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No. 71103-2-I

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

FLIGHT SERVICES & SYSTEMS, INC.,

Appellant,

v.

AIR SERV CORPORATION,

Respondent.

BRIEF OF APPELLANT

Attorneys for Appellant:

LIVENGOOD FITZGERALD
& ALSKOG, PLLC

Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739

121 Third Avenue,
P.O. Box 908
Kirkland, WA 98083-0908
Phone: (425) 822-9281

~~2014 JUN 17~~ FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
AM 11:20

ORIGINAL

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	5
III. STATEMENT OF THE CASE.....	9
IV. ARGUMENT	16
A. The Trial Court Erred as a Matter of Law by Applying the Wrong Measure of Damages.	16
B. The Trial Court Erred By Awarding Expectation Damages Based Upon Contract Theories Dismissed by Judge Rogers.	19
C. AS’s \$175 “Price Point” (Expectation Damages) Determination Was Greatly Flawed.....	23
D. The Trial Court Erred by Excluding FSS Key Witnesses, Which Prevented It from Presenting its Theory of the Case.	37
1. Excluding Testimony of FSS Witness Robert P. Weitzel.....	38
2. Limiting Testimony of FSS Witness Thomas Priola.	44
3. AS’s Motion in Limine.	47

TABLE OF CONTENTS

	<u>Page</u>
E. The Trial Court Erred by Awarding \$116,700 in Attorneys’ Fees and Costs under <i>Quantum Meruit</i> and Unjust Enrichment and by Failing to Conduct any Lodestar Analysis.	49
F. The Trial Court’s Award of Sanctions Cannot be Sustained.	50
G. If the Court Should Determine That a Remand is Necessary, It Should Direct the Remanded Case to a New Trial Judge.	54
V. CONCLUSION.....	55
APPENDIX A.....	55
APPENDIX B.....	55
APPENDIX C.....	55

TABLE OF AUTHORITIES

Page

Washington Cases

<i>Biggs v. Vail</i> , 124 Wn.2d 193, 876 P.2d 448 (1994).....	50, 52, 53
<i>Carson v. Willstadter</i> , 65 Wn. App. 880, 830 P.2d 676 (1992).....	17
<i>Casper v. Esteb Enterprises, Inc.</i> , 119 Wn. App. 759, 82 P.3d 1223 (2004).....	44
<i>Central Wash. Refrig., Inc. v. Barbee</i> , 133 Wn.2d 509, 946 P.2d 760 (1997).....	31
<i>Columbia Comm. Bank v. Newman Park, LLC</i> , 177 Wn.2d 566, 304 P.3d 472 (2013).....	32
<i>Dexter v. Spokane County Health Dist.</i> , 76 Wn. App. 372, 884 P.2d 1353 (1994).....	50, 52, 53
<i>Eaton v. Engelcke Mfg., Inc.</i> , 37 Wn. App. 677, 681 P.2d 1312 (1984).....	19
<i>Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004).....	22

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Flower v. T.R.A. Industries, Inc.</i> , 127 Wn. App. 13, 111 P.3d 1192 (2005)	46
<i>Ford v. Trendwest Resorts, Inc.</i> , 146 Wn.2d 146, 43 P.3d 1223 (2002)	23
<i>Fortune View Condominium Assoc. v. Fortune Star Devel. Co.</i> , 151 Wn.2d 534, 590 P.3d 1062 (2004)	32
<i>GMAC v. Everett Chevrolet, Inc.</i> , 179 Wn. App. 126, 317 P.3d 1074, 1087 (2014)	54
<i>In re Firestorm 1991</i> , 129 Wn.2d 130, 916 P.2d 411 (1996)	39
<i>Jones v. City of Seattle</i> , 179 Wn.2d 322, 314 P.3d 380 (2013)	37, 40, 44
<i>Kinsman v. Englander</i> , 140 Wn. App. 835, 167 P.3d 622 (2007)	38
<i>Lowe v. Double L Properties, Inc.</i> , 105 Wn. App. 888, 20 P.3d 500 (2001)	22

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Mahler v. Szucs</i> ,	
135 Wn.2d 398, 957 P.2d 632 (1998).....	49
<i>Marriage of Gillespie</i> ,	
89 Wn. App. 390, 948 P.2d 1338 (1997).....	38
<i>Marriage of Swaka</i> ,	
--Wn. App.--, 319 P.3d 69 (Div. II Feb. 20, 2014).....	41
<i>Mason v. Mortgage Am., Inc.</i> ,	
114 Wn.2d 842, 792 P.2d 142 (1990).....	22
<i>Mayer v. Sto Indus., Inc.</i> ,	
156 Wn.2d 677, 132 P.3d 115 (2006).....	44
<i>Newcomer v. Masini</i> ,	
45 Wn. App. 284, 724 P.2d 1122 (1986).....	27
<i>Perry v. Costco Wholesale, Inc.</i> ,	
123 Wn. App. 783, 98 P.3d 1264 (2004).....	38
<i>Public Utility Dist. 1 v. Kottsick</i> ,	
86 Wn.2d 388, 545 P.2d 1 (1976).....	49

TABLE OF AUTHORITIES

	<u>Page</u>
<i>RWR Management, Inc. v. Citizens Realty Co.,</i> 133 Wn. App. 265, 135 P.3d 955 (2006).....	20
<i>Saldivar v. Momah,</i> 145 Wn. App. 365, 186 P.3d 1117 (2008).....	55
<i>Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.,</i> 64 Wn. App. 553, 825 P.2d 714 (1992).....	20
<i>State v. Sherrill,</i> 13 Wn. App. 250, 534 P.2d 598 (1975).....	27
<i>Teter v. Deck,</i> 174 Wn.2d 207, 274 P.3d 336 (2012).....	38
<i>Tri-City Const. Council, Inc. v. Westfall,</i> 127 Wn. App. 669, 112 P.3d 558 (2005).....	32
<i>Wenatchee Sportsmen Ass'n v. Chelan County,</i> 141 Wn.2d 169, 4 P.3d 123 (2000).....	19
<i>Young v. Young,</i> 164 Wn.2d 477, 191 P.3d 1258 (2008)	4, 14, 16, 17, 18, 20, 22, 23, 24, 28, 53

TABLE OF AUTHORITIES

Page

Secondary Authorities

Candace S. Kovacic, *A Proposal to Simplify Quantum*
Meruit Litigation, 35 Amer. U.L.Rev. 547, 560 (1986) 16

Restatement of Restitution,
§ 155, cmt. d (1937)..... 16

Restatements of the Law 3d, *Restitution and Unjust Enrichment*,
§ 50 cmt. g (2011)..... 27

Rest. (2d) of Contracts
§ 370 cmt. a (1981). 24

Out of State Cases

Murdock-Bryant Constr. Co., Inc. v. Pearson,
703 P2d. 1206 (Ariz. App. 1984)..... 21

Sommerfield v. City of Chicago,
613 F.Supp.2d 1004 (N.D. Ill. 2009) 22

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Beltran-Tirado v. Immigration and Naturalization Serv.</i> , 213 F.3d 1179 (9th Cir. 2000)	41
<i>Brazos River Authority v. GE Ionics, Inc.</i> , 469 F.3d 416 (5th Cir. 2006)	47
<i>Fail-Safe LLC v. A.O. Smith Corp.</i> , 762 F.Supp.2d 1126 (E.D. Wis. 2011).....	21
<i>Mendenhall v. Mueller Streamline Co.</i> , 419 F.3d 686 (7th Cir.2005)	23
<i>Merle Wood & Associates, Inc. v. Trinity Yachts, LLC</i> , 857 F.Supp.2d 1294 (S.D. Fla. 2012)	21
<i>Peshlakai v. Ruiz</i> , 2014 U.S. Dist. LEXIS 14278, *81	47
<i>The Coryn Group II, LLC v. O.C. Seacrets, Inc.</i> , 265 F.R.D. 235 (D. Md. 2010).....	46
<i>United States v. Donato</i> , 99 F.3d 426, (D.C. Cir. 1997).....	54

TABLE OF AUTHORITIES

Page

Weber Aircraft, LLC v. Krishnamurthy,
2014 U.S. Dist. LEXIS 9368, *7 (E.D. Tex. Jan. 27, 2014)..... 47

Federal Regulation

7 CFR 330.400-300.403..... 35

7 CFR 330.400-330.403..... 34

9 CFR 94.5..... 34, 35

Federal Statutes

7 U.S.C. § 7734..... 35

7 USC § 7702..... 35

7 USC § 8313..... 35

I. INTRODUCTION

This appeal primarily arises from the trial court's use of the wrong measure of damages for ordinary lay services, which led to a windfall money damages award for services provided by Respondent Air Serv Corporation ("AS"), a Georgia corporation, on its claims of *quantum meruit* and unjust enrichment. Instead of requiring that AS prove the reasonable fair market value of its services, Judge Spector erroneously applied contract theories previously dismissed by Judge Rogers (the formerly assigned judge) on partial summary judgment.

Delta Airlines ("Delta") contracted with Appellant Flight Services & Systems, Inc. ("FSS") to provide cabin cleaning services for international and domestic flights. It takes 6-14 employees to clean an airplane depending upon airplane size and the type of cleaning requested. For cleaning international flights, a federal compliance agreement is required to monitor the handling and transfer of trash bags to the company hired to incinerate the trash. During the three-month period it took FSS to obtain a compliance agreement, Delta arranged for AS to temporarily provide a cleaning supervisor for the international flights under AS's own compliance agreement. Delta never consulted with FSS before making

this arrangement.¹ Nevertheless, both FSS and AS diligently performed their services that were arranged by Delta.

After services commenced, however, AS began demanding a large sum of money for its services—\$250 per airplane (\$500 per hour) and then \$175 per airplane (\$350 per hour). Both sums greatly exceeded what FSS received from Delta for performing all international flight cleaning services.² From the outset, FSS has maintained AS should be compensated a reasonable market rate. CP 11. But, AS’s unreasonable non-negotiated \$175 per aircraft price (\$350 per hour) demand was nothing but predatory. In its contract with Delta, FSS had agreed to accept \$14.05 per hour for all out of scope services, which FSS offered to pay AS. Tr. Ex. 51 (at p.5); Tr. Ex. 17 (FSS market analysis). When AS later acquired the same cleaning contract from Delta, AS contractually agreed with Delta to accept \$16.31 per hour for any out of scope services. Tr. Ex. 61 (at p.3). These arms-length negotiated market rates greatly differed from the \$175 rate demanded by AS and awarded by the trial court.

On summary judgment, Judge Rogers dismissed AS’s breach of

¹ FSS and AS are market competitors. Two months after the temporary arrangement ended, Delta cancelled its three year contract with FSS and entered into a new three year contract with AS worth over \$1.1 million. Tr. Ex. 61.

² FSS invoices (Tr. Exs. 3-10) show that Delta paid only \$108.48 per flight **for all cleaning services**. FSS also only received a total of \$62,595.73 **for all cleaning services** on the Delta international flights. See Appendix A (detailing the invoices).

contract and account stated claims, rejecting its arguments that its \$175 price demand had been established by non-agreed invoices or by oral or written contracts.³ CP 1581-82. Judge Rogers held that the parties disputed the price and services over several months and there was never a meeting of the minds as to price. *Id.* Judge Rogers agreed with FSS's position that AS was entitled to reasonable market compensation for its services and, therefore, granted partial summary judgment for liability on the claims *quantum meruit* and unjust enrichment, leaving only the issue of restitution damages applicable to these claims for trial. CP 1584. A few days before trial, the case was reassigned to Judge Spector.

At the two-day trial, however, AS offered no evidence of reasonable fair market value. All AS provided was a single non-market based valuation (its "price point") by its Vice President of Finance, Mr. Nguyen—the same corporate officer who had come up with the \$175 per airplane rate. FSS offered its market evaluation (Tr. Ex. 17) as the appropriate measure of restitution damages for the services.

In the preamble to its findings and conclusions, the trial court correctly stated that the only issue for trial was the determination of the

³ Judge Rogers presided over all aspects of the case except for the trial on damages. Judge Rogers had previously dismissed AS's Consumer Protection Act claim on partial summary judgment.

reasonable value of AS's services.⁴ CP 2180. However, the trial court then applied the wrong measure of damages. It awarded \$83,300 (\$175 per airplane) based only upon AS's invoices, draft contracts, and party representations, grounds that were previously rejected by Judge Rogers on partial summary judgment. CP 1581-82 (dismissing AS's claim for expectation damages under breach of contract and account stated claims because the parties had disputed the price and services over several months and there was no meeting of the minds on price based upon AS's non-agreed invoices, draft contracts, or the parties' oral or written representations). The trial court did not apply *Young*.⁵

Because AS failed to provide evidence to show fair market value, the trial court should have dismissed. Or, correctly applying the measure of restitution damages under *Young*, the trial court should have awarded \$3,511.00—the reasonable value based upon actual market rates and time spent performing the services. Tr. Ex. 17 (FSS' market analysis). The actual market rate is shown by the rate for out of scope services in the Delta contract, which was negotiated and agreed upon with Delta before it had arranged the supervisory services with AS. This was the best

⁴ In that same sentence, the trial court also inaccurately states the dates of service. As stated in ¶ 28 of the complaint, AS only provided services through September 2, 2011, not September 30. *See also* Tr. Ex. 17 (FSS market analysis); Tr. Ex. 19 (AS invoices).

⁵ *Young v. Young*, 164 Wn.2d 477, 191 P.3d 1258 (2008).

evidence of actual market value.

The trial court then further erred when it concluded that AS was entitled to “all associated attorneys’ fees and costs under both theories of quantum *meruit* and unjust enrichment,” CP 2184, and then awarding \$116,500 in fees and costs without even conducting a lodestar analysis including eliminating fees for non-meritorious claims dismissed by Judge Rogers. The trial court additionally erred by later awarding \$35,000 in unwarranted sanctions based upon the same discovery arguments made by AS and rejected by Judge Rogers shortly before trial. The trial court also failed to issue findings and conclusions that would allow this Court to properly review the award of \$35,000 in sanctions.

II. ASSIGNMENTS OF ERROR

1. Pertaining to Findings of Fact and Conclusions of Law from Trial

Assignment of Error 1. The trial court erred when it found that “plaintiff provided cleaning and/or supervision of cleaning 476 Delta flights involving both domestic and international travel.” CP 2180-81. AS only provided supervisory services for the international flights.

Assignment of Error 2. The trial court erred when it found that AS provided services from May 28, 2011 through September 30, 2011. CP 2183. AS only provided services until September 2, 2011.

Assignment of Error 3. The trial court erred when it found AS

was required to assume the risk of liability for a violation of the U.S. Custom and Border Patrol rules. CP 2183.

Assignment of Error 4. The trial court erred when it found that AS supervised the cleaning crews of FSS and remained with the airplane throughout. CP 2183. AS failed to keep any records of its services.

Assignment of Error 5. The trial court erred when it found FSS never interrupted AS's supervisory role throughout the summer. CP 2183. This contradicts Judge Rogers' partial summary judgment order.

Assignment of Error 6. The trial court erred when it awarded AS contractual expectation damages in the amount of \$83,300 based upon claims previously dismissed by Judge Rogers. CP 2183.

Assignment of Error 7. The trial court erred when it found that FSS never made any payment to AS. CP 2183. FSS undisputedly tendered payment of its fair market valuation shown in Tr. Ex. 17.

Assignment of Error 8. The trial court erred when it found that FSS told AS that it would be paid in full and that AS relied upon this representation. CP 2184. Judge Rogers rejected this same argument on partial summary judgment. CP 1584.

Assignment of Error 9. The trial court erred when it found that in a brief phone conversation Mr. Weitzel deliberately misled Mr. Nguyen into believing that Flight Services had agreed to pay \$175 per airplane

(\$350 per hour). CP 2184 (FF §9). Judge Rogers rejected this same argument on partial summary judgment and AS has made no claim of intentional or negligent misrepresentation or fraud. CP 1584.

Assignment of Error 10. The trial court erred when it found that AS “never stopped the indemnity carried solely by plaintiff.” CP 2184. FSS had expressly agreed to indemnify AS if anything arose.

Assignment of Error 11. The trial court erred when it found that FSS’s failure to provide information related to its costs and revenues was intentional. CP 2184. This directly contradicts Judge Rogers’ order on partial summary judgment. CP 1584.

Assignment of Error 12. The trial court erred when it found that Delta paid FSS in excess of \$400,000. CP 2184. The invoices show that Delta paid FSS only \$62,595.73 for the international flights. Appendix A provides a full breakdown of the invoices (Tr. Exs. 3-10).

Assignment of Error 13. The trial court erred when it found that FSS received \$77,730.50 in direct revenue from Delta for airplanes which AS provided a supervisory role. CP 2184. *See* Appx. A.

Assignment of Error 14. The trial court erred when it found that Flight Services received \$77,439.09 in fixed fees for airplanes on which AS provided a supervisory role. CP 2184. *See* Appx. A.

Assignment of Error 15. The trial court erred by concluding that

AS was entitled to \$116,700 in fees and costs under its claims of *quantum meruit* and unjust enrichment in contravention of the American Rule and by failing to conduct a proper lodestar analysis including the elimination of fees for non-meritorious claims. CP 2184; 2300:24-27 & 2301:6-15.

Issue 1. Did the trial court error by using the wrong measure of damage, awarding AS \$83,300 in expectation damages that exceeded the total revenue FSS received for all the international cleaning services?

Issue 2. Did the trial court error when it failed to dismiss the *quantum meruit* and unjust enrichment claims where AS failed to offer any evidence of reasonable fair market value at trial?

Issue 3. Did the trial court error when it ruled that AS was entitled to \$116,500 in attorneys' fees and costs under the claims of *quantum meruit* and unjust enrichment in direct contravention to the American Rule and then failing to properly conduct a lodestar analysis?

2. Pertaining to the Trial Court's Exclusion of Evidence and Appearance of Fairness at Trial

Assignment of Error 16. The trial court erred by excluding two key FSS witnesses and severely circumscribing the testimony of another FSS witness, which prevented FSS from presenting its theory of the case. CP 2181:12-24 & 2182:1-5.

Assignment of Error 17. The trial court erred by granting AS's

motion *in limine* presented on the second day of trial to exclude FSS from introducing any evidence of industry standards or market rates. VRP 268.

Assignment of Error 18. The trial court erred by ordering FSS to pay \$35,000 in sanctions based upon the same alleged discovery violations already rejected and denied by Judge Rogers prior to trial and without issuing any detailed finding and conclusions that would allow a proper review by this Court. CP 2298-2301 (§3.a-i); 2301:15-18.

Issue 4. Did the trial court error by excluding FSS's key witnesses and severely limiting the testimony of FSS Manager Tom Priola, which prevented FSS from presenting its theory of the case at trial?

Issue 5. Did the trial court error by granting AS's 9-page motion in limine at trial, excluding FSS's evidence of market value?

Issue 6. Did the trial court violate Washington's Appearance of Fairness Doctrine, requiring a presiding judge to not only be fair and unbiased, but also to avoid even the appearance of bias or prejudice?

Issue 7. Did the trial court error in awarding AS \$35,000 in sanctions based upon discovery disputes that had already been previously denied by Judge Rogers?

III. STATEMENT OF THE CASE

This case involves a dispute between two competing companies in the aircraft cleaning business over the fair market value of AS services

arranged by Delta Airlines, which is not a party in this case. CP 906. In 2011, FSS was awarded a three-year contract with Delta to provide cabin cleaning on international and domestic flights, starting May 17, 2011. *Id.*; Tr. Exs. 2 & 51. The contract contained a specific negotiated payment rate of \$14.05 per hour for any out of scope services. Tr. Ex. 51 at p. 5.

On May 11, 2011, U.S. Customs and Border Protection (the “CBP”) stated that FSS would need to obtain a Compliance Agreement for the handling and transfer of collected trash on the international flights. CP 932; Tr. Ex. 65 at p. 5. FSS was told that it would take about 6-8 weeks to obtain the compliance agreement. CP 907-908. FSS had compliance agreements for other airports, and understood the compliance standards and requirements. CP 908 at ¶8; CP 1688 at 76.

Unfortunately, FSS was unable to secure a compliance agreement before it started cleaning Delta’s international flights. CP 907-08. However, CBP had agreed to allow FSS to perform the cleaning services so long as a vendor with a compliance agreement monitored FSS’s handling and transfer of the bags of collected trash to Gate Gourmet, the company hired by Delta to incinerate the trash. *Id.*

Without consulting FSS, Delta arranged with AS to provide the temporary supervisory monitoring services under its own compliance agreement. CP 1581. Under this temporary arrangement, until FSS could

obtain its own compliance agreement, AS would send a supervisor to monitor FSS's handling and transfer of the collected bags of trash to the company hired to incinerate the trash. CP 907-908. FSS still performed **all the cleaning services** contemplated under its contract with Delta, which took about **6-14 employees** depending upon the model of airplane being cleaned and the type of cleaning ordered by Delta. *Id.* Both FSS and AS did exactly what Delta had arranged for them to do. *Id.*

On May 28, 2011, AS began providing the temporary supervisory services. *Id.* About two weeks after services commenced, AS began demanding that FSS pay \$250 per airplane (\$500 per hour). CP 912 at ¶19; 923 at ¶55; Tr. Ex. 64 at 1 and 3 (¶1.2). No explanation was given for this extraordinary rate. *See id.* Later, AS proposed a new contract with a price of \$175 per airplane (\$350 per hour), again without providing any explanation for the excessively high rate. Tr. Ex. 66 at 1 and 4 (¶1.2). AS's price demands well exceeded its own contract rates with Delta *for all cleaning operations* after it had taken over the contract from FSS in November 2011. *See* Tr. Ex. 61 at pp. 2-3 (Delta/AS contract).

The parties disputed the unprecedented price over several months, but, nevertheless, FSS expressly agreed to indemnify AS. CP 1581-82; 911-912; VRP 133; 218-219, 221-223, 226-227, 229, 237, 240, 243, 246-247. The AS witness testified that most compliance issues that

infrequently arise do not result in any monetary penalty. VRP 138.

That the amount sought by AS greatly exceeded what FSS received from Delta for all the cleaning services is shown by the invoices. Tr. Exs. 3-10 (invoices) & Appx. A (summary of the invoices). As shown in the summary of the invoices provided in Appendix A, only 14.47% of the flights cleaned were international flights. See Appx. A. FSS received total gross revenues of just \$62,595.73 for the international flights, which amounted to an average total payment per flight of just \$108.48. *Id.* That is for the entire cleaning operation performed by FSS. *Id.*

FSS also contacted AS to object to the charges set forth in AS invoices, which continued to show the excessively high non-agreed rate. CP 916-917 at ¶35. FSS then prepared a market analysis for AS based upon the actual time, hourly rates, dates of services provided and number of flights, which totaled \$3,511.00 for the roughly three month period that AS provided the temporary monitoring services on Delta's flights. Tr. Exs. 17 & 57; CP 917 at ¶36-37; VRP at 346-358. FSS used the out of scope services rate of \$14.05 per hour set forth in its contract with Delta. Tr. Ex. 51 at p.5. It is similar in amount to the \$16.31 per hour out of scope services rate set forth in AS's contract with Delta—when AS took over the cleaning operations in November 2011. Tr. Ex. 61 at p.3.

On September 1, 2011, 14 weeks after the initial estimate of six to

eight weeks, CBP granted FSS its own compliance agreement. Tr. Ex. 1; CP 918 at ¶40. The arrangement between Delta and AS ended on September 2, 2011. *Id.*

On June 14, 2013, Judge Rogers dismissed on partial summary judgment AS's breach of contract and account stated claims based upon AS's disputed invoices, draft contracts, and the alleged oral and written representations of the parties. CP 1581-82. Judge Rogers ruled that "the parties disputed the price of the services over several months" and that [t]here was never a meeting of the minds as to price." *Id.* In addition, agreeing with FSS's counsel's representations at oral argument, Judge Rogers *sua sponte* granted summary judgment in favor of AS on its claims of *quantum meruit* and unjust enrichment for liability purposes only, leaving for trial only the issue of restitution damages. CP 1584.

Judge Rogers' ruling was based on concessions made by FSS at the two summary judgment hearings shortly before trial. At the June 7 hearing, FSS admitted that it owed AS fair market value for the services rendered by AS, and that amount of \$3,511.00, as detailed in the market evaluation that FSS provided AS in September 2011, constituted the appropriate restitution damages. VRP (June 7, 2013) at 44-45; CP 975-980; Tr. Exs. 57 and 17 (market analysis). At the June 14 hearing, in colloquy between FSS counsel and Judge Rogers, FSS conceded that the

trial court had authority to *sua sponte* grant summary judgment finding liability for unjust enrichment and/or quantum meruit, even though AS had not requested it, leaving “a trial on damages to determine what the reasonable value of services are” in case the judge found issues of fact on damages. VRP (June 14, 2013) at 25-26. Judge Rogers followed FSS’s suggestion and ordered a trial solely on the issue of the measure of damages for *quantum meruit* and unjust enrichment. CP 1584.

At trial, AS provided no evidence of fair market value for its services. Contrary to *Young*, 164 Wn.2d at 490, AS argued that fair market value and industry standards were irrelevant in determining the reasonable value of its services. CP 2430-2431 & n. 17; VRP 51-52. AS offered “value” or “price point” testimony only from its finance director, Toan Nguyen, the same individual who unilaterally determined AS’s heavily inflated \$250 / \$175 airplane demand without even discussing the services with the local manager or individuals who did the work. VRP 115-16; 150. Mr. Nguyen testified that he had no prior experience pricing supervisory services like AS provided here. VRP 101. He testified that his pricing was based all upon his own personal assumptions. VRP 111. He further testified that he had no records, market or otherwise, to support any of his assumptions. VRP 139. He could not provide a single market comparison. *Id.* Mr. Nguyen even failed to use the pricing model that AS

ordinarily uses to price its cabin cleaning services. *Id.*

Contrary to its normal practice, AS kept **no employment records** to detail the specific work performed, the dates of the performance, the persons who performed the work, the hours worked, or any problems encountered. *Id.* AS also made no effort to prove what market rates would be for supervisory services. *Id.* AS' own payroll records, Tr. Ex. 60 & CP 981-1001, showed that AS supervisor hourly rates were no more than \$12 per hour during the period of May - September 2011. CP 911 at ¶17. These are not professional services; they are cleaning services by lay workers making just above minimum wage. CP 907.

The only evidence of fair market value offered at trial was the market analysis submitted by FSS, using market rates from a negotiated arm's length transaction with Delta and based upon industry standards, actual observed time spent performing the services and the travel time, which amounted to \$3,511 and tendered to AS. Tr. Exs. 17 & 57.

In addition to the \$83,300 expectation damages award, the trial court awarded AS "all associated attorney's fees and costs under both theories of *quantum meruit* and unjust enrichment." CP 2184. When AS moved for an award of fees (CP 2186), the court awarded AS \$116,700 in attorneys' fees "as part of the remedy to make plaintiff whole in this matter under unjust enrichment and *quantum meruit*—a remedy fashioned

to do substantial justice and put an end to the litigation.” CP 2300. Although it was involved with the case for only two days, the trial court also inexplicably awarded \$35,000 in sanctions “above and beyond plaintiff’s reasonable attorney’s fees” because of “[d]efendant’s misconduct throughout the course of this litigation.” CP 2298-2301.

IV. ARGUMENT

A. The Trial Court Erred as a Matter of Law by Applying the Wrong Measure of Damages.

The trial court erred by awarding AS contractual damages denied on summary judgment instead of applying the standard measure of damages for *quantum meruit* and unjust enrichment—the fair market value for the services performed. The standard of review for applying the wrong measure of damages and the circumstances affecting it is *de novo*. *Young v. Young*, 164 Wn.2d 477, 483, 191 P.3d 1258 (2008). The measure of damages for either *quantum meruit* or unjust enrichment where a defendant requested the work is the reasonable fair market value of the services performed. *Young*, 164 Wn.2d 477 at 485 & 490-91 (quoting *Restatement of Restitution*, § 155, cmt. d (1937)).⁶ Fair market value is

⁶ “The reasonable market value of plaintiff’s services is the only remedy necessary.” Candace S. Kovacic, *A Proposal to Simplify Quantum Meruit Litigation*, 35 Amer. U.L.Rev. 547, 560 (1986), cited in *Young*, 164 Wn.2d at 486. “Reasonable value of the plaintiff’s services is a workable and perhaps the only workable measurement for recovery....” Kovacic, 35 Amer. U.L. at 611.

the price a well-informed buyer would pay to a well-informed seller, where neither is obliged to enter into the transaction. *Carson v. Willstadter*, 65 Wn. App. 880, 884, 830 P.2d 676 (1992); *Dillon v. O'Connor*, 68 Wn.2d 184, 186, 412 P.2d 126 (1966) (not “speculative value, nor a value fixed by depressed or inflated prices”); WPI 150.08.

When the matter concerns the provision of services, the measure of damages is what it would have cost the defendant to obtain the same services from a third party. In *Young*, the claimant contractor provided services to the recipient landowner without an agreement as to the price for the construction services. 164 Wn.2d at 480-82. Washington’s Supreme Court upheld the appeals court ruling that the contractor was entitled to the “full amount it would have cost [the landowner] to pay a third-party to make the improvements.” 164 Wn.2d at 482

Here, purporting to apply *Young*,⁷ and properly stating in the preamble that the only issue was to determine “the reasonable [market]

⁷ The trial court misread *Young* by reading the dissenting opinion as if it were the majority opinion. VRP 389, 393. Citing *Heaton* and *Losli*, it was the dissent that advocated courts use “a flexible approach [that] use[s] factors other than strict “market value” in calculating reasonable value awards.” See *Young*, 164 Wn.2d at 464-465 & n. 5, 497 (Owens, J. dissenting). Relying heavily on *Heaton* and *Losli*, the dissent cited *Heaton* a total of four times, and *Losli* once. But, the majority opinion in *Young* did not rely on *Heaton* or *Losli*, citing them only in a footnote as examples of “imprecise” and “ambiguous” cases that confused unjust enrichment with quantum meruit. 164 Wn.2d at 485 n. 5 (Sanders, J.). Adopting the dissent’s “flexible approach,” instead of the majority’s “strict market value” approach, the trial court erroneously believed it was unconstrained to require proof of fair market value so therefore it could award damages

value of services rendered,” CP 2180-81, the trial court then erred as a matter of law by awarding contractual and account stated damages based solely upon the circumstances of AS, the claimant. CP 2183-84 (fully relying upon draft unexecuted contracts and non-agreed invoices from AS). But, the circumstances of the claimant are never relevant in determining the quantum of recovery. *Young*, 164 Wn.2d at 488. In addition, this \$175 per airplane contractual and accounts stated measure of damages used by Judge Spector was previously rejected and dismissed by Judge Rogers in his final order on summary judgment:

Based upon the facts in this case, the parties disputed the price and the services over several months and this cannot constitute silence by acceptance. **There was never a meeting of the minds as to price [the \$175 per aircraft claimed by AS] under the contract arranged by Delta between AS and FSS.** For these reasons, AS’s claim for breach of contract and accounts stated are dismissed.

CP 1581-82 (Roger, J.) (bold added).

Where the issue concerns services, fair market value is *viewed through the eyes of the recipient and determined by looking at what the recipient would have had to pay a third party for the same services.* *Young*, 164 Wn.2d at 489-90. The focus is upon “similar providers of like services.” *Id.* at 490. But instead of requiring AS prove fair market value,

based on AS’s contractual expectation that it was owed \$175 per plane. This was error.

Judge Spector allowed AS to relitigate its breach of contract and accounts stated claims that were previously dismissed by Judge Rogers and then she applied the measure of damages for AS's breach of contract and account stated claims. CP 2183-84. The fact that FSS refused to pay AS's unreasonable invoices or its inflated price stated in rejected draft contracts is wholly immaterial to the measure of damages, as Judge Rogers held in his final order on summary judgment. CP 1581-82 (holding that the parties disputed the \$175 price and services over several months and never had a meeting of the minds as to the price).

B. The Trial Court Erred By Awarding Expectation Damages Based Upon Contract Theories Dismissed by Judge Rogers.

Findings of fact are reviewed for substantial evidence, meaning evidence sufficient to persuade a rational fair-minded person that the premise is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The party seeking money damages bears the burden of establishing the reasonable fair market value for the services. *Eaton v. Engelcke Mfg., Inc.*, 37 Wn. App. 677, 682, 681 P.2d 1312 (1984). Here, purporting to apply a "reasonable value of services" measure, the trial court failed to make any factual findings to support its legal conclusion that \$175 per aircraft constituted a reasonable market value for the services performed. CP 2180 & 2183-84; CR 52 (trial court

in a bench trial must “find facts specially and state separately its conclusions of law”). As shown by the trial court’s findings, AS offered no evidence of fair market value. CP 2182-83.⁸

In implied contract cases involving services, fair market value is viewed through the eyes of the recipient and determined by looking at what the recipient would have had to pay a third party for the services. *Young*, 164 Wn.2d at 489-90. The focus is upon “similar providers of like services.” *Young*, 164 Wn.2d at 490; *see also Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 567, 825 P.2d 714 (1992) (rejecting sign provider’s proposed fair rental value tied to contract/invoice price since that “figure is not necessarily a reliable indicator of the fair rental value of the sign”); *RWR Management, Inc. v. Citizens Realty Co.*, 133 Wn. App. 265, 277, 135 P.3d 955 (2006) (fair market value shown where claimant “submitted evidence from another development coordinator showing six percent of total project costs as an

⁸ AS conceded at trial that its \$175 per plane valuation did not reflect fair market value. VRP 51-52. AS’s counsel argued that fair market value was entirely irrelevant in determining the reasonable value of its services: “Air Serv should not be made to accept a rate lower than it ever agreed to charge...” CP 2430-2431 & n. 17 (trial brief). Similarly, AS’s counsel argued at trial: “So Air Serv doesn’t know what other companies think the reasonable value of services are. All they know is the price and how they came up with the price point that they were going to provide the services to FSS...” VRP 51-52. AS cited no cases to support its position. AS’s “argument overlooks the focus of an unjust enrichment calculation,” is the fair market value *from FSS’s perspective*, not the subjective value AS placed on its own services. *See Young*, 164 Wn.2d at 488-90 (“the circumstances of the claimant [do not] affect[t] the quantum of recovery”).

acceptable development fee”). Where there is no meeting of the minds as to price, a claimant’s unilateral expectation of a certain price for providing services is insufficient. *See, e.g., Merle Wood & Associates, Inc. v. Trinity Yachts, LLC*, 857 F.Supp.2d 1294, 1304 (S.D. Fla. 2012); *Fail-Safe LLC v. A.O. Smith Corp.*, 762 F.Supp.2d 1126, 1136-37 (E.D. Wis. 2011).

Here, the trial court’s award of \$175 per plane was based entirely on AS’s “circumstances” and “expectations” instead of fair market value. CP 2183-2184, ¶¶5, 6, 9, 16. The trial court’s findings are devoid of any evidence of providers of like services to support AS’s heavily inflated valuation. *Id.* Instead, the trial court made its award by referring to the same alleged oral and written agreements that were rejected by Judge Rogers on summary judgment. *Id.* Judge Rogers specifically held that the parties disputed the price and the services over several months; that there was never a meeting of the minds as to price; and, therefore, he dismissed AS’s breach of contract and account stated claims.⁹ CP 1581-82.

⁹ FSS anticipates AS may argue that it was misled as to price. This is contrary to the holding of Judge Rogers who held that the parties disputed the price and services over several months and that there was never a meeting of the minds. CP 1581-82. Judge Rogers dismissed AS’s breach of contract, accounts stated, and Consumer Protection Act claims. *Id.* Likewise, the trial court stated that the only issue was the reasonable market value of the AS’s services. CP 2180. AS also never pled claims for fraud, misrepresentation, or promissory estoppel. Nonetheless, even assuming for the sake of argument that Judge Rogers was wrong and that AS had been misled, the measure of damages would still be the reasonable market value of the services performed. *See, e.g., Murdock-Bryant Constr. Co., Inc. v. Pearson*, 703 P2d. 1206, 1215-1216 (Ariz. App. 1984) (subcontractor awarded costs that “reflect the fair market value” in *quantum meruit*

Nevertheless, the trial court disregarded Judge Rogers' final order and awarded the full "contractual" expectation damages.

The trial court confused expectation damages applicable to breach of contract¹⁰ and account stated claims with restitution damages applicable to implied contract claims. Instead of using a *fair market value* measure of damages required by *Young*, 164 Wn.2d at 489-491, the trial court decided damages by what AS expected to be paid. CP 2183-2184 (findings and conclusions); VRP 175 ("Invoices are critical to the case's analysis of what the measure of damages should be."). For the trial court to award AS the \$175 per plane it "expected," there had to have been an enforceable express contract. But there was no contract and no account.¹¹

for extra work where construction manager misrepresented quantity of rock that needed to be blasted and subcontractor rescinded contract); Restatement of the Law, *Restitution*, § 152 (1937) (measure of recovery for services acquired by consciously tortious conduct is "market value of such services irrespective of their benefit to the recipient").

¹⁰ See, e.g., *Mason v. Mortgage Am., Inc.*, 114 Wn.2d 842, 849, 792 P.2d 142 (1990) (contract damages based on injured party's reasonable "expectation interest" give party "benefit of the bargain" and put party in as good a position as that party would have been had contract been performed).

¹¹ Judge Rogers' order was the law of the case on the issue of whether FSS made any promise, assurance, representation or agreement on price—clearly there was no bargain to award expectation damages. CP 1581-82 (order). See *Estate of Black*, 153 Wn.2d 152, 170-71, 102 P.3d 796 (2004) (grant of summary judgment motion is final judgment on the merits on all issues decided with same preclusive effect as a full trial); *Lowe v. Double L Properties, Inc.*, 105 Wn. App. 888, 896 20 P.3d 500 (2001) ("Here, the court, acting on its own initiative, abused its discretion by modifying the earlier [summary] judgment" on easement holder's maintenance rights deemed res judicata by the appeals court); *Sommerfield v. City of Chicago*, 613 F.Supp.2d 1004, 1013 and n. 17 (N.D. Ill. 2009) (law of the case doctrine applies even when a case is reassigned from one judge to another since "doctrine reflects the rightful expectation of litigants that a change of judges midway through a case will not mean going back to square one"); *Mendenhall v.*

In an unjust enrichment or *quantum meruit* case, a claimant's expectancy has no bearing. *See Young*, 164 Wn.2d at 490-491. Nor should the trial court be able to award contract expectation damages to punish FSS for any of AS's allegations of wrongdoing. *See Ford v. Trendwest Resorts, Inc.*, 146 Wn.2d 146, 155, 43 P.3d 1223 (2002) (breach of contract "is neither immoral nor wrongful; it is simply a broken promise" and punishment has no justification on either economic or other grounds).

Because AS failed to provide *any evidence* of reasonable fair market value for its services, *i.e.*, what FSS would have had to pay for comparable services from a third party, and the trial court's findings unequivocally establish that AS failed to meet its burden of establishing fair market value, AS's claims should have been dismissed.

C. AS's \$175 "Price Point" (Expectation Damages) Determination Was Greatly Flawed.

"[W]hat Air Serv did was create a price point, it stated its price, and what it expects to be paid is the price which it stated to the person that was providing the services."

VRP 51 (AS counsel). AS tried to justify its \$175 "stated price" based on its own "perceived costs": \$150 in "potential liability" + \$20 labor cost + \$5 profit per plane. CP 2431-2432 n. 18 (AS trial brief); VRP 83, 114,

Mueller Streamline Co., 419 F.3d 686, 691 (7th Cir.2005) (successor judge is not free to alter prior rulings "merely because he has a different view of the law or the facts from the first judge"). Here, the case below was reassigned to Judge Spector on the eve of trial,

139, 146, 154-155 (Nguyen testimony). AS could not recover unless it demonstrated a rational basis to conclude that its “perceived” value of services aligned with a *fair market value of similar services available from other service providers*.¹² AS provided no expert witness testimony either to support the value of its services or to establish that its services could not be evaluated for fair market value. *Cf. Young*, 164 Wn.2d at 482 (claimant offered two expert witnesses at trial).¹³ Each of the components that made up AS’s \$175 “price point” was also materially flawed.

Alleged Liability. Mr. Nguyen—“the person [at Air Serv] who came up with the prices”¹⁴—arbitrarily chose \$175 per plane without

only days after Judge Rogers issued his rulings on summary judgment. *See* CP 1607.

¹² *See Young*, 164 Wn.2d at 489-490 (value of benefit conferred must be “viewed through the eyes of the recipient and not the actual claimant”). A claimant’s perceived costs and expenditures in “performance that do not confer a benefit on the other party do not give rise to a restitution interest.” *See Young*, 164 Wn.2d at 488, quoting *Rest. (2d) of Contracts* § 370 cmt. a (1981).

¹³ AS’s employees Nguyen and Green testified that AS had never supplied such services before, implying they had no knowledge about what similar services would have cost FSS if it had retained another cabin cleaning company. VRP 75, 101, 274. Unlike all his other price settings, Mr. Nguyen did not utilize his computer “pricing model” to generate an appropriate price to charge FSS. VRP 116, 139. It was a literally a number pulled out of thin air based on his own “personal assumptions.” VRP 111.

AS counsel’s suggestion below that this was a “unique” transaction was contradicted by its own exhibit, which showed other cleaning companies subcontracted at Sea-Tac Airport *at the same time and in the same way* Delta requested AS subcontract with FSS. Tr. Ex. 12 at 3 (“Evergreen [Eagle] sub-contracts with World Service to clean BA [British Airways]”); VRP 50. Also, AS’s counsel admitted at trial: “It’s not like they forced—Air Serv was not—didn’t have to provide these services, there were other vendors that could.” VRP 51.

¹⁴ AS’s vice-president of finance, Toan Nguyen, testified that he alone established the price based on his own “assumptions” about labor costs, equipment, profit, liability and risk. *See* VRP 82-85, 111. Mr. Nguyen did not contact FSS to find out what their staffing

regard to market value, which included “\$150 [per plane] “for the liability,” the “financial and operational risk involved with allowing someone else to use our compliance agreement.” VRP 83, 94 (Nguyen testimony). The \$150 liability charge alleged by Mr. Nguyen had no objective reality or rational basis in the marketplace of willing buyers and willing sellers. It was not an actual out-of-pocket cost. Thus, 86% (\$150 per plane) of the price awarded by the trial court was to provide assurance to AS against an alleged “potential” risk of fines or penalties or revocation of its license that might prevent AS from servicing its cleaning contract with United Airlines. VRP 80-82; 154-155 (Nguyen testimony). Mr. Nguyen testified that this alleged potential liability “was really the only concern” the company had going into the subcontract with FSS. VRP 82. Similarly, AS’s Seattle manager, Gilbert Green, testified about his company’s initial concerns about “a possibility of fines” and “exposure to the company, for AS, if there were some fines.” VRP 276.

Furthermore, the subcontract did not result in any *actual* liabilities

was or for any other reason before he set a price. VRP 111, 116. Mr. Nguyen also did not speak with Gil Green, AS’s manager at Sea-Tac Airport, about staffing requirements before calculating a price. VRP 115-116. Mr. Nguyen did not “research the manpower requirements or the flight schedule” before coming up with his \$175 per airplane rate. VRP 140. He did not speak with any of the individuals who actually performed services for AS. VRP 150. Mr. Nguyen testified that he had no personal knowledge or experience with pricing this kind of service, since this was his first and only “supervisory services pricing” since he started working for AS in 2003. VRP 75, 101.

or penalties. There were no incidents, violations, penalties, or liabilities of any kind during or after the 3-month subcontract in 2011. Tr. Ex. 17 at 3; CP 3, ¶17 (complaint). The risk of liability was non-existent. Air Serv’s witnesses spoke only of “potential penalties” and “potential liability” and admitted that fines were merely possible and most fines do not result in an actual monetary penalty because they are mitigated. VRP 80-82, 138 (Nguyen¹⁵); VRP 176, 296-297 (Green¹⁶). AS did not even investigate to see whether FSS had a record of government fines or violations. VRP 138-139 (Nguyen). FSS showed how AS’s alleged “potential liability cost” is based on flawed assumptions, plus FSS undisputedly offered to indemnify AS for all potential liability and still AS refused to lower the price. Inexplicably, Mr. Nguyen testified that he did not communicate with AS’s contract personnel before determining his “price point.”

Contingent hypothetical liabilities that never materialize into actual

¹⁵ Mr. Nguyen testified that AS’s fear of CBP fines was based on his company’s experience of having “multiple fines per year.” VRP 154, 160. But Mr. Nguyen admitted most fines are waived or substantially mitigated. VRP 138-139, 161. He testified that he could remember “probably ten” incidents involving fines in the past year, but he could not recall any of the details except 2-3 that purportedly occurred in Atlanta involving wheelchair services (not cleaning international aircraft) where employees failed to carry proper security identification, and one incident at Dulles where a cabin cleaner did not have proper security identification. VRP 161-163. But, he could not recall the specific results of those violations, *i.e.*, what penalty, if any, was imposed by CBP, the amounts of the fines, or whether they were mitigated. *Id.*

¹⁶ Mr. Green testified that he was not aware of any incidents in the prior 20 years where CBP actually fined a cleaning company for noncompliance. VRP 296-297. He testified, “My only knowledge is by what’s in the compliance agreement as to what

costs are not recoverable in restitution. *See State v. Sherrill*, 13 Wn. App. 250, 255, 534 P.2d 598 (1975) (fair market value is based on conditions that well-informed buyer or seller would assume, reflecting “only what exists in fact and not what is hypothetical”); *cf. Newcomer v. Masini*, 45 Wn. App. 284, 288, 724 P.2d 1122 (1986) (“Potential liability does not satisfy that requirement”—indemnitee must prove actual liability).

When unjust enrichment results from the claimant's discharge of the defendant's obligation, comparable safeguards ensure that the defendant's liability in restitution will not have the effect of liquidating an obligation that is contingent, or accelerating an obligation that is deferred. A natural consequence of subrogation is to protect the restitution defendant against any such increased burden, because it permits the claimant to enforce only the obligation to which the defendant would otherwise have been subject.

Restatements of the Law 3d, *Restitution and Unjust Enrichment*, § 50 cmt. g (2011); *see also id.*, § 57 (subrogation).

In effect, AS expected FSS to satisfy AS's insecurity about speculative “potential liability” in three overlapping ways: (1) FSS must pay \$150 per plane to indemnify AS from liability risks; (2) FSS agreed to indemnify AS from potential liabilities; and (3) AS expected FSS to pay \$25 per flight for an AS supervisor to monitor FSS's cleaning operations

penalties are” and what “they could impose.” VRP 297.

to ensure compliance and avoid CBP fines or sanctions.¹⁷ These measures only favored AS, providing no benefit to FSS because FSS had its own supervisors and trained cleaning staff. Having safely operated at other airports across the country in compliance with federal cleaning regulations, AS's three layers of liability protection was nonsense and not asserted in good faith.¹⁸ There were no incidents of liability—real or potential—during the 3-month 2011 subcontract or in the years since.

The trial court awarded \$175 per aircraft, the price AS “expected” to be paid that included a \$150 “potential liability” charge. The trial court committed error by awarding this \$150 phantom “cost” component in the \$175 “price” without determining whether it provided any benefit to FSS and whether the market would similarly value it as AS had. *See Young*, 164 Wn.2d at 488-89, 491 (no recovery in unjust enrichment for claimant costs that have “inconsequential relationship to the benefit conferred to the

¹⁷ AS had no records to show they performed any supervision of FSS cleaning Delta flights during the subcontract. CP 292-294 (Green testimony). Mr. Green also never witnessed any of the FSS cleaning operations firsthand; nor did he speak to any AS personnel who monitored the cleanings. VRP 317-318, 320.

¹⁸ The evidence does not support AS's claim of concern for potential liability. AS kept no records to show they performed any supervision of FSS cleaning of Delta flights during the subcontract. If CBP had audited to ensure compliance (Air Serv “subject to unannounced inspections by CBP or APHIS personnel” – Tr. Ex. 29 at 10), AS could not have proven it had done anything and would have risked fines or loss of license by their lack of proof. If fines and penalties were a genuine concern, AS would have kept and maintained detailed records of its supervision of FSS to prove their due diligence to the CBP. In addition, AS admitted it did not investigate to see whether FSS had a record of government fines for violations. VRP 138-139 (Nguyen).

defendant”). AS failed to prove that FSS benefitted at all from its perceived \$150 per flight alleged “potential liability” cost.

Indemnity. The trial court ruled that FSS “never stopped the indemnity carried solely by [AS].” CP 2814, ¶10. Substantial evidence does not support this finding. Awarding \$175 per plane, AS’s “stated price” included a \$150 charge for “potential liabilities” that never materialized and provided no benefit to FSS. AS was fully protected from any alleged liability by express and implied indemnity, which AS agreed would fully eliminate the \$150 liability fee in its \$175 price.

Express Indemnity.

Robert P. Weitzel testified that Brad Wilson of Delta Airlines informed him that the reason AS was demanding such a high rate for the subcontract was due to speculative indemnity requirements. CP 1694 (Weitzel Dep. at 97:1-6). Delta informed FSS that Air Serv had “a problem with the liability,” to which Weitzel responded, “if they [Air Serv] have a problem with the liability, we will indemnify Air Serv, and then their concerns go away, so therefore we can get to a reasonable price.” CP 1701 (Weitzel Dep. 103:18-25). When Weitzel spoke to Air Serv’s Nguyen about the proposed \$175 price on June 24, 2011, Weitzel told Nguyen “the price was not acceptable,” and they discussed indemnity. CP 1700 (Weitzel Dep. at 102:17-25). Weitzel testified:

I told Mr. [Nguyen] that we did not agree to the price, that the price was unreasonable, and if they thought that there was a liability here, a big one, that we could name Air Serv as an additional insured, and that would then take – give you the opportunity, bring the price down to a reasonable price.

CP 1711-12 (Weitzel Dep. at 113:7-114:3). Mr. Nguyen responded by telling Weitzel “he would speak with his legal department and get back to [Weitzel], and he never did.” CP 1694, 1702, 1705, 1712 (Weitzel Dep. at 97:21-24, 104:1-4; 107:14-19; and 114:4-6).

AS’s Mr. Nguyen testified that he “made [it] very, very clear” to Weitzel “that we built into our number the risk and liability.” VRP 85. Mr. Nguyen, however, could not recall whether Mr. Weitzel offered to indemnify AS in their June 24, 2011 phone call. VRP 141. Mr. Weitzel had called him that day to say “he felt that Air Serv’s rates were too high” and “Air Serv was claiming...more than what [FSS] were getting for the whole Delta contract.” VRP 140-141.

Mr. Nguyen’s memory lapse at trial notwithstanding, it is undisputed that just after the Weitzel-Nguyen phone call on June 24, 2011, Mr. Weitzel sent Mr. Nguyen an email the same day stating:

Please forward the agreement to my e-mail address. **FSS will indemnify AirServ for this function.**

Tr. Ex. 55 (bold added); VRP 132-133 (Nguyen). During cross-examination, Mr. Nguyen admitted that “Mr. Weitzel, [FSS] president,

offered indemnification.” VRP 136.¹⁹ At his deposition on June 19, 2013, the week before trial, *Mr. Nguyen testified that indemnification by FSS would have eliminated the entire \$150 per plane charge that AS had built into its \$175 per plane rate:*

Q: [FSS Counsel] And if you had knowledge that -- that Flight Services would indemnify Air Serv, does that change your rate calculation?

A: [Nguyen] I can't definitively tell you, but I would venture to guess -- to say yes.

Q: [FSS Counsel] By the 150s that you marked it up?

A: [Nguyen] Possibly.

CP 2031 (dep. transcript); VRP 147 (read at trial). Mr. Nguyen admitted testifying to this at his deposition. *Id.*²⁰

Implied indemnity.

Even if Mr. Weitzel had not promised to indemnify AS [Tr. Ex. 55], AS was still protected from risk under subrogation and indemnity principles. If AS ever became obligated to pay an alleged liability or

¹⁹ Indemnity was one of the few matters on which the parties did agree. AS counsel argued at trial, “You know, just because they said, hey, we’ll indemnify you for this function, doesn’t mean they did. Air Serv always had the risk.” VRP 419. Not only was this not evidence, the statement is contradicted by Washington law of indemnity. *See Central Wash. Refrig., Inc. v. Barbee*, 133 Wn.2d 509, 514, 946 P.2d 760 (1997) (“Indemnity may arise by express contract to indemnify when one party expressly contracts to reimburse the other party for any damages the other party may incur.”). FSS did not have to indemnify AS because there were no incidents, liabilities or damages incurred by AS that would have triggered a duty to compensate AS for its damages.

²⁰ Contradicting deposition testimony, Mr. Nguyen testified at trial that if FSS would have indemnified Air Serv, he would not have taken out the \$150 charge “for risk.” VRP 146. Despite this direct contradiction of his earlier testimony, the trial court nevertheless found him “credible.” CP 2184, ¶9.

penalty for violation of the Compliance Agreement or regulations, and payment was made to protect its own interests, AS would have been entitled to equitable subrogation or implied indemnity.²¹

Labor. Mr. Nguyen testified that to get to the \$20 labor cost, he started his analysis by assuming a \$10 per hour “basic labor rate,” which he arbitrarily increased to \$15 per hour at “time and a half, and then added an additional \$5 for FICA, FUTA, SUTA and general liability insurance.” VRP 144-145. Mr. Nguyen assumed it would take one employee one full hour of work per plane, but he did not check with anyone to see if that assumption was correct. VRP 145. AS did not keep any employment records for its work. VRP 150:7-10. Based on actual observation, FSS found that AS personnel spent no more than 10 minutes for the supervisory services with 20 minutes round trip travel time. *See* Tr. Ex. 57; VRP 354-355 (Priola testimony).²²

²¹ *See Columbia Comm. Bank v. Newman Park, LLC*, 177 Wn.2d 566, 574, 304 P.3d 472 (2013) (“Subrogation prevents the windfall that would otherwise accrue to the debtor—that is, it prevents unjust enrichment”); *Tri-City Const. Council, Inc. v. Westfall*, 127 Wn. App. 669, 674-676, 112 P.3d 558 (2005) (court “will require the party who should pay a debt to ultimately pay it”); *Fortune View Condominium Assoc. v. Fortune Star Devel. Co.*, 151 Wn.2d 534, 539-540, 90 P.3d 1062 (2004) (implied indemnity arises when one party pays more than its fair share, incurring a liability the other party should discharge by virtue of the relationship between the two parties).

²² Ignored by the trial court, the only evidence of *fair market value* was the hourly rates charged by both FSS and AS to Delta in their separate Cabin Cleaning Contracts in 2011. Tr. Ex. 51 at 5; Tr. Ex. 61 at 3. AS’s hourly rate was \$16.31 per hour. Tr. Ex. 61 at 3. This was not the \$20 or \$25 per hour that Nguyen was trying to charge FSS. \$16.31 was the hourly rate AS charged Delta for out of scope services involving cleaning

The trial court determined that “Air Serv provided (1) the use of its certificate; (2) assumed the liability as required by the CBP; (3) supervised the cleaning crews of FSS; and (4) remained with the aircraft throughout the time as required by the CBP certification.” CP 2183 at ¶5. According to the trial court, “On September 20, 2011, Mr. Robert A. Weitzel (sic)²³ attempted to reconcile the amount owed and offered to pay AS \$3,343.90,” but “[m]eanwhile, [FSS] never stopped using AS’s certificate,²⁴ [and] never stopped utilizing the supervisory service...” CP 2184 at ¶10. These findings are not supported by substantial evidence.

First, AS services terminated on September 6, 2011, when FSS obtained its own Compliance Agreement. Tr. Ex. 1. In fact, AS stopped servicing the international flights on September 2, 2011. Tr. Ex. 57 at 2.

Second, the trial court incorrectly held that AS “assumed the

of international flights. FSS observed AS spending no more than 10 minutes of supervisory time and calculated time spent with total travel at no more than 30 minutes total. FSS’s calculation was based on FSS’s actual out of scope services rate with Delta of \$14.05 per hour x 30-36 minutes per flight. Tr. Ex. 57. Also, Nguyen’s assumption of one hour was supported by no evidence that AS’s monitor actually spent an hour to supervise. His one hour estimate is 40-50% higher than FSS’s calculation based on actual flights monitored by FSS staff.

²³ As it did with FSS’s motion to allow telephonic testimony, and its revocation of that order, the trial court confused FSS President Robert P. Weitzel (“Bobby”), the true source of the email, with his father, Robert A. Weitzel, the Chairman and Chief Executive Officer of FSS. Tr. Ex. 17 at 3; CP 1622-1623 at ¶¶1 & 3 (Robert A. Weitzel Decl.). The same confusion is also found in the “Procedural Irregularities” section of the trial court’s findings and conclusions. CP 2181-2182.

²⁴ There was no “certificate” as such. AS had a Compliance Agreement with USDA-APHIS (Tr. Ex. 29, pp. 2-10). FSS obtained the temporary benefit of AS’s compliance

liability as required by the CBP.” The Compliance Agreement provided that “[w]hile cleaning international arrival flights, the cleaning firm is responsible for all regulated garbage...and will not allow its unauthorized diversion, removal, use or consumption.” Tr. Ex. 29 at 6 (§2E). However, AS did not perform cleaning functions on Delta aircraft. Tr. Ex. 53. All cleaning was done by FSS cleaning crews and supervisor under its cleaning contract with Delta. The Agreement distinguishes between “the company, its employees and subcontractors.” Tr. Ex. 29 at 3, 10. Under the Compliance Agreement, AS merely “supervise[d] FSS handling of regulated trash as mandated under 7 CFR 330.400-330.403 and 9 CFR 94.5 on all Delta Airlines inbound international flights into the Port of Seattle.” *Id.* at 10. In other words, it simply watched the bags of garbage transfer from the hands of FSS to the incinerating company.

Mr. Green testified to hearsay statements made by unspecified CBP agents on June 2, 2011 that AS “would be responsible for ensuring that [FSS] followed all the guidelines of the compliance agreement, as stated in the compliance agreement, including any fines or punishment, I guess you would say, related to not following the prescribed procedures for handling regulated garbage.” VRP 279-280. There is no language in

agreement pending approval of its own application.

the Compliance Agreement that supports this testimony. The only language arguably close to his testimony is “Addendum (2)” where it states: “Air Serv Corp has agreed to supervise FSS handling of regulated trash as mandated under 7 CFR 330.400-300.403 and 9 CFR 94.5 on all Delta Airlines Inbound international flights into the Port of Seattle.” Tr. Ex. 29 at 10.²⁵

Third, there was no competent evidence that AS personnel supervised FSS cleaning crews the entire time that FSS was cleaning Delta planes. Neither the Compliance Agreement nor USDA regulations required AS to supervise subcontractor FSS cleaning Delta aircraft “throughout the time” or otherwise. Mr. Green admitted he never directly supervised cabin cleaners. VRP 288. He did not speak to AS employees who did the supervisory work. VRP 292. He did not know how long it took AS employees to perform their supervisory service on each airplane, but he assumed they were there for as long as “it took FSS to clean the aircraft.” *Id.* AS kept no records of specific employees

²⁵ Regulations incorporated into the Compliance Agreement limited Air Serv’s responsibilities. *See* 9 CFR 94.5; 9 CFR 94.5(c)(4)(iii), 94.5(e). FSS was subject to all federal regulations and requirements. 9 CFR 94.5(e)(2); Tr. Ex. 29 at 10. FSS was subject to civil penalties of up to \$250,000 per violation of the Plant Protection Act (“PPA”) and/or the Animal Health Protection Act (AHPA). *See* Tr. Ex. 29 at 2; 7 USC § 8313(b)(1) & (2) (civil penalties under AHPA applies to “any person that violates this chapter” and violator’s “degree of culpability” taken into account by Secretary); 7 USC § 7702 (12); 7 U.S.C. § 7734(b)(1) & (2) (civil penalties for “[a]ny person that violates this chapter” and “degree of culpability” is factor Secretary takes into account).

going to specific planes to supervise FSS cleaning crews for specific durations or dates. *Id.* at 292-294; VRP 150. The only records AS kept were the total number of flights. VRP 292-293. When AS's Nguyen set the \$175 "price," he assumed one full hour per flight, but never checked with anyone to verify his assumption, and did not speak with any AS employees who actually performed the services. VRP 145, 150.

FSS testified at trial that AS was only present on flights to monitor the passing of trash bags from FSS cleaners to Gate Gourmet, the cartage company, 5-10 minutes per flight "depending on when they showed up at the aircraft." Tr. Ex. 57; VRP 352, 354-55. Tom Priola had discussions with FSS cleaners and instructed them that AS's supervisor must be present to supervise the handing of trash to the Gate Gourmet employee. VRP 354. When the judge asked if the Compliance Agreement [Tr. Ex. 29] required an AS supervisor to remain with the FSS crew the entire time that cleaning was going on, Priola answered that his understanding was "the Air Serv person supervised the...handing of the garbage from our employee to the Gate Gourmet employee" and he was not aware of any language in the agreement that required otherwise. VRP 352-53. The trial court ignored that FSS had sole responsibility for providing and paying for its cleaning crew to clean international flights. AS testified that it takes nine people to clean an international flight within the allotted 90 minutes

on the ground. VRP 303-305.

Profit. Mr. Nguyen testified he was unable to explain how he arrived at a \$30 profit on the \$250 per flight offer, VRP 145:21-25, and also never explained his reasons for calculating a \$5 per flight profit on the \$175 price he unilaterally came up with.

D. The Trial Court Erred by Excluding FSS Key Witnesses, Which Prevented It from Presenting its Theory of the Case.

Before excluding testimony, “the trial court must explicitly consider [on the record] whether a lesser sanction would probably suffice, whether the violation at issue was willful or deliberate, and whether the violation substantially prejudiced the opponent's ability to prepare for trial.” *Jones v. City of Seattle*, 179 Wn.2d 322, 338-339; 314 P.3d 380 (2013); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 933 P.2d 1036 (1997). Here, the trial court engaged in no meaningful inquiry into the *Burnet* factors before ordering exclusion of evidence from Weitzel and Priola. The trial court did not determine whether the testimony of either Weitzel or Priola would be prejudicial to AS. Months before trial, AS deposed Robert P. Weitzel for seven hours, and his lengthy declarations had been filed. *See* CP 1672-1827 (Weitzel dep. Apr. 22, 2013); CP 305-327 (Weitzel decl. dated Jan. 10, 2012); CP 906-1038 (Weitzel decl. dated May 10, 2013). Nor did the trial court make a finding of willfulness or

consider lesser sanctions. *See Magana v. Hyundai Motor America*, 167 Wn.2d 570, 591, 220 P.3d 191 (2009).²⁶ Failure to conduct a *Burnet* inquiry cannot be salvaged by remanding back to the trial court to make after-the-fact findings. *See Teter v. Deck*, 174 Wn.2d 207, 220-222, 274 P.3d 336 (2012).

1. Excluding Testimony of FSS Witness Robert P. Weitzel.

After initially allowing testimony by Skype, when Robert P. Weitzel was sworn in to testify, the judge refused to allow it to proceed. VRP 8-11; 334-342. When Mr. Weitzel indicated he was at FSS's corporate office in Cleveland, Ohio, AS moved to exclude Mr. Weitzel's testimony on grounds that he was not unavailable to appear for trial in Seattle as represented in Robert A. Weitzel's declaration in support of telephonic testimony. *Id.* FSS counsel moved for a continuance to bring Weitzel in to testify in person. VRP 338.

Rather than use the occasion to ask Mr. Weitzel if he was available to testify in person,²⁷ the judge decided to hang up on Mr. Weitzel. VRP

²⁶Because this was a bench trial and testimony of Weitzel and/or Priola was not lengthy or complicated, a brief continuance would have been a sufficient and more appropriate remedy than striking their testimony. *See Perry v. Costco Wholesale, Inc.*, 123 Wn. App. 783, 805-07, 98 P.3d 1264 (2004); *In re Marriage of Gillespie*, 89 Wn. App. 390, 404-406, 948 P.2d 1338 (1997).

²⁷ *Cf. Kinsman v. Englander*, 140 Wn. App. 835, 838, 167 P.3d 622 (2007) (during bench trial the court contacted witness by telephone to ask directly whether she was

339. The judge decided it was wrong for Weitzel to be in his office in Cleveland testifying by Skype when “[e]verybody else had to be here.”

VRP 340. The judge indicated that it would have been alright for Weitzel to do Skype from Hilton Head, South Carolina, where she thought he was on vacation, but it was unacceptable for Weitzel to be at his office in Cleveland, Ohio. VRP 340-341, 367. Not accepting FSS’s counsel’s explanation, the judge swiftly blamed FSS’s counsel.

The Court: “I think this is gamesmanship,²⁸ and I’m not going to stand for it so –and I’m not continuing the trial. He’s not testifying via Skype. He’s not testifying telephonically. It was a gamble you made and you lost.”

VRP 341.

Before resting, FSS tried to call Mr. Weitzel as a witness, the judge noted her “concerns” on the record, which included “the quality [of the Skype transmission] was very poor, he could barely hear the Court,” and “there was a misrepresentation at some point...about his whereabouts.” VRP 366-369; CP 2144-2145. Instead of permitting Weitzel to testify in person due to a bad Skype connection, as the judge had stated was her normal practice [VRP 8, 11], the judge was determined to find a

available to testify in person at the trial before allowing telephonic testimony to proceed).

²⁸ The term “gamesmanship” is associated with unfair tactical hiding or concealing of evidence by a party in litigation. *In re Firestorm 1991*, 129 Wn.2d 130, 150, 916 P.2d 411 (1996) (Talmadge, J., concurring). However, merely labeling the actions of a party or counsel as tactical “trial by ambush,” is not a proper willfulness finding for purposes

“misrepresentation,” rather than a mistake or misunderstanding. Canceling her prior approval of Skype, the judge blamed FSS for misrepresenting the facts in its pleadings requesting telephonic testimony. The trial court stated that it relied on “the declaration filed by **Robert A. Weitzel**” and defense counsel’s representation that “Mr. **Robert A. Weitzel** was traveling and unavailable to fly to Seattle for trial.” CP 2181 (findings; bold added). The trial court erred by confusing Robert A. Weitzel (the father, aka “Senior”) with Robert P. Weitzel (the son, aka “Bobby”). CP 2181-2182.²⁹

During trial the Court did not indicate its reason for allowing Skype was unavailability of FSS witnesses or that the reasons for their unavailability were critical to her initial decision to allow Skype. VRP 8-12. AS specifically raised the lack of good cause issue when it first arose on the morning of the first day of trial, and nothing whatsoever was mentioned about Robert P. Weitzel’s *vacation travel plans* during the week of June 24-28 when the trial was held:

of *Jones/Burnet*. See *Jones*, 179 Wn.2d at 352-354.

²⁹ The trial court’s confusion about the two Weitzels occurred throughout the trial. The judge treated both men as one and the same, or switched the two, and counsel repeatedly had to correct the judge a number of times in distinguishing between the two. VRP 209-210; 231, 245; 332-333; 340; 341; 366-367, 369, 371. Confusion of the two Weitzels continued after trial when the judge incorrectly substituted Robert A. Weitzel for Robert P. Weitzel in its findings regarding the sender of a key FSS email to AS on Sept. 20, 2011. See CP 2184 at ¶10 (regarding email from R.P. Weitzel, Tr. Ex. 17 at 3).

Air Serv Counsel: And it's usually been an accident or some major catastrophe that prevented [the witness from appearing in person], **rather than just a business inconvenience.**

The Court: I understand that that's why I'm –

Air Serv Counsel: But I understand your position, too. And I prefer this trial moves forward and our client finally gets paid.

VRP 11 (bold added). Despite AS's objection that it was flying in witnesses from all over the country and "business convenience" was not good cause, the trial judge allowed testimony by Skype. VRP 9, 11. The vacation and travel schedule of Robert P. Weitzel was not discussed. Having successfully used Skype before, the trial judge was convinced it could be an efficient use of people's time and resources. VRP 8-9.

FSS's motion to allow telephonic testimony did not allege that Robert P. Weitzel was unavailable *due to vacation travel*. CP 1611-1614. It specifically cited important *business reasons* why Robert P. Weitzel could not be at trial. *Id.*³⁰ Robert P. Weitzel did not represent in his June 10 declaration that he would be *away from Cleveland* during the dates of

³⁰ Contrary to the trial court's ruling, serious inconvenience to the speaker and/or other persons caused by absence is considered good cause to allow Skype testimony in a bench trial. See *Marriage of Swaka*, --Wn. App.--, 319 P.3d 69 (Div. II Feb. 20, 2014) (Skype testimony of party in Spain allowed where mother in charge of two children would be inconvenienced having to find childcare or remove kids from school to travel to Washington); *Beltran-Tirado v. Immigration and Naturalization Serv.*, 213 F.3d 1179, 1186 (9th Cir. 2000) (government had "reason to arrange" telephonic testimony because the witness lived in Missouri and hearing was in San Diego).

June 24-26. CP 1626-1630.³¹ He stated that he was away on vacation *the week of June 17* and he could not attend *a deposition* that week. CP 1627, ¶3. The itinerary attached to Robert P. Weitzel's declaration clearly showed that Weitzel was on vacation in Hilton Head from June 15-22, just as Weitzel testified. CP 1629; VRP 337.

Robert A. Weitzel produced his own itinerary that showed that he (Robert A.) was traveling to Denver from June 24-26. CP 1620. **Robert A. Weitzel's** second declaration dated June 20 (2 days before Robert P. returned from vacation) did not state that **Robert P. Weitzel** would not be in Cleveland, Ohio during the dates of June 24-26. CP 1622-1624. His declaration referred to Robert P.'s declaration about Robert P.'s unavailability due to vacation plans. CP 1623, ¶3. Robert A's declaration stated that Robert P. Weitzel, as President of the company, had necessary business matters to attend to during the week of June 24 that prevented him from flying to Seattle. CP 1623, ¶4.³² The context of the paragraph

³¹ During trial, when FSS tried to call Robert P. Weitzel (aka "Bobby" or "the son") as a witness, the trial court's reasoning for cancelling its order to allow Skype testimony showed the judge confused the declarations of Robert P. Weitzel ("the son") with the declaration of the father, Robert A. Weitzel. VRP 366.

³² Unknown to FSS's counsel until after trial, an inadvertent miscommunication between Robert A. Weitzel and Robert P. Weitzel contributed to the ambiguous statement in Robert A's declaration concerning Robert P. Weitzel's whereabouts on June 24-26. Robert A. believed that Bobby and his family were traveling from June 24-26, when it was only Bobby's wife and one daughter who were traveling, leaving Bobby at home to take care of his other two daughters in Cleveland, Ohio.

and prior reference to Robert P.'s June 10 declaration, which noted Robert P.'s family vacation plans for June 15-22, show there was no misrepresentation that Robert P. would be away on vacation at Hilton Head or otherwise away from Cleveland, Ohio during the trial dates from June 24-26. While the language of ¶4 of Robert A.'s declaration could have been worded better, the totality of the motion and supporting declarations was not *a deliberate misrepresentation*.

When FSS requested an opportunity to bring Weitzel to Seattle to testify in person, the trial court imposed an unreasonable condition at the last minute:

The Court: If he can get here before the close of business today, great, get him here.

VRP 370. This was at approximately 1:53 p.m. on June 25, 2013, the last day of trial. CP 2145. Cleveland is 2,022 miles from Seattle in a time zone three hours ahead of Seattle. FSS counsel stated it would be impossible to arrange on such short notice. *Id.* The trial court reprimanded FSS counsel:

The Court: ...This is not a trial at your convenience. This isn't just, oh, we're going to continue the trial.

FSS Counsel: Fair enough, your Honor.

The Court: When were you going to continue it to? Were you going to like check with the Court and see what my schedule was, or was this all about your convenience and your client's?

VRP 371.³³ The trial concluded at 3:26 pm on June 25, 2013, with no further exhibits or witness testimony. CP 2145.

2. Limiting Testimony of FSS Witness Thomas Priola.

Exclusion of witness testimony is a “harsher sanction” that requires *Burnet* scrutiny when it affects a party's ability to present its case. *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688-690, 132 P.3d 115 (2006); *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 769, 82 P.3d 1223 (2004). The trial judge prevented FSS from proving its defenses by severely limiting the testimony of FSS corporate manager, Thomas Priola, the company’s speaking agent who had management responsibilities over FSS’s services at Sea-Tac. VRP 344, 353.³⁴

Without conducting a meaningful *Burnet* inquiry,³⁵ the trial court

³³ No logistical reason was given for why the Court could not grant a short continuance to permit Weitzel to testify in person. The trial court did not issue its 6-page findings of fact and conclusions of law until July 30, 2013 [CP 2180-2185], more than a month after the last day of trial.

³⁴ Based on its sanction of exclusion for failure to designate, the trial court sustained AS’ objections to prevent Priola from testifying about the following matters: (1) the FSS-Delta cleaning contract for Sea-Tac Airport (November 2011) [Tr. Ex. 61] that showed a \$16.31 hourly rate FSS charged Delta for out-of-scope services [VRP 345]; (2) whether FSS could have gone to other companies to operate under their Compliance Agreement instead of AS [VRP 346]; (3) the scope of work performed by AS supervisors during the subcontract [VRP 350]; (4) the hourly rate and total amount FSS believed was reasonable for AS to monitor FSS cleaners during the subcontract, as stated in FSS’s market analysis (Tr. Ex. 17 at 4-5) [VRP 357-358]; and (5) FSS’s tender of payment to AS in October 2012 (Tr. Ex. 58 not admitted) in the sum of \$3511, the amount calculated in FSS’s market analysis (Tr. Ex. 17 at 4-5) [VRP 359].

³⁵ See *Jones*, 179 Wn.2d at 342-344 (before excluding witness testimony, trial court cannot simply enforce letter of KCLR disclosure rules without engaging in *Burnet* inquiry of willfulness, prejudice and lesser sanctions).

decided to limit Priola's testimony on key matters relating to market value. *See* VRP 264. Strictly enforcing disclosure rules, the trial judge decided that since Priola had not been designated as FSS's CR 30(b)(6) designee,³⁶ FSS could not call him as the speaking agent of FSS at trial beyond Air Serv's description of Priola's knowledge of "FSS dealings with Air Serv." VRP 259-264.

Neither willful nondisclosure nor prejudice was shown. First listed on AS's primary witness list in January 2013,³⁷ Priola was not initially named in FSS's witness list. FSS reserved the right to call witnesses disclosed by AS. Priola was disclosed in an FSS declaration filed May 24, 2013, that described his job as "regional manager" for FSS including operations at Sea-Tac Airport and interactions with "many management personnel." CP 1325-1326. Priola was also listed as an FSS witness in the Joint Statement of Evidence filed with the court on June 20, 2013 pursuant to KCLR 4(k). CP 2447. Priola's role was as solely as a backup for

³⁶ On June 7, 2013, Judge Rogers ordered the deposition of the "30(b)(6) designees of both parties." CP 1517; CP 1513-1514 ("Court further orders a second deposition of Weitzel"). At a hearing before Judge Rogers on June 14, 2013, there was discussion off the record of "30(b)(6) depositions, and pretrial deadlines" but no order entered. CP 1579. During trial Judge Spector commented: "Well, I just got off the phone with Judge Rogers." VRP 260. However, the substance of their conversation was not disclosed and is not in the record. When FSS counsel objected to Air Serv counsel's account of what Judge Rogers ordered, the judge stated, "That's okay. I can get Judge Rogers on the phone." VRP 264. No record exists of conversations between the two judges.

³⁷ As early as January 18, 2013, AS disclosed Priola as a primary witness "expected to testify about the FSS dealings with Air Serv." CP 264.

President Robert P. Weitzel. Weitzel's knowledge was completely disclosed through written discovery, deposition and declarations. Priola was not expected to add any new facts.³⁸

When Priola testified at trial, the trial court sustained numerous AS objections of "beyond the disclosure of the witnesses which specificity required," *i.e.*, "FSS dealings with Air Serv," a broad description the trial judge construed narrowly. VRP 345, 346, 350, 355 (also hearsay), 356 (relevance, hearsay), 357 (billing rate from out-of-scope section of contract), 358.³⁹ The trial court refused to allow Priola to be a speaking agent for FSS at trial, ruling that "allowing Mr. Priola to be designated as a CR 30(b)(6)⁴⁰ witness at such a late juncture was inappropriate and in

³⁸ Priola's status as a backup for Robert P. Weitzel was well known to AS's counsel. VRP 259. During trial, AS's counsel admitted that Priola "was listed on their trial witness list, Mr. Priola was." *Id.* at 261-262. But AS objected that FSS had not provided a description of his knowledge. *Id.* at 262; *see* KCLR 26(k)(3)(B). In colloquy with the court, FSS counsel further disclosed, "Just so you are aware, your Honor, I may not even need to call Mr. Priola...because I do have Mr. Weitzel available by Skype now...If we get everything through Mr. Weitzel, there is no reason to call Mr. Priola probably." VRP 264-265.

³⁹ Disregarding its prior ruling limiting the scope of Priola's testimony, the trial court interrupted FSS's direct examination to ask leading questions seeking an admission that the Compliance Agreement required an AS supervisor to monitor FSS cleaning crews the entire time they were on Delta international flights. VRP 352-353.

⁴⁰ Civil Rule 30(b)(6) generally allows a corporate party to produce "a corporate designee or multiple designees" to serve as speaking agents at a deposition. *The Coryn Group II, LLC v. O.C. Seacrets, Inc.*, 265 F.R.D. 235, 238-239 (D. Md. 2010) (federal rule); *Flower v. T.R.A. Industries, Inc.*, 127 Wn. App. 13, 39, 111 P.3d 1192 (2005) (multiple designees). The speaking agent does not testify to his personal knowledge or perceptions, he testifies vicariously for the corporation based on the collective knowledge of corporate personnel. *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433-434 (5th Cir. 2006). "It is largely irrelevant under rule 30(b)(6) who the person is." *Peshlakai*

violation of discovery disclosures.” CP 2182 (findings); VRP 370. Another grounds was Priola did not have a CR 30(b)(6) deposition before trial. VRP 263-264, 353. Failing to conduct any *Burnet* inquiry, the exclusion of Priola’s testimony was error.

3. AS’s Motion in Limine.

On the second day of trial, AS filed a motion *in limine* to prevent FSS from offering evidence of industry standards or market rate for similar subcontracts. CP 2434-2444. AS claimed FSS violated discovery rules and an order by Judge Rogers. The trial court heard argument and granted the motion by 9:34 a.m., only minutes after the motion was filed at 9 a.m. CP 2144 (minute entry); CP 2445-2446 (notice of hearing); VRP 266-268 (argument). The trial court’s ruling violated the *Jones/Burnet* doctrine by excluding crucial evidence without a meaningful inquiry and/or careful deliberation of willfulness, prejudice and lesser sanctions.

Having just been assigned the case on June 20, 2013, only days before the trial started, the judge had no prior involvement with any

v. Ruiz, 2014 U.S. Dist. LEXIS 14278, *81 (D. N.M. January 10, 2014).

Nothing in CR 30(b)(6), which applies to designating a person to speak for a corporation *at a pretrial deposition*, expressly prohibited FSS from having Priola speak for the corporation *at trial*. See *Weber Aircraft, LLC v. Krishnamurthy*, 2014 U.S. Dist. LEXIS 9368, *7 (E.D. Tex. Jan. 27, 2014) (“[A]t trial, there is no such thing as a 30(b)(6) witness.”); *Brazos River Authority v. GE Ionics, Inc.*, 469 F.3d 416, 433-434 (5th Cir. 2006) (“[T]here is no rule requiring that the corporate designee testify “vicariously” at trial, as distinguished from at the rule 30(b)(6) deposition[.]”).

discovery matters in the case. *See* CP 1607. All discovery issues had been decided by Judge Rogers. Everything AS argued in its motion in limine was the same as what was argued previously to Judge Rogers, and denied. *See* CP 13-27 (AS motion to compel dated March 11, 2013); CP 336 (order on motion to compel dated April 16, 2013).

AS's motion focused on FSS answers to Interrogatories 8 and 9 concerning "informal agreements" between FSS and other cleaning companies for similar services, which AS contended was relevant to show whether there was an industry custom and practice. *See* CP 15-16. FSS responded that it had fully provided all information and documents responsive to the requests. CP 38. Judge Rogers' April 15, 2013 order granting partial relief, but denying sanctions, provided:

To the extent that defendant has a specific factual contention of damages or of a contract, such documents should be specifically identified, see e.g. Interrogatory No. 8, No. 9.

CP 337. Judge Spector misinterpreted this language, inferring that just because FSS had not produced records it was necessarily withholding relevant information, which was untrue and not proven. AS made no showing that FSS withheld relevant information. In response to Judge Rogers' order, FSS had supplemented its answers to interrogatories by providing further information, although it produced no records because there was no responsive information to produce. Judge Spector refused to

believe FSS, and instead chose to believe AS counsel's speculative insistence that there had to be responsive records.

E. The Trial Court Erred by Awarding \$116,700 in Attorneys' Fees and Costs under *Quantum Meruit* and Unjust Enrichment and by Failing to Conduct any Lodestar Analysis.

The trial court erred when it awarded \$116,700 in attorneys' fees and costs based on *quantum meruit* and unjust enrichment. CP 2184. Washington courts have long the American rule that neither party can recover attorney's fees unless authorized by statute, contract or recognized ground of equity. *Public Utility Dist. 1 v. Kottsick*, 86 Wash.2d 388, 545 P.2d 1 (1976). No authority was cited by the trial court or AS that fees are awardable under *quantum meruit* and/or unjust enrichment. The services here were arranged by a third party, not FSS. *See* CP 1581-82 (Judge Rogers holding that AS's services were fully arranged by Delta and the parties never had a contract). Assuming *arguendo* that attorneys' fees and costs could be awarded in derogation of the American Rule, the trial court compounded its legal error by failing to conduct any type of a lodestar analysis. CP 2298-2301.⁴¹

⁴¹ In Washington, a lodestar analysis must be conducted to determine the reasonableness of any requested fee award. *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998). FSS was the only one that provided a lodestar analysis, presenting a number of legal grounds for materially reducing the excessive fees requested by AS. CP 2234-2283. The trial court, however, disregarded the lodestar requirement, instead opting to fulfill its stated intent "to make [AS] whole." VRP 412.

F. The Trial Court’s Award of Sanctions Cannot be Sustained.

Sanctions are reserved for the most egregious conduct and should not be viewed as “simply another weapon in a litigator’s arsenal.” *Biggs v. Vail*, 124 Wn.2d 193, 198, 876 P.2d 448 (1994). The trial court’s inexplicit order on sanctions is little more than a means to further its stated intent of fashioning a “remedy to make plaintiff whole.” CP 2300 ¶3.h & VRP 412.⁴² In ordering sanctions, however, “it is incumbent upon the trial court **to specify the sanctionable conduct** in its order.” *Biggs*, 124 Wn.2d at 201 (bold added); *see also Dexter v. Spokane County Health Dist.*, 76 Wn. App. 372, 377, 884 P.2d 1353 (1994). Without such findings, effective appellate review is impossible. *Id.*

A copy of the trial court’s sanctions order is attached as Appendix C, the plain terms of which demonstrate that appellate review is impossible. The trial court addressed seven general subject areas (paragraphs 3.a through 3.i), each of which are addressed below.

Paragraphs 3.a & b. The trial court claimed that FSS filed numerous documents with the court that were not well grounded in fact, filed without reasonable investigation, and/or were filed in bad faith. **This is all unsupported by the record.** The trial court refers to “patently false

⁴² The trial court’s vagueness comes directly from AS’s combined attorney fee and cost petition and request for additional sanctions. This was a misnomer as the trial court

statements,” but then fails to identify any such statements. Sub No. 16 is the Declaration of Robert P. Weitzel dated January 10, 2012 (CP 2391-2413), which was consistent with his later filed declaration (CP 906-1038), and nothing has ever been found to be improper about the pleading. Second, Sub Nos. 28-30 (CP 28-327) was FSS’s response to AS’s discovery motion to compel, a common motion in litigation which Judge Rogers granted, and FSS complied with his order. Nothing has ever been determined to be improper with the pleadings.

Third, Sub Nos. 45 & 46 (CP 614-875) concerned FSS’ motion to compel, which was granted in part by Judge Rogers (CP 1514), and nothing was ever found to be improper with these pleadings. Fourth, Sub No. 90 (CP 1409) was a declaration where Mr. Weitzel simply pointed out that an AS employee had used the wrong email address for him. Fifth, Sub No. 91 (CP 1410-23) was the declaration of John Kim, FSS’s former employee who was not even a party to the case. Finally, Sub No. 134F is FSS’s motion requesting that the trial court permit telephonic testimony. As discussed previously, there was nothing improper about the request given that the corporate officer witnesses were responsible for operating a large multi-state company out of Cleveland, Ohio with business conflicts

did not provide an award of any sanctions in her findings and conclusions (CP 2180-85).

that prevented their personal appearance.⁴³

In sum, the trial court's general identification of pleadings without identifying the sanctionable conduct is grounds for reversal. *Biggs*, 124 Wn.2d at 201; *Dexter*, 76 Wn. App. at 377.

Paragraphs 3.c. The trial court claimed that FSS did not comply with Judge Rogers' April 15, 2013 discovery order, CP 336-38, which is wholly inaccurate. After receiving the order, FSS fully supplemented its discovery to comply with Judge Rogers' order and AS never sought any further relief. In addition, as with the previous paragraphs, the trial court failed to provide the specific grounds for the sanction, a legal error.⁴⁴ *Biggs*, 124 Wn.2d at 201; *Dexter*, 76 Wn. App. at 377.

Paragraph 3.d. The trial court claimed that FSS failed to appropriately prepare for its CR 30(b)(6) deposition, again without explaining the specific grounds for the sanction. This was a matter already addressed by Judge Rogers, who ordered both FSS and AS 30(b)(6) to attend follow-up depositions. CP 1517. Judge Rogers also denied all the other discovery motions from the parties. CP 1514.

⁴³ AS never called these witnesses to testify at trial. Thus, whether or not the request for telephonic testimony was granted by the trial court, FSS was not obligated to call these witnesses in its case-in-chief and FSS's discretion to call these witnesses or not cannot form the basis of a sanction awardable to AS.

⁴⁴ FSS can only assume that it concerns AS's request for FSS's cost information for international flights at Sea-Tac, which FSS told AS that it did not keep. CP 2159-77.

Paragraph 3.e through 3.h. The trial court finally claimed that FSS intentionally certified discovery responses, intentionally filed summary judgment declarations in bad faith, and FSS and/or its counsel made misrepresentations to the trial court, all of which completely lacked any sort of specificity that would allow a reviewing court to understand the grounds for the trial court's sanction. Again, this lack of specificity concerning the grounds for sanctions constitutes established legal error. *Biggs*, 124 Wn.2d at 201; *Dexter*, 76 Wn. App. at 377.

In addition, the trial court failed to follow the law governing the imposition of sanctions. The party seeking sanctions must provide advance notice to the opposing party of the intent to seek sanctions. CR 26(i) (“[t]he court cannot entertain any motion or objection with respect to rules 26 through 37 unless counsel has conferred with respect to the motion or objection.”); *Biggs*, 124 Wn.2d at 198 (offending party must be given prompt advance notice regarding a potential violation of CR 11, and opportunity to mitigate sanction by amending or withdrawing offending paper). The law is settled that unless such notice is given, sanctions are unwarranted and inappropriate. *Biggs*, 124 Wn.2d at 198.

Here, AS never provided FSS with any advance notice as required

Nonetheless, it also has no relevancy to the fair market value proof *Young* requires.

by law. It is undisputed that FSS first became aware of AS's intention to request sanctions upon AS's filing of its "combined" fee and cost petition and sanctions request. CP 2186-2203 (filed Aug. 8, 2013). The trial court also never considered whether a lesser sanction would suffice to serve the purpose of the sanction, which is an independent ground for reversal. *See Burnet*, 131 Wn.2d at 497. Each of these grounds supports reversal.

G. If the Court Should Determine That a Remand is Necessary, It Should Direct the Remanded Case to a New Trial Judge.

FSS respectfully requests remand to a different trial judge. Not only must judges be fair and unbiased, they must avoid even the appearance of bias or prejudice. *See GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 153-54, 317 P.3d 1074, 1087 (2014). When a trial judge is incredulous, hostile and derogatory with one side only, consistently offering assistance to one side and not the other, the appearance of unfairness and favoritism taints the proceedings and remand to a different judge is necessary. *See United States v. Donato*, 99 F.3d 426, 434-39 (D.C. Cir. 1997). Here, the trial court made many caustic, hostile and accusatory remarks and rulings during and after trial against FSS and its defense counsel. *See attached Appendix B.*⁴⁵ The record is

⁴⁵ Unnecessarily, the trial court accused FSS of "gamesmanship," and attacked FSS's counsel for "talking out of both sides of your mouth" and "mak[ing] up stuff." VRP 179-180; 340; 262. The apparent bias towards FSS continued after trial. On January 7, 2014,

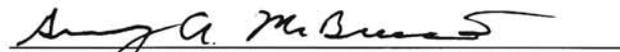
more than sufficient here to prove the trial court “may have difficulty setting aside her previously expressed opinions,” *Saldivar v. Momah*, 145 Wn. App. 365, 186 P.3d 1117 (2008)—grounds for a new judge.

V. CONCLUSION

For the foregoing reasons, the trial court’s decision should be reversed.

Dated this 16th day of June, 2014.

LIVENGOOD, FITZGERALD
& ALSKOG, PLLC



Gregory A. McBroom, WSBA No. 33133
Timothy S. McCredie, WSBA No. 12739
Attorneys for Appellant Flight Services & Systems

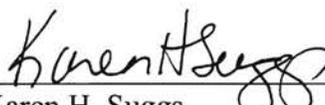
the trial court ordered FSS to pay within seven days an additional \$100,000—on top of the \$268,200 FSS had already posted—for a supersedeas bond. CP 2347. On FSS’s RAP 8.1(h) motion, the order was reversed by a commissioner as “excessive,” “unreasonable,” and “unnecessary.” See Commissioner’s Ruling dated March 4, 2014.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that on the date specified below, I filed and served the foregoing as follows:

Division I Court of Appeals 600 University St. One Union Square Seattle, WA 98101-1176 Phone: 206-464-7750	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>
David Crowe Rohde & Van Kampen, PLLC 1001 Fourth Avenue Ste 4050 Seattle, WA 98154-1000 dcrowe@rvk-law.com Phone: (206) 436-8339	Messenger Service <input type="checkbox"/> First Class U.S. Mail <input checked="" type="checkbox"/> Electronic Mail <input type="checkbox"/> Facsimile <input type="checkbox"/>

DATED: June 16, 2014, at Kirkland, Washington



Karen H. Suggs

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 JUN 17 AM 11:20

APPENDIX A

	A	B	C	D	E
1	From Flight Services Invoices - Trial Exhibit Nos. 3-10				
2					
3	Invoice Date	# Domestic Flights	# International Flights	Total Gross Revenue ¹	Total Gross Revenue w/o Unrelated Expenses
4	5/31/2011 ³	321	53	\$54,037.59	\$40,692.59
5	6/15/2011	403	74	\$63,241.16	\$50,036.16
6	6/30/2011	460	74	\$68,468.70	\$55,753.70
7	7/15/2011	455	75	\$69,931.12	\$57,791.12
8	7/31/2011	486	80	\$76,927.05	\$62,277.05
9	8/15/2011	460	74	\$66,254.50	\$56,454.50
10	8/31/2011	431	80	\$65,143.80	\$56,948.80
11	9/15/2011 ⁴	394	67	\$62,760.00	\$52,575.00
12					
22	Total	3410	577	\$526,763.92	\$432,528.92
23					
25		From Total Gross Revenue	From Total Gross Revenue w/o Unrelated Expenses		
26					
27	Percentage Domestic Flights	85.53%	85.53%		
28					
29	Percentage International Flights	14.47%	14.47%		
30					
31	Total Revenue - Domestic	\$450,530.47	\$369,933.19		
32					
33	Total Revenue - International	\$76,233.45	\$62,595.73		
34					
35	Average Total Payment per Flight - International ⁵	\$132.12	\$108.48		
36					
37	Average Total Gross Revenue per Month	\$131,690.98	\$108,132.23		
38					
39	Average Number of Domestic Flights per Day	27.72	27.72		
40					
41	Average Number of International Flights per Day	4.69	4.69		
44					
45	¹ Total Gross Revenue from invoice includes revenue from all services with management, equipment fees, and start-up costs				
46					
47	² Total Gross Revenue w/o Unrelated Expenses Excludes Deep Cleaning and Carpet Shampooing Expenses (expenses unrelated to trash handling for international flights)				
48					
49	³ Air Serv only provided service on 15 international airplanes in May 2011 (not 53).				
50					
51	⁴ Air Serv only provided service on 10 international airplanes in September 2011 (not 67)				
52					
53	⁵ Average Total Payment Per Flight is the fully loaded payment from Delta for all the cleaning services				
54					

APPENDIX B

ACTUAL OR APPARENT BIAS

1 MR. CROWE: -- your Honor.

2 THE COURT: You've objected to every one of
3 them so far as to irrelevance, so how can you say
4 you're moving it along?

5 MR. McBROOM: Just on relevance. We --

6 THE COURT: They're all --

7 MR. McBROOM: -- objected to the invoices.

8 THE COURT: -- relevant. They've all
9 relevant. I've already made that finding.

10 MR. McBROOM: Oh, I understand that.

11 THE COURT: So how can you --

12 MR. McBROOM: I'm just saying --

13 THE COURT: -- say with a straight face to
14 the Court that you're trying to move things along when
15 you've objected to every one of them. You can't have
16 it both ways. You're talking out of both sides of
17 your mouth, Counsel.

18 Ask another question.

19 MR. CROWE: Your Honor, FSS noted her for
20 trial to show up to attend trial. She was in charge
21 of invoicing, I'm going through --

22 THE COURT: Let's move --

23 MR. CROWE: -- all the invoices --

24 THE COURT: -- along.

25 MR. CROWE: -- with her. I'll go as

1 when Judge Rogers discussed a protective order for
2 Robert P. Weitzel being the designee for the 30(b)(6)
3 witness, FSS would not designate another person other
4 than Robert P. Weitzel, and yet Mr. McBroom also made
5 representations during that hearing that Robert P.
6 Weitzel would be on vacation the week of June 17,
7 however would be available for trial. And he made
8 representations in open court that Robert P. Weitzel
9 would be available for trial.

10 And Judge Rogers knew that we had a lot of
11 out of state witnesses, and he tried his best to make
12 sure trial was accommodated within the early parts of
13 this week so we could have it done in one week to
14 accommodate witnesses' schedules.

15 That's all I have, your Honor.

16 MR. McBROOM: All I've got to say is I don't
17 recall ever making that representation. So, I mean --

18 THE COURT: Well, I'll find out on the
19 record.

20 MR. McBROOM: Sure.

21 THE COURT: And I'll order up that record.
22 So it's June 14?

23 MR. CROWE: Yes.

24 THE COURT: What time approximately, morning
25 or after --

1 MR. CROWE: It was 9:00 in the morning. I
2 don't remember what time. We were just discussing a
3 protective order pending for the deposition, 30(b)(6)
4 witness deposition.

5 THE COURT: All right, I will find it.
6 Because it's electronic, I assume there was no court
7 reporter present. We have access to all --

8 MR. CROWE: I think (inaudible) --

9 MR. McBROOM: There was no court reporter,
10 your Honor.

11 THE COURT: So it's all electronic. I'll
12 pull it up. All right.

13 Do you have any rebuttal?

14 MR. CROWE: I don't, your Honor.

15 THE COURT: I'll hear closing arguments.

16 MR. CROWE: Can we have a break before
17 closing arguments?

18 THE COURT: Sure. How much time do you
19 need?

20 MR. CROWE: I'd like to get a white board.
21 Maybe 20 minutes, 25.

22 THE COURT: Sure.

23 MR. CROWE: How about 2:30 can we start?

24 THE COURT: Sounds fine.

25 THE CLERK: Please rise.

1 contested, hotly litigated case, and it landed here on
2 Friday afternoon and then we were -- we began trial
3 yesterday in earnest.

4 So everything is really before me. The
5 record is before me. I can go back, I'm going to go
6 back to the June 14 and listen to what you had to say
7 about Mr. Weitzel's appearance. There is obviously
8 discrepancy between the declaration and where
9 Mr. Weitzel was sitting when we just saw him earlier
10 today on Skype.

11 So the entire record is before the Court.
12 You don't get to say, oh, it's not part of the record.
13 The whole record is before the Court.

14 MR. McBROOM: I understand --

15 THE COURT: Okay?

16 MR. McBROOM: -- that, your Honor.

17 THE COURT: And I can look at how you
18 conducted yourselves throughout this trial, and I can
19 take that into considerations when it comes to
20 somebody moving for CR 11 sanctions. And I can also
21 do that for attorneys' fees, if there is a basis on
22 another level aside from CR 11 sanctions.

23 So you will have an opportunity to respond.

24 MR. McBROOM: Okay.

25 THE COURT: If you choose --

1 from the Court, the Court specifically ordered this
2 information --

3 THE COURT: Right.

4 MR. CROWE: -- and now we're sitting here
5 waiting and he's trying to wave the white flag, the
6 red flag, saying, wait, they didn't specifically
7 articulate their exact damages based on information
8 that we never provided them. It's -- that's -- it's
9 ridiculous.

10 I mean how can we get their information if
11 they never provided it to us.

12 MR. McBROOM: Your Honor, I'd love to
13 respond to this.

14 THE COURT: Okay. But you know -- you know
15 what we're going to do, we're not going to argue this
16 case through lawyers because I need to hear some
17 evidence today so that we can make good use of our
18 time since we have about ten witnesses, give or take.
19 And --

20 MR. CROWE: Your Honor?

21 THE COURT: Yes.

22 MR. CROWE: Today we've got two witnesses we
23 expect on calling. We're going to call a witness from
24 defense, from the parties (inaudible) three, and we've
25 got one witness we expect on calling first thing

1 tomorrow because he's in Alaska and he's flying in
2 this afternoon.

3 THE COURT: That's fine.

4 MR. CROWE: Besides rebuttal witnesses,
5 that's all we expect to call.

6 THE COURT: Okay. What I'd like to do is
7 this. I want to hear the case. I want to hear the
8 evidence. You're going to let me know if you think
9 it's in violation of the King County local rule, but
10 I've got to let him plead his case.

11 I'm not going to stand -- I've never stood
12 in the way of a plaintiff trying to prove their case,
13 unless somebody has just been so egregious in their
14 discovery behavior prior to trial. You have to
15 understand that I'm not going to procedurally default
16 plaintiff from presenting their case in chief.

17 You have the ability to certainly argue that
18 this information was known, they had it, and it was
19 late. I will tell you this, Counsel, it's not your
20 best argument, because I really want to decide this on
21 the merits. I mean that's the benefit of having a
22 judge trial. I don't want to be kept in a vacuum
23 artificially.

24 I mean I've been known to do site visits.
25 I've walked multimillion dollar ships. I've gone down

1 this.

2 THE COURT: So there is going to be no
3 testimony and this is a nonissue?

4 MR. McBROOM: I don't recall any testimony
5 on market rate.

6 MR. CROWE: Misstates the record.

7 THE COURT: So then --

8 MR. CROWE: Objection; misstates the record.

9 THE COURT: So you're conceding then --

10 MR. McBROOM: No, I'm not conceding. Here
11 is what I'm conceding, okay.

12 They're allowed to testify about what
13 Mr. Nguyen said --

14 THE COURT: Right. Well, Mr. Nguyen --

15 MR. McBROOM: -- obviously, to rebut what
16 Mr. Nguyen said. Obviously they can testify to
17 anything they want about that. They can testify to
18 any experiences they have in the market as to similar
19 type services.

20 THE COURT: But that information has never
21 been provided to Air Serv, and it had been
22 specifically requested. There was a motion to compel,
23 Judge Rogers asked for specificity; you never provided
24 it.

25 MR. McBROOM: That's not true.

1 THE COURT: So I'm going to grant this
2 motion. Let's call Mr. Green.

3 MR. McBROOM: Can I just say one more
4 thing --

5 THE COURT: One more thing --

6 MR. McBROOM: -- please?

7 THE COURT: -- and then we're going to get
8 on with the testimony.

9 MR. McBROOM: Okay. In our discovery we
10 disclosed a Boston incident, in our discovery.

11 THE COURT: A Boston incident?

12 MR. McBROOM: Yeah.

13 THE COURT: What does that have to do with
14 industry --

15 MR. McBROOM: Our a Boston similar
16 circumstance. We put that in our discovery. That's
17 in the interrogatories.

18 THE COURT: So how --

19 MR. McBROOM: I don't understand why we
20 can't --

21 THE COURT: How does that go to industry
22 standard or market rate?

23 MR. McBROOM: It's a similar situation.

24 THE COURT: How does that go to market rate
25 or industry standard? Maybe you have two isolated

1 you know, I mean, if we get everything through
2 Mr. Weitzel, there is no reason to call Mr. Priola
3 probably. So I'm just letting you know.

4 THE COURT: Thank you.

5 MR. McBROOM: That's why I think this whole
6 thing is kind of premature anyways.

7 THE COURT: The motion in limine about
8 industry standard or market rate; do you want to
9 respond to that?

10 MR. McBROOM: Industry standard, market
11 rate, yes.

12 As far as costs go, okay, he's completely
13 misrepresented the record. What we've said during
14 discovery, and what we've maintained during discovery,
15 is we don't main -- they didn't maintain cop --
16 records of costs for the Delta contract. They don't
17 have that information. That's what's told them -- in
18 that --

19 THE COURT: So there isn't --

20 MR. McBROOM: That's what's told them.

21 THE COURT: So Mr. McBroom, let me hear you.
22 So there is no industry standard and there is no
23 market rate.

24 MR. McBROOM: No, no, no. That's separate.
25 I'm talking about costs. His first thing is costs,

1 okay. I'm going to go down his little list of things.

2 THE COURT: Well, I'm reading his first
3 paragraph, relating into any costs --

4 MR. McBROOM: Okay.

5 THE COURT: -- incurred by FSS, any amount
6 of revenue received by FSS limiting the amount stated
7 in the invoices to exclude any, quote, industry
8 standard, close quote, or, quote, market rate, close
9 quote.

10 That's what this is about.

11 MR. McBROOM: I don't think -- the only
12 thing they would testify to is any experiences they
13 have in the market with services, just like Mr. Nguyen
14 did. I mean --

15 THE COURT: So he's going to --

16 MR. McBROOM: There is no --

17 THE COURT: So is somebody going to come in
18 and say, yeah, we have industry standards established
19 at five cents a plane; and that information was never
20 provided previously?

21 MR. McBROOM: Absolutely -- where he gets
22 that, I don't know. I mean I don't have that. I
23 don't know --

24 THE COURT: So then --

25 MR. McBROOM: -- where he's coming up with

1 this.

2 THE COURT: So there is going to be no
3 testimony and this is a nonissue?

4 MR. McBROOM: I don't recall any testimony
5 on market rate.

6 MR. CROWE: Misstates the record.

7 THE COURT: So then --

8 MR. CROWE: Objection; misstates the record.

9 THE COURT: So you're conceding then --

10 MR. McBROOM: No, I'm not conceding. Here
11 is what I'm conceding, okay.

12 They're allowed to testify about what
13 Mr. Nguyen said --

14 THE COURT: Right. Well, Mr. Nguyen --

15 MR. McBROOM: -- obviously, to rebut what
16 Mr. Nguyen said. Obviously they can testify to
17 anything they want about that. They can testify to
18 any experiences they have in the market as to similar
19 type services.

20 THE COURT: But that information has never
21 been provided to Air Serv, and it had been
22 specifically requested. There was a motion to compel,
23 Judge Rogers asked for specificity; you never provided
24 it.

25 MR. McBROOM: That's not true.

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2 motion. Let's call Mr. Green.

3 MR. McBROOM: Can I just say one more
4 thing --

5 THE COURT: One more thing --

6 MR. McBROOM: -- please?

7 THE COURT: -- and then we're going to get
8 on with the testimony.

9 MR. McBROOM: Okay. In our discovery we
10 disclosed a Boston incident, in our discovery.

11 THE COURT: A Boston incident?

12 MR. McBROOM: Yeah.

13 THE COURT: What does that have to do with
14 industry --

15 MR. McBROOM: Our a Boston similar
16 circumstance. We put that in our discovery. That's
17 in the interrogatories.

18 THE COURT: So how --

19 MR. McBROOM: I don't understand why we
20 can't --

21 THE COURT: How does that go to industry
22 standard or market rate?

23 MR. McBROOM: It's a similar situation.

24 THE COURT: How does that go to market rate
25 or industry standard? Maybe you have two isolated

1 incidents, the one in Seattle and the one in Boston.

2 MR. McBROOM: I don't think anybody has
3 testified to industry standards or market rate as far
4 as --

5 THE COURT: Then you're --

6 MR. McBROOM: -- generally.

7 THE COURT: -- conceding.

8 MR. CROWE: Objection; misstates the record.

9 Throughout the summary judgment proceedings,
10 Mr. McBroom and Mr. Weitzel kept on complaining,
11 stating that our charges were 35 times the market
12 rate. They kept on saying that throughout their
13 motions --

14 MR. McBROOM: Your Honor.

15 MR. CROWE: -- throughout their case without
16 any evidence whatsoever. And I don't think without
17 any evidence being provided today --

18 MR. McBROOM: The evidence --

19 MR. CROWE: -- the statement should be
20 allowed.

21 THE COURT: We're done right now.

22 MR. McBROOM: The evidence is the
23 reconciliation (inaudible).

24 THE COURT: I understand, Mr. McBroom.
25 Let's start with Mr. --

1 There is no agreement on price. They're
2 trying to submit -- they have to do this, because they
3 have no evidence, so they have to prove -- try to
4 reprove their breach of contract theory. And that's
5 exactly what they're trying to do to this Court, and
6 that's what you heard from the testimony.

7 THE COURT: Are you suggesting that
8 plaintiffs are not entitled to payment?

9 MR. McBROOM: I am suggesting it's their
10 burden to prove that they have some sort of
11 calculation to go off of. They've provided nothing.
12 The only -- the only calculation, the only -- the only
13 summary of -- I mean a reasonable person in this type
14 of case, your Honor, would have gone out and said,
15 okay, I'm going hire somebody, I'm going to evaluate
16 the value of these services.

17 You'll see nothing from plaintiffs on that,
18 nothing, because they didn't want to do it. Okay.
19 They didn't want to do it because it's not in their
20 benefit to do it, okay.

21 They didn't go out and hire somebody to
22 figure out what the reasonable value of their services
23 are because they're saying, well, because we got a
24 contract, we don't need it.

25 Okay. You won't see any calculation from

1 so you can kind of cut to the math, if you want, about
2 fixed services versus -- anyway, the unjust
3 enrichment.

4 MR. CROWE: I'll cut to the chase.

5 THE COURT: Whatever you want to do. And
6 I -- hang on.

7 MR. CROWE: Might go through a lit bit of
8 the factual background just to --

9 THE COURT: Absolutely.

10 MR. CROWE: Because this is my last time
11 being able to.

12 THE COURT: Right. And I have Young, so if
13 you're going to refer to Young I have it right here.

14 And I'm not being rude. You know, when I
15 take notes I look down, so I'm going to do it to both
16 of you, because I take notes.

17 Whenever you're ready.

18 MR. CROWE: Thank you.

19 Your Honor, this is a clearcut case. One
20 party provided services to another party, and the
21 party that provided the services didn't get paid.

22 These services had a huge amount of value
23 that led to revenues of hundreds of thousands of
24 dollars over the course of a few months for Flight
25 Services & Systems, defendant in this matter, and Air

1 Serv still has yet to be paid.

2 This all happened on the Memorial Day
3 weekend, May 2011. Basically FSS, or Flight
4 Services & Systems, was operating and cleaning flights
5 illegally on Delta's international flights. The
6 government recognized this and informed Delta that,
7 hey, we need somebody who actually has a proper
8 compliance agreement to be involved in order for your
9 flights to be cleaned and for them to get off the
10 ground.

11 Delta, recognizing they needed their flights
12 to get off the ground, contacted one of the numerous
13 vendors that replied and they contacted Air Serv, both
14 at the local and at the corporate level, seeing if Air
15 Serv was willing to allow FSS to work under its
16 compliance agreement.

17 Air Serv was willing to do so. And after it
18 found out that this relationship would last more than
19 a few days, it started providing its price for these
20 services to Flight Services & Systems.

21 The evidence will show that on June 8 Air
22 Serv provided a contract with a stated price of \$250.

23 After objection and consideration of what
24 actual services were being provided by Air Serv, Air
25 Serv lowered its price to \$175 on June 15. That price

1 the reason is because they stole that. And that's the
2 way you'll see the cases drawn out, is if there's some
3 sort of bad conduct or something, then you might have
4 something like that, but that's not this case. That's
5 just not this case.

6 This is contract that was set up for
7 services, the services were performed --

8 THE COURT: Why wasn't --

9 MR. McBROOM: -- presumably.

10 THE COURT: Why wasn't anything paid?

11 MR. McBROOM: It was. We paid the -- we
12 tendered the -- what was the \$3,500 per the --

13 THE COURT: Okay.

14 MR. McBROOM: -- per the analysis.

15 MR. CROWE: Objection; misstates the record.

16 MR. McBROOM: That was actually tendered.

17 THE COURT: All right. Right. My
18 question --

19 MR. McBROOM: So --

20 THE COURT: -- bad question; shouldn't have
21 asked it. He objected.

22 MR. McBROOM: Okay.

23 THE COURT: I'll find out at trial.

24 MR. McBROOM: So -- and the evidence will
25 show that that was tendered to them. They rejected

1 MR. CROWE: -- lack -- he didn't say he came
2 up with a (inaudible).

3 MR. McBROOM: He's got personal knowledge of
4 it. He was part of it.

5 THE COURT: But he wasn't designated as a
6 30(b)(6) witness. It's sustained. Go ahead.

7 Q. (By Mr. McBroom) Go to 58, if you could,
8 please.

9 A. 58?

10 Q. 58.

11 A. Okay.

12 Q. Do you recognize that document?

13 A. Yes.

14 Q. What is this document?

15 A. This was the (inaudible) --

16 MR. CROWE: Objection --

17 THE COURT: It's not --

18 MR. CROWE: -- it's not admitted.

19 THE COURT: -- been admitted.

20 MR. CROWE: When he does try --

21 MR. McBROOM: Okay.

22 MR. CROWE: -- to move for admit, I'm going
23 to object that it's irrelevant. It's just settlement
24 negotiations between counsel.

25 MR. McBROOM: It's not settlement

1 negotiations. It was tender of payment.

2 THE COURT: Well, it hasn't been admitted
3 yet.

4 MR. McBROOM: We would move --

5 THE COURT: There is no foundation. It's a
6 letter from you, Counsel, to opposing counsel. It
7 would appear to violate Evidence Rule 408. I'm going
8 to exclude it.

9 MR. McBROOM: Okay.

10 Q. (By Mr. McBroom) Okay. So you were here,
11 you heard the testimony of Mr. Nguyen, and he
12 testified to a \$10 per hour labor rate that was marked
13 up, I think time and a half, is how he got to \$15 per
14 hour.

15 In your experience do you know how that
16 would have been arrived at?

17 MR. CROWE: Objection; it's beyond the
18 witness's designation.

19 THE COURT: Sustained.

20 MR. McBROOM: We can call anybody in
21 rebuttal, your Honor, to rebut anything.

22 THE COURT: This is your case in chief;
23 we're not on rebuttal.

24 MR. McBROOM: Okay.

25 THE COURT: And it would be sur rebuttal.

1 and Mr. McBroom was not forthright. Mr. Kim's --
2 either, one, he never provided us the notice for
3 subpoena, which apparently he served on Mr. Kim, and,
4 you know, B, if we could have a few minutes to prepare
5 for his testimony beforehand, that would be --

6 THE COURT: Sure.

7 MR. CROWE: -- at least appropriate.

8 THE COURT: Sure.

9 MR. CROWE: I mean I just -- trial by ambush
10 is generally not fair.

11 THE COURT: No, I agree.

12 MR. McBROOM: He's (inaudible) on the
13 witness list, your Honor. He just showed up today
14 instead of tomorrow so, I mean --

15 THE COURT: Well, if he's local --

16 MR. McBROOM: -- it's not trial by ambush,
17 and he was provided everything.

18 THE COURT: Yeah, but he showed up a day
19 early, so he's local. Can he come back tomorrow?

20 MR. McBROOM: Well, that's the problem, he
21 can't. That's what he said. I mean I --

22 THE COURT: Well, why don't you go ask him.
23 But let's finish your cross-examination.

24 MR. McBROOM: I already -- I did ask him,
25 that's why he asked if I would come in and ask you if

1 A. I'm not objecting.

2 THE COURT: You're both --

3 A. This is correct.

4 THE COURT: -- talking over yourselves. So,
5 Counsel, I'm going to put the onus on you.

6 MR. McBROOM: Thank you, your Honor, I will.

7 THE COURT: And you need to wait --

8 THE WITNESS: Until --

9 THE COURT: -- until he finishes talking
10 before you answer.

11 THE WITNESS: Okay.

12 THE COURT: But he's the lawyer, he's
13 supposed to know better.

14 THE WITNESS: Okay.

15 THE COURT: Okay? So let's just slow down
16 and stop talking over each other.

17 Q. (By Mr. McBroom) Dates of service.

18 A. Yes.

19 Q. Okay. Did you ever object to those stated
20 dates of service?

21 A. No.

22 Q. Are those accurate?

23 A. No. Yes, they're accurate.

24 Q. They are accurate, okay.

25 Number of aircraft, the next column down,

1 to leaky commercial buildings. I've examined roofs
2 and floors.

3 MR. CROWE: We won't take you to SeaTac.

4 THE COURT: Don't take me to SeaTac please,
5 not now.

6 MR. McBROOM: Your Honor, one of the reasons
7 I provided this is so I don't have to repeat it each
8 time. So I mean I was trying to speed up things too.

9 THE COURT: And I think you both have done a
10 great job.

11 And Mr. Crowe has been in front of me, I
12 know how quickly he speaks, and I forgot how quickly
13 he speaks. Thank goodness we don't have a live court
14 reporter.

15 MR. CROWE: If you need me to slow down,
16 your Honor, I will.

17 THE COURT: Just a little bit. But it's
18 okay. I mean I've read everything so I'm aware of
19 what the issues are.

20 MR. McBROOM: Right.

21 THE COURT: And I just want to be as mindful
22 as I can. And I will tell you both, you know, you
23 both know this much better than I do, I'm just up to
24 snuff because a few days between Friday getting
25 everything dumped, and if you think I need to know

1 something more, I'm never going to cut you off. I
2 just want to hear the witnesses. That's my goal is to
3 get the people who have flown in in here. I want to
4 listen to them. Sometimes I will ask a question
5 during a bench trial, and if either side feels that
6 it's inappropriate and you want to object to the
7 Court's question, by all means, feel free to object.

8 MR. McBROOM: Your Honor.

9 THE COURT: That's just the way I do it.

10 MR. McBROOM: Your Honor, one more thing.

11 THE COURT: Sure.

12 MR. McBROOM: The reason we provided that
13 reply brief was just because of this. This is a spin
14 on Young vs. Young and it doesn't say -- that's
15 exactly why we provided and spelled it out. So it
16 makes sense that we do that, so you have that, and you
17 have it fully broken -- because what he says of this
18 is not what the cases say.

19 THE COURT: Reasonable minds can differ what
20 cases say, but ultimately the Court of Appeals will
21 tell us what the cases mean after I --

22 MR. McBROOM: Yes.

23 THE COURT: -- make (inaudible).

24 MR. CROWE: Young vs. Young, the Supreme
25 Court articulating the two different standards for

1 to --

2 THE COURT: Sustained.

3 MR. CROWE: -- Gil Green's understanding.

4 THE COURT: Sustained as to Gil Green's
5 understanding.

6 A. That was --

7 THE COURT: Don't answer the question. Wait
8 for another.

9 Q. (By Mr. McBroom) Was it your understanding
10 that everything had to be handled by corporate?

11 A. Yes.

12 Q. And did you say you informed Gil Green
13 that -- let me just say -- rephrase that.

14 That -- did you inform Gil Green, did he
15 know that --

16 MR. CROWE: Objection.

17 Q. (By Mr. McBroom) -- you -- that corporate
18 had to take care of it on behalf of Flight Services?

19 MR. CROWE: Objection; calls for speculation
20 as to what Gil Green knew.

21 THE COURT: It's sustained as to what Gil
22 Green knew. Let me ask you this.

23 Did you ever say, "Stop, don't do services
24 anymore"?

25 THE WITNESS: No, I did not.

1 THE COURT: Okay. Go ahead.

2 I'm going to ask you a question. I have a
3 follow-up.

4 THE WITNESS: I just remembered something.

5 THE COURT: Okay. What is it that you want
6 to tell me?

7 THE WITNESS: Well, I just wanted to add
8 that there was a point when I was able to acquire the
9 compliance agreement for FSS, and that's when I did
10 tell Green that we won't need our services anymore.

11 THE COURT: When was that?

12 THE WITNESS: I would -- I think it was
13 around November.

14 THE COURT: Did you ever -- did you just
15 assume every time you were getting these invoices that
16 they were getting paid and taken care of by corporate?

17 THE WITNESS: Yes.

18 THE COURT: When did you find out that they
19 hadn't been paid, Air Serv?

20 THE WITNESS: About, I want to say, a few
21 months after we stopped using Air Serv services.

22 THE COURT: So the whole time while Air Serv
23 was providing services, you are under the impression
24 that their bills are getting paid.

25 THE WITNESS: Well, as I forwarded the

1 invoices on to corporate, I just assumed that they
2 were taking care of them.

3 THE COURT: Okay. So -- and nobody from
4 corporate ever got back to you and said, "Hey, you
5 better stop the services here, because we're in a fee
6 dispute."

7 THE WITNESS: No. It was -- it wasn't until
8 I secured the compliance agreement for FSS that I told
9 Air Serv to stop.

10 THE COURT: Okay. Go on.

11 Q. (By Mr. McBroom) Did Flight Services
12 arrange these services, or was it Delta that arranged
13 the Air Serv services?

14 MR. CROWE: Objection; calls for
15 speculation.

16 THE COURT: He can answer if he knows who
17 arranged for Flight Services or Air Serv.

18 MR. McBROOM: I'm going to say, you know,
19 your Honor, Judge Rogers already ruled on that. I
20 don't need to --

21 THE COURT: Okay.

22 MR. McBROOM: (inaudible) on that.

23 Q. (By Mr. McBroom) You personally -- did you
24 ever provide any acceptance to any of these contracts
25 that were thrown out there --

1 Q. (By Mr. McBroom) Now, you never assured
2 anybody from Air Serv though that they were going to
3 get paid on their invoices; did you?

4 MR. CROWE: Objection; asked and answered.

5 THE COURT: Sustained. He answered no.

6 MR. McBROOM: Okay.

7 I have no further questions.

8 THE COURT: Cross.

9 MR. CROWE: You know, I'll try to make it
10 short, but can I ask for 15 minutes?

11 THE COURT: Do you want a few minutes?

12 MR. CROWE: Yeah, and I'll get him out
13 today. I can -- I just want to make sure it's
14 organized.

15 THE COURT: I appreciate it.

16 MR. CROWE: Thank you.

17 THE COURT: And you can kind of tell by the
18 Court's questions my areas of concern, so I tried to
19 give you a little clue.

20 MR. CROWE: I think you're spot on, yes.

21 THE COURT: All right. We're just going to
22 be at recess, give him a few minutes, because he
23 hasn't -- he wasn't prepared to cross-examine you
24 today.

25 THE WITNESS: Okay.

1 garbage.

2 Q. Was that with the \$250 per aircraft charge?

3 A. I think so. I can't find it in here though.

4 Q. If you look at page 59 section 1.2.

5 A. Yep.

6 Q. Yes?

7 A. Yes.

8 Q. Okay.

9 MR. McBROOM: I'd move to admit Exhibit 64,
10 your Honor.

11 THE COURT: I think it's already in.

12 THE CLERK: Yes.

13 MR. McBROOM: 64 is in, okay.

14 THE COURT: Yes.

15 Q. (By Mr. McBroom) And what's your
16 understanding of Flight Services' position on the \$250
17 per aircraft offer from Air Serv?

18 A. I know that FSS corporate said that that was
19 a ridiculous rate.

20 Q. Okay.

21 MR. CROWE: Objection; hearsay.

22 Q. (By Mr. McBroom) Let me --

23 THE COURT: It's sustained.

24 Q. (By Mr. McBroom) Let me ask you this. Were
25 you responsible at all for agreeing to any of the

1 MR. CROWE: Objection --

2 THE COURT: Sustained.

3 MR. CROWE: -- relevance.

4 THE COURT: Same grounds as before.

5 MR. McBROOM: Okay.

6 Q. (By Mr. McBroom) Now, did -- now, you --
7 were you provided copies of the invoices from Air
8 Serv?

9 A. They were emailed to me, yes.

10 Q. Okay. And did you forward those on to
11 corporate?

12 A. Absolutely.

13 Q. Okay. Did you ever provide assurances of
14 payment of those invoices at any time?

15 A. I don't remember doing so. But if I said
16 anything, it probably was to the effect of I'm sure
17 they'll take care of it.

18 Q. Because it was in corporate's hands --

19 A. Yes.

20 Q. -- at that time? Okay.

21 Was that both yours and Gil Green's
22 understanding, that it was -- everything was --

23 MR. CROWE: Objection --

24 Q. (By Mr. McBroom) -- in corporate's hands?

25 MR. CROWE: -- calls for speculation as

1 to --

2 THE COURT: Sustained.

3 MR. CROWE: -- Gil Green's understanding.

4 THE COURT: Sustained as to Gil Green's
5 understanding.

6 A. That was --

7 THE COURT: Don't answer the question. Wait
8 for another.

9 Q. (By Mr. McBroom) Was it your understanding
10 that everything had to be handled by corporate?

11 A. Yes.

12 Q. And did you say you informed Gil Green
13 that -- let me just say -- rephrase that.

14 That -- did you inform Gil Green, did he
15 know that --

16 MR. CROWE: Objection.

17 Q. (By Mr. McBroom) -- you -- that corporate
18 had to take care of it on behalf of Flight Services?

19 MR. CROWE: Objection; calls for speculation
20 as to what Gil Green knew.

21 THE COURT: It's sustained as to what Gil
22 Green knew. Let me ask you this.

23 Did you ever say, "Stop, don't do services
24 anymore"?

25 THE WITNESS: No, I did not.

1 hostile witness (inaudible) your Honor.

2 THE COURT: Well.

3 Q. (By Mr. Crowe) Do you recognize this
4 document, Mr. --

5 A. I do.

6 Q. -- Kim?

7 And what was it referring to (inaudible)
8 senior's email regarding this issue, if you recall?

9 A. I believe when I forwarded email that Gil
10 sent to me with the contract price, I forward -- I
11 forwarded that to senior P. Weitzel and, you know,
12 Mark Exeler at the time. And senior had responded to
13 that, I believe, with, you know, that's way too much
14 and I'm the only one that's authorized to sign this.

15 Q. Okay. I believe -- will you look at
16 Exhibit 21, Mr. Kim. Does this refresh your memory of
17 the communication?

18 A. Yep.

19 Q. Is that the communication you're
20 referencing?

21 A. Yeah.

22 Q. Okay. And it says that senior was willing
23 to pay \$75 per plane?

24 MR. McBROOM: I'm going to object; lack of
25 personal knowledge (inaudible).

1 THE COURT: He can ask him. He's the
2 general manager, presumably at this time. It's
3 obviously a contested issue. He's been getting lots
4 of emails with lots of invoices. I think he's
5 certainly in a position to opine. It's overruled.

6 A. I'm sorry, what was the question?

7 Q. (By Mr. Crowe) Did you take this email to
8 mean that senior was willing to offer \$75 per plane?

9 A. That's -- yeah, that's my assumption.

10 Q. Did you ever get any further clarification
11 from your email asking please advise regarding this
12 issue?

13 A. I don't recall.

14 Q. I'd like to refer you to Exhibit 13. Do you
15 recognize this email, Mr. Kim?

16 A. You said 13?

17 Q. Um-hmm.

18 A. My book goes from twelve to 14, unless I'm
19 not in the right (inaudible).

20 Q. Oh, 13, right, the next one. Right there.

21 A. I was confused because it says 15 here.

22 Q. Yeah, those are the deposition exhibits.

23 A. Oh, okay.

24 Q. The binder tabs are the right ones.

25 A. Okay.

1 A. Yes.

2 Q. Okay. And in the email from you to Phil
3 Armstrong, Robert Weitzel, and Robert P. Weitzel, what
4 are you talking about in reference to senior's email?

5 MR. McBROOM: Your Honor, this is beyond the
6 scope of direct.

7 THE COURT: Well, there are two ways we can
8 handle this, Mr. McBroom. It's true, it is beyond the
9 scope of direct, otherwise he can re-call him as his
10 own witness. And since he's being taken out of order
11 as a courtesy, I don't have any problems with it. So
12 I'm going to give him latitude and he can even -- he
13 can lead him or he can use direct examination, because
14 he has the ability to call him on his own.

15 MR. McBROOM: Right. But if he does call
16 him on his own he can't use leading questions
17 (inaudible).

18 THE COURT: But --

19 MR. McBROOM: That's fine.

20 THE COURT: -- I think as a courtesy --

21 MR. McBROOM: That's fine.

22 THE COURT: -- because we've taken him out
23 of order to accommodate his schedule, I don't have any
24 problems with it. Go ahead, Counsel.

25 MR. CROWE: I don't expect him to be a

1 MR. CROWE: So --

2 THE COURT: That's doable.

3 MR. CROWE: But depending on what
4 rebuttal -- most of the witnesses will be reserved for
5 rebuttal, depending on what has happened, or what
6 issues that your Honor feels are still relevant at
7 this juncture.

8 THE COURT: Sure, absolutely. Absolutely.
9 Go ahead, Mr. McBroom.

10 MR. McBROOM: So we do have the motion
11 before the Court of the two witnesses that need to
12 testify by phone and --

13 THE COURT: I don't have any problems with
14 telephonic testimony. That's fine.

15 MR. CROWE: They are key witnesses, your
16 Honor. They're the only -- they're the only person
17 who's been -- has used a declaration for the summary
18 judgment motion, it's the same witness who was the
19 30(b)(6) deponent. It's highly irregular for us not
20 to have him in person and you be able to examine his
21 credibility in front of you in person.

22 THE COURT: Let me put it to you this way.
23 If I think I'm not getting a clear picture, I'm going
24 to make my own motion to reserve that I get the person
25 in there. But right now I've taken testimony from

1 Skype --

2 MR. CROWE: Right.

3 THE COURT: -- South America, I've done
4 telephonic testimony all over the United States, and
5 of course in person in court testimony.

6 My question to you is can this person be
7 available on Skype?

8 MR. McBROOM: The problem with Skype to me
9 is that sometimes it breaks up a lot (inaudible).

10 THE COURT: That's what I think --

11 MR. McBROOM: And (inaudible) sometimes I'm
12 a little worried about the reception. Some of the
13 different courtrooms have different receptions.

14 THE COURT: We had a very interesting
15 service issue. Anyway. The gentleman appeared from
16 Columbia via Skype and it worked fine. We just popped
17 him up on the screen.

18 MR. CROWE: Also, your Honor, we had to fly
19 witnesses from all over the country here. We've got
20 somebody from LA waiting. We've got somebody from
21 Atlanta waiting.

22 THE COURT: Sure.

23 MR. CROWE: And, you know, we could have
24 discussed this for the past two and a half weeks, and
25 the day before trial we get a motion on shortened

1 time, which is improper right now and shouldn't be
2 considered today, but for these two witnesses, key
3 witnesses to be able to attend telephonically, I think
4 it's just unorthodox and unheard of procedure by
5 defense counsel to pull this at the last minute.

6 THE COURT: Well, things happen, and I'm
7 used to it in this business that things happen;
8 sometimes cases settle over the weekend and we've made
9 arrangements with other courts and then last minute
10 evidentiary issues arise. I realize it's a bit
11 unorthodox, but I'm okay. I think we should get the
12 case tried.

13 But I would ask that Skype be made available
14 for the telephonic witnesses so I can see the person.

15 MR. McBROOM: Sure.

16 Just one thing, on Skype, can you pull it up
17 on both your computers (inaudible)?

18 THE COURT: I'd have to load it on to mine,
19 but generally what happens is counsel, who is the
20 moving party for the telephonic and/or Skype
21 testimony, they bring in a laptop and they just set it
22 up on the bar, we plug in, and then everybody crowds
23 around the bar, and I just sit here usually and, you
24 know, watch and listen. And then I ask questions,
25 too. All right. So let's try it that way.

1 MR. McBROOM: I'll check with --

2 THE COURT: If you can get your hands on a
3 laptop and plug it in, and everybody sees what I'm
4 saying, and there is no issue. And if there is an
5 issue, I'll make the person get on a plane and get
6 here.

7 MR. McBROOM: Okay.

8 THE COURT: That's what I've done.
9 Sometimes I just say the quality is so poor I have
10 concerns about my own ability to discern credibility.
11 Since it's a bench trial, I think that's a legitimate
12 concern, that's why I'm saying Skype, not telephonic.

13 MR. CROWE: Okay. I will say that the cases
14 I've reviewed, your Honor, it's usually been video
15 conferencing, not just telephonic.

16 THE COURT: Yeah, I agree.

17 MR. CROWE: And it's usually been an
18 accident or some major catastrophe that prevented it,
19 rather than just a business inconvenience.

20 THE COURT: I understand and that's why
21 I'm --

22 MR. CROWE: But I understand your position,
23 too. And I prefer this trial moves forward and our
24 client finally gets paid.

25 THE COURT: You've got -- you've got people

1 from all over, so I would prefer to get this case
2 rolling --

3 MR. CROWE: Sure.

4 THE COURT: -- at least today and tomorrow.

5 MR. CROWE: And my witnesses are here, so,
6 yeah.

7 THE COURT: I'm sure they're lined up down
8 there.

9 MR. CROWE: They actually are right now.

10 THE COURT: Lined up down --

11 MR. CROWE: Waiting to see what the
12 scheduling is.

13 THE COURT: Actually I will say -- okay,
14 what else do we have, gentlemen?

15 MR. McBROOM: We also have a motion in
16 limine to hand up to the bench that we also think will
17 reduce what's going on in the case.

18 THE COURT: Well, I need to see it. I
19 can't --

20 MR. CROWE: I have yet to see it either,
21 your Honor, so --

22 MR. McBROOM: I was told not to unpack, so I
23 was waiting.

24 MR. CROWE: I have yet to see the motion in
25 limine, it's not been served on us in any fashion

1 he were in the box.

2 MR. McBROOM: Okay, yes.

3 Could you please state your name and address
4 for the record, please.

5 THE COURT: Okay. You're calling him as a
6 witness.

7 MR. McBROOM: Oh, okay. Yes, we're calling
8 Robert P. Weitzel, your Honor.

9 THE COURT: All right. Mr. Weitzel, raise
10 your right hand.

11 Do you swear or affirm in the matter before
12 the Court to tell the whole truth and nothing but the
13 truth.

14 THE WITNESS: (Inaudible).

15 THE COURT: Can you bring it up here,
16 please. Is it plugged in?

17 UNIDENTIFIED SPEAKER: Yes.

18 THE COURT: Juan, can you just put it right
19 there, right on your -- where you would put your
20 notes. I can see him now.

21 Mr. Weitzel, can you see me? Can you see
22 me?

23 THE WITNESS: Hello.

24 THE COURT: Hello.

25 THE WITNESS: Yeah, you have to speak up,

1 your Honor.

2 THE COURT: Do you promise to tell the whole
3 truth and nothing but the truth?

4 THE WITNESS: I do.

5 ROBERT P. WEITZEL, being duly sworn, testified
6 upon oath, as follows:

7 THE COURT: All right. Your witness.

8 MR. CROWE: Your Honor, can I voir dire the
9 witness briefly?

10 THE COURT: Come on up into the court
11 reporter box and shout. Let's flip it around so he
12 can see him.

13 MR. CROWE: I can --

14 THE COURT: Okay. Go ahead.

15 MR. CROWE: Whatever you prefer.

16 THE COURT: No, no, go ahead.

17 MR. CROWE: (Inaudible) next to you --

18 THE COURT: No, no, no, I need you in the
19 speaker.

20 V O I R D I R E E X A M I N A T I O N

21 BY MR. CROWE:

22 Q. Hi, Mr. Weitzel. My name is David Crowe,
23 I'm an attorney for Aircraft Corporation. I have met
24 you only -- had a deposition a couple weeks ago or
25 actually about a month and a half ago.

1 I've got a question for you. Where are you
2 right now?

3 A. I'm sorry, you're going to have to speak
4 into the microphone. I have a very hard time hearing
5 you.

6 Q. Where are you right now?

7 A. I'm in an office.

8 Q. In which city and which state?

9 A. In Cleveland, Ohio.

10 Q. And from my understanding you were
11 unavailable for deposition the week of June 17;
12 correct?

13 A. That's correct, yes.

14 Q. And that was because you were on a vacation
15 with your family, Hilton Head; correct?

16 MR. McBROOM: What's the --

17 A. Yes.

18 MR. McBROOM: -- relevance of this, your
19 Honor?

20 THE COURT: What's the relevance of this?

21 MR. CROWE: I'm going to -- your Honor, the
22 only deposition -- the only declaration of why we're
23 having this teleconference is a declaration from his
24 father that stated Bobby Weitzel is out of the city
25 and traveling from June 24 to June 26. Clearly he's

1 in Cleveland, Ohio, in his home office.

2 THE COURT: Right.

3 MR. CROWE: The declaration for the premise
4 of this whole proceeding to be done on Skype, the only
5 reason, he's already testified to he's back at home.

6 THE COURT: Go ahead.

7 MR. CROWE: I'm just trying --

8 THE COURT: Go ahead.

9 MR. CROWE: -- to figure out when he got
10 back at home.

11 THE COURT: Go ahead.

12 Q. (By Mr. Crowe) And I believe your vacation,
13 Hilton Head, from the invoice attached to your
14 declaration said ended on June 22; is that correct?

15 MR. CROWE: Is he getting guidance from
16 somebody?

17 A. No, that's incorrect.

18 Q. (By Mr. Crowe) Okay. When did you leave
19 Hilton Head, South Carolina?

20 A. I left Hilton Head, South Carolina, at
21 7:37 a.m. in the morning on Saturday. But I was on
22 vacation through Sunday.

23 THE COURT: Saturday what date?

24 MR. CROWE: That would be June 22.

25 A. (Inaudible) beyond the date you just gave

1 me.

2 Q. (By Mr. Crowe) Right. Right. So on
3 June 23, Sunday, June 23, you returned home to
4 Cleveland, Ohio?

5 A. Yes.

6 Q. Okay.

7 MR. CROWE: Your Honor, I move to exclude
8 this witness. The only dep -- the only declaration of
9 why we're having this unique experience right now
10 states that his father's stating he's out of town
11 traveling from June 24 to June 26, and therefore he's
12 unavailable. The declaration --

13 THE COURT: Can I see the --

14 MR. CROWE: -- (inaudible) false.

15 THE COURT: Show it to counsel first.

16 MR. McBROOM: Okay. So --

17 THE COURT: Can I see the declaration,
18 please? You can step down, Counsel. Thank you. You
19 can --

20 What do you want to do, Counsel?

21 MR. McBROOM: If he doesn't want to do it,
22 we'll -- (inaudible) in person, we'll continue the
23 trial. I'll move to continue it.

24 MR. CROWE: Your Honor, Judge --

25 MR. McBROOM: If that's --

1 MR. CROWE: -- Rogers already --

2 MR. McBROOM: -- what he wants.

3 MR. CROWE: -- denied a motion --

4 MR. McBROOM: I mean I say --

5 MR. CROWE: -- for continuance.

6 MR. McBROOM: -- we just get it done. He's

7 just obviously trying to conceal the evidence. I

8 don't understand. It's like --

9 MR. CROWE: I say we move for --

10 MR. McBROOM: -- he should be --

11 MR. CROWE: -- default (inaudible) 43(f),

12 your Honor.

13 MR. McBROOM: -- able to say -- we should be

14 able to put our case forward.

15 THE COURT: Okay. I'm going to -- we're

16 going to hang up. We're going to call you back, so

17 stay available.

18 Can you hand this back to counsel, please.

19 I've got to make a record here.

20 Thank you, Mr. Weitzel.

21 MR. McBROOM: Thank you.

22 THE COURT: We're going to call him back;

23 tell him not to leave.

24 MR. McBROOM: We'll call you back. Don't

25 leave.

1 THE WITNESS: I'm right here.

2 MR. McBROOM: Okay. I'm going to hang up.

3 THE WITNESS: Okay.

4 THE COURT: All right. The concerns I have
5 are twofold. When we started this case yesterday
6 there was permission asked to do telephonic testimony,
7 which plaintiff's counsel vehemently objected to,
8 because he had flown witnesses in from California, as
9 I understand, and Roswell, Georgia, Mr. Nguyen, and
10 Ms. Ong.

11 He asked why Mr. Weitzel -- Mr. Robert P.
12 Weitzel was not available. And what I had been led to
13 believe was that he had this prearranged travel.

14 And then there is this declaration from
15 Robert A. Weitzel indicating that he was going to be
16 gone on the very dates of the trial; the 24th, 25th,
17 and 26th. I'm reading page two, line four --
18 paragraph four, line seven through 13.

19 Now, we come to learn that Mr. Weitzel is
20 back in Cleveland, Ohio, which is the home office of
21 FSS.

22 What is going on here? Why isn't he here?
23 Everybody else had to be here.

24 MR. McBROOM: Your Honor, he was
25 unavailable. All I have is what's in the declaration.

1 I don't have anything else --

2 THE COURT: You have --

3 MR. McBROOM: -- to tell you.

4 THE COURT: You stand by the declaration,
5 yet your client is sitting in his office in Cleveland.

6 MR. McBROOM: I -- I was -- obviously that
7 is from Robert A. Weitzel, not Robert P. Weitzel.
8 Okay. I didn't have a chance to talk to Robert P.
9 Weitzel because he was on vacation. So otherwise I
10 would have.

11 MR. CROWE: Your Honor, he's got his
12 business cell phone.

13 THE COURT: Here you go. Juan, you can give
14 this back to Mr. Crowe.

15 I think this is gamesmanship, and I'm not
16 going to stand for it so -- and I'm not continuing the
17 trial. He's not testifying via Skype. He's not
18 testifying telephonically. It was a gamble you made
19 and you lost.

20 MR. CROWE: Plaintiffs respectfully request
21 default pursuant to 43(f), your Honor.

22 THE COURT: I'm not going to default him.
23 He can call whoever he needs to call, but I'm not
24 going to hear from Mr. Robert Weitzel via Skype, now
25 that I know he's back in Cleveland, he's not in Hilton

1 Head, South Carolina, and he is remarkably available,
2 as is everybody else in this trial who's had to fly in
3 to Seattle.

4 MR. McBROOM: I don't know if he would or
5 not. I would have to check that. I mean you're
6 saying that --

7 THE COURT: Call your next witness.

8 MR. McBROOM: -- and all I had was that.

9 THE COURT: Call your next witness.

10 MR. McBROOM: Okay. Mr. Priola.

11 Can I -- can we take a --

12 THE COURT: No.

13 MR. McBROOM: I just wanted to tell
14 Mr. Weitzel that we weren't going to be calling him
15 back, your Honor.

16 THE COURT: You can have -- just let him sit
17 by. We've waited and wasted enough of the Court's
18 time.

19 Mr. Priola, come forward, I'm going to swear
20 you in.

21 MR. CROWE: Your Honor, would you like a
22 copy of the witness disclosure I mentioned earlier for
23 a limited (inaudible).

24 THE COURT: I'm aware of what (inaudible).
25 Step forward and raise your right hand.

1 THE COURT: Do you want to reopen your
2 direct?

3 MR. McBROOM: No, that's okay, your Honor.
4 That's fine. We're good.

5 THE COURT: All right.
6 Thanks for (inaudible).
7 Your next witness.

8 MR. McBROOM: My next witness would be Bobby
9 Weitzel, which I understand the Court's excluded from
10 the trial so we can't call him.

11 THE COURT: Well, you can't -- let me make
12 the record very clear here.

13 The motion for telephonic testimony was done
14 on the eve of trial; it was not done timely. The
15 reason stated was that he was unavailable, he was
16 traveling, there is a declaration by the son to that
17 effect, and that he was unavailable the 24th, 25th,
18 and 26th of June, when this case was scheduled for
19 trial.

20 The Court relied on that declaration and the
21 representations made by counsel, and presumably
22 counsel also wrote the declaration for the other
23 Weitzel, the son, to sign.

24 So I have some concerns.

25 Today when Mr. A. Weitzel, Robert A. Weitzel

1 was brought up on Skype --

2 MR. McBROOM: I'm sorry, it's Robert P.

3 THE COURT: Robert P. --

4 MR. McBROOM: Yeah, sorry.

5 THE COURT: -- Weitzel was brought up on
6 Skype, the quality was very poor, he could barely hear
7 the Court. And he indicated through voir dire
8 questions asked by plaintiff's counsel where he was,
9 and his first response was I'm in the office or I'm in
10 an office; he was pretty evasive about that.

11 And then Mr. Crowe asked the next question,
12 which is where are you, what city and state, please.
13 And he said I'm in Cleveland, Ohio. That's a far cry
14 from being on vacation in Hilton Head, South Carolina.

15 I didn't hear any further questioning,
16 because I really didn't need to hear it at that point,
17 because Mr. Crowe handed up a declaration to the Court
18 indicating that he was supposedly traveling and
19 unavailable to be here in person.

20 So there are two reasons why the Court has
21 concerns. Generally as officers of the Court this
22 Court is known to give great latitude to people who
23 are on vacation, because we all need to live our
24 lives. And the declaration by the son indicated he
25 was on vacation.

1 And there was further questioning of the
2 witness via Skype that he had returned on the 22nd and
3 was home by the 23rd and had just returned to work
4 yesterday.

5 So there was a misrepresentation at some
6 point. But certainly asking the Court, which is well
7 within its discussion under CR 43, which allows or
8 permits a Court in discretion to permit telephonic
9 testimony, ordinarily I would have gladly been willing
10 to do that to get this case moving.

11 But there are two concerns. One is there
12 was an absolute misrepresentation about his
13 whereabouts. Everybody else came here; Mr. Priola
14 came here from Chicago, Ms. Ong came here from
15 California, Mr. Nguyen came from Georgia.

16 I don't know what special rules apply, if
17 any, which would allow the Court on the eve of trial
18 to consider this, other than the fact that perhaps he
19 didn't want to be inconvenienced, I'm not sure. I'm
20 not making or drawing any inferences to his decision
21 not to come to Court. But to not even give the other
22 side proper notice -- and I will say there have been a
23 lot of last minute filings, the reply came in late,
24 the Court had had enough. And I think it would be an
25 abuse of discretion if I were to permit the Skype

1 testimony under these circumstances when clearly this
2 was just absolutely at somebody's inconvenience who
3 did not want to fly to the west coast for either one
4 or two questions or whatever the case may be.

5 And that's the reason why I said no more as
6 soon as I found out he was in Cleveland and wasn't
7 traveling on vacation, he was in his office. And
8 that's the reasoning that the Court declined to listen
9 to his Skype testimony, along with the fact that the
10 quality was very poor.

11 Anything else for purposes of the record
12 regarding the testimony of Mr. P. Weitzel?

13 MR. McBROOM: Defendants would like to be
14 heard, your Honor.

15 Just to make the record clear, the
16 declaration was not from Robert P. Weitzel, the person
17 who was on --

18 THE COURT: Right, it was --

19 MR. McBROOM: -- Skype, at all --

20 THE COURT: -- made by the son.

21 MR. McBROOM: -- it was made by Robert A.
22 Weitzel because Robert P. Weitzel was out of town at
23 the time. And that was his best understanding at the
24 time.

25 And, you now, I mean if -- you know,

1 previously it was Skype or the Court is going to order
2 him in person. I mean if that's the case, then I
3 think we should have an opportunity to have him appear
4 in person then.

5 THE COURT: If he can get here before the
6 close of business today, great, get him here.

7 MR. McBROOM: I know. That's not going to
8 happen, so we know that can't happen, it's impossible.

9 So we're not able to put on our 30(b)(6).
10 And just -- the record is clear that we tried to call
11 Mr. Priola as the 30(b)(6) witness as well, too, and
12 that's also been denied.

13 THE COURT: It's been denied because you
14 failed to comply with the discovery rules, which
15 requires that you as an attorney of record shall
16 designate him accordingly, not when one witness is
17 inconvenienced so then you just morph another witness
18 into the 30(b)(6) at your convenience. We have rules
19 for a reason and they need to be complied with, and
20 they haven't been done so here.

21 MR. McBROOM: If I could just finish my
22 remark.

23 Just on the record, we were going to have
24 all three of them testify as the 30(b)(6) speaking
25 agents for the company, not just --

FILED

13 JUN 21 PM 2:53

KING COUNTY
SUPERIOR COURT CLERK

Honorable Julie A. Spector E-FILED

Trial Date: June 24, 2013 at 10:00 a.m. Case No. 12-2-01364-1 SEA

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

AIR SERV CORPORATION,

Plaintiff,

v.

FLIGHT SERVICES & SYSTEMS, INC.,

Defendant.

No. 12-2-01364-1 SEA

DEFENDANT FLIGHT SERVICES &
SYSTEMS, INC.'S REQUEST FOR A
PROTECTIVE ORDER TO PERMIT TWO
CORPORATE EXECUTIVE WITNESSES
TO TESTIFY TELEPHONICALLY
PURSUANT TO CR 43(f)(1) and CR 43(a)(1)

AND SUBJOINED DECLARATION OF
COUNSEL

Defendant Flight Services & Systems, Inc. respectfully seeks permission from the Court under CR 43(f)(1) and CR 43(a)(1) to have the Chairman and Chief Executive Officer (Robert A. Weitzel) and the President (Robert P. Weitzel) to testify telephonically. The request is based upon the declarations of compelling in-person unavailability from these two top executive defendant witnesses from Cleveland, Ohio and the posture of the case. See Exhibits 1 and 2 (First and Second Declarations of Robert A. Weitzel, dated June 20, 2013). Flight Services will be sending its Regional Director to attend in-person for the duration of the trial.

Under CR 43(f)(1) for corporate agents, in cases of unusual hardship, or for other good cause shown, the Court may enter a protective order excusing a party from attending, or granting other relief as appropriate. KARL B. TEGLAND, WASHINGTON PRACTICE: RULES OF PRACTICE 101 (6th ed. 2013). The Court also has the complete authority under CR 43(a)(1) to permit a party to testify telephonically (contemporaneous communication) for good cause in

1 compelling circumstances and with the appropriate safeguards. As stated in the Notes of
2 Advisory Committee on 1996 amendments for the federal rule counterpart, “[t]he most
3 persuasive showings of good cause and compelling circumstances are likely to arise when a
4 witness is unable to attend trial for unexpected reasons, such as accident or illness, **but remains
5 able to testify from a different place.**” (bold added).

6 Both corporate executives here **will be** available telephonically to answer any questions
7 that may be useful. Counsel has sent copies of all the trial exhibits to the witnesses, which will
8 be at their disposal. If these two witnesses were compelled to testify in-person, the company
9 would stand to lose substantial business. Both of the corporate executive witnesses, however,
10 who operate out of company headquarters in Cleveland, Ohio, have significant compelling
11 business and health reasons that prevent them from testifying in-person.

12 Plaintiff cannot credibly argue that it would be prejudiced in any manner by permitting
13 telephonic testimony from these two witnesses. Especially, as here, where the issues have been
14 substantially narrowed in pre-trial summary proceedings to solely the element of relief under
15 quantum meruit or unjust enrichment. In fact, opposing counsel stated on Friday, June 20, 2013,
16 that he only intended to question Robert A. Weitzel *on a single document* (Tr. Ex. 21) and that if
17 Flight Services dropped any objections to the document, that he would not object. See Exhibit 3
18 (copy of opposing counsel’s communication). Unfortunately, Flight Services cannot concede to
19 the demand because Flight Services’ relevance objection still applies.

20 Here, there are many compelling reason to permit the testimony to be taken
21 telephonically. First, the witnesses are legitimately unavailable to attend in-person due to the
22 stated corporate executives’ business obligations and a health issue. Second, the only issues
23 remaining are whether *quantum meruit* or unjust enrichment relief is available and, if so, how
24 much. This has substantially curtailed the scope of any testimonial evidence. As discussed
above, opposing counsel has stated that it only intends to question Robert A. Weitzel *on a single
document* (Tr. Ex. 21). This comment alone demonstrates the undue and unnecessary burden.

1 Third, Flight Services stands to be materially economically harmed by mandating in-
2 person testimony in Seattle for its two top executives out of Ohio. Mr. Robert A. Weitzel and
3 Mr. Robert P. Weitzel both have meetings with key customer clients (airlines) that cannot be
4 rescheduled. Flight Services & Systems operates in a highly competitive market and timing is
5 everything. Taking the two top executives away from the company for a period of three days (or
6 more) is an undue and unnecessary burden. Fourth, Robert A. Weitzel has immediate dental
7 issues that need to be addressed. Fifth, the size of the case (plaintiff's claim of \$80K) is not
8 proportional to the demands plaintiff would be placing on these two defendant witnesses. The
9 case is understandably important to the parties, but the magnitude of the case also factors in
10 favor of permitting testimony through telephonic communications. Finally, plaintiff's
11 description of its claimed damages in discovery relies in no manner at all on defendant's
12 corporate executives. See attached Exhibit 4. Nevertheless, the executives *are* making
themselves available telephonically for providing any necessary testimony.

13 Based upon the foregoing, Flight Services respectfully requests that the Court grant
14 permission to allow these two executive witnesses to testify telephonically. If the request was
15 denied, defendant Flight Services would need to respectfully request additional time for the trial
16 so that these witnesses could become available to appear in person. This is something that is
17 unnecessary for the circumstances here. Given the current posture of this case, the facts weigh
18 heavily in favor of granting the request for telephonic testimony.

19 DATED this 20th day of June, 2013

20 s/ Gregory A. McBroom

21 Gregory A. McBroom, WSBA No. 33133
22 Livengood Fitzgerald & Alskog, PLLC
23 Attorneys for Def. Flight Services & Systems, Inc.
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DECLARATION

GREGORY A. MCBROOM declares under penalty of perjury under the laws of the State of Washington as follows: I am counsel for Flight Services & Systems, Inc., over the age of 18, competent to testify, and make this declaration based upon my own personal knowledge. The foregoing facts stated herein are true and accurate to the best of my knowledge and belief. Exhibits A through C attached hereto are true and accurate copies, highlighting and bold added for ease of reference on the communications.

SIGNED at Kirkland, Washington this 20th day of June, 2013

Gregory A. McBroom
GREGORY A. MCBROOM

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EXHIBIT 1

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

AIR SERV CORPORATION,

Plaintiff,

v.

FLIGHT SERVICES & SYSTEMS, INC.,

Defendant.

No. 12-2-01364-1 SEA

DECLARATION OF
ROBERT A. WEITZEL

Dated June 20, 2013

ROBERT A. WEITZEL declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am the Chairman and Chief Executive Officer of Flight Services & Systems, Inc., in the money damages lawsuit filed by plaintiff. I am over the age of 18, and am competent to testify to the contents of this Declaration based upon my personal knowledge.

2. As the Chairman and CEO of Flight Services, I have numerous responsibilities demanding my time and attention concerning our company's operations in several states. Flight Services provides many types of airline and airport services around the country. Our headquarters is in Cleveland, Ohio, but I spend a lot of my time working with our airline and airport customers both domestically and internationally.

DECLARATION OF
ROBERT A. WEITZEL - 1

LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 THIRD AVENUE
P.O. BOX 908
KIRKLAND, WASHINGTON 98083-0908
PHONE: (425) 822-9281 FAX (425) 828-0908

Page 1616

1 3. Although plaintiff knows we operate on the East coast, it did not send a trial
2 notice until June 7, 2013. I received a trial notice to testify in Seattle and need to seek relief
3 because I am unable to attend in person for the reasons detailed below. Unfortunately, I am
4 unavailable to attend in-person because of my many obligations as the chief executive charged
5 with running Flight Services & Systems, Inc. around the country. I have a specific business
6 conflicts, including the one discussed below, that cannot be resolved.

7 4. I will certainly make myself fully available by phone to answer any questions that
8 may be useful. I have requested that counsel send to me a copy of the trial exhibits, which I will
9 have at my disposal. I am also sending our regional director, Mr. Tom Priola, to attend the full
10 trial in person. Among other things, Mr. Priola serves our airline and airport customers on the
11 West coast, including Sea-Tac.

12 5. As stated above, I am not available to attend the trial in-person from June 24-27,
13 2013 (or anytime during that week). In addition to my substantial responsibilities involving the
14 daily operations of our company, I have to attend a corporate business meeting in Denver,
15 Colorado with the President of Frontier Airlines during the same time as the trial. **Exhibit A**
16 attached is a true and accurate copy of my travel arrangements. This is an important business
17 meeting for our company and I cannot miss it. As shown in my travel arrangements, I have to
18 leave Cleveland, Ohio on June 24, 2013 at 1644 pm (Eastern Time) to interface with Frontier's
19 President concerning our operations for Frontier Airlines. Because I am traveling on Monday,
20 June 24, 2013, the best day for me to testify would be Tuesday, June 25, 2013. I will be
21 available most of this day. This is a meeting I am unable to reschedule because Flight Services
22 cannot afford to lose this business.
23
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25

DECLARATION OF
ROBERT A. WEITZEL - 2

LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 THIRD AVENUE
P.O. BOX 908
KIRKLAND, WASHINGTON 98083-0908
PHONE: (425) 822-9281 FAX (425) 828-0908

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EXHIBIT A

DECLARATION OF
ROBERT A. WEITZEL -- 4

LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 THIRD AVENUE
P.O. BOX 908
KIRKLAND, WASHINGTON 98083-0908
PHONE: (425) 822-9281 FAX (425) 828-0908



COMPANY BUSINESS TRAVEL REQUEST

Form Number: 30394
Effective Date: 08/20/09

CONTACT: PASS BUREAU Phone: 720-374-4600 Fax: 720-374-4654 E-Mail: bscorporatetravel@flyfrontier.com Website: www.myfrontier.com
CONTACT PERSON: Ernestine Trejo LOCATION: ATO AUS DEPT: CS COST CENTER: AUS302
PHONE: 512 530-3369 FAX: 512 530-3343 CELL: 512-585-0224 EMAIL: etrojo@flyfrontier.com

	LAST NAME	FIRST NAME	MIDDLE NAME	GENDER	DOB	EMP #	DEPARTMENT	JOB TITLE/RELATION	E-MAIL
1	Weltzel	Robert	Adam	Male	10Jul35		FSS	Chairman/ CEO	rweltzel@fsspeople.com
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	FROM	TO	AIRLINE	FLT #	DATE	DEP	ARR	STATUS	REC LOC	FARE BASIS	FARE	TOTAL	F.O.P.	Special Info
1	CLE	DEN	F9	523	24 June 2013	16:55	18:25	PS	HJZLI					
2	DEN	CLE	F9	524	26 June 2013	16:46	21:35	PS						
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4														

	Driver's Name:	OVER 25	Employee #:	RaC/LIMO/VAN	Phone / Fax:	PU City	PU Date	PU Time	DO City	DO Date	DO Time	Conf. #	Rate	F.O.P.	Rental Car Company
1		<input type="checkbox"/>													
2		<input type="checkbox"/>													

	HOTEL	CITY	ARR. DATE	TIME	DEPT DATE	TIME	QTY	ROOM TYPE	RATE W/ TAXES	F.O.P.	HOTEL PH #	HOTEL FAX #
1												
2												

ADDRESS: _____ CITY: _____ STATE: _____ CONF. #: _____

PURPOSE OF TRAVEL: FSS CEO has meeting in Denver with John Bendoraitis V.P. AUTHORIZATION: _____ DATE: _____
General Notes: _____

- THE FOLLOWING COMPANY POLICY APPLIES TO ALL FRONTIER AIRLINE EMPLOYEES AND COMPANY OFFICERS. DEVIATIONS TO THIS POLICY REQUIRE THE PRIOR WRITTEN APPROVAL OF THE VP OR ABOVE. SUBMITTING THIS REQUEST ATTESTS THAT YOU HAVE READ AND UNDERSTAND THESE POLICIES AND PROCEDURES.
- 1 Frontier employees traveling on business and requesting positive space (confirmed seating) are required to submit a travel request to the Pass Bureau.
 - 2 Requests must be submitted for all carriers including travel on Frontier Airlines.
 - 3 Employees must use Frontier Airlines for business travel to the maximum extent possible. Requests to travel on another carrier when a Frontier flight is available must have V.P. approval.
 - 4 Travel on other carriers is restricted to coach class unless the carrier provides a complimentary upgrade.
 - 5 Appropriate dress for business travel as defined by the carrier is business casual. No jeans, shorts, tank tops or T-shirts are permitted. All employees will be well groomed and present a professional image and behavior.
 - 6 All rental car agencies contracted provide unlimited mileage. Cars must be returned with a full tank, and not prepaid fuel is allowed. All cars rented will be compact automobiles unless a free upgrade is offered by the rental company. Frontier Airlines, Inc. is self-insured, you must decline the CDW and LDW insurance, and any other options offered, if accepted they will not be reimbursed.
 - 7 VP approval is required if you anticipate drop off charges with your rental. No optional equipment i.e. cell phone, GPS etc, will be reimbursed.
 - 8 Hotel Reservations will only be made by the Pass Bureau with contracted Hotels. Do not charge food, movies, liquor, or incidentals to your room.

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

AIR SERV CORPORATION,

Plaintiff,

v.

FLIGHT SERVICES & SYSTEMS, INC.,

Defendant.

No. 12-2-01364-1 SEA

SECOND DECLARATION OF
ROBERT A. WEITZEL

Dated June 20, 2013

ROBERT A. WEITZEL declares under penalty of perjury under the laws of the State of Washington as follows:

1. As stated in my prior declaration, I am the Chairman and Chief Executive Officer of Flight Services & Systems, Inc. I am over the age of 18, and am competent to testify to the contents of this Declaration based upon my personal knowledge.

2. I am providing this supplemental declaration to provide the Court with the details of Mr. Robert P. Weitzel's unavailability to attend the trial in-person on June 24-26, 2013. Mr. Robert P. Weitzel is currently out-of-the-office, but I do have personal knowledge of his unavailability to attend the trial in-person. As with me, he will be available to testify by phone to answer any questions that may be useful. Our counsel is also sending him copies of the trial exhibits that he will have at his disposal.

DECLARATION OF
ROBERT A. WEITZEL - 1

LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 THIRD AVENUE
P.O. BOX 908
KIRKLAND, WASHINGTON 98083-0908
PHONE: (425) 822-9281 FAX (425) 828-0908

1 3. Mr. Robert P. Weitzel is the President of Flight Services & Systems, Inc. and
2 operates out of our corporate headquarters in Cleveland, Ohio. He received a notice just on June
3 7, 2013 to testify in Seattle. He submitted a declaration to the Court on June 11, 2013, showing
4 his unavailability due to his vacation plans that he had already scheduled and paid for prior to the
5 time that plaintiff noticed him for trial. Exhibit A attached is a true and accurate copy of the
6 declaration submitted by Mr. Robert P. Weitzel.

7 4. I know that Mr. Weitzel will be traveling from June 24-26, 2013 based upon his pre-
8 arranged and paid-for vacation plans for his family. Once he returns, he will immediately head out
9 for a new operational launch, which cannot be missed. This will last through the rest of the week.
10 As President of Flight Services & Systems, Inc., Mr. Robert P. Weitzel has numerous
11 responsibilities demanding his daily time and attention concerning our company's operations in
12 several states. He has specific business commitments that cannot be resolved.

13 5. The issues in this case have been substantially narrowed through pre-trial
14 proceedings, the only remaining issue being whether plaintiff is entitled to quantum meruit or
15 unjust enrichment relief and, if so, how much. Therefore, it would be unfair and an undue
16 burden to ask Mr. Robert P. Weitzel to attend in-person and incur the time and expense for a
17 three day trial in Seattle, to answer a few questions that could be easily presented over the phone.
18 He will be fully available by phone to answer any questions that may be useful.

19 6. As I stated in my earlier declaration, our company cannot afford to substantially
20 disrupt business operations for a period of three days. This is serious. We have substantial
21 customer commitments with several airlines and airports that must be met. It is not economically
22 feasible for a company our size to fail customer commitments and take away key executives
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1 from their company obligations. This is a very difficult economic climate. No prejudice will
2 result from permitting our testimony by phone, and we ask the Court for relief to do so.

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4 Executed this 20th day of June 2013, at Cleveland, Ohio.

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Robert A. Weitzel

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EXHIBIT A

DECLARATION OF
ROBERT A. WEITZEL - 4

LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 THIRD AVENUE
P.O. BOX 908
KIRKLAND, WASHINGTON 98083-0908
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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

AIR SERV CORPORATION,

Plaintiff,

v.

FLIGHT SERVICES & SYSTEMS, INC.,

Defendant.

No. 12-2-01364-1 SEA

DECLARATION OF
ROBERT P. WEITZEL

Dated June 10, 2013

ROBERT P. WEITZEL declares under penalty of perjury under the laws of the State of Washington as follows:

1. I am the President of Flight Services & Systems, Inc. ("FSS"), defendant in the lawsuit filed by Air Serv Corporation ("AS"). I am over the age of 18, and am competent to testify to the contents of this Declaration based upon my personal knowledge.

2. On Friday, June 7, 2013, counsel contacted me to obtain a few dates that I would be available to appear for another day of deposition. I live in Ohio and must make travel arrangements to Seattle. I have substantial work commitments that must be rescheduled due to our company's operations out of several states in order to appear for deposition. Nevertheless, I informed counsel that I could adjust my schedule to appear for deposition on June 11 or 12, 2013.

DECLARATION OF
ROBERT P. WEITZEL -- 1

LIVENGOOD, FITZGERALD & ALSKOG, PLLC
121 THIRD AVENUE
P.O. BOX 908
KIRKLAND, WASHINGTON 98083-0908
PHONE: (425) 822-9281 FAX (425) 828-0908

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3. Counsel later called me back to ask if I could be available for deposition during the week of June 17, 2013. Unfortunately, I have a family vacation that has been scheduled since March 2013 that precludes me from attending anytime during the week of June 17, 2013. Exhibit A attached hereto is a true and accurate copy of the reservations I made in March 2013. I will be driving my family to our vacation destination.

4. It is my understanding that opposing counsel has claimed that he would have inadequate time to prepare for a deposition on June 11 or 12, 2013. I do not understand this as opposing counsel has already deposed me *for more than a full day* and, with all the papers already filed in the case, it is incomprehensible that much preparation time would be necessary.

Executed this 10th day of June 2013, at Cleveland, Ohio.

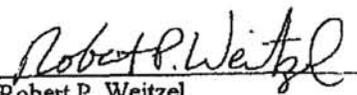

Robert P. Weitzel

EXHIBIT A

----- Forwarded message -----

From: **Hilton Head Vacation Rentals** <info@800beachme.com>
Date: Mon, Mar 11, 2013 at 10:05 AM
Subject: Update for Reservation # 51863
To: Kristin Weitzel <weitzelsoccer@gmail.com>
Cc: info@800beachme.com

If this is your initial e-mail, please open the attachment containing the vacation rental agreement and **DIRECTIONS TO CHECK-IN**. **Payment reminder notices have no attachments.** Please call us at [800-732-7671](tel:800-732-7671) if you have any questions. If you have already sent in your payment, please disregard this reminder.

This is your reservation confirmation and receipt. Please, retain for your records.

Reservation ID:51863

Property Info

Shorewood Villas 220
Forest Beach
21 S. Forest Beach Dr.
South Forest Beach Area
Hilton Head Island SC, 29928
US

Member Info

Kristin Weitzel
260 Senlac Hills
Chagrin Falls OH, 44022
US
weitzelsoccer@gmail.com
none

Apply the username and password values to login to the guest extranet and update existing reservations.

Username:

Password:

[Guest Login](#)

Reservation Info

Starting/Arrival Date: 6/15/2013
Ending/Departure Date: 6/22/2013
Travel Insurance:

Number in Party: 1

Price Breakdown

Rent: \$1745.00

Insurance: \$0.00

Total Other Charges: \$0.00

Total Taxes and Fees: \$174.50

Total Vacation Cost: \$1919.50

Damage Deposit: \$0.00

Total Bill: \$1919.50

Advance Required By: 3/25/2013

Advance Amount: \$698.00

Advance Received: \$0.00

Advance Now Due: \$698.00

Amount Due On or Before: 5/16/2013

Total Left To Pay: \$1919.50

You are a valued guest and we want to do everything possible to make your trip enjoyable and worry free. Because the unforeseen and unexpected can occur before you leave or when you're away from home we recommend [CSA's Travel Insurance Plan](#). Did you know that you can protect your entire vacation from rental property to flights to a rental car? Regardless of the company whom you've paid or booked these arrangements through they can be insured through us. Don't delay, be sure to secure coverage for all items you have pre-paid and are non-refundable for your vacation. [Click here](#) to protect your entire vacation investment today.

It's not too late to purchase travel insurance. Contact one of our staff members to find out your options.

Thank you for booking with us. We appreciate your business!

Hilton Head Vacation Rentals

Please make checks payable to: 430 William Hilton Parkway, Suite 504

Hilton Head Island, SC 29926

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EXHIBIT 3

1 **From:** David Crowe [mailto:DCrowe@rvk-law.com]
2 **Sent:** Friday, June 21, 2013 10:08 AM
3 **To:** Greg McBroom
4 **Subject:** RE: Air Serv v. Flight Services, No. 12-2-01364-1 SEA; Defendant's Statement of Evidence and
5 Trial Details

6
7 Greg,

8 First, as the parties previously agreed to discuss witness availability issues long ago (as
9 demonstrated in the joint confirmation re trial readiness), I am stunned that the day before trial -- without
10 any prior discussion with me -- you request the Court to permit telephonic testimony.

11 **As to Robert A. Weitzel, we are willing to agree that he does not need to testify so long as
12 defendant stipulates to admit trial exhibit 21 into evidence.**

13 As to Robert P. Weitzel, we fully expect him to attend trial if he is going to testify for defendant.
14 If defendant does not intend on calling him as a witness, there is no issue. However, to the extent he
15 intends on testifying, we certainly want full opportunity to cross-examine him in person.

16
17 David

18
19 **From:** Greg McBroom [mailto:mcbroom@lfa-law.com]
20 **Sent:** Friday, June 21, 2013 9:25 AM
21 **To:** David Crowe

22
23 Dear David,

24 It is my understanding that Mr. Weitzel (Robert A.) is not available until Tuesday. He may be
available parts of the day on Monday, but Tuesday morning would be preferred. It is my understanding
that Mr. Weitzel (Robert P.) can be available to testify on Monday. It is also my understanding that they
will both need to testify by phone, as you know from Karen's email and your communication to the
Court.

We are sending them copies of trial exhibits that will be at their disposal. It sounds like you are
not agreeing to testimony by phone, so we will file a motion with the Court as we indicated. If your
position changes, please let us know.

Do you still need Mr. Weitzel (Robert P.) to testify? I did not see him on your list below. We
can do Mr. Green on Tuesday, that will work. I anticipate that you will take most if not all of the day on
Monday. So, I would not expect to have anyone testify on Monday.

In advance, thank you.

-Greg

Gregory A. McBroom
Livengood Fitzgerald & Alskog, PLLC
Phone: (425) 822-9281, Ext. 315

1 **From:** David Crowe [mailto:DCrowe@rvk-law.com]

2 **Sent:** Friday, June 21, 2013 8:53 AM

3 **To:** Greg McBroom

4 **Subject:** FW: Air Serv v. Flight Services, No. 12-2-01364-1 SEA; Defendant's Statement of Evidence and Trial Details

5 **Importance:** High

6 Greg,

7 The only witness I am aware of that has an issue is Gil Green. He is currently in Alaska and
8 returns Monday afternoon. He will be available to testify first thing Tuesday morning. Let me know if
9 there are any witnesses you know that have any issues. **As this is a bench trial, I am more than willing
10 to take witnesses out of order to accommodate the witnesses respective schedules.** Also, on Monday,
11 I intend on calling Toan Nguyen, Tessie Ong, and Robert A. Weitzel to testify. If we have additional
12 time, please advise as to who you may call on Monday so I can proceed accordingly. I also intend on
13 calling Gil Green (first thing Tuesday morning).

14 Thanks,

15 David

**Air Serv Corporation vs. Flight Services & System, Inc.
King County Cause No. 12-2-01364-1**

Date: June 25, 2013

Judge: Julie Spector
Bailiff: Christine Henderson
Court Clerk: Juan Buenafe
Reporter:
Digital Record: DR-815

Continued from: June 24, 2013

MINUTE ENTRY

Parties and respective counsel are present.

09:23:35 Court convenes.

09:34:36 Discussion regarding plaintiff's Motions on Limine.

09:34:36 Gil Green is sworn and examined on behalf of the plaintiff.

Plaintiff exhibit 29 is offered and admitted.
Plaintiff exhibit 34 is offered and admitted.

09:52:05 Cross examination of Gil Green,

09:55:47 Defendant's Motion to Publish Gil Green deposition is granted.

Defendant exhibit 53 is offered and admitted.
Defendant exhibit 68 is offered and admitted.

10:29:45 Redirect examination

10:32:28 Recross examination

10:35:36 - 10:55:51 Morning break

10:55:00 Defendant moves for half time motion to dismiss plaintiff's claim for unjust enrichment. Court denies defendant's motion to dismiss.

11:33:17 Robert P. Weitzel is sworn and examined on behalf of the defendant by skype. Due to technical difficulites, the examination is discontinued. Court reprimands defense counsel regarding misrepresentation of his witness

**Air Serv Corporation vs. Flight Services & System, Inc.
King County Cause No. 12-2-01364-1**

whereabout.

11:38:14 Discussion regarding Robert A. Wietzel failure to appear and testify in the trial.

11:41:27 Tom Priola is sworn and examined on behalf of the defendant.

Defendant exhibit 57 is offered and admitted.

Defendant exhibit 58 is excluded by the court

Defendant exhibit 52 is offered and admitted.

12:07:07 - 01:42:12 Lunch break

01:44:35 Tom Priola direct examination continues.

01:53:19 Defense rests.

01:55:17 Off the record to give counsel enough time to prepare for closing arguments.

02:30:43 Court convenes.

02:30:52 Plaintiff presents closing arguments.

02:44:06 Defendant presents closing arguments

03:18:45 Plaintiff presents rebuttal.

03:28:13 Court makes preliminary ruling as to the merit of the case and where the court is going.

Court will render decision in writing.

03:26:47 Court is adjourned.

1 Delta flights involving both domestic and international travel that occurred between May 28,
2 2011 through September 30, 2011. There was no written contract entered between plaintiff
3 and defendant. The cost of utilizing plaintiff's certificate (while defendant obtained their
4 own), providing supervision of defendant's cleaning crews and/or actually cleaning the
5 airplanes remained in dispute and led to this trial. Previously on summary judgment, the
6 Honorable Jim Rogers held that although there was no written contract, defendant FSS was
7 liable under theories of unjust enrichment and *quantum meruit*.

8 Both plaintiff and defendant have relied extensively upon the case of Young v.
9 Young, 164 Wn.2d 477 (2008), for opposite propositions.
10

11 PROCEDURAL IRREGULARITIES

12 Defendant designated Mr. Robert P. Weitzel as their CR 30(b)(6) witness on April 22,
13 2013. On the eve of trial defendant filed a motion for two witnesses' testimony to be done
14 telephonically (*see* Sub No. 134(C)). The court has discretion to permit telephonic testimony
15 upon a showing of good cause pursuant to CR 43. The court relied upon a declaration filed
16 by Robert A. Weitzel, dated June 2013 and defense counsel's representation that Mr. Robert
17 A. Weitzel was traveling and unavailable to fly to Seattle for trial. Subsequently, the court
18 learned that defense counsel made representations to the court (the Honorable Jim Rogers) on
19 June 14, 2013 that all his witnesses would be available during the week of June 24, 2013.
20 The court permitted "Skype" testimony over plaintiff's objection based on defense's
21 representations to the court and the declaration of Mr. Robert A. Weitzel that he was on
22 vacation in Hilton Head, S.C. During trial plaintiff's counsel conducted voir dire of Mr.
23
24
25

1 Weitzel after much delay in making the connection and all present learned that Mr. Weitzel
2 was not on vacation and was at his office in Cleveland, Ohio. The court prevented further
3 testimony due to misrepresentations that had been made to the court either by counsel, his
4 client and/or both. Good cause no longer existed; instead the court found that this long-
5 distance testimony was only serving as a convenience to the Weitzels. Meanwhile, plaintiff's
6 witnesses had flown in from Carson, California, Roswell, Georgia and the sole remaining
7 witness on behalf of defendant, Mr. Tom Priola, had flown in from Chicago, Illinois. As Mr.
8 Priola testified live, counsel for defendant attempted to designate Mr. Priola as a CR 30(b)(6)
9 witness months after the deadline for this designation had passed and during the second day
10 of trial. The court did not permit this late designation in violation of the discovery and
11 disclosure requirements. According to the case schedule, the parties had a January 22, 2013
12 deadline to disclose all possible primary witnesses, and a March 4, 2013 deadline to disclose
13 all possible additional witnesses. Pursuant to LCR 4(j), parties must exchange a list of
14 witnesses that they expect to call at trial no later than 21 days before the scheduled trial. (See
15 LCR 4(j)). Allowing Mr. Priola to be designated as a CR 30(b)(6) witness at such a late
16 juncture was inappropriate and in violation of discovery disclosures.
17
18

19 FINDINGS OF FACT AND CONSLUCIONS OF LAW

20 The court makes the following Findings of Fact and Conclusions of Law:

- 21 1. United States Customs and Border Protection informed Delta that FSS did not have
22 approval to clean inbound international flights for Delta, and was in violation of 7
23 CFR § 330.400.
24
25

- 1 8. The court finds the testimony by Gilbert Green as highly credible. Mr. Green was told
2 that Air Serv would be paid in full, and he relied upon defendant's representation.
- 3 9. The court specifically finds Mr. Nguyen's testimony to be credible about the brief
4 telephone conversations he had with Robert P. Weitzel. FSS deliberately misled Air
5 Serv to believe it would be paid its reduced price of \$175 per flight.
- 6 10. Defendant failed to respond to many of the invoices sent. On September 20, 2011 Mr.
7 Robert A. Weitzel attempted to reconcile the amount owed and offered to pay Air
8 Serv \$3,343.90. Meanwhile, defendant never stopped using Air Serv's certificate,
9 never stopped utilizing the supervisory service and never stopped the indemnity
10 carried solely by plaintiff.
- 11 11. FSS admitted to owing Air Serv money for the services it provided and performed.
- 12 12. FSS's failure to provide information related to its costs and revenues was intentional.
- 13 13. FSS's contract with Delta provided FSS in excess of \$400,000 during the time Air
14 Serv allowed FSS to work as a subcontractor utilizing its federal certification.
- 15 14. FSS received \$77,730.50 in direct revenue due to Air Serv's actions during the period
16 of June through August 2011.
- 17 15. The fixed fees total \$77,439.09 on the invoices, which include the dates on which Air
18 Serv provided services to FSS.
- 19 16. Quantifying the undisputed services will be as follows: defendant will pay plaintiff
20 Serv provided services to FSS.
21 the reduced amount of \$175/flight or \$83,300 along with all associated attorney's fees
22 and costs under both theories of *quantum meruit* and unjust enrichment.
23
24
25

1 night so she had at least --

2 THE WITNESS: I'm grateful --

3 MR. CROWE: -- one good (inaudible).

4 THE WITNESS: -- for his tour. I really
5 love your city.

6 THE COURT: We've been in the running.

7 THE WITNESS: First time I've been in this
8 downtown area. Thank you, your Honor.

9 THE COURT: You're welcome.

10 If you would just leave those -- you can
11 leave those notebooks with your attorney.

12 MR. CROWE: Do you have any questions as to
13 your --

14 THE WITNESS: No.

15 MR. CROWE: I will give you a call to thank
16 you again.

17 THE WITNESS: Okay, thank you. Nice meeting
18 you.

19 THE COURT: You, too.

20 And for the record, Ms. Ong is excused.

21 MR. CROWE: Thank you.

22 THE COURT: Next witness.

23 MR. CROWE: Your Honor, today I was going to
24 call Mr. Robert A Weitzel to the stand. I've been
25 informed by plaintiff's counsel, as you were, in a

1 briefing he filed on Friday, that Robert A. Weitzel
2 cannot attend today, as he's in Denver at a business
3 meeting apparently.

4 THE COURT: Right.

5 MR. CROWE: However, the only testimony I
6 really need Mr. Weitzel to --

7 THE COURT: Which Weitzel?

8 MR. CROWE: Robert A, the senior.

9 THE COURT: Okay.

10 MR. CROWE: He was still involved with the
11 pricing, he was still involved with making
12 discussions. However, I just really want one exhibit
13 that we provided to the Court to be admitted as
14 evidence, and I think it's clearly relevant as it
15 states a pricing --

16 THE COURT: Okay.

17 MR. CROWE: -- that Mr. Weitzel --

18 THE COURT: Which exhibit is it?

19 MR. CROWE: I believe if the Court refers to
20 Exhibit No. 21.

21 THE COURT: All right.

22 MR. CROWE: And also I need to make a
23 correction to this exhibit too on the record. During
24 the deposition of FSS, Robert P. Weitzel, junior --
25 and this is on the record in the deposition as well, I

1 A. Yes.

2 Q. So you had the ability to sign a compliance
3 agreement on behalf of FSS at that time?

4 A. Yes.

5 Q. Okay. Mr. Kim, could we look at Exhibit No!
6 22, trial exhibit.

7 MR. CROWE: And actually, I'd also like to
8 request at this time that Exhibit No. 22 be admitted
9 into evidence.

10 THE COURT: Any objection?

11 MR. McBROOM: 22?

12 THE COURT: That's the one from Mr. Kim to
13 Phil Armstrong, Robert Weitzel, and the Weitzels,
14 father and son.

15 MR. McBROOM: You said 22; right?

16 THE COURT: I didn't; he did.

17 MR. McBROOM: Right, right, right.

18 MR. CROWE: And, your Honor, for the
19 record --

20 MR. McBROOM: No, I have no problem with
21 that one.

22 THE COURT: 22 is admitted.

23 MR. CROWE: And now that Exhibit No. 22 and
24 21 have both been admitted into the record, during the
25 deposition it appears that the pages behind number

1 R E D I R E C T E X A M I N A T I O N

2 BY MR. McBROOM:

3 Q. If you could just go to Exhibit No. 21, if
4 you could, please. This email is right around June 15
5 and June 16, these two emails at the bottom, and talks
6 about the 250 per international turn.

7 Was that at the very beginning of the
8 discussions with Air Serv, the 250?

9 A. Yes.

10 Q. Okay. And what is your understanding of
11 what happened to the 250 offer?

12 A. I know that senior said that he would not
13 agree to that price.

14 Q. Okay.

15 THE COURT: And how do you know that? Did
16 he tell you that himself?

17 THE WITNESS: I heard it from his mouth,
18 yeah.

19 THE COURT: And we're talking about
20 Mr. Weitzel.

21 THE WITNESS: Yes, A. Weitzel, yes.

22 THE COURT: I know they're referred to in
23 routine to senior, junior.

24 So was it that senior wouldn't agree to even
25 half the amount, like one and a quarter --

1 MR. McBROOM: On Skype.

2 THE COURT: All right, get him on the phone.

3 MR. McBROOM: Okay.

4 THE COURT: Get him on Skype.

5 MR. CROWE: Greg, what's your -- can you
6 tell us your plan today, who you're going to plan on
7 calling?

8 MR. McBROOM: Well, it depends on how far we
9 get through with Mr. Weitzel.

10 THE COURT: Who are you calling after
11 Mr. Weitzel?

12 MR. McBROOM: And as far as Mr. Robert A.
13 Weitzel, I want him to testify, he's not available to
14 testify by Skype, he can only testify by phone.

15 THE COURT: Then he'll have to fly here.

16 MR. McBROOM: What's that?

17 THE COURT: Then he has to fly here, as I've
18 indicated.

19 MR. McBROOM: Well, if that's the case, then
20 we'll just waive it. We won't call him.

21 THE COURT: Are you going to get him on
22 Skype now or not?

23 MR. McBROOM: I'm going to get Bobby Weitzel
24 on Skype.

25 THE COURT: Okay. Fine.

1 MR. McBROOM: Yes.

2 THE COURT: Okay. So then Bobby Weitzel by
3 Skype. A. Weitzel by Skype. If not, you're not going
4 to call him. And then who?

5 MR. McBROOM: Yeah, if he has to show up
6 here in person we have to do that.

7 And then -- I mean it's only one document he
8 has to talk to, your Honor, as far as --

9 THE COURT: I've made my ruling.

10 MR. McBROOM: Okay.

11 THE COURT: Who else are you calling?

12 MR. McBROOM: Mr. Priola.

13 THE COURT: And that's it?

14 MR. McBROOM: That's it.

15 THE COURT: All right, great. I'll get off
16 the bench. Let me know when you get Mr. Bobby Weitzel
17 on Skype.

18 MR. McBROOM: Thank you, your Honor.

19 THE COURT: Thank you.

20 (Recess.)

21 THE COURT: Okay. We're back on the record
22 in the matter of Air Serv and FSS. And who is this?

23 MR. McBROOM: This is -- can you just state
24 your name and your add --

25 THE COURT: No, you need to call him as if

1 I don't have anything else --

2 THE COURT: You have --

3 MR. McBROOM: -- to tell you.

4 THE COURT: You stand by the declaration,
5 yet your client is sitting in his office in Cleveland.

6 MR. McBROOM: I -- I was -- obviously that
7 is from Robert A. Weitzel, not Robert P. Weitzel.
8 Okay. I didn't have a chance to talk to Robert P.
9 Weitzel because he was on vacation. So otherwise I
10 would have.

11 MR. CROWE: Your Honor, he's got his
12 business cell phone.

13 THE COURT: Here you go. Juan, you can give
14 this back to Mr. Crowe.

15 I think this is gamesmanship, and I'm not
16 going to stand for it so -- and I'm not continuing the
17 trial. He's not testifying via Skype. He's not
18 testifying telephonically. It was a gamble you made
19 and you lost.

20 MR. CROWE: Plaintiffs respectfully request
21 default pursuant to 43(f), your Honor.

22 THE COURT: I'm not going to default him.
23 He can call whoever he needs to call, but I'm not
24 going to hear from Mr. Robert Weitzel via Skype, now
25 that I know he's back in Cleveland, he's not in Hilton

1 Head, South Carolina, and he is remarkably available,
2 as is everybody else in this trial who's had to fly in
3 to Seattle.

4 MR. McBROOM: I don't know if he would or
5 not. I would have to check that. I mean you're
6 saying that --

7 THE COURT: Call your next witness.

8 MR. McBROOM: -- and all I had was that.

9 THE COURT: Call your next witness.

10 MR. McBROOM: Okay. Mr. Priola.

11 Can I -- can we take a --

12 THE COURT: No.

13 MR. McBROOM: I just wanted to tell
14 Mr. Weitzel that we weren't going to be calling him
15 back, your Honor.

16 THE COURT: You can have -- just let him sit
17 by. We've waited and wasted enough of the Court's
18 time.

19 Mr. Priola, come forward, I'm going to swear
20 you in.

21 MR. CROWE: Your Honor, would you like a
22 copy of the witness disclosure I mentioned earlier for
23 a limited (inaudible).

24 THE COURT: I'm aware of what (inaudible).
25 Step forward and raise your right hand.

1 THE COURT: Do you want to reopen your
2 direct?

3 MR. McBROOM: No, that's okay, your Honor.
4 That's fine. We're good.

5 THE COURT: All right.
6 Thanks for (inaudible).
7 Your next witness.

8 MR. McBROOM: My next witness would be Bobby
9 Weitzel, which I understand the Court's excluded from
10 the trial so we can't call him.

11 THE COURT: Well, you can't -- let me make
12 the record very clear here.

13 The motion for telephonic testimony was done
14 on the eve of trial; it was not done timely. The
15 reason stated was that he was unavailable, he was
16 traveling, there is a declaration by the son to that
17 effect, and that he was unavailable the 24th, 25th,
18 and 26th of June, when this case was scheduled for
19 trial.

20 The Court relied on that declaration and the
21 representations made by counsel, and presumably
22 counsel also wrote the declaration for the other
23 Weitzel, the son, to sign.

24 So I have some concerns.

25 Today when Mr. A. Weitzel, Robert A. Weitzel

1 was brought up on Skype --

2 MR. McBROOM: I'm sorry, it's Robert P.

3 THE COURT: Robert P. --

4 MR. McBROOM: Yeah, sorry.

5 THE COURT: -- Weitzel was brought up on
6 Skype, the quality was very poor, he could barely hear
7 the Court. And he indicated through voir dire
8 questions asked by plaintiff's counsel where he was,
9 and his first response was I'm in the office or I'm in
10 an office; he was pretty evasive about that.

11 And then Mr. Crowe asked the next question,
12 which is where are you, what city and state, please.
13 And he said I'm in Cleveland, Ohio. That's a far cry
14 from being on vacation in Hilton Head, South Carolina.

15 I didn't hear any further questioning,
16 because I really didn't need to hear it at that point,
17 because Mr. Crowe handed up a declaration to the Court
18 indicating that he was supposedly traveling and
19 unavailable to be here in person.

20 So there are two reasons why the Court has
21 concerns. Generally as officers of the Court this
22 Court is known to give great latitude to people who
23 are on vacation, because we all need to live our
24 lives. And the declaration by the son indicated he
25 was on vacation.

1 And there was further questioning of the
2 witness via Skype that he had returned on the 22nd and
3 was home by the 23rd and had just returned to work
4 yesterday.

5 So there was a misrepresentation at some
6 point. But certainly asking the Court, which is well
7 within its discussion under CR 43, which allows or
8 permits a Court in discretion to permit telephonic
9 testimony, ordinarily I would have gladly been willing
10 to do that to get this case moving.

11 But there are two concerns. One is there
12 was an absolute misrepresentation about his
13 whereabouts. Everybody else came here; Mr. Priola
14 came here from Chicago, Ms. Ong came here from
15 California, Mr. Nguyen came from Georgia.

16 I don't know what special rules apply, if
17 any, which would allow the Court on the eve of trial
18 to consider this, other than the fact that perhaps he
19 didn't want to be inconvenienced, I'm not sure. I'm
20 not making or drawing any inferences to his decision
21 not to come to Court. But to not even give the other
22 side proper notice -- and I will say there have been a
23 lot of last minute filings, the reply came in late,
24 the Court had had enough. And I think it would be an
25 abuse of discretion if I were to permit the Skype

1 testimony under these circumstances when clearly this
2 was just absolutely at somebody's inconvenience who
3 did not want to fly to the west coast for either one
4 or two questions or whatever the case may be.

5 And that's the reason why I said no more as
6 soon as I found out he was in Cleveland and wasn't
7 traveling on vacation, he was in his office. And
8 that's the reasoning that the Court declined to listen
9 to his Skype testimony, along with the fact that the
10 quality was very poor.

11 Anything else for purposes of the record
12 regarding the testimony of Mr. P. Weitzel?

13 MR. McBROOM: Defendants would like to be
14 heard, your Honor.

15 Just to make the record clear, the
16 declaration was not from Robert P. Weitzel, the person
17 who was on --

18 THE COURT: Right, it was --

19 MR. McBROOM: -- Skype, at all --

20 THE COURT: -- made by the son.

21 MR. McBROOM: -- it was made by Robert A.
22 Weitzel because Robert P. Weitzel was out of town at
23 the time. And that was his best understanding at the
24 time.

25 And, you now, I mean if -- you know,

1 previously it was Skype or the Court is going to order
2 him in person. I mean if that's the case, then I
3 think we should have an opportunity to have him appear
4 in person then.

5 THE COURT: If he can get here before the
6 close of business today, great, get him here.

7 MR. McBROOM: I know. That's not going to
8 happen, so we know that can't happen, it's impossible.

9 So we're not able to put on our 30(b)(6).
10 And just -- the record is clear that we tried to call
11 Mr. Priola as the 30(b)(6) witness as well, too, and
12 that's also been denied.

13 THE COURT: It's been denied because you
14 failed to comply with the discovery rules, which
15 requires that you as an attorney of record shall
16 designate him accordingly, not when one witness is
17 inconvenienced so then you just morph another witness
18 into the 30(b)(6) at your convenience. We have rules
19 for a reason and they need to be complied with, and
20 they haven't been done so here.

21 MR. McBROOM: If I could just finish my
22 remark.

23 Just on the record, we were going to have
24 all three of them testify as the 30(b)(6) speaking
25 agents for the company, not just --

1 THE COURT: Did you --

2 MR. McBROOM: -- one of them.

3 THE COURT: -- designate him as a 30(b)(6),
4 Mr. Priola; no, you have not. This is not a trial at
5 your convenience. This isn't just, oh, we're going to
6 continue the trial.

7 MR. McBROOM: Fair enough, your Honor.

8 THE COURT: When were you going to continue
9 it to? Were you going to like check with the Court
10 and see what my schedule was, or was this all about
11 your convenience and your client's?

12 MR. McBROOM: It had nothing to do with my
13 convenience, your Honor.

14 THE COURT: Anything else?

15 MR. McBROOM: No. I think that makes the
16 record clear. Thank you.

17 THE COURT: Are you resting?

18 MR. McBROOM: At that point, yes, we're
19 resting, your Honor.

20 THE COURT: Any rebuttal?

21 MR. CROWE: I would just like to make a
22 couple points for the record.

23 Actually Robert A. Weitzel, the person
24 writing the declaration, is the father, not the son.

25 And secondly, in representation on June 14

1 whatsoever.

2 THE COURT: All right.

3 MR. McBROOM: It was served actually.

4 MR. CROWE: When, Greg?

5 MR. McBROOM: This morning.

6 MR. CROWE: While we're in court?

7 THE COURT: But service on the day of trial
8 is not really --

9 MR. CROWE: I have yet to see it, your
10 Honor. I haven't opened my emails since I came to the
11 court.

12 THE COURT: We're looking at it at the same
13 time, Counsel.

14 MR. McBROOM: I also have defendant's
15 response trial brief to hand up as well, too.

16 MR. CROWE: Which I have yet to see at this
17 point either, your Honor.

18 THE COURT: We don't usually do defense
19 trial briefs.

20 MR. CROWE: Okay.

21 THE COURT: Can I see the -- is the -- can I
22 have the motion in limine, please.

23 MR. CROWE: Is this okay if we're up here,
24 your Honor?

25 THE COURT: Absolutely. I don't bite.

1 MR. McBROOM: Your Honor, to be --

2 MR. CROWE: I've been before you before and
3 you did not bite me. (Inaudible).

4 THE COURT: (Inaudible).

5 MR. McBROOM: The reason we're handing this
6 up, your Honor, is we obviously didn't get their brief
7 until Thursday of last week, and this motion in limine
8 addresses (inaudible) trial as presented in their
9 trial brief. And you'll see in our joint statement of
10 evidence there is a bunch of relevancy issues.

11 And as you know, Judge Rogers substantially
12 curtailed this trial. Okay.

13 THE COURT: He did.

14 MR. McBROOM: It's just whether relief is
15 available and what's, you know -- if there is a relief
16 available, what is it.

17 THE COURT: What are the -- what are the --

18 MR. McBROOM: Yeah.

19 MR. CROWE: I don't think it was whether
20 relief was available, your Honor, I think it was
21 what's the measure of the relief.

22 THE COURT: What's --

23 MR. CROWE: -- which is --

24 THE COURT: -- the measure of damages.

25 MR. CROWE: What's the measure, not whether

1 tomorrow because he's in Alaska and he's flying in
2 this afternoon.

3 THE COURT: That's fine.

4 MR. CROWE: Besides rebuttal witnesses,
5 that's all we expect to call.

6 THE COURT: Okay. What I'd like to do is
7 this. I want to hear the case. I want to hear the
8 evidence. You're going to let me know if you think
9 it's in violation of the King County local rule, but
10 I've got to let him plead his case.

11 I'm not going to stand -- I've never stood
12 in the way of a plaintiff trying to prove their case,
13 unless somebody has just been so egregious in their
14 discovery behavior prior to trial. You have to
15 understand that I'm not going to procedurally default
16 plaintiff from presenting their case in chief.

17 You have the ability to certainly argue that
18 this information was known, they had it, and it was
19 late. I will tell you this, Counsel, it's not your
20 best argument, because I really want to decide this on
21 the merits. I mean that's the benefit of having a
22 judge trial. I don't want to be kept in a vacuum
23 artificially.

24 I mean I've been known to do site visits.
25 I've walked multimillion dollar ships. I've gone down

1 to leaky commercial buildings. I've examined roofs
2 and floors.

3 MR. CROWE: We won't take you to SeaTac.

4 THE COURT: Don't take me to SeaTac please,
5 not now.

6 MR. McBROOM: Your Honor, one of the reasons
7 I provided this is so I don't have to repeat it each
8 time. So I mean I was trying to speed up things too.

9 THE COURT: And I think you both have done a
10 great job.

11 And Mr. Crowe has been in front of me, I
12 know how quickly he speaks, and I forgot how quickly
13 he speaks. Thank goodness we don't have a live court
14 reporter.

15 MR. CROWE: If you need me to slow down,
16 your Honor, I will.

17 THE COURT: Just a little bit. But it's
18 okay. I mean I've read everything so I'm aware of
19 what the issues are.

20 MR. McBROOM: Right.

21 THE COURT: And I just want to be as mindful
22 as I can. And I will tell you both, you know, you
23 both know this much better than I do, I'm just up to
24 snuff because a few days between Friday getting
25 everything dumped, and if you think I need to know

1 of July.

2 THE COURT: Well, I might have to just carve
3 out part of Thursday, maybe we can do it Thursday.

4 MR. McBROOM: I could -- I could come in any
5 time this week.

6 MR. CROWE: Your Honor, I don't foresee this
7 possibly going past tomorrow.

8 THE COURT: Well, let's see.

9 MR. CROWE: Okay. Yeah.

10 THE COURT: What I want to focus on, just
11 because I feel bad, they sent you to me and then I
12 said I've got this emergency on Wednesday, I can't --
13 I'm not going to be at work, have to deal with my dad,
14 who is 91, not doing well. I said I've got a
15 commercial case, I'm excited, because I'd read
16 everything, I was so excited, and then --

17 MR. CROWE: I'm prepared.

18 THE COURT: I love commercial cases. I'm
19 prepared, I've read everything, I love unjust
20 enrichment, I love quantum meruit.

21 MR. CROWE: I'm glad you do.

22 THE COURT: Well, I do, I've had quite a few
23 of them.

24 And I did remember you and I certainly
25 remember your firm.

1 But you, this is the first time I think.

2 MR. McBROOM: I think you're right, yeah.

3 THE COURT: I think so.

4 MR. McBROOM: Yeah.

5 THE COURT: Well, pleasure.

6 MR. McBROOM: I've never before you, your
7 Honor.

8 THE COURT: So what I'd like to do is this,
9 let's take five minutes, regroup. Do you need to make
10 some calls about Skype?

11 MR. McBROOM: I do.

12 THE COURT: So maybe a ten-minute recess.

13 MR. McBROOM: Okay.

14 THE COURT: You're going to tell your
15 witnesses in whichever order you want to go in. Do
16 you guys want to do openings briefly?

17 MR. CROWE: You've read the (inaudible)
18 briefs?

19 MR. McBROOM: I have, but if you want to
20 just do a, you know, five-minute, it's fine with me.

21 MR. CROWE: Okay. Okay.

22 THE COURT: I don't want to preclude you
23 from doing openings.

24 MR. McBROOM: I think that's good, five
25 minutes.

1 MR. CROWE: That's fine. I mean I don't
2 have a whole lot to talk to you about, besides some
3 simple math.

4 THE COURT: I love it, bring on the math.
5 I've got my calculator all warmed up, my solar --

6 MR. CROWE: I brought one as well, your
7 Honor.

8 THE COURT: -- my solar powered calculator.
9 And then you need to call to make sure the Skype --

10 MR. McBROOM: I do, your Honor.

11 THE COURT: -- is set up. And then we'll go
12 through until noon, thereabouts.

13 MR. CROWE: Okay.

14 THE COURT: We'll take a 15 minute recess
15 after the -- we'll see how the first witness goes.

16 MR. CROWE: Okay. Well, we've got -- I told
17 Mr. McBroom the witnesses we intend on calling today.

18 THE COURT: Okay.

19 MR. CROWE: So he should be -- have had
20 ample time to prepare. I'm not -- given the last
21 minute filing, I'm not sure who he plans on calling
22 today. I requested that one person be applied.

23 THE COURT: Don't worry about it.

24 MR. CROWE: But, you know, if we can do it
25 after lunch, I'll have a little bit more time to

1 prepare.

2 THE COURT: Absolutely.

3 MR. CROWE: That might be --

4 THE COURT: I don't have any problems with
5 it.

6 MR. CROWE: -- beneficial. And honestly I
7 think that we might be able to get through my
8 testimony in an hour.

9 THE COURT: All right.

10 MR. CROWE: Depending on how much redirect
11 is done this morning.

12 THE COURT: Let's do it. Let's --

13 MR. CROWE: And I'm sorry we couldn't bring
14 the last witness in, but he was fishing in Alaska and
15 he's (inaudible) --

16 THE COURT: He's going to be here by --

17 MR. CROWE: -- can't get ahold of him.

18 THE COURT: He's going to be here this
19 afternoon.

20 MR. McBROOM: He'll be here tomorrow, right?

21 THE COURT: And we'll --

22 MR. CROWE: He flies in this afternoon, but
23 he's going to smell kind of fishy, I believe, so we're
24 going to --

25 THE COURT: Let him shower, let him get --

1 MR. CROWE: Clean up a little bit.

2 THE COURT: Let him get accustomed to our wet
3 weather --

4 MR. CROWE: Unless you want that on site
5 visit, on site smell visit.

6 THE COURT: -- 70 wet weather, and we'll
7 have a trial.

8 MR. McBROOM: Okay (inaudible).

9 MR. CROWE: Thank you very much.

10 THE COURT: All right. Be at recess.

11 Let us know -- let my bailiff or my clerk
12 know --

13 MR. McBROOM: I will.

14 THE COURT: -- Mr. McBroom, when you've got
15 that Skype call made, setting it up.

16 (Recess.)

17 MR. McBROOM: Your Honor, if I could just
18 introduce my client, if we could. This is Tom Priola
19 from Flight Services.

20 THE COURT: Mr. Priola, nice to meet you.

21 MR. McBROOM: (Inaudible).

22 THE COURT: All righty. Are we going to do
23 brief openings?

24 MR. CROWE: Sure.

25 THE COURT: Okay. And I've read everything,

1 either the reasonable value of the services provided
2 or the benefit that's conferred upon the party that
3 receives the benefit and doesn't pay for it.

4 A lot of plaintiff's -- a lot of defendant's
5 brief recites the reasonable value portion of Young
6 for the unjust enrichment portion, but it omits
7 phrases, such as on page 1265, or by the extent to
8 which the other party's property has been increased in
9 value.

10 Other courts in Washington have reasonably
11 recognized, and rightfully so, that that value can be
12 conferred by the profit that the party obtained due to
13 the services. That's what Air Serv is requesting
14 here, is the profit that FSS received for the services
15 which it could only provide because Air Serv allowed
16 it to work under -- as a subcontractor under its
17 compliance agreement.

18 THE COURT: Can I ask you a question? I
19 know it's a little out of order to do this during
20 opening.

21 But I was reading Young vs. Young and the
22 whole issue of unjust enrichment in dealing with the
23 profit that was generated. Are they entitled to both,
24 the reasonable value and the profit generated that you
25 still don't know about? Well, you know about, but it

1 MR. CROWE: It will take me just one moment.

2 THE COURT: Sure.

3 R E D I R E C T E X A M I N A T I O N

4 BY MR. CROWE:

5 Q. First, Ms. Ong, could you look at trial
6 Exhibit No. 25.

7 MR. CROWE: Actually, I'd like to admit
8 trial Exhibit No. 25 into evidence, if in fact it
9 hasn't been already.

10 MR. McBROOM: It was already admitted.

11 THE COURT: Is 25 in?

12 THE CLERK: Yes, your Honor.

13 THE COURT: It's in.

14 MR. CROWE: Okay. Sorry, my assistant --

15 THE COURT: It's okay.

16 MR. CROWE: -- didn't have the check box
17 correct.

18 THE COURT: Don't worry about it.

19 MR. CROWE: Just to make sure.

20 THE COURT: Not a problem.

21 Q. (By Mr. Crowe) Ms. Ong, are you ever
22 provided the information on the hours taken to perform
23 cabin cleaning services?

24 A. No.

25 Q. So nobody ever provides you --

1 MR. McBROOM: Yes, it's not relevant.

2 THE COURT: It is relevant. I make the
3 determination of relevancy.

4 MR. McBROOM: (Inaudible).

5 THE COURT: Is there any other objection? I
6 will get the context through other witnesses. That's
7 up to the trial lawyers to --

8 MR. McBROOM: That was it, just relevance.

9 THE COURT: It's relevant, it's admitted.

10 MR. McBROOM: Okay.

11 THE COURT: So who else is going to testify
12 here?

13 MR. CROWE: Your Honor, we plan calling Gil
14 Green to the stand.

15 THE COURT: Right.

16 MR. CROWE: However, he won't be here until
17 tomorrow morning. And that's the last witness we plan
18 on calling until we have rebuttal.

19 THE COURT: Do you have your waiting witness
20 with child --

21 MR. McBROOM: I do, your Honor. It would be
22 great if we could get him in.

23 THE COURT: Let's get him in.

24 MR. CROWE: And after direct, can I have a
25 few minutes to --

1 THE COURT: You can do it right now. Why
2 don't you take 15 minutes and talk to him since we're
3 taking him out of order. I'm just trying to fill the
4 day.

5 MR. CROWE: Yeah, I understand, your Honor.
6 I appreciate that.

7 THE COURT: Take your time.

8 MR. CROWE: Okay.

9 THE COURT: Let me know when you're ready
10 after speaking with him.

11 MR. CROWE: Well, it's actually his witness,
12 so I did not plan on talking to him.

13 THE COURT: I know, but you're going to talk
14 to him to tell us when you're done talking to him, so
15 we can bring him in and he can examine him.

16 MR. CROWE: Oh, I get to speak to the
17 witness right now?

18 THE COURT: You have -- my understanding is
19 you needed some time to talk with him.

20 MR. CROWE: No, I need some time to -- I
21 didn't have any idea he was going to be called as a
22 witness today. We discussed Robert A. Weitzel
23 beforehand, we discussed the witnesses I've called
24 previously today, we discussed Gil Green. We actually
25 discussed Robert P. Weitzel.

1 THE COURT: How much -- how much time do you
2 need?

3 MR. McBROOM: Not very much at all. I would
4 say less than ten minutes probably.

5 THE COURT: Okay.

6 MR. CROWE: I'm glad he could answer for my
7 time allotments, but I will do the best I can within
8 ten minutes.

9 THE COURT: All right. So you're going to
10 bring him in now, and then we're going to take a
11 break, and then you're going to cross-examine him?

12 MR. CROWE: That might work the best for me,
13 yes, your Honor.

14 THE COURT: Bring him in.

15 If you'll step up here and raise your right
16 hand, I'll swear you in.

17 Do you swear or affirm in the matter before
18 the Court to tell the whole truth and nothing but the
19 truth.

20 THE WITNESS: I do.

21 THE COURT: Be seated, sir.

22 JOHN KIM, being duly sworn, testified
23 upon oath, as follows:

24 THE COURT: Mr. McBroom, your witness.

25 UNIDENTIFIED SPEAKER: Is this yours?

1 SEATTLE, WASHINGTON; TUESDAY, JUNE 25, 2013

2 TRANSCRIPT OF PROCEEDINGS

3 VOLUME II

4 BEFORE THE HONORABLE JULIE A. SPECTOR

5 -oOo-

6 P R O C E E D I N G S

7 THE COURT: Good morning.

8 MR. McBROOM: Good morning --

9 MR. CROWE: Good morning.

10 MR. McBROOM: -- your Honor.

11 THE COURT: All right. Do we -- we're back
12 on the record in the matter of FSS and Air Serv.

13 Do we have witnesses? Did Mr. Fishy Green
14 make it down from Alaska.

15 MR. CROWE: Mr. Green is ready to testify,
16 yes, your Honor, he's --

17 THE COURT: All right.

18 MR. CROWE: -- right outside the courtroom.
19 However, can we deal with a couple preliminary matters
20 first.

21 THE COURT: Sure. Absolutely.

22 MR. CROWE: Okay.

23 First, we filed a motion in limine, as we
24 suggested we might yesterday, with the Court this
25 morning. I provided a copy up to the bench.

1 father's estimate of \$75 per plane to indicate any --
2 any supervisory services out -- anywhere in the
3 industry throughout the country to make an argument
4 there's a market rate, which defense counsel has made
5 throughout this case without any evidence whatsoever.

6 So we submit that any evidence or testimony
7 on those subjects should be excluded at this time.

8 Also, I want to discuss the potential
9 testimony of Thomas Priola today, if he's still
10 intending on testifying.

11 MR. McBROOM: Is this part of the motion in
12 limine? Are we doing them one at a time or --

13 MR. CROWE: This isn't --

14 MR. McBROOM: -- are we doing a whole bunch
15 of things?

16 MR. CROWE: This isn't included in the
17 motion in limine, but I'd like to also present to the
18 Court what -- what was disclosed in the primary
19 witness disclosures.

20 Defense never listed Mr. Priola as a witness
21 in his primary witness disclosures, however, we did
22 list Mr. Priola in our primary witness disclosures and
23 we listed him as for information. Thomas -- and I
24 apologize, I put Riola instead of Priola in my witness
25 disclosure, but I meant Mr. Priola -- is expected to

1 testify about the FS dealings with Air Serv. That's
2 all I have in my witness disclosure. Defense counsel
3 never listed him in his witness disclosure. I think
4 any testimony just beyond the communications directly
5 with FSS and Air Serv he personally had should be
6 excluded, and anything beyond that should be excluded
7 as well.

8 THE COURT: Do you want to respond to both
9 of these motions?

10 MR. McBROOM: Yes, your Honor. Let me tell
11 you what Judge Rogers actually did on the motion --

12 THE COURT: Well, I just got off the phone
13 with Judge Rogers.

14 MR. McBROOM: Okay.

15 THE COURT: So go ahead.

16 MR. McBROOM: So on the motion to compel, he
17 made Bobby available for another deposition that they
18 decided not to take, okay. We totally made him
19 avail -- in fact I made him --

20 MR. CROWE: Objection; misstates the record.

21 MR. McBROOM: Excuse me.

22 THE COURT: He can object.

23 MR. McBROOM: This is -- this is responding
24 to his argument, your Honor.

25 MR. CROWE: He's --

1 MR. McBROOM: I don't want to get
2 interrupted every second here.

3 THE COURT: He can object to your --

4 MR. McBROOM: Okay.

5 THE COURT: -- representations.

6 MR. McBROOM: So the bottom line is this,
7 your Honor. He's had ample opportunity. Actually in
8 May --

9 THE COURT: Bottom line is you haven't
10 listed him as a witness.

11 MR. McBROOM: Who -- no, I did. Absolutely.

12 THE COURT: Let me see your witness
13 disclosure list.

14 MR. McBROOM: The witness list -- our
15 witness list says we are designating these people and
16 everybody on their witness list. That's what we said.
17 Everyone.

18 THE COURT: All right, I'll pull that up.

19 MR. McBROOM: That's what it says. That's
20 our -- that's our disclosure. So Tom Priola was
21 listed on the witness -- that was inaccurate.

22 MR. CROWE: Your Honor, just a point of
23 clarification. He was listed on their trial witness
24 list, Mr. --

25 THE COURT: Okay.

1 MR. CROWE: -- Priola was. As far as the
2 primary witness list, we did disclose him on our
3 primary witness list, but we only disclosed him for
4 communications between -- directly between FSS and Air
5 Serv.

6 THE COURT: All right.

7 MR. CROWE: And I will -- I will stipulate
8 and agree that dare -- on FSS's primary witness list
9 they said any witness we included as well in their
10 disclosure without specifically naming him. However,
11 to the extent he testifies beyond specific dealings
12 with FSS and Air Serv, beyond that I think it should
13 be excluded because that's --

14 THE COURT: All right.

15 MR. CROWE: -- all we listed him for.

16 MR. McBROOM: I'm just bothered they failed
17 to disclose that to the Court. So he was listed.
18 It's generally, you know -- he can be also designated
19 as the 30(b)(6) for purposes of speaking.

20 MR. CROWE: Objection, your Honor.

21 THE COURT: No, he can't, not under --

22 MR. McBROOM: Okay.

23 THE COURT: -- King County local rules.
24 Don't make up stuff.

25 MR. McBROOM: Okay.

1 THE COURT: Okay. Let's just get --

2 MR. McBROOM: I'm not making up stuff, your
3 Honor. I'm not trying to. Just saying.

4 THE COURT: You're just saying, but in
5 contravention of local rule. He's not designated as a
6 30(b)(6), he's never been designated. That deadline
7 has come and gone.

8 MR. McBROOM: Okay. He is designated as a
9 manager of the corporation to speak for the
10 corporation.

11 THE COURT: He's never been designated as a
12 30(b)(6); correct?

13 MR. McBROOM: Okay.

14 MR. CROWE: Unless (inaudible) --

15 MR. McBROOM: Not by -- he wasn't in a
16 deposition (inaudible) --

17 MR. CROWE: I'd also like to make a point,
18 your Honor. On June 7, Judge ordered -- Judge Rogers
19 ordered that a 30(b)(6) deposition be taken of FSS.

20 In response, FSS said that only Bobby
21 Weitzel could be the 30(b)(6) deponent, and he was
22 only available two and three court days after Judge
23 Rogers made his order when I was not available. So we
24 noticed his deposition for the week of June 17, and
25 Mr. McBroom moved for a protective order on that --

1 for the week of June 17, because Mr. Weitzel was on
2 vacation and could not be made available.

3 So subsequently we were not able to continue
4 our deposition of FSS, and we're left to the record we
5 have before us which we intend to bind FSS to, which
6 Judge Rogers did agree was appropriate, during our
7 hearing on June 14 when he allowed no further
8 deposition to be -- when he -- when I -- when -- he
9 basically in essence granted the motion for protective
10 order because of the unavailability of Mr. Bobby
11 Weitzel, the only person they would allow to be
12 designated as a 30(b)(6) deponent at that time.

13 MR. McBROOM: He's saying a lot of stuff
14 that Judge Rogers says without showing any of it.

15 THE COURT: That's okay. I can get Judge
16 Rogers on the phone. But --

17 MR. McBROOM: Okay. That would be good.

18 THE COURT: -- it doesn't sound -- it
19 doesn't sound like Mr. Priola can just testify to
20 anything. Okay? There will be a limitation on the
21 scope of his testimony. Let's move on.

22 MR. McBROOM: Okay. Just so you're aware,
23 your Honor, I may not even need to call Mr. Priola, so
24 it just depends. I mean, because I do have
25 Mr. Weitzel available by Skype now. So just to let

1 And, you know, he just doesn't understand
2 Young vs. Young, or he's trying to get the Court not
3 to understand Young vs. Young.

4 You know, unjust enrichment allows for
5 reasonable value of the services provided or it allows
6 for the benefit conferred on the party that received
7 the benefit. I mean it's absolutely clear.

8 Young vs. Young was a property dispute --

9 THE COURT: (Inaudible).

10 MR. CROWE: -- where the benefit conferred
11 was 750,000 to a million dollars. The reasonable
12 value was articulated around \$768,000, and the greater
13 of the two the Court said should be (inaudible) 750 to
14 a million. If it got over the 768, whatever the
15 number is over the 768 should be provided as damages.

16 And the Court found that -- I believe the
17 Appellate Court (inaudible) because they awarded
18 \$560,000, which was not in the range of the greater of
19 the two.

20 You know, as Young vs. Young af -- directly
21 after opposing counsel states it only means the
22 reasonable value of services, on page 491 states,
23 phrased alternatively, Judith must disgorge the entire
24 value of the benefit she received as determined by
25 either the fair market value of the services rendered

1 the only thing they can go -- that your Honor can go
2 off is the revenues that were provided in response --
3 just the invoices, because they actually didn't
4 provide what the revenues were. So this money take is
5 defendant's own doing.

6 And, you know, buyer beware when you're
7 failing to respond to discovery and you're failing to
8 properly abide by Court orders. But, you know, that's
9 the situation we have. We've got revenues and we've
10 got no evidence of any cost whatsoever provided by the
11 defendants. And, you know, when you're deciding what
12 the profits are going to be or what the benefit
13 conferred is, profits is a reasonable way of doing so.

14 Young vs. Young supports that. It supports
15 the benefit conferred on the defendant can be attained
16 by the plain -- attained by the plaintiff, and that's
17 because the defendant should never be unjustly
18 enriched by its actions.

19 And by allowing the (inaudible) revenues to
20 be kept, that would allow them to have -- be
21 benefiting by their actions. It's black code law
22 that's been around for a long period of time, and
23 Mr. McBroom's reconceptualization of what unjust
24 enrichment is is not supported --

25 MR. McBROOM: I'm taking --

1 MR. CROWE: -- by Young vs. Young.

2 MR. McBROOM: -- offense to these personal
3 attacks, your Honor.

4 THE COURT: I don't think he's personally
5 attacking you. I'm not listening to it that way. Can
6 you just wait until it's your --

7 MR. McBROOM: Yes.

8 THE COURT: -- turn.
9 Go ahead.

10 MR. CROWE: And if your Honor wants to
11 discuss this further, I would --

12 THE COURT: No, I don't.

13 MR. CROWE: I would suggest we can -- I can
14 file a brief and explain more in depth what the
15 benefit conferred prong is of unjust enrichment, but I
16 don't think there is any reason.

17 His motion should be denied.

18 THE COURT: I'm going to -- the motion is
19 denied. Let's move on to the next --

20 MR. McBROOM: Okay.

21 THE COURT: -- part of the case.

22 MR. McBROOM: I need, because I didn't know
23 he was going to rest, I need about ten to 15 minutes
24 to get Mr. Bobby Weitzel on the phone.

25 THE COURT: On Skype?

1 A. Yes.

2 Q. Okay. What is this document?

3 A. This is some of the other available
4 companies at SeaTac Airport that had compliance
5 agreements.

6 Q. Okay. So FSS could have gone to other
7 contractors to get a -- to operate under their
8 compliance agreement?

9 MR. CROWE: Objection; beyond the scope of
10 the witness's testimony provided in the witness
11 disclosures.

12 THE COURT: Sustained.

13 MR. McBROOM: I'd move to admit Exhibit 52,
14 your Honor.

15 MR. CROWE: Objection, your Honor, this
16 document is subsumed in a prior exhibit.

17 THE COURT: Is it in another exhibit?

18 MR. CROWE: It is.

19 MR. McBROOM: It's part of another exhibit.

20 THE COURT: That's fine. He can refer to it
21 so we can move along --

22 MR. CROWE: Okay.

23 THE COURT: -- with the testimony. If there
24 is no objection, 52 is admitted.

25 Q. (By Mr. McBroom) If you could, please, turn

1 Q. And for Air Serv to get from its United
2 cleaning areas to the Delta, is 20 minutes a
3 reasonable estimate?

4 A. Yes.

5 MR. CROWE: Objection; beyond the scope of
6 the witness's designation.

7 THE COURT: You can lay some foundation as
8 to how he knows that --

9 MR. McBROOM: Okay.

10 THE COURT: -- since he's Chicago based.

11 Q. (By Mr. McBroom) Did you have any
12 communications with the actual cleaners involved?

13 A. With --

14 Q. With the people who did the cleaning of the
15 Delta airplanes.

16 A. Our FSS employees?

17 Q. Yes.

18 A. Yes.

19 Q. Okay. And did they detail the scope of the
20 work that the Air Serv employees did?

21 A. Yes.

22 Q. Okay. What was the scope of that work?

23 MR. CROWE: Objection; beyond the scope of
24 the designations for the witness.

25 THE COURT: That's sustained.

1 follow-up; I'm not trying to quibble with you,
2 Mr. Priola, is the CBP certificate required that Air
3 Serv provide a supervisor for the entire time that the
4 cabin, for whatever flight, was being cleaned. Are
5 you aware of that?

6 THE WITNESS: I'm not.

7 THE COURT: Okay. Fair enough. Go ahead.

8 Q. (By Mr. McBroom) Well, just to follow up on
9 that. What's your understanding of the trash handling
10 responsibilities and how long it took?

11 MR. CROWE: Objection; beyond the scope of
12 the designation of the witness.

13 THE COURT: He can answer it if you can lay
14 a foundation how he would know it. He's not aware of
15 the CBP certificate and he wasn't designated. So.

16 MR. McBROOM: Our --

17 THE COURT: Let's see --

18 MR. McBROOM: Our -- our position, your
19 Honor, is he is designated as the speaking agent for
20 the corporation.

21 THE COURT: He's never been designated as a
22 30(b)(6), so on that basis it's sustained. See if he
23 can answer this individual question. If he can't, he
24 can't.

25 MR. McBROOM: Okay.

1 A. We only were under the impression that they
2 were there to see the physical handing off of the
3 garbage to the Gate Gourmet employee, which was five,
4 five to ten minutes, depending on when they showed up
5 at the aircraft.

6 Q. Okay. So based upon -- the Court's question
7 is, did Air Serv need to be there for the entire
8 cleaning operation?

9 MR. CROWE: Objection.

10 THE COURT: Calls --

11 MR. CROWE: Calls --

12 THE COURT: -- for --

13 MR. CROWE: -- for.

14 THE COURT: -- a legal --

15 MR. CROWE: -- a legal conclusion.

16 THE COURT: -- conclusion. Sustained.

17 Q. (By Mr. McBroom) Was it -- it was your
18 understanding they were there for ten minutes then; is
19 that accurate?

20 A. Yes.

21 Q. (By Mr. McBroom) Okay.

22 MR. CROWE: Objection; hearsay.

23 THE COURT: That's sustained.

24 Q. (By Mr. McBroom) Based upon your
25 understanding of the communications, has Air Serv ever

1 objected and said it took any longer than ten minutes
2 to perform its services?

3 MR. CROWE: Objection; relevance.
4 Objection; hearsay.

5 THE COURT: Sustained on both grounds.

6 MR. McBROOM: I'm asking for his personal
7 knowledge, your Honor.

8 THE COURT: It's still hearsay. It's what
9 somebody else said out of court, that's not sworn to.

10 Q. (By Mr. McBroom) Were you ever informed by
11 anybody from Air Serv that it took any longer than ten
12 minutes to perform its function?

13 MR. CROWE: Objection; relevance.

14 THE COURT: Sustained.

15 MR. CROWE: Objection; hearsay.

16 THE COURT: It's hearsay.

17 Q. (By Mr. McBroom) Okay. Go to the next
18 column then, if you could, please.

19 A. Okay, total time?

20 Q. Total time, yes. What does that column
21 represent?

22 A. It adds up the aircraft and then the travel
23 to and from time, as well as the supervisor monitoring
24 time.

25 Q. Okay. And the next column is the billing

1 rate. What would the billing rate correspond to?

2 A. The billing --

3 MR. CROWE: Objection; beyond the
4 designation of the witness.

5 THE COURT: He's not designated as a
6 30(b)(6), but you can go ahead and testify. It will
7 be in provisionally, but I'm not saying it's going to
8 be considered substantively. Go ahead. You can
9 answer.

10 A. Okay. The billing rate was taken from the
11 out of scope portion of the contract.

12 Q. (By Mr. McBroom) Okay. And does that
13 include any markup from actual labor rates?

14 MR. CROWE: Objection; beyond the scope of
15 the witness's designation.

16 THE COURT: That's sustained.

17 Q. (By Mr. McBroom) Okay. And the last column
18 then, what does that represent?

19 A. The last column was the total for the day
20 based on the amount of aircraft that were serviced in
21 that day.

22 Q. Okay. And what was the total that you --
23 that you came up with as far as how much --

24 MR. CROWE: Objection --

25 MR. McBROOM: He said he --

1 international PAF ground time less than 90 minutes.

2 Does it take nine people for that one?

3 A. It would be preferred.

4 Q. What's that?

5 A. It would be preferred to have that many
6 people on it, yes, sir.

7 Q. Okay.

8 A. You only have 90 minutes.

9 Q. I only asked that, because you testified
10 previously that there were nine people --

11 A. Yeah.

12 Q. -- that it took nine people, in your
13 deposition. So I'm just wondering what airplanes
14 could it take nine people to perform the cabin
15 cleaning services?

16 A. On any international --

17 MR. CROWE: Objection --

18 A. -- (inaudible) --

19 MR. CROWE: -- misstates the record.

20 THE COURT: You know, an objection that says
21 it misstates the record doesn't really purport with --
22 in evidence. I'm not sure if the question is
23 misstating the record or his answer is presuming to
24 misstate the record. So I need your objections to be
25 a little bit more legally based.

1 the reason is because they stole that. And that's the
2 way you'll see the cases drawn out, is if there's some
3 sort of bad conduct or something, then you might have
4 something like that, but that's not this case. That's
5 just not this case.

6 This is contract that was set up for
7 services, the services were performed --

8 THE COURT: Why wasn't --

9 MR. McBROOM: -- presumably.

10 THE COURT: Why wasn't anything paid?

11 MR. McBROOM: It was. We paid the -- we
12 tendered the -- what was the \$3,500 per the --

13 THE COURT: Okay.

14 MR. McBROOM: -- per the analysis.

15 MR. CROWE: Objection; misstates the record.

16 MR. McBROOM: That was actually tendered.

17 THE COURT: All right. Right. My
18 question --

19 MR. McBROOM: So --

20 THE COURT: -- bad question; shouldn't have
21 asked it. He objected.

22 MR. McBROOM: Okay.

23 THE COURT: I'll find out at trial.

24 MR. McBROOM: So -- and the evidence will
25 show that that was tendered to them. They rejected

1 it.

2 MR. CROWE: Objection; misstates the record.

3 MR. McBROOM: Okay.

4 THE COURT: I'll deal with it at trial.

5 MR. McBROOM: Again, I really think you need
6 to read the reply brief, because it goes through
7 Young vs. Young and not --

8 THE COURT: Well, I have. I have --

9 MR. McBROOM: Okay.

10 THE COURT: -- Young vs. Young. Don't worry
11 about it.

12 MR. McBROOM: And Young vs. Young goes
13 through a couple of restatements in there and that
14 sort of stuff. We put that out there of what those
15 actually say and how it kind of breaks it down. And
16 again, it's just -- you know, it's really getting down
17 to this is a -- this is a reasonable value of
18 service -- what is the market value of these services,
19 it's really what you provided.

20 I think what it's going to come down to for
21 the Court is whether these guys are entitled to this
22 \$150 of risk that they're -- that they're claiming is
23 such a big risk factor of this whole case, okay.

24 The evidence will show that's completely
25 unsupportable, your Honor. I mean obviously there

1 insurance, and FSS from the very beginning offered
2 indemnification. And that was everybody's
3 understanding, okay.

4 So what they were trying to do -- what
5 Flight Services was trying to do is double -- double
6 bill for that. Okay. From the very get go
7 indemnification was the understanding and that was
8 repeated --

9 MR. CROWE: Objection --

10 MR. McBROOM: -- repeated.

11 MR. CROWE: -- misstates the record.

12 MR. McBROOM: -- repeated. So --

13 THE COURT: I'm going to sustain that as I
14 did sustain --

15 MR. McBROOM: Okay.

16 THE COURT: So let's get to the evidence.

17 MR. McBROOM: Okay.

18 Again, when you -- when we get done with
19 this trial, the evidence before you is going to be the
20 reconciliation. The reasonable value of the services
21 performed. That is the reasonable value. That's a
22 detailed -- breaks down the time that they spent out
23 there traveling to and from the site, the time
24 actually spent performing the services, and the \$14.05
25 per hour that's reasonable. That's actually a 15 to

1 Q. Okay. So if there is six to 14 people that
2 are necessary to go out and actually clean an
3 airplane, it would be an expense covered for all six
4 to 14 of those people.

5 MR. CROWE: Objection; speculation. Also --

6 THE COURT: He can answer. It's overruled.

7 A. If that is the -- if that is the number of
8 agents a company assumes is necessary, then the answer
9 is yes.

10 Q. (By Mr. McBroom) Okay.

11 A. That is not necessarily Air Serv's, but if
12 that is in a company's assumption, then yes.

13 Q. Right. But you don't have any knowledge of
14 Air Serv's, right, specific knowledge of Air Serv's?

15 MR. CROWE: Objection; misstates the record.

16 THE COURT: He can answer it, if he can. I
17 don't know.

18 A. It varies. I -- it varies from -- again,
19 our pricing varies from station to station, from
20 airline to airline, from aircraft --

21 Q. (By Mr. McBroom) Let me re--

22 A. -- to aircraft.

23 Q. -- rephrase it. Have you ever spoken to
24 anybody from Air Serv about what -- how they staff up
25 for their airplanes?

1 crews any more, so that was removed. So it's \$20 for
2 the supervisor labor.

3 THE COURT: Okay.

4 THE WITNESS: \$5. So then I reduced the
5 (inaudible) down to \$5 per flight.

6 THE COURT: Okay.

7 THE WITNESS: And then the remaining balance
8 was 150, which is for the liability.

9 THE COURT: And with whom did you
10 communicate that; with Weitzel? Who did you
11 communicate that with?

12 THE WITNESS: The 175 was with Mr. Weitzel,
13 yes.

14 THE COURT: And that was in June --

15 THE WITNESS: Yes, ma'am.

16 THE COURT: -- of 2011?

17 THE WITNESS: Yes, ma'am.

18 THE COURT: So the original cost of 250 was
19 essentially for six to 14 people.

20 MR. CROWE: Objection; misstates the record.
21 It's for three people.

22 THE COURT: Well, no. Maybe I don't
23 understand, so let me --

24 MR. CROWE: Point of clarification, your
25 Honor.

1 Q. Okay. Now, the original price that you came
2 up with was \$250 per aircraft; correct?

3 A. Yes.

4 Q. Okay. Now, that \$250 per aircraft was also
5 assuming that Flight Services would indemnify Air
6 Serv; correct?

7 A. No.

8 Q. It wasn't. Are you sure about that?

9 MR. CROWE: Objection; misstates the record.

10 MR. McBROOM: Okay.

11 THE COURT: I don't know what the record is,
12 so I can't really rule on it, whether it's a
13 misstatement or not. So all I can do is wait until I
14 hear more evidence.

15 MR. CROWE: Right.

16 Excuse me, what are we marking this?

17 MR. McBROOM: What's that? 64.

18 MR. CROWE: 64.

19 MR. McBROOM: Yeah.

20 Q. (By Mr. McBroom) If you could take a look
21 at that document, if you could, please.

22 THE COURT: I don't think he has it.

23 MR. McBROOM: (inaudible) we can use this
24 one. You can use that one. Let's use this because
25 this is the Court document.

1 A. Yes.

2 Q. Okay. So you're disputing what the
3 government is saying here the normal process time
4 would be; is that accurate?

5 A. I have told you how -- the average time it
6 takes Air Serv to obtain a compliance agreement.

7 Q. Okay. And actually Flight Services obtained
8 theirs in September; correct?

9 A. I don't know when they obtained it.

10 Q. When did you stop providing services; do you
11 know that?

12 A. The -- in September sometime.

13 Q. Okay. So wouldn't it be fair to assume that
14 they obtained their compliance agreement sometime in
15 September?

16 A. Yes. Which is five months -- not six to
17 eight weeks.

18 Q. It's not nine months either; is it?

19 A. It's not six to eight weeks.

20 MR. CROWE: Objection; argumentative.

21 THE COURT: It is argumentative.

22 MR. McBROOM: Okay.

23 Q. (By Mr. McBroom) Actually three months,
24 isn't it, from end of May to September 1?

25 MR. CROWE: Actually misstates the record.

1 Q. What are out of scope services?

2 A. Services that are not defined in the
3 contract.

4 Q. And look at Exhibit 61, if you could,
5 please. Now, this is the contract that Air Serv
6 essentially took over from Flight Services in November
7 of 2011; is that accurate?

8 A. Yes.

9 MR. CROWE: Objection; misstates the record.
10 Air Serv did not take over the contract, it went for
11 open bid.

12 MR. McBROOM: He's already answered.

13 THE COURT: No, it's -- rephrase the
14 question.

15 Q. (By Mr. McBroom) Is this the contract
16 between Air Serv and Delta that began about November
17 of 2011?

18 A. Yes.

19 Q. Go to page 81 for out of scope services.
20 And it says the hourly rate for out of scope services
21 referenced in section 4.4 of the agreement is \$16.31;
22 correct?

23 A. Yes.

24 Q. Okay. That's an hourly rate; right?

25 A. Yes.

1 we could take him out of order.

2 THE COURT: Not -- not under the
3 circumstances. Let's get going --

4 MR. McBROOM: Okay.

5 THE COURT: -- with cross.

6 MR. McBROOM: Thank you.

7 Q. (By Mr. McBroom) Okay, let's go back to
8 your pricing, if we could. Now, it's my understanding
9 that you started with a \$10 per hour wage rate; is
10 that accurate?

11 MR. CROWE: Objection; misstates the record.

12 THE COURT: Restate the question.

13 Q. (By Mr. McBroom) Did you start with a \$10
14 per hour labor rate, and then to get to a \$15 per hour
15 did you go time and a half?

16 A. Yes.

17 Q. Okay. So you got up to \$15 per hour by
18 taking the standard labor rate, basic labor rate, and
19 adding it up to time and a half; is that accurate?

20 A. Yes.

21 Q. Okay. Okay. And then you added to that \$15
22 rate, which is \$20 per hour; is that correct?

23 A. Yes.

24 Q. Okay. And that includes FICA, FUTA, SUTA,
25 and liability insurance?

1 Q. (By Mr. McBroom) You don't recall providing
2 it? Was -- the only time you provided it was at your
3 deposition, which just occurred last week; correct?

4 A. To my best recollection, yes.

5 Q. Counsel was talking about incremental
6 revenues. Is that the same as your verbiage for
7 variable rates that you used before on Exhibit No. 61?
8 You talked about incremental revenues, I'm just
9 curious on what you meant by the term incremental
10 revenue amounts.

11 MR. CROWE: Objection; misstates the record.
12 I used the term incremental revenue amounts.

13 THE COURT: Okay. So he can see if he can
14 clarify or explain the difference between incremental
15 revenues and variable rates.

16 A. They would be very similar, if not the same
17 thing, yes, that's correct.

18 Q. (By Mr. McBroom) And that would be the
19 rates for the worker bees going out, all the worker
20 bees doing the work out there.

21 A. To include -- not -- that is not just the
22 labor rate, that is -- that includes the allocation of
23 the fully burden, that includes allocation of
24 uniforms, contract expense, contract related expenses.
25 It is -- those rates are not reflective of just labor.

1 MR. CROWE: Objection; misstates the record.
2 Counsel has yet to provide any estimate of six to 14
3 throughout the discovery period, if that's actually
4 the labor being provided for --

5 THE COURT: Rephrase --

6 MR. CROWE: -- any of the contracts.

7 THE COURT: -- the question.

8 Q. (By Mr. McBroom) Okay. You testified you
9 assumed three people cleaning all the airplanes.
10 Would that -- would that amount include all three of
11 those people?

12 A. Yes.

13 Q. Okay. So if that amount was assumed at six
14 to 14, then it would assume -- it would include all
15 six to 14 of those people; correct?

16 MR. CROWE: Objection; calls for
17 speculation.

18 THE COURT: Sustained. Rephrase.

19 MR. McBROOM: Okay.

20 Q. (By Mr. McBroom) You just testified that
21 fines occur multiple times per year; is that correct?

22 A. Yes.

23 Q. Okay. For Air Serv you get multiple fines
24 per year from the feds?

25 A. Yes.

1 Q. Okay. And most of those are resolved, per
2 your previous testimony, with some sort of mitigation?

3 MR. CROWE: Objection; misstates the record.
4 A fine, if it's issued, is not resolved.

5 THE COURT: You can answer if you can
6 answer. It's overruled.

7 A. Most of them are mitigated down from its
8 original fine amount, yes.

9 Q. (By Mr. McBroom) In fact very rarely does
10 it ever come to a monetary fine.

11 A. No.

12 Q. No?

13 A. That's incorrect.

14 Q. Okay. Tell me how many incidents in the
15 last year you can remember.

16 A. Probably ten.

17 Q. Okay. Describe in detail all ten of those.

18 MR. CROWE: Objection; relevance.

19 THE COURT: What's the relevance?

20 MR. McBROOM: Well, he's saying that this
21 occurs multiple times per year, I want to see what his
22 knowledge is on it.

23 THE COURT: All right. Go ahead.

24 A. I don't know all ten specifically. I know
25 one. I can give you an example for one in Atlanta.

1 A. -- I forwarded it.

2 Q. (By Mr. McBroom) Okay.

3 A. So they can take care of it.

4 Q. Okay. So you never personally wrote back
5 and objected to anything as far as Mr. Weitzel's
6 reconciliation; is that correct?

7 MR. CROWE: Objection --

8 A. No.

9 MR. CROWE: -- misstates the record.

10 THE COURT: I'm going to sustain this. I
11 don't think she's been established as a speaking
12 agent, so this becomes really irrelevant.

13 MR. McBROOM: I was just asking if she did,
14 if she responded back. That's all I was asking.

15 THE COURT: I understand, I'm just --

16 MR. McBROOM: Oh.

17 THE COURT: -- telling you what's --

18 MR. McBROOM: Okay.

19 THE COURT: -- before the Court and what's
20 not --

21 MR. McBROOM: Okay.

22 THE COURT: -- before the Court, Counsel.

23 Q. (By Mr. McBroom) Are you aware of -- is --
24 are you aware of anybody at flight -- at Air Serv that
25 responded back regarding this reconciliation to

1 Mr. Weitzel?

2 A. No, because after that I leave it to their
3 hands to make the de -- because I can't do anything.
4 There is nothing I can do.

5 Q. Okay. Was it your understanding that
6 corporate was the one responsible for the pricing,
7 your corporate?

8 A. Yes.

9 Q. Okay. On Exhibit 17, Mr. Weitzel's email
10 address is shown as bweitzel@fsspeople.com.

11 Do you see that?

12 A. Yeah.

13 Q. Okay. Go to Exhibit 36, tell me what email
14 address you were using for Mr. Weitzel on Exhibit 36.

15 A. It's rweitzel@fsspeople.com.

16 Q. Okay. It's different, isn't it?

17 A. B, so, rweitzel. Well, this is the address
18 that he used, but the address that I've been using was
19 this one. So after that I can't communicate with the
20 address he gave me, because that's the end of my
21 converse -- communication with him.

22 Q. But they're different; right?

23 A. Yes, they are.

24 Q. Okay. That's all (inaudible).

25 A. May I ask?

1 testify about the FS dealings with Air Serv. That's
2 all I have in my witness disclosure. Defense counsel
3 never listed him in his witness disclosure. I think
4 any testimony just beyond the communications directly
5 with FSS and Air Serv he personally had should be
6 excluded, and anything beyond that should be excluded
7 as well.

8 THE COURT: Do you want to respond to both
9 of these motions?

10 MR. McBROOM: Yes, your Honor. Let me tell
11 you what Judge Rogers actually did on the motion --

12 THE COURT: Well, I just got off the phone
13 with Judge Rogers.

14 MR. McBROOM: Okay.

15 THE COURT: So go ahead.

16 MR. McBROOM: So on the motion to compel, he
17 made Bobby available for another deposition that they
18 decided not to take, okay. We totally made him
19 avail -- in fact I made him --

20 MR. CROWE: Objection; misstates the record.

21 MR. McBROOM: Excuse me.

22 THE COURT: He can object.

23 MR. McBROOM: This is -- this is responding
24 to his argument, your Honor.

25 MR. CROWE: He's --

1 this.

2 THE COURT: So there is going to be no
3 testimony and this is a nonissue?

4 MR. McBROOM: I don't recall any testimony
5 on market rate.

6 MR. CROWE: Misstates the record.

7 THE COURT: So then --

8 MR. CROWE: Objection; misstates the record.

9 THE COURT: So you're conceding then --

10 MR. McBROOM: No, I'm not conceding. Here
11 is what I'm conceding, okay.

12 They're allowed to testify about what
13 Mr. Nguyen said --

14 THE COURT: Right. Well, Mr. Nguyen --

15 MR. McBROOM: -- obviously, to rebut what
16 Mr. Nguyen said. Obviously they can testify to
17 anything they want about that. They can testify to
18 any experiences they have in the market as to similar
19 type services.

20 THE COURT: But that information has never
21 been provided to Air Serv, and it had been
22 specifically requested. There was a motion to compel,
23 Judge Rogers asked for specificity; you never provided
24 it.

25 MR. McBROOM: That's not true.

1 incidents, the one in Seattle and the one in Boston.

2 MR. McBROOM: I don't think anybody has
3 testified to industry standards or market rate as far
4 as --

5 THE COURT: Then you're --

6 MR. McBROOM: -- generally.

7 THE COURT: -- conceding.

8 MR. CROWE: Objection; misstates the record.
9 Throughout the summary judgment proceedings,
10 Mr. McBroom and Mr. Weitzel kept on complaining,
11 stating that our charges were 35 times the market
12 rate. They kept on saying that throughout their
13 motions --

14 MR. McBROOM: Your Honor.

15 MR. CROWE: -- throughout their case without
16 any evidence whatsoever. And I don't think without
17 any evidence being provided today --

18 MR. McBROOM: The evidence --

19 MR. CROWE: -- the statement should be
20 allowed.

21 THE COURT: We're done right now.

22 MR. McBROOM: The evidence is the
23 reconciliation (inaudible).

24 THE COURT: I understand, Mr. McBroom.
25 Let's start with Mr. --

1 A. That's correct.

2 MR. CROWE: Objection; misstates the record.

3 THE COURT: Just rephrase it, Counsel.

4 Q. (By Mr. McBroom) What employment records
5 did Air Serv keep concerning the work that Air Serv
6 performed out there, detailed employment records?

7 A. Basically there is assignment sheets, who
8 was assigned to work the flights. And how long they
9 were on the flight depended on how long it took FSS to
10 clean the aircraft.

11 Q. Okay. If you could turn to page 27 of your
12 deposition, please, of your deposition.

13 THE COURT: I'm sorry, what page?

14 MR. McBROOM: Page 27, your Honor.

15 THE COURT: Okay. Just the next page, I see
16 it.

17 Q. (By Mr. McBroom) At the very bottom,
18 starting at line 24, I say, do you know how long it
19 took each Air Serv employee to do their supervisory
20 service on an airplane?

21 And you answered, I can't give you a minute
22 or time, but however long it takes the FSS crew to
23 clean the aircraft.

24 Then I went on and said, okay. Did Air Serv
25 keep any records of the specific work they performed

1 \$250 rate?

2 A. No, sir.

3 Q. Or the \$175 rate?

4 A. No, sir.

5 Q. It was your understanding that John Kim had
6 to get approval from his corporate headquarters for
7 any agreement to be created; is that accurate?

8 MR. CROWE: Objection --

9 A. Yes.

10 MR. CROWE: -- misstates the record.

11 THE COURT: It's overruled.

12 Q. (By Mr. McBroom) The answer was?

13 A. Yes.

14 THE COURT: He said, "Yes."

15 Q. (By Mr. McBroom) So Mr. Kim made clear that
16 he had no authority to enter into any agreement with
17 Flight Services -- or with Air Serv, it had to have
18 been his corporate?

19 A. Yes, sir. Yes, sir, that's correct.

20 Q. Were you ever made aware of any
21 communications where Flight Services had agreed to
22 indemnify Air Serv for the supervisory services it was
23 providing?

24 A. No, sir, I wasn't aware of it. But I
25 believe --

1 Q. Did Mr. Nguyen ever contact you and say that
2 air -- that Flight Services has agreed to indemnify?

3 A. There was an email that I was involved in,
4 but I don't really recall. I've seen the email, yes.

5 Q. Okay.

6 A. I believe I was included in on it.

7 Q. Did Mr. Nguyen ever tell you that he had a
8 discussion with Mr. Bobby Weitzel who rejected the
9 \$175 rate?

10 A. No, sir.

11 Q. He never told you that?

12 A. No.

13 MR. CROWE: Objection; misstates the record.

14 THE COURT: Overruled.

15 Q. (By Mr. McBroom) Were you ever provided the
16 copy of the breakdown, the rate breakdown, that Flight
17 Service -- Flight Services provided to Air Serv on a
18 flight by flight basis that detailed the rate, the
19 time it took, and the amount?

20 A. Was I ever provided that?

21 Q. Yes.

22 A. No, sir.

23 Q. You were never provided with that?

24 A. For Flight Services?

25 Q. Yes.

1 A. No. No, sir.

2 Q. Do you know what the hourly rate was for the
3 supervisory services that were provided by Air Serv?

4 MR. CROWE: Objection; misstates the record.

5 THE COURT: He can answer the question. I
6 don't think he's asking -- anyway, he can answer.
7 It's overruled.

8 A. Okay, for a full (inaudible) basically
9 you're talking about all benefits and everything?

10 Q. (By Mr. McBroom) We'll just start with the
11 basic. What's the basic?

12 A. \$16 an hour, \$16.50 for supervisor.

13 Q. Okay. If you could turn to -- why don't you
14 go to Exhibit 61, if you could, please.

15 A. 61?

16 Q. 61, yes.

17 A. Okay.

18 Q. Now, we've talked a little bit about this,
19 but if you could tell me what is the -- what's your
20 understanding of an international PAS -- PAF ground
21 time less than 90 minutes?

22 A. International?

23 Q. Yeah. And I'm looking at page two, which is
24 page 80 of the exhibit, Bates stamp 80. Do you see
25 where it says international PAF ground time less than

1 THE COURT: He can answer if he knows.

2 A. I don't know (inaudible).

3 Q. (By Mr. McBroom) You don't know?

4 A. I didn't put together -- basically the
5 numbers are put together by the corporate office, so
6 what it includes, the breakdown of what it's
7 actually -- how they get the number, again, that's
8 something that the corporate office puts together.

9 Q. Well, does this --

10 A. But it would include everybody who has to
11 work the flight, yes.

12 Q. Everybody who worked the flight. And that
13 would include all supervisors?

14 A. Supervisors, that's correct.

15 Q. Okay. Is it your understanding that it took
16 about nine people to clean an airplane on a 90 minute
17 turn?

18 MR. CROWE: Objection; misstates the record.

19 THE COURT: Just rephrase it to a specific
20 plane, size of plane, international, domestic. It's
21 vague --

22 MR. McBROOM: Okay.

23 THE COURT: -- so rephrase it.

24 Q. (By Mr. McBroom) We'll just start with that
25 90 minute turn that we just talked about,

1 international PAF ground time less than 90 minutes.

2 Does it take nine people for that one?

3 A. It would be preferred.

4 Q. What's that?

5 A. It would be preferred to have that many
6 people on it, yes, sir.

7 Q. Okay.

8 A. You only have 90 minutes.

9 Q. I only asked that, because you testified
10 previously that there were nine people --

11 A. Yeah.

12 Q. -- that it took nine people, in your
13 deposition. So I'm just wondering what airplanes
14 could it take nine people to perform the cabin
15 cleaning services?

16 A. On any international --

17 MR. CROWE: Objection --

18 A. -- (inaudible) --

19 MR. CROWE: -- misstates the record.

20 THE COURT: You know, an objection that says
21 it misstates the record doesn't really purport with --
22 in evidence. I'm not sure if the question is
23 misstating the record or his answer is presuming to
24 misstate the record. So I need your objections to be
25 a little bit more legally based.

1 A. I don't recall.

2 MR. CROWE: Objection; misstates what the
3 evidence was that he's referring to. It has nothing
4 to do with cost (inaudible).

5 THE COURT: You can't recall anyway.

6 MR. McBROOM: Okay.

7 THE COURT: Ask another question.

8 A. I don't recall.

9 Q. (By Mr. McBroom) I think you've testified
10 to Exhibit 34. Do you see that? At the very top is
11 an email from you where it says we're still sending
12 people over and you know they haven't paid a dime. Is
13 John Kim in town?

14 Do you recall that?

15 A. Yes, sir.

16 Q. Okay. So at that time in August of 2011 you
17 knew that there was no payments.

18 A. Yes, sir.

19 Q. (Inaudible) I was trying to clarify that,
20 because it sounded like you said from your testimony
21 that you didn't know until after the discussion with
22 Tessie Ong in September that there was no payments
23 being made.

24 A. No, I knew before, I knew that. I'd asked
25 John on several occasions --

1 Okay. Then -- then remember we get to the
2 \$150 risk factor that he throws in. He provided the
3 Court nothing as far as substantiation for that risk
4 factor, other than we might get a fine. Okay, you've
5 heard from all the testimony, in fact you heard from
6 Gil Green, their own witness, saying I've never heard
7 of a fine happening, not one.

8 And here's the -- the other interesting
9 thing is is when he valued this, when Mr. Nguyen
10 valued this 250, the contracts that were going out
11 said we're indemnifying you, the proposed contract
12 saying we're indemnifying you. So his 250 was based
13 upon their own understanding that they were going to
14 be indemnified by this whole thing.

15 And not only that, in his deposition --

16 MR. CROWE: Objection; misstates the record.
17 Your Honor, he's (inaudible) the record numerous
18 times, would you -- I've been letting him go, but his
19 own --

20 THE COURT: You know, I get the joy of
21 reading this entire record after you're both done here
22 today, so I will spend much more time on it than just
23 yesterday and today. So if you want to point it out
24 in rebuttal, you're welcome to do that, and I'll just
25 note that there is an issue here to be looked at

1 THE COURT: -- and we're not going to pay
2 175, but we're going to continue to use your
3 services -- they didn't stop the 476 flights. So
4 isn't there a value there that their business
5 continued, FSS continued, whether Mr. Nguyen testified
6 to it or not, or he talked about it as a risk factor;
7 how about the value to FSS of continuing with the
8 contract? Isn't there a value there?

9 MR. McBROOM: Ab-- if their contract was
10 pulled, like it was, and given to them --

11 THE COURT: Yeah, but I don't know that.
12 That's not in front of me.

13 MR. McBROOM: Okay. Well, that was part --
14 they did testify to that. But --

15 THE COURT: Yeah, that's --

16 MR. CROWE: Objection; misstates the record.

17 THE COURT: Anyway it's not --

18 MR. McBROOM: But anyways --

19 THE COURT: -- it's not in front of me.

20 MR. McBROOM: Anyways.

21 THE COURT: I mean I heard that at the end
22 of testimony.

23 MR. McBROOM: Yeah.

24 So the value of the -- you know, if you
25 didn't have a compliance agreement, you would never --

1 So what you end up with is a figure,
2 multiplied by .65 (inaudible), and have the \$81,106,
3 and a maximum of \$159,345.59 or \$132,241.90. That's
4 what Mr. Nguyen's testimony is saying, it would be
5 approximately 65 percent.

6 With either figure the Court comes up with,
7 it's easy to liquidate this claim based upon the
8 invoices that were provided. So whether it's
9 \$159,345.59 or \$132,241.90, we can apply the
10 prejudgment interest rate per the date of the invoices
11 supplied by FSS to Delta, and presumably paid shortly
12 thereafter.

13 Either number is a correct figure to go for
14 for Air Serv's -- for the benefit conferred to FSS for
15 the services that it took from Air Serv and could not
16 have provided to Delta without Air Serv's services.
17 It would have been illegal for them to do so.

18 The second quantifica -- the way the Court
19 can quantify is the reasonable value of services.

20 You know, it's hard to quantify what the
21 reasonable value of services are for services that
22 don't have industry standard, they don't have a market
23 rate, and it's just the pricing of one company
24 providing their price to another and the other company
25 acquiescing for most of the duration of the contract

1 and taking those services fully well knowing the
2 price.

3 THE COURT: And that would be the 476 times
4 175?

5 MR. CROWE: That would be. And that equals
6 \$83,000 and \$300. That's lesser than the two
7 valuations for the unjust enrichment. But that is
8 still a figure that would be the reasonable value of
9 services.

10 Or the Court could go much higher with the
11 reasonable value of service evaluation, too, and under
12 equity Air Serv would be rightfully able to request
13 that the Court provide all the money that was paid for
14 through the summer of 2011, because Delta would have
15 most likely canceled the contract even for the
16 domestic flights if FSS did not service them.

17 The value of these services at the time they
18 were provided over Memorial Day weekend and continued
19 to be provided at a high level and performed fully
20 well is a huge benefit. This only quantifies a
21 portion of it, but this right here is just for the
22 international flights.

23 Air Serv, of course, suggests you go with
24 this figure, because you rightfully can make an
25 adverse inference given all the discovery abuses and

1 Again, the benefit of trial for this is is
2 what evidentiary support did they provide for any of
3 Mr. Nguyen's testimony on this, and there was nothing.
4 He didn't -- he didn't point to a standard, nothing.
5 I mean there was simply nothing that was provided.

6 I do want to get a little bit more to --

7 THE COURT: Well, let me ask you a
8 question --

9 MR. McBROOM: Sure.

10 THE COURT: -- about that.

11 Let's assume, arguendo, that Mr. Nguyen, to
12 use your words, just pulled it out of thin air. So
13 what? Aren't they entitled to get paid? So what?

14 And I know that your side has said, well,
15 you know, they did ten minutes here and 20 minutes
16 here, and you're trying do this hourly thing. And
17 Nguyen testified we do it on plane per plane basis, we
18 don't do it on an hourly basis. So what? Let's
19 assume for argument sake --

20 MR. McBROOM: Sure.

21 THE COURT: -- he just said 175 because I
22 say so, because I'm the grand whatever position he
23 holds. So what? Don't they still get to get paid
24 something?

25 MR. McBROOM: I agree. I'm not disagreeing

1 say he just pulled it out of thin air. So what? How
2 come his -- how come his 175 a plane is any less valid
3 than you picking apart every minute that they have had
4 to spend or not spend standing there in a supervisory
5 capacity so that your company, FSS, could have the
6 benefit of the certificate of compliance, which your
7 company was desperately trying to achieve so that they
8 could do away with whatever they were going to be held
9 responsible for. So what?

10 MR. McBROOM: Well, the so what to me, your
11 Honor, if I can answer, the so what is the law states
12 that you're supposed to provide market value,
13 reasonable market value. What a -- what I could go
14 get those services on the outside for. That's what's
15 so what. So that's why we have to go through this
16 process to determine --

17 THE COURT: So that --

18 MR. McBROOM: -- what that reasonable market
19 value is. That's what the --

20 THE COURT: Where's the ev --

21 MR. McBROOM: -- law says.

22 THE COURT: Where's the evidence of what all
23 those other companies in that exhibit, that listed out
24 the six other companies, where is their market value?
25 Where is that in the record?

1 MR. McBROOM: Are you talking about from
2 Flight Services? Is that the one you're talking
3 about?

4 THE COURT: FS -- you said. FSS --

5 MR. McBROOM: The reconciliation, is that
6 what you're talking about?

7 THE COURT: Could have gone to all of these
8 other companies.

9 MR. McBROOM: Yeah, I agree. The burden is
10 on the defendant to come forward with the market
11 value. That is their burden, not my burden. That's
12 their burden to come forward with the evidence that
13 shows with reasonable certainty, as the law states,
14 you have to specify your damages with reasonable
15 certainty that there is a market value. So that's --
16 that's -- that's in our brief as well, too.

17 But still, what a willing buy and what a
18 willing seller could get those on the outside, that's
19 what you're trying to get to. And that's what -- I
20 mean they didn't agree on the 175, they didn't agree
21 on the 250; we know that, that's established.

22 So now we're to the point of what do we
23 value these services at? And that's all we're trying
24 to get at is what are the value of those services?
25 What is the market value?

1 You know, go through the -- like I said, it
2 talks about it has to be the market value. That's
3 what you're looking for is the market value of these
4 services.

5 It seems to me that a lot of this is this
6 claimed risk factor that they threw in, that's what a
7 lot of this is about. That seems to me to be one of
8 the linchpins of the whole thing is this, you know,
9 150 that, you know, was just thrown out, even though
10 they knew that was determined with the understanding
11 that they were going to get indemnified.

12 THE COURT: What about the value of FSS
13 continuing to do business? Isn't there a value there?
14 Without Air Serv your company wouldn't be able to
15 survive.

16 MR. McBROOM: That's not realistic.

17 THE COURT: What do you mean it's not
18 realistic?

19 MR. McBROOM: You have (inaudible) there was
20 like seven other vendors they could have gone to.

21 THE COURT: That's what I just asked you.
22 But they didn't, they continued on with them. And so
23 they -- if they thought, well, we're not going to pay
24 250 --

25 MR. McBROOM: Yeah.

1 THE COURT: Right.

2 MR. McBROOM: -- do the services.

3 THE COURT: Right.

4 MR. McBROOM: Now, remember what happened
5 here, okay. I mean you were ignoring the facts. The
6 person who went to Air Serv said we want you to do
7 this and this is what we want you to do was not our
8 client. It wasn't. It was Delta. And that's in
9 Judge Roger's order too.

10 THE COURT: But Delta is not a party to this
11 (inaudible).

12 MR. McBROOM: No, I understand that. But
13 they are the ones who -- who basically retained them
14 to do the work.

15 THE COURT: Where are they, other than
16 Tschumi, where are they in this lawsuit? Where is
17 Delta?

18 MR. McBROOM: They're not involved. No.

19 THE COURT: So they didn't retain them. So
20 how can you say that? FSS retained Air Serv.

21 MR. McBROOM: That's not what Judge Rogers
22 found. But -- and that's in his order. He says Air
23 Serv was retained by Delta -- or it wasn't in those
24 words, but it was something along those lines. There
25 is specific language in his order that shows that and

1 that wasn't -- that's not refuted. Because it wasn't
2 until twelve days after they started providing
3 services that they even came to us with any
4 expectation of payment.

5 THE COURT: Oh, you think they were going to
6 do it for free?

7 MR. McBROOM: I didn't say that. As you
8 see --

9 THE COURT: You just said there was an
10 expectation of payment as if --

11 MR. McBROOM: No, I said they came to us
12 twelve days afterwards with an expectation of payment.

13 THE COURT: Okay.

14 MR. McBROOM: Okay. So the services started
15 out on the 28th or 29th, I don't recall exactly the
16 date, okay. About June 8 they came to John Kim with
17 that con -- the 250 contract.

18 THE COURT: Right.

19 MR. McBROOM: Okay. But that's all I'm
20 saying with that.

21 THE COURT: Okay.

22 MR. McBROOM: And as you'll see from the
23 testimony that's in the record, that's in the
24 deposition testimony that's before you, there -- this
25 happens in the industry. They help out each other,

1 MR. McBROOM: -- from another --

2 THE COURT: -- when you don't pay.

3 MR. McBROOM: -- party.

4 THE COURT: How about --

5 MR. McBROOM: Or some sort of bad act is
6 going on.

7 THE COURT: Well, how about when you keep
8 getting services but you don't pay your bills?

9 MR. McBROOM: Your Honor --

10 THE COURT: How does that work, in your
11 analysis here?

12 MR. McBROOM: There was no -- I mean it's
13 res judicata. There was no agreement to price in this
14 case.

15 THE COURT: It's res judicata? There was no
16 litigation when the --

17 MR. McBROOM: No.

18 THE COURT: -- when the services were being
19 provided; what are you talking about?

20 MR. McBROOM: Judge -- Judge Rogers found
21 that the silence -- you know, I mean that they
22 (inaudible) -- the fact that they were providing the
23 silence, we litigated this. This was part of the
24 breach of contract motion, okay.

25 What the record was before him is is it got

1 actually have a right to stand on an objection. And,
2 you know, regardless of --

3 Your Honor, you've got to remember also,
4 this is a -- this is a very -- invoices didn't even
5 start coming until July. This whole thing was a three
6 month process, from May to September. This was a very
7 quick thing. I mean we weren't talking like lots
8 of -- lots of things going on as far as a long period
9 of time. There is no course of dealings, no course of
10 conduct between these parties, none of that.

11 THE COURT: I don't know what you're trying
12 to say. There were 476 flights that were serviced --

13 MR. McBROOM: Yes.

14 THE COURT: -- in some fashion or another,
15 and you're saying there was no course of conduct? I
16 don't know what that means.

17 MR. McBROOM: There was no prior course of
18 conduct --

19 THE COURT: What --

20 MR. McBROOM: -- that can establish some
21 sort of meeting of the minds on a forward-going basis.

22 THE COURT: I'm not saying there was. I'm
23 just trying -- let's get back to my original --

24 MR. McBROOM: Okay.

25 THE COURT: -- question.

1 THE COURT: I don't think it's disputed that
2 the price was rejected.

3 MR. CROWE: Right, right. I'm just
4 saying --

5 MR. McBROOM: Yes.

6 MR. CROWE: -- it's not -- it's not a proper
7 (inaudible).

8 THE COURT: I know.

9 MR. CROWE: Okay.

10 THE COURT: I'm well aware of that.

11 MR. CROWE: Okay.

12 MR. McBROOM: Page 120 was the travel time,
13 actually 120 to 121.

14 Page 122 he talks about why it took him no
15 more than ten minutes.

16 So all I ask is the Court does justice in
17 the case, I mean --

18 THE COURT: I'm going --

19 MR. McBROOM: -- the reasonable value.

20 THE COURT: -- to try to do --

21 MR. McBROOM: That's what we're asking. You
22 know, do I think that they should be paid for
23 services? The answer is yes.

24 THE COURT: Okay.

25 MR. McBROOM: Okay.

1 MR. CROWE: It was 9:00 in the morning. I
2 don't remember what time. We were just discussing a
3 protective order pending for the deposition, 30(b)(6)
4 witness deposition.

5 THE COURT: All right, I will find it.
6 Because it's electronic, I assume there was no court
7 reporter present. We have access to all --

8 MR. CROWE: I think (inaudible) --

9 MR. McBROOM: There was no court reporter,
10 your Honor.

11 THE COURT: So it's all electronic. I'll
12 pull it up. All right.

13 Do you have any rebuttal?

14 MR. CROWE: I don't, your Honor.

15 THE COURT: I'll hear closing arguments.

16 MR. CROWE: Can we have a break before
17 closing arguments?

18 THE COURT: Sure. How much time do you
19 need?

20 MR. CROWE: I'd like to get a white board.
21 Maybe 20 minutes, 25.

22 THE COURT: Sure.

23 MR. CROWE: How about 2:30 can we start?

24 THE COURT: Sounds fine.

25 THE CLERK: Please rise.

1 (Recess.)

2 THE COURT: Be seated. We're back on the
3 record. Mr. Crowe.

4 MR. CROWE: Your Honor, there is two ways
5 that damages should be calculated in this matter, and
6 you should choose the higher of the two.

7 As far at the benefit conferred on FSS by
8 Air Serv under Air Serv's unjust enrichment claim, we
9 can make this very mathematical, because the only
10 evidence we have are trial Exhibits 3 through 10 that
11 provide the revenues that FSS invoiced Delta to
12 receive for the international flights.

13 As detailed on page 14 of plaintiff's trial
14 brief, the set amounts that were incremental fees that
15 were paid to FSS for Air Serv services total
16 \$81,906.50. Those were direct fees brought to FSS
17 because of Air Serv's services. That's undisputed.

18 The second fee on page 15 is a fixed fee of
19 management fees, equipment fees, and startup fees.
20 That total equals \$77,439.09.

21 Now, FSS, in its deposition, could not
22 provide any way or chose not to provide any way to
23 evaluate between the fixed fee -- the fixed fees for
24 international or domestic services.

25 Air Serv's -- Toan Nguyen, who is in charge

1 of pricing for Air Serv, said that with a similar
2 contract that they provided since that time he said
3 about 65 percent, or roughly 65 percent of that fee
4 would be -- that fixed fee would just be for
5 international flights.

6 Furthermore, since the Court has more than
7 enough discretion to make an adverse inference on this
8 number, the Court could award a hundred percent of
9 this fixed fee to Air Serv given the circumstances in
10 this specific case.

11 So either you can use a multiple by one,
12 providing the full amount to Air Serv, which I would
13 urge the Court to do because of -- because of FSS's
14 wild abuse of use of discovery in this matter and it's
15 failure to provide this information -- and, you know,
16 they even haven't defended this number whatsoever. Or
17 you can use Mr. Toan Nguyen's .65 percent number
18 multiplied by this.

19 The third evaluation would be the costs
20 associated with providing FSS services to subtract
21 from this total. We have not provided -- been
22 provided a single cost figure through discovery. Are
23 there costs? Probably. You'd assume there are. But
24 they haven't been provided, and we can only go with
25 the evidence we've been given.

1 So what you end up with is a figure,
2 multiplied by .65 (inaudible), and have the \$81,106,
3 and a maximum of \$159,345.59 or \$132,241.90. That's
4 what Mr. Nguyen's testimony is saying, it would be
5 approximately 65 percent.

6 With either figure the Court comes up with,
7 it's easy to liquidate this claim based upon the
8 invoices that were provided. So whether it's
9 \$159,345.59 or \$132,241.90, we can apply the
10 prejudgment interest rate per the date of the invoices
11 supplied by FSS to Delta, and presumably paid shortly
12 thereafter.

13 Either number is a correct figure to go for
14 for Air Serv's -- for the benefit conferred to FSS for
15 the services that it took from Air Serv and could not
16 have provided to Delta without Air Serv's services.
17 It would have been illegal for them to do so.

18 The second quantifica -- the way the Court
19 can quantify is the reasonable value of services.

20 You know, it's hard to quantify what the
21 reasonable value of services are for services that
22 don't have industry standard, they don't have a market
23 rate, and it's just the pricing of one company
24 providing their price to another and the other company
25 acquiescing for most of the duration of the contract

1 and taking those services fully well knowing the
2 price.

3 THE COURT: And that would be the 476 times
4 175?

5 MR. CROWE: That would be. And that equals
6 \$83,000 and \$300. That's lesser than the two
7 valuations for the unjust enrichment. But that is
8 still a figure that would be the reasonable value of
9 services.

10 Or the Court could go much higher with the
11 reasonable value of service evaluation, too, and under
12 equity Air Serv would be rightfully able to request
13 that the Court provide all the money that was paid for
14 through the summer of 2011, because Delta would have
15 most likely canceled the contract even for the
16 domestic flights if FSS did not service them.

17 The value of these services at the time they
18 were provided over Memorial Day weekend and continued
19 to be provided at a high level and performed fully
20 well is a huge benefit. This only quantifies a
21 portion of it, but this right here is just for the
22 international flights.

23 Air Serv, of course, suggests you go with
24 this figure, because you rightfully can make an
25 adverse inference given all the discovery abuses and

1 the fact that they can't even quantify what -- were
2 not even willing to split up what the fixed fee is
3 within their explanation.

4 Furthermore, your Honor, this case has been
5 litigated to death, it really has been. And a lot of
6 that is because of pure shenanigans that violate our,
7 you know, basic principles of how we conduct
8 discovery.

9 If you look at certain documents; the motion
10 to compel provided by Air Serv to Judge Rogers, it
11 lists off the discovery responses provided by FSS.
12 Those discovery responses were specious to say the
13 least.

14 They basically stated, look at our
15 documents, it provides all the answers. But the
16 answers weren't in the documents because the documents
17 weren't provided.

18 MR. McBROOM: Object, your Honor. This is
19 beyond the scope of trial.

20 THE COURT: But it's all part of the record.
21 It's all before me (inaudible).

22 MR. CROWE: Yes, your Honor, and I'm going
23 to be moving for CR 11 sanctions right now for
24 reasonable attorneys' fees, because of all the
25 shenanigans that have been part of this trial -- or

1 this proceedings to date.

2 And if you look at specifically Docket 26,
3 it's Air Serv's motion.

4 If you look at specifically Docket 28, it's
5 FSS's response filed on March 15, 2013, where it
6 specifically states, there is one specific document,
7 trial Exhibit No. 21, requested by Air Serv in its
8 motion to compel Docket 26. That trial Exhibit No. 21
9 is a response from Robert A. Weitzel saying \$75 per
10 plane.

11 That document was not provided until Air
12 Serv had to move specifically for that document. And
13 in FSS's response in Docket 28 they informed the Court
14 on March 15 that docket doesn't exist. Air Serv's
15 moving the Court for dockets that don't exist.

16 Surprisingly, your Honor, on March 19, the
17 day after I filed my reply brief to the motion to
18 compel, I received, amongst a hundred of other pages
19 of documents, a three page email specifically -- I'd
20 been specifically requesting for over nine months.

21 There has yet to be an explanation of how
22 this email that was mailed on March 18, the following
23 Monday after their reply brief -- their opposition was
24 filed on March 15, on a Friday, how this document came
25 into being, how the representation, or lack of

1 clarification from opposing counsel to me of how we
2 got this so late, and after specifically representing
3 to the Court that it was -- didn't exist --

4 MR. McBROOM: Your Honor, I'd move --

5 MR. CROWE: -- I filed --

6 MR. McBROOM: I'd move that we wait for this
7 until after the trial. I mean to be honest with you,
8 I'm not prepared to discuss this. I mean --

9 THE COURT: And I --

10 MR. McBROOM: -- in mine, so.

11 THE COURT: -- understand that. This is
12 closing argument and you'll have an opportunity to
13 respond. It depends on -- if I need more argument,
14 I'll certainly ask for it. I've never --

15 MR. McBROOM: 'Yeah. I mean obviously Judge
16 Rogers --

17 THE COURT: Let me finish --

18 MR. McBROOM: Okay.

19 THE COURT: -- what I have --

20 MR. McBROOM: Sorry.

21 THE COURT: -- to say --

22 MR. McBROOM: I'm sorry.

23 THE COURT: It might save some words; maybe,
24 maybe not.

25 You know, I realize this has been a hotly

1 contested, hotly litigated case, and it landed here on
2 Friday afternoon and then we were -- we began trial
3 yesterday in earnest.

4 So everything is really before me. The
5 record is before me. I can go back, I'm going to go
6 back to the June 14 and listen to what you had to say
7 about Mr. Weitzel's appearance. There is obviously
8 discrepancy between the declaration and where
9 Mr. Weitzel was sitting when we just saw him earlier
10 today on Skype.

11 So the entire record is before the Court.
12 You don't get to say, oh, it's not part of the record.
13 The whole record is before the Court.

14 MR. McBROOM: I understand --

15 THE COURT: Okay?

16 MR. McBROOM: -- that, your Honor.

17 THE COURT: And I can look at how you
18 conducted yourselves throughout this trial, and I can
19 take that into considerations when it comes to
20 somebody moving for CR 11 sanctions. And I can also
21 do that for attorneys' fees, if there is a basis on
22 another level aside from CR 11 sanctions.

23 So you will have an opportunity to respond.

24 MR. McBROOM: Okay.

25 THE COURT: If you choose --

1 MR. McBROOM: Fair enough.

2 THE COURT: -- not to do it today orally,
3 that's fine, that's your choice, but I'm not going to
4 cut him off.

5 So instead of interrupting him, unless he's
6 talking about things that are outside of the record,
7 I'm not going to entertain anymore objections. But
8 the entire record is before the Court. So I hope I've
9 made myself clear.

10 MR. McBROOM: Fair enough, your Honor.
11 Thank you.

12 MR. CROWE: Specifically (inaudible)
13 explained in Docket 35, when I received this document,
14 I filed a supplemental declaration with the Court
15 saying, you know, out of the blue this document that
16 I've been fighting for to explain -- you know, it
17 seemed to be indicative of what maybe FSS's position
18 was. And not receiving many documents in discovery,
19 and not receiving any of these emails that John Kim
20 claimed on the record under oath to be forwarding to
21 FSS, (inaudible) invoices, via the contracts; I
22 received none of that information.

23 I filed the declaration to the Court
24 providing the document and saying there was no
25 explanation provided. To date I still don't have an

1 explanation to provide why I received this document
2 late and why I had to go through a motion to compel to
3 get this document, among other information.

4 In the last two months this case is becoming
5 seemingly costly, in part because FSS has determined
6 it's important to fly Air Serv's individuals around
7 the country at the last moment's notice. Six days
8 before discovery cutoff FSS served notices for five
9 deponents of Air Serv to be held three on one day and
10 two on the last day for the last two days of discovery
11 period. Never before, the night before that, had FSS
12 ever informed me of anybody he might like to depose or
13 when he might like to do so.

14 This caused a flurry of activity with Judge
15 Rogers; numerous motions being filed, protective
16 orders, motions to compel, and Judge Rogers finally
17 determined, okay, I'll give them the 30(b)(6)
18 deposition and deposition of Gil Green who is local,
19 make it happen in two weeks, and make FSS, who after
20 being deposed and not coming prepared, make sure they
21 get a deposition. Too. Work it out in the next 14
22 days.

23 We were able to work out the depositions for
24 Air Serv.

25 FSS gave me the option of providing on two

1 and three court days advanced notice from the hearing
2 say, the following Tuesday and Wednesday, and I said
3 I'm unavailable, I'm busy. I've got 14 days to figure
4 this out. And they said, no, we're not going to do
5 any other days besides on our time when we want you to
6 take our deposition.

7 It's cost us a lot of time. It's cost us a
8 lot of havoc. It shouldn't have cost us this much.
9 We've been fighting over things that should have been
10 provided honestly and forthright. And only this trial
11 is a microcosm of what we've seen happen.

12 We've had two declarations admitted,
13 admittedly false declarations filed by FSS at trial.
14 It's hard to prove falsities between -- from another
15 party, it really is. There is a bunch of trust in our
16 system inherent upon the attorney's respect for making
17 sure the truth is known.

18 We're getting false declarations. We're
19 getting misrepresentations to the Court. It's cost
20 us, our client, a lot of money to litigate the suit.
21 And a lot of these violations are in clear violation
22 of CR 11. They're misrepresentations. They're just
23 trying to increase the costs. They're for improper
24 purposes.

25 We request the Court take the entire record

1 into account and award Air Serv reasonable attorneys'
2 fees under CR 11.

3 Thank you.

4 THE COURT: Thank you.

5 Mr. McBroom.

6 MR. McBROOM: First to the law. The law is
7 clear, your Honor. Young vs. Young, which involved a
8 landowner.

9 THE COURT: I have the case.

10 MR. McBROOM: Okay. You've read the case,
11 I'm sure.

12 Once again, you'll never find anything the
13 greater of. What you will find in there is what the
14 actual issue was, which was whether the proper measure
15 of recovery is the market value of the services
16 rendered or the claimant's actual cost to render those
17 services.

18 They specifically cite to restatement
19 contracts, and there is a section D that they cite to.
20 And -- actually it's section 371(b).

21 And essentially what the Court said in
22 Young, at 490, which it says -- you know, and it cites
23 to section 155 Comment D, it's an old one, it's 1937,
24 which applies to services or improvements for the
25 proposition that the fact that he asked for them shows

1 THE COURT: All right.

2 MR. McBROOM: Do I think it should be 175?

3 Absolutely not. I don't think that's justified. And
4 that's -- that's what I believe, your Honor. I
5 appreciate it. Thank you.

6 THE COURT: Thank you, Mr. McBroom.

7 Briefly any rebuttal.

8 MR. CROWE: Sure. (Inaudible) erase some of
9 my beautiful math, but (inaudible).

10 THE COURT: I wrote it down. But go ahead,
11 that's fine. It's government property, what can I
12 tell you.

13 MR. CROWE: (Inaudible).

14 THE COURT: Still going to be there,
15 (inaudible) default.

16 MR. CROWE: Yeah, we disagree on the
17 reading, opposing counsel and I do, of Young vs.
18 Young.

19 THE COURT: I know.

20 MR. CROWE: And I think the important part
21 of Young vs. Young is as a judge you need to ensure
22 that they don't receive any of the benefit they
23 unjustly got. The benefit is the revenues they
24 received. You can subtract the costs so -- because
25 that's not a benefit, because they had to pay it, but

1 here they provided no costs.

2 It's a strange situation. Why didn't they
3 provide the cost? I have no idea. I would have been
4 providing costs the first day of discovery saying this
5 cost us a lot. But we didn't get those.

6 And what else can we do besides ask through
7 document requests, interrogatory, Court order, and
8 30(b)(6) deposition. Still didn't get them.

9 What can we infer from that? Either the
10 costs are zero or the costs they don't want to tell
11 us. And to the extent they're willing to admit the
12 costs are zero. Either way we don't know how much
13 cost they incurred.

14 And so what the Court must do is ensure that
15 the party that's being unjustly enriched receives no
16 benefit. They have -- they don't get a benefit for
17 being unjustly enriched. That would be the total
18 amount of the revenues they received minus the costs.

19 Now, there is a portion of the fixed fee,
20 which admittedly is domestic and international
21 flights.

22 THE COURT: Right.

23 MR. CROWE: Now, there is a portion that's
24 not, there is no -- there is no dispute is all for
25 international flights, and that equals \$81,000 and

1 change itself.

2 Then there is a proportion of the fixed fee
3 that's for international and domestic flights.

4 The only testimony we have as to what that
5 fixed fee percentage would be for international
6 flights is roughly 65 percent. That's from somebody
7 who does pricing in this industry all the time. And
8 he actually has a contract where he is doing the same
9 flights at SeaTac where he made the analysis from.

10 Now, I still urge the Court to go with a
11 hundred percent of the fixed fees, because it's still
12 FSS's burden to provide what its revenues are
13 throughout discovery, and they failed to do so even
14 after being compelled to do so by a Court order.
15 Instead they just loosely said, oh, here's our --
16 here's our invoices. Well, that's not enough.

17 If you have the information, if you have the
18 accounting information and you can derive your
19 profits, and you're being asked your revenues and your
20 costs, you need to provide that information. They
21 didn't to their own detriment, which finds Mr. McBroom
22 arguing about unjust enrichment and how the conferred
23 benefit no longer exists in the state of Washington
24 for -- under our case law.

25 But Young vs. Young doesn't stand for that.

1 In fact Young vs. Young did the conferred benefit in
2 its conclusion. It wasn't the reasonable value. It
3 did discuss how the reasonable value can be obtained,
4 but then at the end it actually said it's the benefit
5 conferred. We need to make sure they don't get any of
6 the benefit conferred, the amount they're unjustly
7 enriched by.

8 In this case, if you go with a hundred
9 percent of the fixed fee, which rightfully you can do
10 so, your Honor, it's \$159,345.59. If you go with
11 Mr. Nguyen's testimony, the only testimony on the
12 issue, you go with \$132,241.90.

13 That's the benefit conferred on FSS from all
14 the data we have, all the information in discovery.
15 The numbers are clear.

16 And we can derive that down to the invoices
17 because it's the only dates when these claims have
18 been liquidated, and prejudgment interest would be
19 applicable. Even if you use the 65 percent term, as
20 cited in the plaintiff's trial brief, cases have found
21 (inaudible) portion of the fee if you can bring that
22 proportion back to a certain date, it becomes a
23 liquidated claim as well.

24 Young vs. Young hasn't changed case law, it
25 described it better. But there's still the benefit

1 conferred in the state of Washington, and that's what
2 you should award in this instance, because we want to
3 make sure FSS didn't benefit because its actions
4 (inaudible) cause this unjust enrichment.

5 I'm not going to discuss the CR 32
6 designation. It seems like the Court understands it
7 can only be used for -- against the party that it was
8 provided for.

9 As far as reasonable value of the services,
10 it's a unique situation. There were a lot of vendors
11 out there. Air Serv was asked on Memorial Day
12 weekend, how can we help these guys out? Can you help
13 these guys out?

14 They bent over backwards and had a meeting
15 on a Friday night on Memorial Day weekend with their
16 CEO and other people trying to figure it out, and
17 saying, yes, we'll try to work it out. They contacted
18 the management at FSS and said, where are your papers,
19 where are your documents? They went down to CBP's
20 office and made sure they signed these agreements.

21 Did they want to help the competitor out?
22 Probably not. They weren't under any obligation to do
23 so. There is nothing in this industry that says
24 you've got to help your competitors out when they fail
25 to get a compliance agreement. But Air Serv was

1 willing to do so.

2 And then they said, hey, this is going to
3 last possibly months, we don't know. We'll give them
4 a price.

5 Mr. Nguyen, what are you going to do?
6 Usually has up to two months to come up with a price
7 for any of these contracts, but he says, well, rough
8 figure is \$250 for the cleaning (inaudible) throw it
9 out there, let's get the price to them, let's get a
10 contract written up so we can make sure that we get
11 our money.

12 Well, that price was rejected. Mr. Nguyen
13 understood it that they weren't providing cleaning
14 services. And then said well, 175, we'll price it at
15 175 because there is a lot of risk. What do we do
16 with a company who's willing to violate laws knowingly
17 and, you know, potentially face -- put it on our
18 liability (inaudible).

19 Well, they never indemnified Air Serv. Air
20 Serv had the risk the entire time. That's admitted by
21 FSS in deposition. They never even tried -- they
22 don't even know if they tried to contact their
23 insurance company. You know, just because they said,
24 hey, we'll indemnify you for this function, doesn't
25 mean they did. Air Serv always had the risk.

1 And what they risked that price at was \$175.
2 And everybody in the industry working on it; Gil
3 Green, John Kim, assumed that the corporate offices
4 were taking care of it. There wasn't objections being
5 made. He assumed it was going to be paid until right
6 after the services were complete and this
7 reconciliation was forwarded on that doesn't comply
8 with -- the ten minutes; they have to be on the
9 flights the entire time for 30 to 40 minutes under the
10 compliance agreement, not just for the ten minutes
11 they watched, supposedly watched the garbage being
12 handed out, they needed to be on the flights while FSS
13 personnel were on the flights.

14 FSS personnel could not be there without Air
15 Serv personnel under its compliance agreement. That
16 was made clear to Gil Green by the CBP. It was made
17 clear to Gil Green that they were taking on the
18 liability of FSS's actions.

19 The reasonable value of that service, you
20 know, it could be -- it could be astronomical. It
21 could be the value of the contract. It could be
22 saving face with Delta over the nation, you know.
23 This happens all over the place. They're competing
24 all over the country. And FSS could continue to
25 service this company because Air Serv stepped in.

1 How you value that, that's difficult. Air
2 Serv said, okay, 175 and they provided the services.
3 Probably should have saved more.

4 But let's go back to how much FSS got,
5 because that's what we should rule on today. You want
6 to make sure they don't get a nickel of this benefit
7 conferred unjustly. That number is \$159,345.59. And
8 let's multiply that by pre -- by the dates --
9 prejudgment interest by the dates of the invoices.

10 Thank you, your Honor. And thank you for
11 stepping in at the last minute to hear this trial.

12 (End of FTR recording.)

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1 on that amounts to point -- about a 43 percent profit
2 over what he just provided there, 43 percent. Your
3 normal stuff for almost all contracts is cost plus
4 15 percent. I don't know how he gets 30 percent. And
5 he couldn't explain it to you.

6 THE COURT: Are those facts in evidence that
7 you just said?

8 MR. McBROOM: Absolutely, yeah, he testified
9 to that.

10 THE COURT: No, no, what normal profit
11 margin is. What you just said, not what he said.
12 That's not before me.

13 MR. McBROOM: That's right.

14 THE COURT: So I'm not going to consider
15 that.

16 MR. McBROOM: Okay.

17 What you do have before you is the
18 designated deposition testimony from Mr. Weitzel which
19 goes through the calculate -- his own calculation and
20 how it came out, how he -- how they've actually
21 monitored the people to find out it only took them ten
22 minutes to do the cert -- to monitor.

23 THE COURT: And let me ask you. Was
24 Weitzel's deposition perpetuated?

25 MR. McBROOM: They offered, pursuant to the

1 Court rules, they offered part of the deposition. We
2 have an opportunity to provide -- we could have
3 provided the whole thing --

4 THE COURT: Was his --

5 MR. McBROOM: -- under the Court rule.

6 THE COURT: Was his deposition perpetuated?

7 MR. McBROOM: He was -- it wasn't a
8 perpetuation type deposition that I know of.

9 THE COURT: Thank you. That's all --

10 MR. McBROOM: That's right.

11 THE COURT: -- I asked.

12 MR. McBROOM: Yeah, it wasn't designated as
13 a perpetuation designation. But he does live out of
14 the county obviously, more than a hundred miles, that
15 sort of thing, and any part can -- other party can
16 bring it up. But if they introduce it, then the other
17 party has a right to introduce on their own per the
18 deposition rules. So that is before you. And the
19 justification for his analysis is all in there.

20 He had -- they monitored, ten minutes. They
21 saw the supervisors doing this for ten minutes.

22 You had the testimony from Mr. Priola that
23 said, you know, from the layout of SeaTac 20 minutes
24 was more than generous for getting there and getting
25 back.

1 So what you end up with is a figure,
2 multiplied by .65 (inaudible), and have the \$81,106,
3 and a maximum of \$159,345.59 or \$132,241.90. That's
4 what Mr. Nguyen's testimony is saying, it would be
5 approximately 65 percent.

6 With either figure the Court comes up with,
7 it's easy to liquidate this claim based upon the
8 invoices that were provided. So whether it's
9 \$159,345.59 or \$132,241.90, we can apply the
10 prejudgment interest rate per the date of the invoices
11 supplied by FSS to Delta, and presumably paid shortly
12 thereafter.

13 Either number is a correct figure to go for
14 for Air Serv's -- for the benefit conferred to FSS for
15 the services that it took from Air Serv and could not
16 have provided to Delta without Air Serv's services.
17 It would have been illegal for them to do so.

18 The second quantifica -- the way the Court
19 can quantify is the reasonable value of services.

20 You know, it's hard to quantify what the
21 reasonable value of services are for services that
22 don't have industry standard, they don't have a market
23 rate, and it's just the pricing of one company
24 providing their price to another and the other company
25 acquiescing for most of the duration of the contract

1 In fact Young vs. Young did the conferred benefit in
2 its conclusion. It wasn't the reasonable value. It
3 did discuss how the reasonable value can be obtained,
4 but then at the end it actually said it's the benefit
5 conferred. We need to make sure they don't get any of
6 the benefit conferred, the amount they're unjustly
7 enriched by.

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12 issue, you go with \$132,241.90.

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14 the data we have, all the information in discovery.
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17 because it's the only dates when these claims have
18 been liquidated, and prejudgment interest would be
19 applicable. Even if you use the 65 percent term, as
20 cited in the plaintiff's trial brief, cases have found
21 (inaudible) portion of the fee if you can bring that
22 proportion back to a certain date, it becomes a
23 liquidated claim as well.

24 Young vs. Young hasn't changed case law, it
25 described it better. But there's still the benefit

1 How you value that, that's difficult. Air
2 Serv said, okay, 175 and they provided the services.
3 Probably should have saved more.

4 But let's go back to how much FSS got,
5 because that's what we should rule on today. You want
6 to make sure they don't get a nickel of this benefit
7 conferred unjustly. That number is \$159,345.59. And
8 let's multiply that by pre -- by the dates --
9 prejudgment interest by the dates of the invoices.

10 Thank you, your Honor. And thank you for
11 stepping in at the last minute to hear this trial.

12 (End of FTR recording.)

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FILED

13 JUN 27 AM 11:45

Honorable Julie A. Spector
Trial Date: June 24, 2013
KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 12-2-01364-1 SEA

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

AIR SERV CORPORATION,

Plaintiff,

v.

FLIGHT SERVICES & SYSTEMS, INC.

Defendant.

NO. 12-2-01364-1 SEA

DEFENDANT'S RESPONSE TO
PLAINTIFF'S CLAIM FOR
PREJUDGMENT INTEREST ON
UNLIQUIDATED CLAIMS

I. INTRODUCTION

Prejudgment interest is not generally applied for claims of quantum meruit or unjust enrichment. Air Serv (AS) seeks an award of prejudgment interest "solely based on FSS's invoices and the responding revenues stated in those invoices" and the "the percentage of the fixed fee Air Serv is entitled to." Pltff. Trial Brief, p. 16. It is unclear what "invoices" AS is referring to,¹ what AS means by "percentage of the fixed fee," or what theory of "entitlement" it claims a percentage of fees under.

For purposes of denying AS's claim to prejudgment interest, however, no further inquiry is required. On the face of its argument, AS admits the amount of its recovery (if any amount is awarded) is not liquidated since the Court must use its equitable discretion to

¹ On summary judgment, Judge Rogers dismissed AS's claims to breach of contract and money due on account as shown by unpaid AS invoices. See Order Denying Plaintiff's Motion for Summary Judgment dated June 14, 2013; Pltff. Complaint dated December 15, 2011. The court ruled "[T]he parties disputed the price and the services over several months and this cannot constitute silence by acceptance. There was never a meeting of the minds as to price under the contract arranged by Delta between AS-FSS. For these reasons, AS's claims for breach of contract and accounts stated are dismissed." (p. 2).

1 determine whether to award a larger or smaller amount of damages under either of its
2 remaining claims—unjust enrichment or quantum meruit.

3 II. ISSUES PRESENTED

4 A. Does AS have a right to prejudgment interest on its unjust enrichment claims where
5 damages are measured by the reasonable value of services rendered, and the amount
6 of recovery depends on the trial court’s opinion and discretion about the amount of
7 enrichment that is unjust and that plaintiff has a right to recover for its services?

8 B. Does AS have a right to prejudgment interest on its quantum meruit claim where
9 damages are measured by the reasonable value of services rendered and the amount
10 of recovery, if any, depends on the trial court’s opinion and discretion on whether to
11 award a larger or smaller amount of damages?

12 III. AUTHORITY

13 A. **Prejudgment interest should not be awarded for unjust enrichment since the
14 amount of recovery would have to rely upon the Court’s opinion and discretion
15 as to whether a larger or smaller amount of recovery should be allowed.**

16 Prejudgment interest for unjust enrichment is denied when the amount of recovery is
17 not liquidated: the reasonable value of benefit conferred, which depends on what it would
18 have cost the defendant to obtain the benefit from some other person in the plaintiff’s
19 position, is not a liquidated amount for which prejudgment interest can be awarded. *See*
20 *Noel v. Cole*, 98 Wn.2d 375, 383, 655 P.2d 245 (1982); *Bailie Communications, Ltd. v.*
21 *Trend Business Systems, Inc.*, 61 Wn. App. 151, 810 P.2d 12 (1991) (allowing prejudgment
22 interest on unjust enrichment award based on non-payment of agreed sum of money where
23 liquidated amount of \$175,000 was fixed sum not subject to opinion or discretion because
24 directly “calculable by reference to the original promissory note for \$175,000, and the
subsequent reassurance of payment of \$175,000 if they co-signed the mortgage” [p. 155]).²

² The Washington Supreme Court cited and relied on both *Noel* and *Bailie Communications* in *Young v. Young*, 164 Wn.2d 477, , 191 P.3d 1258 (2008), the seminal case in Washington on unjust enrichment, though not on the issue of prejudgment interest. *See Young*, 164 Wn.2d at 484-486 (citing *Bailie*) & 487, 490-491 (citing *Noel*).

1 The test for prejudgment interest was stated in *Bailie* as follows:

2 The applicable law in this case was stated in *Hansen v. Rothaus*, 107 Wash.2d 468,
3 472-73, 730 P.2d 662 (1986):

4 The nature of the claim, not its characterization as sounding in contract or
5 negligence, decides the issue. We reiterate the court's established analysis,
6 and hold that whether prejudgment interest is awardable depends on whether
7 the claim is a liquidated or readily determinable claim, as opposed to an
8 unliquidated claim. *See, e.g., Prier v. Refrigeration Eng'g, Co.*, 74 Wn.2d 25,
9 442 P.2d 621 (1968); *Mall Tool Co. v. Far West Equip. Co.*, 45 Wn.2d 158,
10 273 P.2d 652 (1954); *Parks v. Elmore*, 59 Wash. 584, 110 P. 381 (1910). The
11 rule is stated:

12 [I]nterest prior to judgment is allowable (1) when an amount claimed is
13 "liquidated" or (2) when the amount of an "unliquidated" claim is for an
14 amount due upon a specific contract for the payment of money and the
15 amount due is determinable by computation with reference to a fixed
16 standard contained in the contract, without reliance on opinion or discretion.

17 *Prier*, 74 Wash.2d at 32 [442 P.2d 621].

18 A "liquidated" claim is a claim "where the evidence furnishes data
19 which, if believed, makes it possible to compute the amount with exactness,
20 **without reliance on opinion or discretion.**" *Prier*, at 32 [442 P.2d 621]
21 (citing C. McCormick, *Damages* § 54 (1935)). A dispute over the claim, in
22 whole or in part, does not change the character of a liquidated claim to
23 unliquidated. *Prier*, at 33 [442 P.2d 621] (citing C. McCormick, *Damages* §
24 54 (1935)).

25 An unliquidated claim, by contrast, is one "where the exact amount of
26 the sum to be allowed cannot be definitely fixed from the facts proved,
27 disputed or undisputed, **but must in the last analysis depend upon the
28 opinion or discretion of the judge or jury as to whether a larger or a
29 smaller amount should be allowed.**"

30 [bold added] *Prier*, at 33 [442 P.2d 621] (quoting C. McCormick, *Damages* §
31 54 (1935)).

32 Prejudgment interest awards are based on the principle that a
33 defendant "who retains money which he ought to pay to another should be
34 charged interest upon it." *Prier*, at 34 [442 P.2d 621]. The plaintiff should be
35 compensated for the "use value" of the money representing his damages for
36 the period of time from his loss to the date of judgment. *Mall Tool Co. v. Far
37 West Equip. Co.*, *supra* [45 Wash.2d] at 177 [273 P.2d 652]; *see also Grays
38 Harbor Cy. v. Bay City Lumber Co.*, 47 Wn.2d 879, 891, 289 P.2d 975
39 (1955). **A defendant should not, however, be required to pay**

1 **prejudgment interest in cases where he is unable to ascertain the amount**
2 **he owes to the plaintiff.** *Prier*, [74 Wash.2d] at 34 [442 P.2d 621]. *Accord,*
3 *Ferber v. Wisen*, 195 Wash. 603, 610, 82 P.2d 139 (1938); *Pearson Constr.*
4 *Corp. v. Intertherm, Inc.*, 18 Wn.App. 17, 20, 566 P.2d 575 (1977).

5 This court has consistently applied the liquidated-unliquidated analysis to
6 both contract and tort claims.

7 *Bailie*, 61 Wn. App. at 156-157, quoting *Hansen v. Rothaus*, 107 Wn.2d at 472-73 (bold
8 added). The court of appeals ruled that the \$175,000 was liquidated because it involved
9 non-payment of money of a fixed sum, not the reasonable value of services rendered:

10 In the present case, **Trend received a benefit in the form of money received.**
11 Trend had knowledge, through its sole stockholder Wosepka, that **\$175,000 of this**
12 **money was to be paid to the Bailies.** The Court of Appeals in *Bailie I* determined
13 that Trend's retention of this money was wrongful. **It was possible to compute with**
14 **exactness the amount retained by Trend which should have been paid to the**
15 **Bailies. As Judge Webster stated in *Bailie I*, neither Trend nor the Bailies could**
16 **dispute the fact that the amount was \$175,000.** Under these circumstances it was
17 error for the trial court to deny an award of prejudgment interest on this amount.

18 *Bailie*, 61 Wn. App. at 160 (bold added). "The Court of Appeals ruled in *Bailie I*
19 that the Bailies had been damaged in the amount of \$175,000, and that this had been the
20 agreed valuation of their "right to rescind." *Bailie*, 61 Wn. App. at 161.

21 Unlike *Bailie*, this case does not involve non-payment of a fixed sum of money
22 agreed to by the parties. More like *Noel v. Cole*, this case does involve a determination of
23 the benefit conferred by services rendered based on the reasonable value of those services to
24 FSS. As in *Noel*, any award of restitution for such services cannot be considered fixed or
25 liquidated since here a determination depends on the "**discretion of the judge or jury as to**
26 **whether a larger or a smaller amount should be allowed.**" *Bailie, supra, quoting Hansen*
27 *and Prier.*

28 Plaintiff's reliance on *Dautel v. Heritage Home Center, Inc.*, 89 Wn. App. 148, 948
29 P.2d 397 (1997) is misplaced. See Pltffs Trial Brief at 16-17. Although *Dautel* applies
30 *Hansen* and the other prejudgment cases cited in *Bailie Communications*, **it does not**

1 involve claims of unjust enrichment or quantum meruit. *Dautel* involved a former
2 sales employee's action to recover unpaid wages and commissions. As to unpaid
3 minimum wages, the Court ruled the sum was liquidated because the parties did not dispute
4 the hours worked, gross pay, amount and date of draws. On unpaid commissions, the issue
5 was whether the plaintiff was entitled to "her full commission rate of 20 percent," or only a
6 10 percent commission the employer admitted owing. The court of appeals ruled this
7 amount was also liquidated:

8 ...The trial court was able to enter the judgment without any exercise of discretion or
9 opinion regarding the amount due. Because the amounts owed to Dautel could be
10 determined exactly, without reliance on opinion or discretion, the claims were
11 liquidated, and thus an award of prejudgment interest is proper.

12 89 Wn. App. at 155. However much AS tries to analogize this case to *Dautel*, there is
13 insufficient information provided in *Dautel* that would indicate its similarity to this case.
14 *Dautel* involved no question of measuring the reasonable value of the plaintiff's services
15 rendered or the benefit conferred on the defendant. Since the Court ruled that no opinion or
16 discretion was involved, it appears to be a simple contract case of enforcing the express
17 agreement between the parties regarding the agreed commission owed on two disputed
18 transactions. Either the plaintiff's 20% figure or the defendant's 20% figure had to be
19 correct, and not any amount in between. This is materially different from the present case
20 where there is no express agreement between the parties as to price. Judge Rogers
21 dismissed AS's claims based on breach of contract and failure to pay or object to AS
22 invoices because there was no meeting of the minds regarding price and no acceptance by
23 silence or inaction. See Order Denying Pltffs Motion for Summary Judgment, dated June
24 14, 2013. With the only remaining claims involving the reasonable value of AS's services,
the Court must necessarily exercise its discretion to decide what is just and equitable. No
prejudgment interest can be awarded on such unliquidated matters.

1 **B. AS should not be awarded prejudgment interest on its quantum meruit claim**
2 **since damages are measured by the reasonable value of services rendered and**
3 **the amount of recovery, if any, depends on the trial court's opinion and**
4 **discretion on whether to award a larger or smaller amount of damages.**

5 “Pre-judgment interest is not allowable in a quantum meruit case.” *Irwin Concrete,*
6 *Inc. v. Sun Coast Properties, Inc.*, 33 Wn. App. 190, 200, 653 P.2d 1331 (1982); *Modern*
7 *Builders, Inc. v. Manke*, 27 Wn. App. 86, 96, 615 P.2d 1332 (1980) (“By its very nature, an
8 award of damages based upon quantum meruit is not liquidated and is not readily
9 ascertainable in the parties’ contract. Therefore, prejudgment interest may not be awarded
10 when a labor and materialmen’s lien is set by quantum meruit.”). Here, since quantum
11 meruit is “the method of recovering the reasonable value of services provided,” *Young v.*
12 *Young*, 164 Wn.2d at 485, the Court necessarily exercises its opinion and/or discretion to
13 award an amount it determines is fair compensation, which cannot be considered liquidated.

14 IV. CONCLUSION

15 The above is provided for the purpose of providing the applicable established
16 controlling legal precedent for prejudgment interest.

17 DATED this 26th day of June, 2013

18 *s/ Gregory A. McBroom*
19 Gregory A. McBroom, WSBA No. 33133
20 Livengood Fitzgerald & Alskog, PLLC
21 Attorneys for Def. Flight Serv. & Systems, Inc.

FILED

13 JUL 02 PM 3:05
Honorable Julie Spector
Thursday, July 11, 2013

NO ORAL ARGUMENT
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 12-2-01364-1 SEA

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

AIR SERV CORPORATION,

Plaintiff,

vs.

FLIGHT SERVICES & SYSTEMS, INC.

Defendant.

NO.: 12-2-01364-1 SEA

**MOTION TO STRIKE
DEFENDANT'S RESPONSE TO
PLAINTIFF'S CLAIM FOR
PREJUDGMENT INTEREST**

RELIEF REQUESTED

Plaintiff Air Serv Corporation respectfully requests the Court to strike Defendant's Response to Plaintiff's Claim for Prejudgment Interest (Dkt. 145) as it implicitly requests, without proper motion, the Court to reconsider its decision that pre-judgment interest applies to the damages to be awarded in this matter.

STATEMENT OF FACTS

At the conclusion of the trial, on June 25, 2013, the Court clearly explained that it had already decided that prejudgment interest was appropriate and would be applied to the damages to be awarded in this matter. The Court did not request further post-trial briefing on this issue at that time. However, defendant elected to provide post-trial briefing on this issue requesting the Court to reconsider its decision without a proper motion requesting such relief. See Dkt. 145. Although unclear whether the Court would even consider defendant's response, the Court informed plaintiff that if it had any

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IN THE SUPERIOR COURT FOR KING COUNTY, WASHINGTON

AIR SERV CORPORATION,

NO.: 12-2-01364-1 SEA

Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE**

vs.

PROPOSED

FLIGHT SERVICES & SYSTEMS, INC.

Defendant.

This matter comes before the Court on plaintiff Air Serv's Motion to Strike Defendant's Response to Plaintiff's Claim for Prejudgment Interest. The Court has considered plaintiff's motion, reply, if any, and supporting papers and defendant's opposition and supporting papers, if any.

Based on the above and the pleadings on file, the Court hereby ORDERS that plaintiff's motion is GRANTED. Defendant's Response to Plaintiff's Claim for Prejudgment Interest, Dkt. 145, is hereby stricken.

DATED this ____ day of July, 2013.

Judge Julie Spector
King County Superior Court

1 Presented by:

2 ROHDE & VAN KAMPEN PLLC

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5 Al Van Kampen, WSBA No. 13670

6 David Crowe, WSBA No. 43529

Attorneys for Plaintiff Air Serv Corporation

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FILED
KING COUNTY, WASHINGTON

JUL 11 2013

JBUENAFE
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT FOR KING COUNTY, WASHINGTON

AIR SERV CORPORATION,

NO.: 12-2-01364-1 SEA

Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE**

vs.

FLIGHT SERVICES & SYSTEMS, INC.

Defendant.

This matter comes before the Court on plaintiff Air Serv's Motion to Strike Defendant's Response to Plaintiff's Claim for Prejudgment Interest. The Court has considered plaintiff's motion, reply, if any, and supporting papers and defendant's opposition and supporting papers, if any.

Based on the above and the pleadings on file, the Court hereby ORDERS that plaintiff's motion is GRANTED. Defendant's Response to Plaintiff's Claim for Prejudgment Interest, Dkt. 145, is hereby stricken.

DATED this 11 day of July, 2013.



Judge Julie Spector
King County Superior Court

1 Presented by:

2 ROHDE & VAN KAMPEN PLLC

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5 Al Van Kampen, WSBA No. 13670
6 David Crowe, WSBA No. 43529
7 Attorneys for Plaintiff Air Serv Corporation

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FILED
KING COUNTY, WASHINGTON

JUL 30 2013

SUPERIOR COURT CLERK
BY JUAN C. BUENAFE
DEPUTY

SUPERIOR COURT OF WASHINGTON FOR COUNTY OF KING

AIR SERV CORPORATION,

Plaintiff,

NO. 12-2-01364-1 SEA

v.

FINDINGS OF FACT,
CONCLUSIONS OF LAW

FLIGHT SERVICES & SYSTEMS, INC.

Defendant.

THIS CASE came before the court on June 24, 2013 - June 25, 2013 and was presented to the bench. The issue for the court to determine was the reasonable value of services rendered by plaintiff to the defendant for use of its CBP certificate to clean/service Delta's international and domestic flights between May 28, 2011 through September 30, 2011. The plaintiff was represented by David Crowe and the defendant was represented by Gregory A. McBroom. Plaintiff called the following witnesses: Toan Nguyen, Tessie Ong, Gilbert W. Green and the defendant called John Kim, Tom Priola.

It is undisputed that plaintiff provided cleaning and/or supervision of cleaning 476

ORIGINAL



- 1 8. The court finds the testimony by Gilbert Green as highly credible. Mr. Green was told
2 that Air Serv would be paid in full, and he relied upon defendant's representation.
- 3 9. The court specifically finds Mr. Nguyen's testimony to be credible about the brief
4 telephone conversations he had with Robert P. Weitzel. FSS deliberately misled Air
5 Serv to believe it would be paid its reduced price of \$175 per flight.
- 6 10. Defendant failed to respond to many of the invoices sent. On September 20, 2011 Mr.
7 Robert A. Weitzel attempted to reconcile the amount owed and offered to pay Air
8 Serv \$3,343.90. Meanwhile, defendant never stopped using Air Serv's certificate,
9 never stopped utilizing the supervisory service and never stopped the indemnity
10 carried solely by plaintiff.
- 11
- 12 11. FSS admitted to owing Air Serv money for the services it provided and performed.
- 13 12. FSS's failure to provide information related to its costs and revenues was intentional.
- 14 13. FSS's contract with Delta provided FSS in excess of \$400,000 during the time Air
15 Serv allowed FSS to work as a subcontractor utilizing its federal certification.
- 16 14. FSS received \$77,730.50 in direct revenue due to Air Serv's actions during the period
17 of June through August 2011.
- 18 15. The fixed fees total \$77,439.09 on the invoices, which include the dates on which Air
19 Serv provided services to FSS.
- 20 16. Quantifying the undisputed services will be as follows: defendant will pay plaintiff
21 the reduced amount of \$175/flight or \$83,300 along with all associated attorney's fees
22 and costs under both theories of *quantum meruit* and unjust enrichment.
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APPENDIX C

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FILED

SEP 18 2013

**SUPERIOR COURT CLERK
GARY POVIL
SEATTLE**

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR KING COUNTY

AIR SERV CORPORATION,

Plaintiff,

vs.

FLIGHT SERVICES & SYSTEMS, INC.

Defendant.

NO. 12-2-01364-1 SEA

**ORDER APPROVING PLAINTIFF'S
ATTORNEY FEES AND COSTS AND
GRANTING PLAINTIFF'S MOTION
FOR SANCTIONS**

THIS MOTION came before the Court on plaintiff's motion for approval of the amount of its attorney fees and expenses and for additional sanctions. The Court considered the following:

1. Plaintiff's motion for approval of the amount of its attorney fees and expenses and for additional sanctions and supporting papers, including the Declaration of David Crowe in support of same;
2. Defendant's opposition memorandum and supporting papers; and
3. Plaintiff's memorandum in reply including papers filed therewith.

After consideration thereof, the Court FINDS that:

a. Defendant filed numerous documents with the Court that were not well grounded in fact, were filed without any reasonable investigation, and/or were filed in bad faith and for an improper purpose, including but not limited to Dkt. 16 (Declaration of Robert P.

Weitzel dated January 10, 2012), Dkt. 28 (Defendant's Response to Plaintiff's Motion to Order Approving Plaintiff's Attorney Fees and Costs And Granting Additional Sanctions - 1

ORIGINAL

Judge Julie A. Spector
King County Superior Court
516 3rd Ave
Seattle, WA 98104

1 Compel), Dkt. 29 (Declaration of Gregory McBroom dated March 15, 2013), Dkt. 30
2 (Declaration of Robert P. Weitzel dated January 10, 2012), Dkt. 46 Declaration of Gregory
3 McBroom dated May 9, 2013), Dkt. 90 (Declaration of Robert P. Weitzel dated June 3, 2013),
4 Dkt. 91 (Declaration of John Kim dated May 28, 2013) and Dkt. 134F (Defendant's Motion for
5 Protective Order to Permit Telephonic testimony, including declarations of Robert A. Weitzel
6 and Gregory McBroom in support thereof);

7 b. Defendant's numerous improper filings caused plaintiff to expend
8 extensive resources and incur unnecessary costs to refute patently false statements. The least
9 severe sanction that fulfills the purposes of CR 11 is to order defendant to reimburse plaintiff's
10 attorney fees and costs incurred throughout the course of this litigation and to apply additional
11 sanctions;

12 c. Defendant intentionally failed to comply with the Court's order dated
13 April 15, 2013. The least severe sanction that fulfills the purposes of CR 37(b) for defendant's
14 intentional disregard for this Court's order and to deter conduct is for defendant to be made to
15 pay plaintiff's attorney fees and costs incurred through the course of this litigation as well as
16 additional sanctions;

17 d. Defendant intentionally failed to be appropriately prepared for its CR
18 30(b)(6) deposition. The least severe sanction that the fulfills the purposes of CR 37(d) is for
19 defendant to pay plaintiff its attorney fees and costs associated with the deposition held on April
20 22, 2013, including time spent in preparation for the deposition, additional fees and costs
21 associated with attempting to continue the deposition, and expenses associated with the court
22 reporter during the deposition; defendant attempted to re-designate a witness as a 30 (b)(6)
23 witness during trial in violation of the discovery schedule and in violation of the local rules.

24 e. Defendant and its counsel intentionally certified discovery responses
25 which were unwarranted and substantially increased the cost of litigation. The least severe
26

1 sanction that fulfills the purposes of 26(g) is for defendant to pay plaintiff its attorney fees and
2 costs associated with discovery in this matter;

3 f. Defendant and its counsel intentionally filed declarations in support of its
4 motion for summary judgment which were made in bad faith. Given the Court's reliance on
5 these declarations in dismissing certain claims made by plaintiff, the least severe sanction that
6 fulfills the purposes of 56(g) is for defendant to pay plaintiff its attorney fees and costs associated
7 with the summary judgment motions filed in this matter and for defendant and its counsel to pay
8 additional sanctions;

9 g. Defendant and/or its counsel made misrepresentations to the Court during
10 trial. These misrepresentations, along with defendant's consistent failure to follow the local rules
11 of the Court, further demonstrated defendant's bad faith and efforts to disrupt litigation and
12 increase plaintiff's costs; this provides a basis for the Court to use its inherent power to impose
13 appropriate sanctions;

14 h. But for the Court including plaintiff's attorney fees and costs as part of the
15 remedy to make plaintiff whole in this matter under unjust enrichment and *quantum meruit* – a
16 remedy fashioned to do substantial justice and put an end to the litigation – the Court
17 alternatively awards all such attorney fees and costs due to defendant's and its counsel's
18 numerous violation of the rules of the Court including, but not limited to, CR 11, CR 26(g), CR
19 37(b) & (d), CR 56(g), and the Court's local rules; and

20 i. All fees and expenses are reasonable and were necessarily incurred.

21 Based on the foregoing findings, and all other evidence before the Court, the Court
22 GRANTS plaintiff's motion for approval of the amount of its attorneys' fees costs as terms and
23 HEREBY ORDERS:

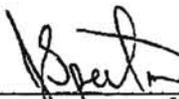
24 A. Plaintiff's attorney fees and costs in the amount of \$116,700.00 are
25 reasonable and appropriate for inclusion as terms. Under RCW 23B.13.310 (2), attorneys' fees
26 and costs appear to be fair and reasonable. The amount represents only the reasonable "lodestar"

1 amount actually incurred and/or paid by plaintiff to their attorneys based on the attorneys hourly
2 billing rates. The hourly rates charged plaintiff by their attorneys appear reasonable in
3 relationship to their backgrounds and the time spent appears reasonable in light of the nature and
4 extent of the litigation activities. Plaintiff should be reimbursed their requested attorneys' fees
5 under the statute.

6 Finally, the fees are calculated using the lodestar fee methodology. The lodestar fee is
7 calculated by multiplying the reasonable hourly rate by the reasonable number of hours incurred
8 in obtaining the successful result, may, in rate instances, be adjusted upward or downward at the
9 trial court's discretion. *Fetzer v Weeks*, 114 Wn.2d 109, 786 P.2d 265 (1990). In *Fetzer* and by
10 using the lodestar methodology provided this court with a clear and simple formula for deciding
11 the reasonableness of attorney fees in civil cases and gives the appellate court a clear record upon
12 which to decide if a fee decision was appropriately made. Under the lodestar methodology and
13 *Fetzer*, the party seeking fees bears the burden of proving the reasonableness of the fees.

14
15 C. Defendant's misconduct throughout the course of this litigation warrants
16 additional sanctions, above and beyond plaintiff's reasonable attorney fees and costs, in the
17 amount of \$35,000.00.
18

19 DATED this 17th day of September, 2013.
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23 _____
24 Honorable Julie Spector
25 King County Superior Court Judge
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