

**COURT OF APPEALS OF THE STATE OF  
WASHINGTON**  
**Division III**

Court of Appeals No. 350495  
Okanogan County Superior Court No. 15-2-00444-3

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WORK-FORCE SOLUTIONS, INC.,

Appellee/Plaintiff

v.

ANTOINE CREEK FARMS LLC,

Appellant/ Defendant

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**BRIEF OF APPELLANT**

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**INTRODUCTION**

This is a case in which the trial court misapplied the summary judgment standard to deny Antoine Creek Farms LLC (“Antoine Creek”) its right to trial on the merits of questions of fact. The trial court made factual findings against Antoine Creek rather than resolving contradictory evidence in a light most favorable to Antoine Creek as required by the summary judgment standard. The decision of the Okanogan County Superior Court should be reversed and the case remanded for trial on the merits.

**STATEMENT OF THE CASE**

Antoine Creek owns a farm in Chelan County where it grows and harvests legal marijuana. The business is conducted in full compliance with Washington law. Work-Force Solutions, Inc. (“Work-Force”) is a temporary employment agency located in Wenatchee, Washington.

Antoine Creek and Work-Force never entered into a written contract. McCORMACK DECLARATION ¶ 6 (CP 37-

38), BIGHOUSE DECLARATION ¶ 7 (CP 114). The terms of the oral contract between Antoine Creek and Work-Force included a repayment agreement for any and all amounts owed on the alleged debt on which Work-Force sued in this case. McCORMACK DECLARATION ¶ 6 (CP 37-38). Work-Force accepted payments of \$500 per month pursuant to this agreement. *Id.* Although Antoine Creek has contested and continues to contest the amount Work-Force claims is owed, Antoine Creek has nonetheless continued to make the monthly \$500 payments as agreed. *Id.* at ¶ 7 (CP 38). At the time of this repayment agreement, Antoine Creek had already paid over \$150,000 to Work-Force.

In addition to the repayment agreement, the terms of the agreement between Antoine Creek and Work-Force included Work-Force's agreement to conduct criminal background checks and drug screenings as to all employees, an important task in light of the sensitive nature of a legal marijuana business. McCORMACK DECLARATION ¶ 11-12 (CP 38). The agreement also required Work-Force to allow Antoine Creek to

direct hire workers initially provided by Work-Force and to provide a sufficient number of workers to fill the increased need for workers at harvest time. McCORMACK DECLARATION ¶ 13, 16 (CP 38-39)

All claims and counterclaims in this case arise out of this oral agreement between the parties, the terms of which are strongly contested. Antoine Creek filed the affidavit of Timothy B. McCormick, testifying to the terms of the oral agreement between Work-Force and Antoine Creek as follows:

In my capacity as owner of Antoine Creek Farms, I hereby state that the parties have no written contract. The parties agree[d] to a repayment agreement for the alleged debts in question. Antoine Creek Farms offered to pay off the debt at the rate of \$500 per month and Work-Force Solutions has accepted these partial payments without objection.

Antoine Creek Farms continues to fulfill these terms by making payments to Work-Force Solutions' attorneys' trust account.

Work-Force Solutions previously accepted, before the final repayment agreement a "Payment Proposal Schedule" agreement for

alleged debt owed at the time.

Work-Force Solution agreed to conduct background screenings, including criminal and drug screens, for all workers.

Due to the sensitive nature of growing marijuana crop[s], criminal background checks and drug screenings were a material provision of the agreement. These background checks and drug screening were important because of the strict legal guidelines applicable to the industry, desire to avoid bad publicity and the “criminal element” potentially associated with legal marijuana farming.

Antoine Creek Farms advised Work-Force Solutions of the increased need for farm workers at harvest and Work-Force Solutions agreed.

McCORMACK DECLARATION ¶¶ 6, 7, 10-13 (CP 37-38).

Mr. McCormack's declaration also states that Work-Force Solutions agreed to allow Antoine Creek to direct hire workers initially provided by Work-Force Solutions. *Id.* at ¶ 16 (CP 39).

Work-Force breached the terms of its oral agreement with Antoine Creek by filing a lawsuit despite Antoine Creek's compliance with the agreed upon repayment schedule, by

failing to conduct criminal background checks and drug screenings on many workers, by refusing to allow Antoine Creek to direct hire employees initially provided by Work-Force, by sending workers who were not even arguably qualified, and by failing to provide a sufficient number of workers to fill the increased need for workers at harvest time.

Antoine Creek's affidavits in opposition to summary judgment provide proof that Work-Force breached its obligations under the agreement. Mr. McCormack's declaration states:

Work-Force Solutions was unable to provide sufficient staffing to meet the increased needs of Antoine Creek Farms during harvest time.

Despite its agreement to do so, Work-Force Solutions refused to allow Antoine Creek Farms to direct hire workers.

Work-Force Solutions had a strict paycheck pick-up policy. Employees were required to pick-up their paychecks at the Work-Force Solutions office by 4:30 p.m. Work-Force Solutions was unwilling to change this policy. Employees had to leave Antoine Creek Farms by 3:00

p.m. to drive an hour and a half to arrive at Work-Force's office by 4:30 p.m.

Throughout this agreement, Antoine Creek Farms did not receive quality employees from Work-Force Solutions.

McCORMACK DECLARATION ¶¶ 14, 16-18 (CP 38-39).

Exhibit 4 to Mr. McCormack's declaration makes clear that Work-Force did not even conduct drug screenings or background checks as to numerous workers. Of 32 workers listed on the "Employment History Screening Summary" (provided by Work-Force in discovery), 11 have an "N" for "No" in the column labeled "Criminal History Check" and ten have an "N" for "No" in the column labeled "Drug Test."

McCORMACK DECLARATION, EXH. 4 (CP 83).

The Declaration of Joe Bighouse, manager of day to day operations at Antoine Creek, also provided proof of Work-Force's breached of its obligations to provide a sufficient number of qualified workers, to conduct drug screening and criminal background checks, and to allow direct hire of workers, as follows:

To the best of my knowledge, only one employee Work-Force Solutions provided was an experienced farm worker.

Antoine Creek Farms did not receive quality employees from Work-Force Solutions.

In or around October 2014 harvest time, Work-Force Solutions provided two female employees that arrived at the farm dressed in high heel shoes and shirts baring their midriffs, which is not proper attire for farm work. Once these ladies saw the outdoor farm environment where they would be working, they immediately left the premises and did not return.

In or around October 2014 harvest time, Work-Force Solutions provided three employees that were related, a husband and wife and sister-in-law. The trio argued and fought verbally on several occasions. They were reprimanded, but the behavior continued, and I was forced to fire them as a group.

Other employees were unreliable and failed to show up to work or called in sick on multiple occasions.

It is . . . important to Antoine Creek Farms that the employees be drug tested and have criminal background checks since there is the potential to

have had publicity with the new legal marijuana growing. It is also important because Washington has strict review policies for the permits it grants, making Antoine Creek Farms especially sensitive to ensuring it obeys all regulations.

To the best of my knowledge, Work-Force Solutions failed to drug test all the employees provided.

On multiple occasions, employees provided by Work-Force Solutions were caught smoking marijuana on the premises. Antoine Creek Farms promptly terminated these employees and reported the actions to Work-Force Solutions.

Antoine Creek Farms advised Work-Force Solutions that it needed additional workers for the harvest season. Work-Force Solutions did not provide adequate staffing to meet the additional needs for the harvest.

Work-Force Solutions also had strict paycheck pick-up rules; workers were required to personally pick-up their checks at Work-Force Solutions' office by 4:30 p.m. Work-Force Solutions was unwilling to change the office hours. To arrive at Work-Force Solutions by 4:30 p.m., employees had to leave the farm in Chelan no later than 3:00 p.m. to drive the hour and a half to Wenatchee for their

paychecks.

When the employees had to leave to pick up their paychecks, the farm lost productivity because the majority of operations stopped . . .

DECLARATION OF JOE BIGHOUSE, ¶¶ 8, 10-20 (CP 114-116).

Along with proof of the terms of the agreement between Antoine Creek and Work-Force and proof of breaches of those terms by Work-Force, Antoine Creek provided proof that it was damaged by those breaches in an amount far exceeding the relatively small balance Work-Force claims remains due. Mr. McCormack's Declaration explains:

As a result of Work-Force Solutions failure to provide qualified employees, failure to screen workers for drugs and criminal backgrounds, and requirement that workers leave early to pick-up their paychecks, there was a high turnover rate of workers. The high turnover rate forced Antoine Creek Farms to continually retrain replacement workers causing a loss of productivity when staff left. The loss of productivity caused harvest and other work to take longer than it should have, resulting in the labor costs skyrocketing.

Work-Force Solutions actions by loss of qualified workers, lost productivity, lost revenue, and estimates that it overpaid Work-Force Solutions by a significant amount to be determined, caused damages to Antoine Creek Farms. These damages are yet to be determined, but at least in excess of \$75,000. I base this on a comparison of the cost, yield, and productivity of the 2014 and 2015 harvests.

. . . [O]n the specific issue of increased harvest costs, we now have two harvests and based on those harvests, including volume, yield, workers hired and related factors it is clear that Work-Force Solutions' negligence caused Antoine Creek Farms damages to be proved at trial by failing to provide properly qualified agricultural workers and other negligent/breach of contract wrongs caused by Work-Force Solutions.

Antoine Creek Farms has also been damaged in an amount to be determined as a result of Work-Force Solutions failure to conduct background checks for the potential exposure to errors as yet to be uncovered, bad publicity, and related risks. Such damages may be as high as approximately 30% off the top of amounts paid to Work-Force Solutions since Work-Force Solutions

failed to conduct background checks on approximately 30% of workers.

McCORMACK DECLARATION ¶¶ 19-22 (CP 39-40).

The Declaration of Joe Bighouse also proves damages as follows:

In my experience, as a result of the lack of quality employees Work-Force Solutions provided, the harvest and other work took longer than it should have causing labor costs to increase.

Preliminary estimates of damage to Antoine Creek Farms as a result of Work-Force Solutions' failure to provide adequate and qualified staffing, lost productivity, and lost revenue are at least in excess of \$75,000. In addition, there are unknown damages likely to result from potential bad publicity and other errors and omissions left to uncover based on Work-Force Solutions failure to conduct background screenings on employees. Those damages may be as high as approximately 30% of the amounts Antoine Creek Farms paid to Work-Force Solutions for the employees Work-Force Solutions failed to screen.

BIGHOUSE DECLARATION ¶¶ 22-23 (CP 116).

Despite its agreement to accept payments and Antoine

Creek's compliance with that agreement, Work-Force filed a lawsuit claiming that Antoine Creek had breached its oral promise to pay. COMPLAINT (CP 236-49). The case was initially filed in Chelan County District Court and transferred by stipulated order to Okanogan County Superior Court. STIPULATION AND ORDER OF TRANSFER (CP 173-174). Work-Force filed a motion for summary judgment with the Okanogan County Superior Court. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT (CP 163). On January 25, 2017, the Okanogan County Superior Court entered summary judgment in favor of Work-Force and against Antoine Creek for the entire amount claimed by Work-Force, effectively summarily dismissing all of Antoine Creek's counterclaims. JUDGMENT (CP 15-18).

On February 10, 2017, Antoine Creek filed its timely Notice of Appeal to this Court. NOTICE OF APPEAL (CP 1).

### **ASSIGNMENTS OF ERROR**

1. The Superior Court erred in dismissing all of Antoine Creek's counterclaims and defenses when there was ample

evidence that Work-Force breached its contractual obligations and caused damages to Antoine Creek.

2. The Superior Court erred in granting summary judgment on Antoine Creek's claims under the Consumer Protection Act when there is ample evidence as to each of the elements of proof required under the Act.

2. The Superior Court erred in granting summary judgment rejecting the parties agreement to a \$500/month repayment plan as to which adequate proof was provided and upon which Antoine Creek had made payments as promised.

## ARGUMENT

### 1. Standard of Review

An appellate court's standard of review of an order granting summary judgment is *de novo*. *Quinault Indian Nation v. Imperium Terminal Services LLC*, --- Wn.2d---, 387 P.3d 670, 675 (2017) (citing *Michak v. Transnation Title Insurance Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003)).

“Summary judgment is proper if there is no genuine issue as to any fact, the moving party is entitled to judgment as a matter of

law, and reasonable minds could reach only one conclusion from the evidence presented.” *Id.* (citing *Bostain v. Food Express, Inc.* 159 Wn.2d 700, 153 P.3d 846 (2007)).

Summary judgment must be employed with “caution lest worthwhile causes perish short of a determination of their true merit.” *Smith v. Acme Paving*, 16 Wn.App. 289, 992, 558 P.2d 811 (1976) (citing *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960)). Courts are particularly cautious about granting summary judgment as to mutual assent regarding the terms of a contract. Washington courts have uniformly held that whether there is mutual assent to contract terms is a question of fact for the jury. *Hansen v. Trans-World Wireless TV-Spokane, Inc.* 111 Wn.App. 361, 44 P.3d 929, 937 (2002) (citing *Sea-Van Invs. Assocs. v. Hamilton* 125 Wn.2d 120, 126, 881 P.3d 1035 (1994)).

## **2. The Court Erred in Dismissing Antoine Creek's Breach of Contract Counterclaims.**

There is more than sufficient evidence from which a reasonable juror could conclude that *Work-Force* breached its

contractual obligations to *Antoine Creek*. In *Colorado Structures, Inc. v. Insurance Co. of the West*, 161 Wn.2d 577, 167 P.3d 1125, 1131 (2007), the court explained:

Any unjustified failure to perform when performance is due is a breach of contract which entitles the injured party to damages. If the breach is slight or insubstantial, it is called a partial breach, for which plaintiff's damages are restricted to compensation for the defective performance. If the breach is material, it is called a total breach, which gives to the injured party an election to substitute for his contractual rights the remedial right to damages for total failure of performance. He has the alternative election of treating the contract as continuing, however, in which case his damages are limited as for a partial breach.

Antoine Creek filed affidavits which, construed in a light most favorable to Antoine Creek as the non-moving party, clearly establish that Work-Force had obligations to conduct criminal background checks and drug tests and to provide enough qualified workers to fill Antoine Creek's needs at harvest time. The affidavits and exhibits further establish that Work-Force failed to perform these obligations.

McCORMACK DECLARATION ¶¶ 14, 16-18 (CP 38-39);  
DECLARATION OF JOE BIGHOUSE, ¶¶ 8, 10-20 (CP 114-  
116). Work-Force's own screening summary document, Exhibit  
4 to Mr. McCormack's Declaration, shows that Work-Force  
failed to conduct either a criminal background check or drug  
screening or both for fully half (16 out of 32) employees listed  
on the summary. McCORMACK DECLARATION, EXH. 4  
(CP 83).

Work-Force does not deny that it failed to screen workers  
or that it failed to provide a sufficient number of qualified  
workers. Instead, it claims that Antoine Creek sent an e-mail,  
which included the phrase “use your best judgment on who to  
send but we need a massive surge.” PLAINTIFF'S REPLY TO  
SUMMARY JUDGMENT OPPOSITION (CP 25). The need  
for a “massive surge” of workers was obviously caused by  
Work-Force's failure to provide enough qualified workers to  
complete the job. Antoine Creek had no way of knowing that  
Work-Force had failed to even conduct the promised  
background checks and/or drug screening on more than half of

the workers provided. The fact that Antoine Creek was expressing its fervent desperation for Work-Force fulfill its obligation to provide workers in no way excuses Work-Force from its obligation to perform that contractual obligation.

Work-Force's failure to conduct criminal background checks and drug screens as promised had a predictably negative impact on the quality of the workers provided. As detailed in the Declaration of Joe Bighouse, several workers were caught using marijuana on the premises, and Antoine Creek had no choice but to fire them. DECLARATION OF JOE BIGHOUSE, ¶ 16 (CP 115).

Work-Force's primary claim in its summary judgment papers regarding Antoine Creek's breach of contract claims is that Antoine Creek did not sufficiently prove causation and damages. Antoine Creek filed the declarations of Joe Bighouse and Tim McCormack, both of which explain that Work-Force's failure to provide properly screened and qualified workers greatly increased labor costs. While the exact amount of this increase could not be determined, both declarations testify that

the increased cost exceeded \$75,000. Mr. McCormack's declaration states:

Work-Force Solutions actions by loss of qualified workers, lost productivity, lost revenue and estimates that it overpaid Work-Force solutions by a significant amount to be determined, caused damages to Antoine Creek Farms. These damages are yet to be determined, but at least in excess of \$75,000. I base this on a comparison of the cost, yield, and productivity of the 2014 and 2015 harvests.

McCORMACK DECLARATION ¶ 20 (CP 39). Mr.

McCormack goes on to explain:

[On] the specific issue of increased harvest costs, we now have two harvests and based on those harvests, including volume, yields, workers hired, and related factors, it is clear that Work-Force Solutions' negligence caused Antoine Creek damages to be proved at trial by failing to provide qualified agricultural workers . . .

McCORMACK DECLARATION ¶ 21 (CP 40).

Mr. Bighouse's declaration confirms the evidence provided by Mr. McCormack:

In my experience, as a result of the lack of quality employees Work-Force

Solutions provided, the harvest and other work took longer than it should have causing the labor costs to increase.

Preliminary estimates of damages to Antoine Creek Farms as a result of Work-Force Solutions' failure to provide adequate and qualified staffing, lost productivity, and lost revenue are at least in excess of \$75,000. In addition, there are unknown damages likely to result from potential bad publicity and other errors and omissions left to uncover based on Work-Force Solutions' failure to conduct background screenings on employees . . .

DECLARATION OF JOE BIGHOUSE ¶¶ 22-23 (CP 116).

The above quoted declaration testimony creates issues of fact as to causation and damages for summary judgment purposes. In its summary judgment papers, Work-Force claims that this evidence amounts only to “conclusory statements” insufficient to raise an issue of fact. As stated by the Washington Court of Appeals, the rule is that “affidavits containing conclusory statements without adequate factual support are insufficient to defeat a motion for summary judgment.” *Guile v. Ballard Community Hosp.*, 70 Wn.App. 18,

25, 851 P.2d 689 (1993). The rule does not apply here. The declarations of Mr. McCormack and Mr. Bighouse provide a specific factual basis for determining damages. Labor and related costs were increased by more than \$75,000. This is confirmed by both declarants based on prior experience and based on a direct comparison of labor expenses for the 2014 and 2015 harvests.

**3. The Court Erred in Dismissing Antoine Creek's Claims Under the Consumer Protection Act.**

Work-Force's misconduct gives rise to a claim under the Consumer Protection Act. To prevail on a claim under the Consumer Protection Act, a party must prove: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). Each of these elements is established in this case.

Work-Force engaged in a deceptive act or practice. It

represented that it was conducting criminal background checks and drug screening on all potential employees. As demonstrated by Exhibit 4 to Mr. McCormack's deposition, this claim was blatantly false. Exhibit 4, Work-Force's own screening summary, shows that only half of the 32 employees listed underwent both drug screening and criminal background checks. McCORMACK DECLARATION, EXH. 4 (CP 83).

Work-Force's deception occurred in business or commerce. Work-Force agreed to provide sufficient qualified workers for a harvest in connection with Antoine Creek's farming business.

Work-Force's deception had and will continue to have a public interest impact. The evidence shows that Work-Force represents that it conducts criminal background checks and drug screenings for all employees. Yet only half of the employees underwent both a background check and a drug screening. The impact on the public is obvious. All customers of Work-Force who rely on background checks and drug screening for reasons of safety and legal compliance are adversely impacted by Work-

Force's deceptive practice.

Finally, Antoine Creek has provided evidence of damages. The declarations of Mr. Bighouse and Mr. McCormack set forth in detail the increase labor costs incurred as a result of Work-Force's failure to provide qualified and properly screened employees.

**4. The Court Erred in Determining As a Matter of Law That the Parties Did not Agree on a Payment Plan.**

There is a genuine issue of material fact as to whether a Payment Plan was agreed to by the parties. Mr. McCormack's declaration states:

The parties agree[d] to a repayment agreement for the alleged debt in question. Antoine Creek Farms offered to pay off the debt at a rate of \$500 per month and Work-Force Solutions has accepted these partial payments without exception.

Antoine Creek Farms continues to fulfill these terms by making payments to Work-Force Solutions' attorney's trust account.

Antoine Creek Farms continues to follow the agreed upon terms and continues to do so. The payments

have amounted to an additional \$6,000 in \$500 per month installments since August 2015.

Work-Force Solutions previously accepted, before the final repayment agreement, a “Payment Proposal Schedule” agreement for alleged debt owed at the time.

McCORMACK DECLARATION ¶¶ 6-10 (CP 37-38).

Work-Force claims that the repayment agreement is not enforceable because it is not supported by consideration. Work-Force cites *Duncan v. Alaska USA Federal Credit Union, Inc.*, 148 Wn.2d 52, 74, 199 P.3d 991 (2008) for the proposition that “modification of a bilateral contract requires consideration separate from the original contract.” Work-Force's argument relies on the false premise that there was no dispute regarding the obligation to pay. Antoine Creek vigorously disputes that it owes Work-Force any additional money. Antoine Creek had a right to sue Work-Force immediately for breach of contract and Consumer Protection Act violations because, among other things, Work-Force falsely claimed that it was conducting drug screening and criminal background checks. Antoine Creek

agreed to at least temporarily delay the assertion of those claims and continue making payments. Because it thus changed position to its detriment in exchange for the payment terms, there was consideration for the repayment deal. “Consideration is 'any act, forbearance, creations, modification or destruction of a legal relationship, or return promise given in exchange.” *Labriol v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 793 (2004) (quoting *King v. Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994)). The agreement to continue making \$500 per month payments on a disputed obligation is clearly supported by consideration.

In addition to its argument regarding consideration, Work-Force claims that an agreement was never reached and/or that the parties had not established a pattern under which silence would indicate consent. The circumstances under which silence may constitute acceptance are explained in *Freimuth v. Glen Falls Ins. Co.*, 50 Wn.2d 621, 626, 314 P.2d 468 (1957):

The offeree may authorize the offeror to regard silence as an acceptance of

his offer. Such authorization is not likely to be given in express terms, but the conduct of the offeree in previous dealings or in earlier stages of the existing negotiation may have justified the offeror in understanding silence as assent. If he does so understand there is a contract.

The parties previous course of dealing and negotiation of modification of payment terms makes clear that silence was to be regarded as acceptance. This included an e-mail message from Work-Force's Debra Montgomery stating “if you needed my replay [*sic*] and didn't receive one, you should have reached out before the deadline came and went.” McCORMACK DECLARATION, EXH. 5 (omitted from Clerk's Papers, but undisputed). Construed in a light most favorable to Antoine Creek, this statement invited Mr. McCormack to view silence as to a proposed repayment plan as acceptance.

## **CONCLUSION**

There are genuine issues of material fact precluding summary judgment. Antoine Creek has provided sufficient evidence to create genuine issues of material fact as to whether

a repayment plan was agreed upon and whether Work-Force failed to do drug screening and background checks and otherwise failed to provide enough qualified workers for Antoine Creek's harvest. Antoine Creek has also provided sufficient evidence that it was damaged in that its labor and related costs were greatly increased as a proximate result of Work-Force's breaches of contract. The judgment of the Superior Court should be reversed and the case remanded for trial on the merits.

Respectfully submitted this 26<sup>th</sup> day of June, 2017.



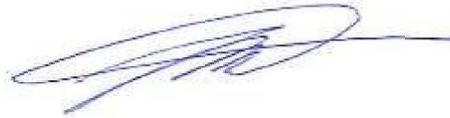
By \_\_\_\_\_  
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Attorney for Antoine Creek Farms, LLC

**Certificate of Service**

I hereby certify that on June 26, 2017, I filed the attached BRIEF OF APPELLANT with the Appeals court Via ECF filing can served a copy on the attorney noted below via U.S. Mail, postage pre-paid and email and caused a copy of the same to be served in person.

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Respectfully submitted this 26<sup>th</sup> day of June, 2017.



By \_\_\_\_\_  
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# MCCORMACK INTELLECTUAL PROPERTY PS

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## Transmittal Information

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**Appellate Court Case Title:** Work-Force Solutions, Inc., v Antoine Creek Farms, LLC  
**Superior Court Case Number:** 15-2-00444-3

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