing was being done in anticipation of litigation. Furthermore, CP 1711 (Appendix 7) is a redacted email communication between Mr. Earl and the lab, over a month before Mr. Earl filed this action, which shows that all work Mr. Earl commissioned through ExperTox was done in anticipation of litigation. The Respondents go further to misstate settled law in "*In Re Firestorm*, 129 Wn.2d 130 (1996)". In that case the expert in question had NOT been retained as an "expert witness", as Respondents falsely claim. The expert in that case had been retained in the identical capacity as ExperTox in the instant case, to develop facts and opinions in anticipation of litigation.

14. At page 38, Respondents falsely claim neither Kroger nor Menu Foods made requests to have experts present during laboratory tests. This claim is willfully fraudulent as shown by the Declaration of Meissner filed on May 19, 2010. It is a letter Mr. Meissner sent to ExperTox on April 21, 2010, and copied to Mr. Earl, after learning Mr. Earl planned to order tests through ExperTox. In relevant part, Mr. Meissner, counsel for Menu Foods, wrote as follows:

*"In addition the Washington court has ruled that Menu Foods is permitted to have an expert witness attend and observe any product testing that Mr. Earl chooses to have conducted in*

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*connection with the lawsuit. By reply email (please also copy Mr. Earl), please let me know the most convenient way to make arrangements to have Menu Foods' expert witness attend and observe any tests that you conduct for Mr. Earl in connection with this lawsuit." (CP 1684) (Appendix 8)*

15. At page 41, Respondents falsely claim Mr. Earl never made any attempts to depose Dr. Hall. At CP 1735 (Appendix 9) of the Supplemental Declaration of Meissner, filed on January 11, 2011 is a copy of an email Mr. Earl sent to counsel for Menu Foods. In that communication, Mr. Earl states, *"I believe we're at a point where some discussions between the parties should take place to make arrangements for deposing out of state witnesses."* The out of state witnesses referred to include, ExperTox located in Texas, Dr. Hall located in Utah and, Dr. Poppenga located in California.

16. Respondents falsely claim at 41 that the trial court did not grant summary judgment based on giving 100% weight to Dr. Hall's opinions. At RP 33, 1/14/11, the trial court states that Dr. Hall's opinion the pet food did not cause the death of Mr. Earl's cat is the basis of granting summary judgment. At CP 1665, the trial court wrote, *"The most direct documents relevant to the motion are the Declaration of Jeffrey O. Hall..."*. The truth is, in granting summary judgment, the trial court did not consider any evidence whatsoever that was not based exclusively on the unsubstantiated opinions of Dr. Hall and Ms. Van Cleave.

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III. ARGUMENT

**Reply to A. The trial court erred in dismissing express and implied warranty claims against Menu Foods.**

17. In *Lawson v. State*, 107 Wn. 2d 444 (1986) our Supreme Court ruled, "*A plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion.*"

18. The Respondents arguments are based on frivolous interpretations of horizontal privity law in regard to commercial contracts, whereas product warranties for consumer goods are subject to vertical privity.

19. In *City of Seattle v. State*, 136 Wn.2d 693 (1998), our Supreme Court ruled, "*If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences.*"

20. To accept Respondents' frivolous arguments would mean rendering all warranties relied upon by end users void because the goods passed through a network of wholesalers and retailers before reaching the consumer. On its face, the argument must be rejected as inherently absurd.

21. In *Touchet Valley v. Opp & Seibold Constr.*, 119 Wn.2d 334 (1992), our Supreme Court ruled on horizontal versus vertical privity as

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follows:

"We believe the commentary to RCW 62A.2-318 is unmistakable: vertical privity is a different concept from horizontal privity. We also believe the Legislature spoke clearly when it defined § 2-318 as neutral on vertical privity and left its development to the courts. ***We hold that vertical privity controls warranty issues here between a remote manufacturer and ultimate purchaser.***" (emphasis added)

22. Respondents cite *Tex Enters., Inc. v. Brockway Standard, Inc.*, 149 Wn.2d 204 (2003) in support of their privity theories, yet the rulings in *Tex Enters.* refutes their arguments. In that case, our Supreme Court held that, "***an end user who purchases a product from a retailer may be deemed to be in vertical privity with the manufacturer.***"

23. Respondents also cite *Thongchoom v. Graco Children's Prods., Inc.*, 117 Wn. App. 299 (2003), which both refutes their arguments and is distinguishable from the instant case. In *Throngchoom*, the court ruled in relevant part: "***There was no privity here between Graco and the Thongchooms... Because there is no privity, they must show an express representation by Graco. They have not done so. The court properly dismissed this claim.***" (emphasis added). Unlike in *Graco*, Mr. Earl showed express representations by Menu Foods.

24. In moving for CR 12(b)(6) dismissal, Menu Foods did not deny it is the author of warranties on which it intends end users to rely and, subsequently admitted in answers to interrogatories that it is, in fact, the

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author of those representations and warranties. Mr. Earl properly claimed "Defendants", plural (there are only two), expressly warrant the pet food and, under well settled Washington law, vertical privity is inherent in manufacturers' express representations and warranties to end users. The trial court's dismissal of Mr. Earl's express and implied warranty claims against Menu Foods was obvious legal error.

**Reply to B. and C. The trial court lacked legal authority to authorize the destruction of evidence and Mr. Earl was substantially justified in opposing the order.**

25. In *State v. Wadsworth*, 139 Wn.2d 724 (2000), a case involving the separation of powers doctrine, our Supreme Court ruled, "*It is the function of the Legislature to define the elements of a specific crime.*"

26. In *State v. Lewis*, 115 Wn.2d 294 (1990), our Supreme Court ruled that under separation of powers principles, trial courts do not have the authority to substitute their judgment for that of the prosecutor's.

27. In *State v. Moreno*, 147 Wn.2d 500 (2002), our Supreme Court ruled that separation of powers principles are violated when "*the activity of one branch threatens the independence or integrity or invades the prerogatives of another.*"

28. In *Discipline of Hammermaster*, 139 Wn.2d 211 (1999) our Supreme Court rules in relevant part as follows:

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*"Judicial independence requires a judge to commit to following the constitution, the statutes, common law principles, and precedent without intrusion from or intruding upon other branches of government."* (emphasis added)

29. As these decisions apply to the instant case, the legislature, not the trial court, has the sole authority to enact laws making it a crime to destroy evidence. The executive branch, not the trial court, has the sole authority to prosecute, or not prosecute, criminal acts.

30. Respondents fail entirely to either directly address this issue or to provide any legal authority whatsoever that would support a contention a trial court has the legal authority to authorize acts, which on their face, are criminal in nature. Whether or not a court has discretion to enter reasonable orders to produce or not produce discovery is NOT the issue here. What IS at issue is whether or not a court has the legal authority to authorize criminal spoliation of evidence. After over three years of intense litigation on this issue, Respondents remain utterly helpless to cite a single authority, from any source or jurisdiction, that would support the contention courts have the legal authority to grant legal immunity to a litigant in anticipation of that litigant committing a criminal act.

31. Respondents do not dispute, nor can they dispute, the Federal order was obtained through fraud on the court. Respondents do not dispute, and cannot dispute, the evidence in question was material to a host

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of pending or potential civil actions, as well as Federal civil and criminal investigations. Counsel for Respondents do not dispute, and cannot dispute, that at all times throughout the litigation of this matter they were fully aware they were willfully aiding and abetting felony spoliation of material evidence, in violation of Federal and Washington law, as well as the rules of professional conduct pursuant to RPC 3.4.

32. Not only did Mr. Earl have a Constitutional due process right to reasonable discovery to enter premises and obtain samples pursuant to CR 34, that right is expressly preserved pursuant to RCW 62A.2-515, which Respondents freely admit is incorporated by reference in product liability actions, and which reads in relevant part as follows:

"Preserving evidence of goods in dispute.

In furtherance of the adjustment of any claim or dispute

*(a) either party on reasonable notification to the other and for the purpose of ascertaining the facts and preserving evidence has the right to inspect, test and sample the goods including such of them as may be in the possession or control of the other" (emphasis added)*

33. There is no delicate way to put it. The record in this matter shows that under color of law the trial court and counsel for Menu Foods knowingly aided and abetted felony spoliation of evidence.

34. That Mr. Earl was sanctioned for his righteous opposition to these criminal acts cannot be viewed as anything other than unlawful

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retaliation, again under color of law, under conditions so abusive the very integrity of our courts is at stake. Mr. Earl has done nothing more, and nothing less, than to oppose an order that is void on its face and, to seek to obtain discovery of a nature no similarly situated litigant would fail to request, or reasonably expect to be denied. The order permitting felony spoliation of evidence was entered without legal authority and is void on its face. Mr. Earl not only had a legal right to oppose its destruction, but a legal duty to do so as well. There is no cognizable basis whatsoever by which sanctions can be legally or factually justified.

**Reply to D. The record demonstrates Judge Verser should be removed from the case.**

35. Respondents out of context citation to *Liteky v. United States*, 510 U.S. 540 (1994) does not support their position. In context, the citation reads as follows:

"Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. They *may* do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." (emphasis as in the original)

36. No reasonable person could believe they will receive fair treatment from a judge that has described their action as "the pursuit of imagined conspiracy theories" as Judge Verser did in the instant case. More

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telling, however, is the most vitriolic and prejudicial statements made by Judge Verser were not made in the heat of the moment in open court, but in the leisurely solitude of formulating written opinions. In all cases Mr. Earl has examined where motions for recusal were denied, the typical situations are ones where disrespectful litigants brought disfavor upon themselves through unseemly conduct in open court. If there's one thing the record in this matter demonstrates beyond doubt it's that Mr. Earl has been unfailingly polite at all hearings in this case, has at all times shown the court every courtesy and, has exhibited respect for the office held by Judge Verser under even the most adverse of circumstances imaginable.

37. As noted in section II above, Mr. Earl identified a litany of abuses in the motion to remove Judge Verser (Appendix 1-5). Furthermore, the record demonstrates the abuse has continued, unchecked, ever since. In the absence of this horrendous abuse, this case should have been ready for trial on the order of six months after it was filed. Instead, Mr. Earl has been forced to spend over 4 years fighting frivolous litigation, where the record in now literally thousands of pages deep. The standard cited in Liteky shows recusal is mandatory when, as in the instant case, a judge has revealed *such a high degree of favoritism or antagonism as to make fair judgment impossible.*

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**Reply to E, the trial court abused its discretion and committed legal error in failing to recognize that ExperTox acquired expert facts and opinions in anticipation of litigation and that Menu Foods' ex parte contacts with ExperTox violated court rules.**

38. Respondents' arguments in this section appear to be based exclusively on misstatements of fact and law and, statements unsupported by fact or law.

39. In *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107 (1990), the Court ruled, "*appellate courts may independently review evidence consisting of written documents and make the required findings*"

40. In the instant case, Mr. Earl filed affidavits (CP 701 & 1711) (Appendix 6-7) demonstrating that all facts and opinions acquired by ExperTox were acquired in anticipation of litigation and trial preparation. This is undisputed by the Respondents. In *Bryant*, the Court found fault with the trial court for failing to consider undisputed affidavit evidence as follows, "*The trial court does not appear to have given any consideration to the substantial and uncontroverted affidavit evidence before it.*"

41. The Respondents do not, and cannot, dispute that ExperTox is a recognized expert in the field of forensic toxicology. Respondents do not, and cannot, dispute that Mr. Earl hired ExperTox in anticipation of litigation and trial preparation. Respondents do not, and cannot, dispute that the plain language of CR 26(b)(5) mandates that the ONLY

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permissible inquiry is by deposition or interrogatory if the expert is expected to be called as a witness at trial, and, that for all practical purposes, discovery is barred if the expert is not expected to be called as a witness.

42. Far from Mr. Earl's reliance on *In Re Firestorm*, 129 Wn.2d 130 (1996) being misplaced, as asserted without basis by Respondents, the essence of *Firestorm* is to simply restate the plain language of CR 26(b)(5). Ex parte communications with an opposing party's experts, who acquired facts and opinions in anticipation of litigation and trial preparation, is unconditionally prohibited regardless of whether or not the expert has been formally retained as a witness. The decision in *Firestorm* is especially applicable to the instant case, where, as was the case in *Firestorm*, the expert had not yet been formally retained to testify at trial as an expert witness. Moreover, unlike in *Firestorm*, Mr. Earl explicitly informed counsel for Menu Foods that ExperTox should be treated as a potential expert witness.

43. For the trial court's ruling to be other than obvious legal error, it would be, at bare minimum, necessary for the trial court to find that ExperTox was not an expert, and/or that facts and opinions acquired by ExperTox were not acquired in anticipation of litigation and trial preparation. The trial court never made such findings and the record refutes

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any such findings can be made. Mr. Meissner's conduct was a gross violation of rule and related well settled law. Mr. Earl suffered extreme prejudice as a result and the trial court's failure to sanction the violation. The failure was a manifest abuse of discretion and legally erroneous.

**Reply to F, the burdensome conditions placed on sample testing by the trial court was unreasonable and prejudicial to Mr. Earl.**

44. The record shows that for over three years Mr. Earl worked extensively with ExperTox to conduct tests on pet food relevant to this case, as well as for an unrelated effort Mr. Earl manages. It was not until counsel for Menu Foods made ex parte contacts with ExperTox and demanded accommodations be made for ExperTox to provide for the presence of an expert for Menu Foods, that ExperTox refused to do any further business with Mr. Earl. The prejudice to Mr. Earl was not, as the Respondents claim, "speculative". The prejudice Mr. Earl suffered was immediate and substantial.

45. All parties to the instant case have been provided pet food samples on discovery. The quantities available to each party should be sufficient for each party to conduct numerous tests. Case law related to circumstances where only a single test is possible, or where the evidence is permanently changed, is not applicable to the instant case. Here, no party is deprived of the ability to conduct its own testing as the result of tests

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deprived of the ability to conduct its own testing as the result of tests conducted by any other party. The trial court abused its discretion in placing burdensome restrictions on testing that can't be justified by the needs of the case in light of the fact all parties have identical samples in their own possession.

**Reply to G, In granting summary judgment, the trial court did not comply with rule and law.**

**Reply to G 1: Respondents misstate Assignment of Error 9 and fail to address the trial court's legal error in failing to strike noncomplying affidavits.**

46. Here, Respondents begin with an inapposite reference to review standards regarding "evidentiary decisions". The trial court's failure to strike noncomplying affidavits was legal error, which is subject to de novo review. In *City of Seattle v. Holifield*, 150 Wn.App. 213 (2009), the court ruled:

"We review a lower court's interpretation of a court rule de novo. Court rules are interpreted using principles of statutory construction. Language that is clear does not require or permit any construction. Where there is no ambiguity in a rule, there is nothing for the court to interpret."

47. At issue is the plain language of CR 56(c) and CR 56(e), which read in relevant part as follows:

"The motion and *any supporting affidavits*, memoranda of law, or other documentation *shall* be filed and served not later than 28 calendar days before the hearing.", and, "Sworn or certified copies of all papers or parts thereof referred to in an affidavit *shall be*

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*attached thereto or served therewith."*

48. Respondents' argument expert witnesses are exempt from this requirement relies on isolated Federal opinion that is based on the assumption the non moving party will be allowed an opportunity to depose experts. Mr. Earl moved for time to depose experts, which the trial court did not consider. That a litigant should be denied the ability to depose opposing party experts, as well as being deprived of a chance to review documents on which the expert's opinion is based, is fundamentally unjust. Furthermore, the Federal opinions cited by Respondents are in direct conflict with well settled Washington law. In *Bryant v. Joseph Tree, Inc.*, 57 Wn. App. 107 (1990), the Court rejected an expert affidavit for failing to attach referenced documents as follows:

"In his affidavit, Strait states that he based his opinion on a number of documents supplied by Bolin. *Although he lists these documents, they are not attached to the affidavit.* We are unable to identify with certainty the precise documents upon which the expert relied *and therefore cannot discern the factual basis for his opinion....* it appears Strait based his opinion on misleading facts... These facts, at best, fail to tell the entire story." (emphasis added)

49. In *State v. Copeland*, 130 Wn.2d 244 (1996), citing various cases, our Supreme Court ruled, "*federal case law interpreting a federal rule is not binding on this court even where the rule is identical this court is the final authority insofar as interpretations of this State's rules is concerned*" (internal brackets and quotation marks omitted)

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50. Respondents, relying on the provision in CR 56(e), which allows supplementation of the record with the trial courts permission, argue the late filed supplemented affidavits cured the original non compliance. This argument has to fail on its face as Respondents did not move the trial court for permission to file supplemental affidavits. Furthermore, even if the defect could be cured by supplementation, it was not done within the timeframe mandated by CR 56(c).

51. In *Hash v. Children's Orthopedic Hosp.*, 49 Wn. App. 130 (1987), the Court ruled on a trial court's failure to strike an expert affidavit based on conclusory opinions as follows: "*Does an affidavit by an expert medical witness which states only conclusory opinions satisfy the initial burden of the moving party to prove the nonexistence of any material issue of fact? We hold that it does not.*" Our Supreme Court upheld the Court of Appeals in *Hash v. Children's Orthopedic Hosp.*, 110 Wn.2d 912 (1988). There is no exception to the strict requirements of CR 56(e) for expert witnesses under Washington law.

52. At CP 810, paragraph 5, Dr. Hall states, "*My conclusions are set forth in detail in the report attached hereto as Exhibit B, but a brief summary of my key conclusions is as follows:*" (emphasis added) Dr. Hall does not state a single fact as factual in his sworn statement and goes one

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step further in adding a disclaimer that every statement in Exhibit B is  
conclusional in nature. At CP 842, Dr. Hall expresses doubt as to the  
accuracy and completeness of hearsay provided by Menu Foods and openly  
calls into question the veracity of his opinions. The Hall affidavit does not  
meet the threshold requirement to establish that there are no genuine  
issues of material fact

53. As a matter of law, Dr. Hall's affidavit should have been  
stricken. Respondents failed to meet the initial burden required to shift the  
burden to Mr. Earl. As in *Hash v. Children's Orthopedic Hosp*, this Court  
should find Respondents' failure to meet the initial burden warrants  
reversal.

**Reply to G 2: Respondents fail to address the fact learned treatises  
were submitted by affidavit and rule ER 904.**

54. Respondents do not, and cannot, dispute that all learned  
treatises submitted by Mr. Earl were submitted both by affidavit and by ER  
904 notice. Respondents do not, and cannot, dispute that no objection was  
made as to the reliability of the authorities provided, or to the authenticity  
of any document submitted under rule ER 904. Respondents do not, and  
cannot, dispute that learned treatises are admissible evidence. Respondents  
do not, and cannot, dispute that many of the learned treatises on which Mr.  
Earl relies are the very same documents cited by their own expert.

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arguments the trial court properly refused to consider learned treatises submitted in opposition to summary judgment. The learned treatises submitted by Dr. Hall, by themselves, are sufficient to establish genuine issues of material fact (See: CP 1529-1536) (Appendix 10-17).

56. Furthermore, the Respondents acknowledge, as they must, that learned treatises may be introduced by the opposing party at trial in cross examination of expert witnesses (ER 803(18)). The Respondents, themselves, opened the door to admissibility of learned treatises in opposition of summary judgment by bringing in their own expert.

57. Respondents also fail to cite any authority supporting their contention an elaborate foundation is required to introduce evidence in opposition to summary judgment and, offer no argument in rebuttal to the rulings in *International Ultimate, Inc. v. St. Paul Fire & Marine Ins. Co.*, 122 Wn. App. 736 (2004). In *International Ultimate*, the court provides a detailed analysis for consideration of evidence on summary judgment, ruling in relevant part as follows:

"Underlying CR 56(e) is the requirement that documents the parties submit must be authenticated to be admissible. ***Because the proponent seeking to admit a document must make only a prima facie showing of authenticity, the rule's requirement of authentication or identification is met if the proponent shows proof sufficient for a reasonable fact finder to find in favor of authenticity.*** The rule does not limit the type of evidence allowed to authenticate a document; it merely requires some evidence which

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to authenticate a document; it merely requires some evidence which is sufficient to support a finding that the evidence in question is what its proponent claims it to be."

58. The Respondents argument at page 42 in claiming the "plain language" of ER 803(18) "only" allows learned treatises in connection with expert testimony defies logic in light of the fact Respondents, themselves, by introducing an expert, opened the door to presenting learned treatises in opposition.

**Reply to G 3: Respondents' arguments regarding issues related to the admissibility of ExperTox test results are not before the Court on review.**

59. Beginning at page 44, Respondents ask this Court to reject evidence, admitted by the trial court, which shows the pet food at issue in this case was contaminated with substances known to be toxic to cats. Respondents neither cross appealed this decision, nor have they met the requirements for discretionary review, which is a prerequisite to such a challenge even if a cross appeal had been filed (See: *Sunbreaker v. Travelers Ins. Co.*, 79 Wn. App. 368 (1995)).

60. At CP 1314, Dr. Hall explicitly incorporates the ExperTox test results by reference to the record at paragraph 7. b. of his affidavit. Respondents offer the preposterous notion that having introduced this evidence themselves, the trial court should not have considered it. The trial court found this objection impossible to credit at the hearing and the fact

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the trial court subsequently called the decision into question does little more than further illustrate the level of bias that has been the defining characteristic of this case for over 4 years.

61. Furthermore, Mr. Earl has personal knowledge of the ExperTox test results and can, and did, authenticate the results through that personal knowledge. Even if the results had been improperly admitted, which is not the case, the Respondents' failure to properly raise the issue on review forecloses any need to give the issue consideration at this late date.

62. As the moving parties, the burden was on the Respondents to depose ExperTox witnesses and introduce some factual basis for why the results do not create a genuine issue of fact. That failure alone should have resulted in denial of the summary judgment motion.

**Reply to G 4: The trial court acted without legal authority in settling factual questions of value on summary judgment.**

64. Respondents arguments here are no less frivolous now than they were in the trial court. Respondents' citation to *Port of Seattle v. Equitable Cap. Group Inc.*, 127 Wn.2d 202 (1995) is entirely inapposite. In that case, the court ruled the owner's testimony on fair market value was not based on the owner's "*intimate experience with and knowledge of the land's uses as a basis for determining its fair market value*". In the instant case, Mr. Earl is the ONLY person who has such knowledge.

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65. At CP 853 of the Declaration of Donald R. Earl, Mr. Earl states, "I was Chuckles' sole owner her entire life. Chuckles was exclusively bonded to me and exhibited fear of all other persons. As a result of this bond, I was the only person able to realize value from ownership of Chuckles. Chuckles had no market value to any other person." The declaration is further supported by admissible evidence (CP 1167-1172), which show arm's length transactions for an identical pet of up to \$155,000.00, and, rewards offered by pet owners of \$25,000.00 for the safe return of a lost pet.

66. As with all of the admissible evidence submitted by Mr. Earl in opposition to summary judgment, rather than viewing that evidence and all reasonable inferences in a light most favorable to Mr. Earl, the trial court arbitrarily rejected any and all evidence unfavorable to the Respondents.

IV. CONCLUSION

67. For the above reasons, the Appellant, Donald R. Earl, respectfully requests the relief sought in part VI of the Appellant's Brief be granted.

Date: September 20, 2011  
Respectfully submitted by:

  
Donald R. Earl (pro se)  
3090 Discovery Road  
Port Townsend, WA 98368  
(360) 379-6604

**CERTIFICATE OF MAILING**

I certify that on the 20th day of September, 2011 I placed by US Certified mail, return receipt requested, a copy of "Appellant's Reply to Respondents' Brief" addressed to:

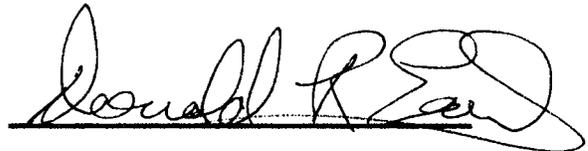
The Kroger Company Defendant's attorney of record, Charles Willmes, (mail receipt # 7011 0470 0000 4853 5748) at:

Merrick, Hofstedt & Lindsey  
3101 Western Ave. #200  
Seattle, WA 98121

And to: The Menu Foods Income Fund Defendant's attorney of record, Stellman Keehnel, (mail receipt # 7011 0470 0000 4853 5731) at:

DLA Piper  
701 Fifth Avenue #7000  
Seattle, WA 98104-7044

Dated: September 20, 2011  
Respectfully submitted by:



Donald R. Earl (pro se)  
3090 Discovery Road  
Port Townsend, WA 98368  
(360) 379-6604

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THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR THE COUNTY OF JEFFERSON

DONALD R. EARL (Plaintiff)	)	Case No. 07-2-00250-1
	)	
v.	)	Judge: The Honorable Craddock Verser
	)	
Menu Foods Income Fund, et al The Kroger Co. (Defendants)	)	PLAINTIFF'S MOTION TO REMOVE JUDGE VERSER FOR CAUSE SHOWN For Hearing On: July 10, 2009 at 1:00 PM

1. INTRODUCTION

The Plaintiff, Donald R. Earl, hereby respectfully moves the Court for the removal of Judge Verser pursuant to Canon 3 of the Code of Judicial Conduct.

2. FACTS AND PROCEDURAL BACKGROUND

At page 3, line 22 of the order entered on October 13, 2008, Judge Verser refers to the Plaintiff's case as the pursuit of "imagined conspiracy theories".

At page 3, line 34 of the order entered on October 13, 2008, Judge Verser writes, "Mr. Earl should not mistake his complaint for damages arising from the death of his beloved cat as a license to embark on a crusade to attempt to punish Menu Foods for what he believes are unconscionable practices motivated by "corporate greed.".

At the hearing held on May 1, 2009, Judge Verser likened factual allegations in the Plaintiff's complaint to claims the sun rises in the West.

Judge Verser has repeatedly displayed open hostility to the pro se status of the

1  
2 Plaintiff. On October 12, 2007, Judge Verser stated, "I'm not going to teach you how to  
3 be a lawyer.". The Plaintiff has at no time requested that Judge Verser provide such  
4 instruction.

5  
6 At page 2, line 22 of the order entered on October 13, 2008, Judge Verser again  
7 singles out the fact the Plaintiff is acting pro se as justification for a vitriolic attack on the  
8 Plaintiff.

9 On November 9, 2007 Judge Verser again references the Plaintiff's pro se status,  
10 stating, "In a default situation, Mr. Earl -- if you were an attorney, you'd probably  
11 recognize it -- if I were to give you a default now, they would just move next week to  
12 vacate it, and it would."

13  
14 The fact is that an entry of default would have required the Defendants to show  
15 cause that a defense to the complaint existed. The court has broad discretion to enter an  
16 order of default and the court is under no obligation to extend the time mandated for filing  
17 an answer that was due three weeks earlier. The ultimate effect of Judge Verser's failure  
18 to enter an order of default was to shift the litigation burden from the Defendants, where it  
19 belonged, to the Plaintiff. Judge Verser continued, "And, you know, to say that the  
20 pleading under Local Rule 7.5 was a day late. I'm not going to decide whether that's  
21 correct or not."

22  
23 This granting of the Defendants' untimely request for a continuance contrasts with  
24 Judge Verser's refusal to grant a timely filed, similar request by the Plaintiff in response to  
25 a massive motion filed by Menu Foods on Friday, February 8, 2008 for hearing the  
26 following Friday. For the Plaintiff to obtain a one week continuance, Judge Verser ruled  
27

1 the Plaintiff would have to post a bond in the amount of \$39,000.00 for costs Menu Foods  
2 claimed it was incurring for evidence storage. Menu Foods had been storing the evidence  
3 in question for nearly a year, without taking any action whatsoever. The Plaintiff showed  
4 the evidence was stored in warehouses owned by Menu Foods. Menu Foods did not show  
5 it had any immediate plans for the disposal of the evidence and was in fact voluntarily  
6 holding the evidence pursuant to discussions that would not be concluded for nearly two  
7 more months. The samples the Plaintiff sought to obtain on discovery were from a body of  
8 evidence making up less than 10% of what was being stored by Menu Foods and  
9 presumably making up less than 10% of the \$39,000.00 storage costs claimed by Menu  
10 Foods, even if that claimed cost could be substantiated, which it was not.

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12  
13 Judge Verser, in awarding discovery sanctions to Menu Foods in the order dated  
14 October 13, 2008, states, "Mr. Earl did not prior to the February 15, 2008 hearing show  
15 how any samples of this unorganized inventory would possibly be relevant to his case."

16  
17 The February 15, 2008 hearing was the first time the Plaintiff had an opportunity  
18 to do so.

19 At the hearing on December 21, 2007, in reference to the Plaintiff's Amended  
20 Complaint, Judge Verser states, "They shouldn't have to wade through, um, you know, a  
21 13-page Amended Complaint and wonder, does this apply to me or does it apply to  
22 Kroger?". Yet, Judge Verser saw nothing unreasonable about the Plaintiff being required  
23 to "wade through" a 500 plus page sheaf of documents and file a response within 4 days,  
24 as required by the local rules, for the February 15, 2008 hearing.

25  
26 In preparing for the December 21, 2007 hearing, the Plaintiff obtained a transcript  
27 of the October 12, 2007 hearing in order to refute mischaracterizations of the proceedings

1  
2 made by Memu Foods. Judge Verser reprimanded the Plaintiff for doing so, stating, "it  
3 doesn't behoove you to give me the whole record of everything that was said".

4 Judge Verser ignores repetitive and varied rule violations by the Defendants. On  
5 September 7, 2007, Judge Verser ruled Kroger should not be expected to truthfully  
6 answer the complaint as required by CR 11. Judge Verser has never responded to  
7 objections raised by the Plaintiff for the Defendants' habitually late filing and service of  
8 responses to motions. Judge Verser has repeatedly tolerated citations by Memu Foods to  
9 unpublished opinion in violation of GR 14, over the Plaintiff's repeated objections. CR 12  
10 allows defendants to file pre-answer motions "then available" to them, yet on December  
11 21, 2007 Judge Verser ruled in favor of the Defendants on existing issues not previously  
12 raised. At the hearing on March 13, 2009, over the Plaintiff's objections, Judge Verser  
13 ruled he would entertain any CR 12(b)(6) filed by the Defendants that a creative  
14 imagination could produce.  
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17 On April 10, 2009, Judge Verser's former law partner, Commissioner Bierbaum,  
18 indicating she was operating according to Judge Verser's instructions, granted the  
19 Defendants' motions to limit damages and denied the Plaintiff's cross motion for GR 14  
20 violation sanctions . At the hearing on May 1, 2009, in response to the Plaintiff's motion  
21 to vacate the Commissioner's order striking factual contentions in the Plaintiff's  
22 complaint, Judge Verser ruled that simply having jurisdiction over the case and the parties  
23 gives the Court unlimited authority to enter any order it sees fit, even in violation of  
24 Constitutionally protected rights. Judge Verser openly expresses his contempt for the  
25 Constitution on page 3, line 19 of the order entered on October 13, 2008, stating "It is not  
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1 a "magic phrase" protecting the Plaintiff's right to due process.

2  
3 The Defendants have become so assured of favorable rulings by Judge Verser that  
4 they did not file responses to the Plaintiff's April 20, 2009 motion to vacate, relying  
5 instead on Judge Verser to argue the motion in their favor, which he did on May 1, 2009.

6 In the order entered on October 29, 2008, Judge Verser states: "There is no risk  
7 that allowing destruction of the unorganized inventory would erroneously deprive Mr.  
8 Earl of any possible interest he would have in preservation of the inventory. His interests  
9 are duly protected by the Dr. McCabe sampling and retrieval program for the organized  
10 inventory." The fact is that Dr. McCabe's sampling plan made no provision whatsoever  
11 for preserving any part of the unrecalled pet food relevant to this case, which is the reason  
12 the Plaintiff opposed its destruction in the first place.

13  
14 At page 3, line 27 of the October 13, 2008 order, Judge Verser states, "his motion  
15 was not justified in any manner either factually or legally".

16  
17 The motion in question cites 8 legal authorities, and contains 2 pages of concisely  
18 stated facts, supported by 5 exhibits.

19 At the hearing held on June 19, 2009, Judge Verser makes clear his award of  
20 immediate payment of sanctions is to restrain the Plaintiff from seeking redress of abuses  
21 of discretion.

### 22 3. LEGAL AUTHORITY

23  
24 Judge Verser should recuse himself from this case pursuant to Canon 3(A)(5) and  
25 Canon 3(D)(1), which read in pertinent part as follows:

26 "Judges shall perform judicial duties without bias or prejudice.

27 Comment: A judge must perform judicial duties impartially and fairly. A judge who

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**Mr. Earl's August 20, 2009 email to ExperTox (edited to redact "mental impressions, conclusions, opinions, or legal theories"):**

Hi Jenelle,

I wanted to touch base with you on the current status of unknown toxin scans on pet food.... What I'd like to be able to do is have Menu Foods send a couple of those samples directly to you so they can be tested the same way.... I need to see it done in your lab for an apples to apples comparison. Anyhow, I mainly wanted to double check that the test is still available and the current cost.

On another issue, things are coming to a point in my lawsuit to where I need to start looking at putting together my expert witnesses. Who should I talk to there about making those kind of arrangements? Thanks.

Regards,

Don Earl

**Mr. Meissner sent the following on April 07, 2010:**

Don:

I've got two files that are each in the 8-9 MB range, plus a number of smaller files. Given the overall size, I will have the documents burned to a cd and put in the mail to you this afternoon.

As far as the lab goes, please take a look at the lab's proposed protocol for handling and shipping the samples (attached to my earlier email). I think the lab's proposed treatment should be sufficient to preserve the chain of custody, but let me know whether you have any concerns with it, so that we can resolve any issues before the lab actually opens and divides the samples.

Regards,  
Brad

**Mr. Earl sent the following reply on April 07, 2010:**

**ACCUTRACE RESPONSE  
REDACTED TO DELETE  
CONFIDENTIAL DISCUSSIONS  
RELATED TO TESTING**

----- Original Message -----

From: "Don Earl" <"mailto:don-earl@waypoint.com">

To: ""mailto:Teri@AccuTace"" <"mailto:teri@accutracetesting.com">

Sent: Thursday, June 07, 2007 1:08 PM

Subject: Re: Testing

> Hi Teri,  
>  
> I spoke with Donna and hopefully I've managed to get the message across  
> than I want the tests done the way I ordered the tests done. ----REDACTED  
> -----REDACTED-----  
> -----REDACTED-----  
> -----REDACTED----- there really is a good  
> reason I want it done the way I ordered it. I'll explain and would like  
> you to forward this to Donna so hopefully she will understand my  
> position also. What ExperTox wants to do is -----REDACTED-----  
> REDACTED----- I picture the following in court using that method.  
>  
> Attorney: You tested Mr. Earl's food -----REDACTED-----  
> -REDACTED-- is that correct?  
>  
> ExperTox: Yes, that is correct.  
>  
> Attorney: So, if there were ----- REDACTED -----  
> ---REDACTED--- Is that correct?  
>

**BALANCE OF COMMUNICATION  
REDACTED TO DELETE  
MENTAL IMPRESSIONS,  
CONCLUSIONS, OPINIONS,  
OR LEGAL THEORIES RELATED  
TO USING THE EVIDENCE AT TRIAL**

**Meissner, Bradley**

**From:** Meissner, Bradley  
**Sent:** Wednesday, April 21, 2010 9:35 AM  
**To:** customerservice@expertox.com  
**Cc:** 'Don Earl'

**Subject:** Earl v. Menu Foods Income Fund, No. 07-2-00250-1 (Wash. Super. Ct., Jefferson County)

I am an attorney for Menu Foods Income Fund, one of the named defendants in the above-titled lawsuit that is currently pending in Washington state court. I understand that the plaintiff in the lawsuit, Donald R. Earl (who is copied on this email), intends to have your laboratory conduct tests on certain samples of the pet food at issue in the case for the presence of acetaminophen and/or cyanuric acid. In connection with that anticipated testing, I would appreciate it if you would please provide me with a copy of all relevant standard operating procedures, testing protocols, and/or any other documents about the procedures that your laboratory will follow in connection with those tests.

In addition the Washington court has ruled that Menu Foods is permitted to have an expert witness attend and observe any product testing that Mr. Earl chooses to have conducted in connection with the lawsuit. By reply email (please also copy Mr. Earl), please let me know the most convenient way to make arrangements to have Menu Foods' expert witness attend and observe any tests that you conduct for Mr. Earl in connection with this lawsuit.

Best regards,



**Bradley T. Meissner**  
Associate

DLA Piper LLP (US)  
701 Fifth Avenue, Suite 7000  
Seattle, Washington 98104

(206) 839-4814 T  
(206) 494-1713 F

[bradley.meissner@dlapiper.com](mailto:bradley.meissner@dlapiper.com)

[www.dlapiper.com](http://www.dlapiper.com)

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**From:** Don Earl [don-earl@waypoint.com]  
**Sent:** Monday, October 18, 2010 6:05 PM  
**To:** Howson, Patsy; cwillmes@mhlseattle.com  
**Cc:** Keehnel, Stellman; Meissner, Bradley; Marie, Nina Lauren  
**Subject:** Re: Earl v. Menu Foods Income Fund and The Kroger Co.; Jefferson Co. Cause No. 07-2-00250-1

Dear Mr. Meissner,

**REDACTED SETTLEMENT COMMUNICATIONS**

You have no basis for summary judgment, which may only be granted when there are no facts in controversy. It will be up to a jury to decide questions of fact related to conflicting lab results. Furthermore, I would question whether or not your lab's results are admissible as they were obtained in contempt of the Court's order that I be allowed to have my own expert present during testing. I anticipate moving for sanctions on that basis.

Those issues aside, I believe we're at a point where some discussions between the parties should take place to make arrangements for deposing out of state witnesses. My schedule is generally flexible enough that I should be able to accommodate whatever is convenient for Kroger and Menu for a conference as long as I have a few days notice.

Sincerely,

Donald R. Earl

----- Original Message -----

**From:** "Howson, Patsy" <Patsy.Howson@dlapiper.com>  
**To:** <don-earl@waypoint.com>; <cwillmes@mhlseattle.com>  
**Cc:** "Keehnel, Stellman" <Stellman.Keehnel@dlapiper.com>; "Meissner, Bradley" <Bradley.Meissner@dlapiper.com>; "Marie, Nina Lauren" <nina.marie@dlapiper.com>  
**Sent:** Monday, October 18, 2010 4:57 PM  
**Subject:** Earl v. Menu Foods Income Fund and The Kroger Co.; Jefferson Co. Cause No. 07-2-00250-1

Please see attached letters from Bradley Meissner.

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1 need for the Court to do so. The Court barred the Plaintiff from reading into the record any  
2 published journal facts supporting his claims. The Court indicated it had read very little of the  
3 Plaintiff's affidavits. The Court entered judgment in favor of Menu Foods and further ordered  
4 the value of the Plaintiff's cat would be limited to \$100 regardless of the decision, after ruling  
5 competent testimony by the Plaintiff, as the owner, should be rejected. The Court ruled  
6 documents obtained from the Internet are not admissible evidence. The Court did not consider  
7 the Plaintiff's conditional motion to allow time to depose affiants.  
8

9  
10 **b) Dr. Hall's declaration and supplement.**

11 At page 2 of Exhibit B, paragraph 9, Dr. Hall states: "*Mr. Earl has indicated that two*  
12 *other cats being fed the same four foods were not reportedly ill, other than having need for*  
13 *dental care.*" At page 4 of Exhibit B, paragraph 2, Dr. Hall states: "*Lack of testing in the dry*  
14 *foods prevents ruling them out as causative agents.*" At page 4 of Exhibit B, paragraph 4, Dr.  
15 Hall states: "*Lack of any clinical effects in the two remaining cats that were eating the same*  
16 *foods diminishes the possibility of the food being causative in the disease and death of*  
17 *Chuckles.*"  
18

19 Dr. Hall has asserted he made these conclusions based on the Plaintiff's answers to  
20 interrogatories. In relevant part, the Plaintiff answered Interrogatory 14 as follows: "*Monster*  
21 *and Buzzer refused to eat the pet food identified in paragraphs 5, 6, and 14.*"  
22

23 The fact is that as Monster and Buzzer were only eating the dry food at the time, and  
24 for a significant period following Chuckles' death, their continued good health rules out the  
25 dry food as a causative agent. (See also: Plaintiff's affidavit filed on December 27, 2010)  
26

27 At page 2 of Exhibit B, paragraph 14, Dr. Hall states: "*Mr. Earl has indicated that two*  
28 *"Experimental control samples" labeled "Acetaminophen Pet Food" and Cyanuric Acid Pet*

1 *Food" were tested by ExperTox Inc. The samples were reported to be spiked with an un-*  
2 *described amount of acetaminophen or cyanuric acid. Mr. Earl has indicated that both tested*  
3 *positive for acetaminophen, but both were negative for both cyanuric acid and melamine."*  
4

5 The fact is the Plaintiff previously disclosed to Defendants that both control samples  
6 were fortified with 500 ppm acetaminophen and one of the two was fortified with 1%  
7 cyanuric acid. The results demonstrate ExperTox is able to accurately detect acetaminophen,  
8 but the reported levels may be more than 50 times lower than the original amount. Dr. Hall's  
9 assumptions regarding toxicity are based on two fallacies. 1. Dr. Hall fails to recognize the  
10 evidence indicates acetaminophen was originally present at a level in excess of 10 ppm. 2. His  
11 calculations are based on single acute dose toxicity, not chronic exposure to the food, which  
12 was known to be on the market for at least 8 months.  
13

14 The Plaintiff's answers, which Dr. Hall claims to have read, specifically address the  
15 issues of chronic toxicity. Interrogatory 28 reads as follows: "*State all facts upon which YOU*  
16 *base YOUR allegation in Paragraph 6 of the COMPLAINT that "Asymptomatic damage may*  
17 *have been present as a result of consumption of the Defendants' adulterated pet food*  
18 *purchased prior to that date."*  
19

20 The Plaintiff answered, "*The Plaintiff has conducted exhaustive research on the toxins*  
21 *identified as being present in samples of Menu Foods products. All information on which the*  
22 *Plaintiff relies, with the exception of lab reports already provided, is in the public domain and*  
23 *readily available to Menu Foods through its own reasonable due diligence. Publicly available*  
24 *information includes published studies related to cumulative, asymptomatic kidney damage*  
25 *associated with chronic exposure to the identified toxins."*  
26  
27

28 At page 2 of Exhibit B, paragraph 2, Dr. Hall states: "*Cats can efficiently and*

1 *effectively eliminate acetaminophen at low doses by this non-toxic sulfation pathway. Only at*  
2 *high doses, after depletion of sulfation path way capabilities, [does] this result in toxic*  
3 *metabolites and poisoning."*

4  
5 Dr. Hall's claim is directly refuted by the journal articles he, himself, cites as  
6 references to support his opinions. Dr. Hall includes in his supplemental declaration at Exhibit  
7 I, a journal article titled: "*Toxicity of over-the-counter drugs*" by Karyn Bischoff. The article  
8 reads in relevant part as follows starting at page 363 of the study:

9  
10 *"Unexpected circumstances may arise, making it difficult to properly assess the*  
11 *history. One such example concerns severe clinical signs prompting euthanasia in a kitten.*  
12 *It was later discovered that the feline in question had been allowed to play with an empty*  
13 *acetaminophen container (Allen, 2003)." (emphasis added)*

14  
15 And, at page 364 of the above study: "*Acetaminophen toxicosis is most commonly*  
16 *reported in cats (Rumbeiha et al., 1995). Clinical acetaminophen toxicosis is usually*  
17 *associated with a single exposure, though adverse effects as a result of multiple dosing have*  
18 *been reported (Hjelle and Grauer, 1986; Villar et al, 1998).... One report documents severe*  
19 *poisoning in a kitten that had played with an empty acetaminophen container (Allen,*  
20 *2003).... Individual differences in sensitivity to acetaminophen are reported within species*  
21 *(Webb et al., 2003), but the use of acetaminophen is always contraindicated in cats due to*  
22 *their sensitivity to this drug (Jones et al., 1992; Villar et al., 1998; Wallace et al., 2002;*  
23 *Roder, 2005a). Clinical signs of acetaminophen toxicosis in cats, including death, have been*  
24 *reported at doses of 10 mg/kg (Aronson and Drobatz, 1996)" (emphasis added)*

25  
26  
27 And at page 366 of the above study: "*Anorexia is reported in 35% of cats presenting*  
28 *for acetaminophen exposure, as is vomiting."* Both of these symptoms are documented in

1 Chuckles' veterinary records.

2 It should also be noted that the references section of Dr. Hall's Exhibit I at page 389  
3 includes, "*The diagnosis of acetaminophen toxicosis in a cat*", by Allen AL. This is the  
4 article included as Item 2 from Exhibit A of the Plaintiff's Declaration, which states at page  
5 510 of the study, "*There is no safe dose of acetaminophen for cats*", and also provides more  
6 detail on the ultra low dose exposure received by the referenced kitten, which indicates a dose  
7 of less than one milligram, as described in sections below.  
8

9 At page 4 of Dr. Hall's declaration, he states: "*In addition, because very low doses of  
10 acetaminophen and cyanuric acid are rapidly and efficiently eliminated from cats' bodies,  
11 very low doses of acetaminophen and cyanuric acid would not build up in a cat's system and  
12 would therefore not present a risk of chronic poisoning.*"  
13

14 In Dr. Hall's Exhibit L, "*Acetaminophen-induced toxicosis in dogs and cats*", page 744  
15 of the exhibit directly refutes Dr. Hall and reads in pertinent part as follows: "*The inability of  
16 cats to glucuronidate acetaminophen also may have implications in situations in which low  
17 doses of acetaminophen are administered over several days.*" (emphasis added)  
18

19 Again, it should be noted that document footnotes in journal articles presented by Dr.  
20 Hall, in several instances, refer to documents included in the Plaintiff's affidavits. In this  
21 instance, the article footnote 2 refers to "*The toxicity and biotransformation of single doses of  
22 acetaminophen in dogs and cats*", which is the first item in the Plaintiff's Exhibit A.  
23

24 At page 389 of Dr. Hall's supplemented affidavit, Exhibit O, "*Small Animal  
25 Toxicology*", the article reads in relevant part as follows: "*Compared to dogs, cats are  
26 extremely sensitive to the toxic effects of acetaminophen and can develop clinical signs of  
27 toxicity with dosages in the range of 50 to 100 mg/kg. Toxicosis has been occasionally  
28*

1 *observed with dosages as low as 10 mg/kg. In cats that have received subtoxic doses of*  
2 *acetaminophen, subsequent doses can prove rapidly fatal.* (emphasis added)

3  
4 Dr. Hall's exhibit K, "*A Review of Toxicology Studies on Cyanurate and its*  
5 *Chlorinated Derivatives*" shows that cyanuric acid alone is nephrotoxic (toxic to kidneys) and  
6 causes renal (kidney) damage. Page 292 of the report reads in relevant part as follows:

7 "*Tissues identified as target organs for cyanurate-induced toxicity were examined from*  
8 *animals administered lower doses of sodium cyanurate. Treatment-related mortality was*  
9 *observed in some (13/100) high-dose male animals that died on test during the first 12 months*  
10 *of the study....These changes included hyperplasia, bleeding, and inflammation*  
11 *of the bladder epithelium, dilated and inflamed ureters, and renal tubular nephrosis. Slight*  
12 *tubular nephrosis was also observed in a few high-dose females during the first 12 months.*  
13 *These animals did not exhibit bladder calculi.*" (emphasis added)

14  
15 At page 3 of Dr. Hall's Exhibit B, at paragraph 9, Dr. Hall states, "*In cats, specifically,*  
16 *concentrations of up to 1% in the diet of either melamine or cyanuric acid alone caused no*  
17 *renal effects (Puschner et al., 2007).*

18  
19 The journal article cited by Dr. Hall is Exhibit M of his supplemental affidavit,  
20 "*Assessment of melamine and cyanuric acid toxicity in cats*", which is also the first item in  
21 the Plaintiff's declaration at Exhibit C.

22  
23 Page 619 of the article reads in relevant part, "*In addition, the kidney of the cat*  
24 *receiving cyanuric acid alone (part 3 of study) contained 22 mg/g of cyanuric acid*", and, at  
25 page 622, "*It has also been hypothesized that renal damage occurs secondary to an*  
26 *inflammatory response caused by the crystals.*" (emphasis added) It should also be noted this  
27 was a very short term study of only 10 days.  
28

1 Chuckles' veterinary records show high levels of leukocytes in her urine, which are  
2 white blood cells produced as an inflammatory response. Footnote 3 in this article is  
3 "*Outbreaks of renal failure associated with melamine and cyanuric acid in dogs*  
4 *and cats in 2004 and 2007.*", which is item 2 in Plaintiff's Exhibit F, and, footnote 5,  
5 "*Chemical, bacteriological, and toxicological properties of cyanuric acid and chlorinated*  
6 *isocyanurates as applied to swimming pool disinfection*" is item 1 in the Plaintiff's Exhibit F.  
7 Plaintiff's Exhibit F, item 1, recognized as an authority by Dr. Hall's own exhibits, describes  
8 the results of a 6 month study on cyanuric acid at very low doses as follows: "*Oral daily*  
9 *administration of 30 mg of cyanuric acid per kg of body weight to guinea pigs and rats for 6*  
10 *months caused dystrophic changes in their kidneys*" (emphasis added)  
11

12  
13 At subparagraphs c and d, at page 4 of Exhibit B of Dr. Hall's affidavit, Dr. Hall  
14 states: "*c. The calculated maximal exposure is more than a hundred fold less than the toxic*  
15 *dose in cats after maximal calculated potential exposure to which Chuckles could have been*  
16 *subjected. (See scientific facts #7 and 10 above) d. Even though there is scientific evidence of*  
17 *toxic effects of high dose chronic cyanuric acid exposure in rodents (bladder irritation and*  
18 *urinary stones), there is no scientific evidence that very low exposure poses any chronic risks*  
19 *of renal failure.*"  
20

21  
22 Based on assumptions made by Dr. Hall, and corrected for Chuckles' actual body  
23 weight, Chuckles was exposed to 4 mg kg/bw (milligrams per kilogram of body weight) of  
24 cyanuric acid, only 7.5 fold less than studies showing renal damage in rodents, not 100. This  
25 was also greater than the Low Observed Effects Level (LOEL) of 3 mg/kg bw in the study.  
26

27 At page 4 of Dr. Hall's Exhibit B, subparagraph 3(c), Dr. Hall states: "*The renal*  
28 *failure could have been of an acute or chronic nature, but only an evaluation of the kidney*

1 *tissues can differentiate these conditions."*

2 The Plaintiff's veterinarian, Dr. Frank, positively diagnosed Chuckles' condition as  
3 CRF (chronic renal failure) (see: page 1 vet records at Plaintiff's first affidavit at Exhibit B).  
4

5 Dr. Hall's supplemental affidavit Exhibit N at pages 1217-1217, "*Evaluation of the*  
6 *renal effects of experimental feeding of melamine and cyanuric acid to fish and pigs*", settles  
7 the question raised at hearing regarding the acceptability of LC/MS (Liquid chromatography-  
8 mass spectrometry) used by UC Davis, and the GC/MS (Gas chromatography-mass  
9 spectrometry) method use by ExperTox. In relevant part, this exhibit demonstrates the  
10 GC/MS method used by ExperTox is the one approved by the FDA for detection of cyanuric  
11 acid as follows: "*When melamine and the s-triazines were identified as possible causative*  
12 *agents, the FDA immediately began to develop chemical methods to detect melamine-related*  
13 *s-triazine compounds in the ingredients of food for humans and other animals. A method*  
14 *involving gas chromatography in combination with mass spectrometry was developed jointly*  
15 *by several FDA laboratories to analyze flour, wheat gluten, and other food ingredients for*  
16 *adulterants.*" (emphasis added)  
17  
18

19 **Summary of Facts Contained in Dr. Hall's Supplemented Affidavit:**

- 20
- 21 1. No amount of acetaminophen is safe for cats.
  - 22 2. Minute traces of acetaminophen in an empty acetaminophen bottle were  
23 found to be sufficiently lethal to kill a cat.
  - 24 3. Repeat exposure to very low doses of acetaminophen is lethal to cats within  
25 a few days.
  - 26 4. Acetaminophen causes kidney damage.
  - 27 5. Repeat exposure to very low doses of cyanuric acid causes kidney damage.  
28

1                   6. Cyanuric acid crystals cause an inflammatory immune response in kidneys.

2                   7. Any individual cat may be far more sensitive to acetaminophen toxicity than  
3 is typical even among cats.

4                   8. The testing method used by UC Davis is not the one approved by the FDA  
5 for detection of cyanuric acid in pet food.

6  
7 **c) Admissible evidence presented in Plaintiff's affidavits.**

8                   **i. Declaration of Donald R. Earl filed December 27, 2010**

9                   Item 2 of Exhibit A is, "*The diagnosis of acetaminophen toxicosis in a cat*". The  
10 article reads in relevant part at page 509 as follows:  
11

12                   "A 6- to 8-week-old kitten was submitted to the diagnostic laboratory of the  
13 Western College of Veterinary Medicine to determine the cause of its clinical signs. It  
14 had been presented to the submitting veterinarian in a state of collapse and coma. The  
15 veterinarian also noted very severe edema of the head. The kitten was euthanized.

16                   At necropsy, the kitten's head was swollen due to marked edema within the  
17 subcutis, including the conjunctiva. The edema extended along the fascial planes of  
18 the neck into the thorax. About 3 mL of dark brown, translucent urine remained in the  
19 bladder (Figure 1). The differential diagnoses for the pigmenturia included  
20 myoglobinuria, hemoglobinuria, methemoglobinuria, and, possibly, hematuria. The  
21 color of the urine was most consistent with methemoglobinuria and suggested that the  
22 kitten had experienced methemoglobin formation and hemolysis. The most likely  
23 cause of methemoglobinemia and hemolysis in cats is exposure to a strong oxidative  
24 agent.

25                   Subcutaneous edema of the head and methemoglobinuria are suggestive of  
26 acetaminophen toxicity in cats. Therefore, the submitting veterinarian was queried  
27 about the possibility of the cat having come in contact with acetaminophen, and the  
28 urine was submitted to the medical laboratory of Royal University Hospital,  
Saskatoon, to determine the concentration of acetaminophen.

                  The submitting veterinarian was adamant that he had not administered  
acetaminophen to the kitten. The kitten's owners had not noticed monitory signs of  
illness and, therefore, had no motivation or opportunity to give the kitten any drugs.  
However, the urine was found to contain 3820 mmol/L of acetaminophen. When  
informed of this, the owners recalled giving the kitten an empty bottle that had  
contained acetaminophen tablets to play with on the day that the kitten had become  
moribund."

Notes: Based on Dr. Hall's references to acetaminophen half life in cats, the figure of