

64192-1

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No. 64192-1

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

TELEKENEX IXC, INC.,

Respondent/Plaintiff,

v.

CHARLOTTE RUSSE INCORPORATED,

Appellant/Defendant

RESPONDENT'S BRIEF

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I. INTRODUCTION

At all times, Telekenex IXC, Inc. (“IXC”) complied with the applicable Civil Rules in seeking the default judgment at issue in this appeal. Indeed, Defendant Charlotte Russe, Inc. (“Charlotte Russe”) can point to no violation of the Civil Rules in letter or spirit. Instead, Defendant seeks to have this Court imply rules of conduct upon IXC and its legal counsel that do not exist in the law in order to deflect the court’s attention from the unmistakable fact that this appeal would not be before the court had it not been for the inexcusable negligence on the part of the Defendant.

In December of 2004, AuBeta Networks Corporation (“AuBeta”) entered into a Master Services Agreement (“MSA”) with Charlotte Russe whereby AuBeta would provide certain telecommunication services to Charlotte Russe. Due to circumstances beyond its control, AuBeta Network had become significantly past due with its third party vendors and telecommunications carriers. In March, 2009, IXC entered into negotiations with AuBeta Networks to purchase the assets of AuBeta. In order to prevent the underlying carriers of AuBeta from shutting off telecommunications services to its customers—Charlotte Russe being one of them—IXC entered into modified contracts with AuBeta customers who were willing to make a long-term commitment to IXC. These

contracts were integral to the asset purchase between IXC and AuBeta and key to maintaining AuBeta's credit line with its secured lender, Silicon Valley Bank, so communication services would not be disrupted.

On March 30, 2009, IXC conducted a number of calls with Charlotte Russe's VP of Technology Giri Durbhakula, wherein it was explained that the underlying carriers would not transition circuits to IXC without a long-term commitment made by IXC to those carriers. Charlotte Russe signed an extension of the MSA ("Extension") with IXC on March 30, 2009, after modifications to the Extension were made by Mr. Durbhakula. During the month of May and in violation of their obligations to IXC under the Extension, Charlotte Russe began cancelling circuits that had been committed to by IXC.

IXC filed its complaint for breach of contract against Charlotte Russe on June 11, 2009. The summons and complaint were filed with the Court and were served on Charlotte Russe's Washington registered agent, Corporation Services Co., on June 12, 2009. The registered agent promptly sent the summons and complaint to Charlotte Russe where it was received and signed for in the mail room. Charlotte Russe does not dispute that it received actual and constructive service of the summons and complaint, that it was fully aware of the Washington lawsuit, and that it

never answered, entered a notice of appearance, emailed or called opposing counsel or otherwise acknowledged the Washington legal action.

Charlotte Russe offers no evidence or explanation as to how it failed to notice IXC's proper service of the summons and complaint saying only that the documents "appear to have been lost" and the error was "innocent" or "simply a mistake." However, just because the mistake was honest or innocent does not therefore make it excusable under Washington law.

Unbeknown to IXC, on June 4, 2009, Charlotte Russe filed suit against Telekenex, Inc. ("Telekenex") in San Diego County Superior Court for declaratory relief. Telekenex was served with the complaint in California on June 10, 2009. Despite the fact that IXC and Telekenex are distinct and separate legal entities, Charlotte Russe continues to assume and assert that Telekenex and IXC are one in the same citing only the word of its legal counsel and email signature line as evidence of this fact.

The reasons for this are clear. Charlotte Russe is attempting to argue that it made an "appearance" in the suit brought against it by IXC on June 11, 2009 in Washington. If this is true, the trial court has no discretion to deny Charlotte Russe's motion to vacate the default judgment as defendant was not given proper notice of the motion for default. In essence, defendant wants this court to believe that being a party to a

lawsuit in California, against Telekenex, a different entity, somehow constitutes an “appearance” for a lawsuit brought in Washington by IXC, a separate entity.

Finally, Charlotte Russe cannot at a matter of law establish that it entered into the Extension with IXC as a result of economic duress—its only defense. Under Washington law, to prove economic duress, the “victim” must show that the threat involved serious business loss in a situation so immediate as to render resolution in court impractical, and it must also prove that both the immediate pressure and the underlying vulnerability of the victim to such pressure were attributable to the offending party. Not only was defendant not in the position to suffer serious business loss, but more importantly, the pressure or “threat” asserted by defendant was not coming from IXC. The pending disconnect notices which defendant is claiming constitute the threat were made by the telecommunications carriers of AuBeta, the company IXC was in negotiations to purchase. IXC negotiated with these carriers, together with Charlotte Russe, in an attempt to reach an agreement by which the pending disconnections would be avoided. IXC simply informed Charlotte Russe of the terms of the contract required by the carriers in order to avoid the disconnection. IXC issued no threats. While the negotiations certainly happened quickly and over a short period of time, a

contract is not voidable for duress solely because it was made in a stressful situation.

Charlotte Russe also makes much of the fact that counsel for IXC, in addition to properly serving Charlotte Russe as required by Washington law, could have tracked down Charlotte Russe's attorneys to verify receipt of service of the summons and complaint. A duty not imposed by law or the rules. However, it admits that it fully was aware of the Washington lawsuit and having dismissed it as "forum shopping" simply did not respond to it. It also makes no mention that it had all the contact information of IXC's Washington counsel, yet made not one single phone call, sent no letter or email, and made no effort to secure Washington counsel. Simply put, IXC followed the rules and Charlotte Russe ignored them.

II. STATEMENT OF THE CASE

A. Telekenex, Inc. is a distinct and separate entity from Telekenex IXC, Inc.

Telekenex, Inc. ("Telekenex") is a public utility company in the state of California, regulated by the California Public Utilities Commission and headquartered in San Francisco, California. CP 253 ¶ 2, 254 ¶ 5. IXC is an unregulated entity and headquartered in Seattle, Washington. CP 253 ¶ 2, 254 ¶ 5. Telekenex and IXC are separate

corporations, with different ownership structures, employee medical plans, payroll, insurance, accounting systems, banking relationships and accounts. CP 253 ¶ 3. IXC is merely an affiliate of Telekenex. Telekenex provides IXC wholesale connectivity solutions, sales and marketing and public relations services. IXC licenses the Telekenex name for sales and marketing purposes and for this reason there is only one website at *www.telekenex.com*. Within the website, the press releases are specific to which company is being discussed. CP 254 ¶ 4. IXC and Telekenex separately contract with outside legal counsel and the two companies do not regularly communicate about independent legal issues. CP 253 ¶ 4, 254 ¶ 7.

B. Telekenex IXC, Inc. purchases assets of AuBeta and separately contracts with Charlotte Russe.

On March 18, 2009, IXC entered into negotiations with AuBeta Networks regarding a purchase of the assets of AuBeta. CP 254 ¶ 8. Charlotte Russe, a customer of AuBeta, is a mall-based retailer of women's clothing, with more than 500 stores in the United States. CP 88 ¶ 1. From late 2004 until the spring of 2009, AuBeta provided telecommunications services to more than 200 Charlotte Russe stores. CP 129-3 ¶ 2-3. On March 18, 2009, IXC issued a press release regarding the asset purchase of AuBeta where it advised all the customers of AuBeta

“to promptly contact the Telekenex IXC Transition Team as soon as possible to avoid potential service disruption to their existing service.”

CP 254 ¶¶ 8-9, 272-75.

AuBeta Networks had fallen on hard times due to the tragic and unexpected death of their founder and CEO in an airplane crash, the credit crisis, and the general effects of a global recession. CP 254 ¶ 8. AuBeta Network had become significantly past due with their vendors and carriers when their senior secured lender, Silicon Valley Bank, froze their credit line. *Id.* As it was a matter of only days before the entire business would collapse and all the customers’ networks went completely dark, IXC, AuBeta and Silicon Valley Bank worked quickly to try to figure out a deal structure that would make it possible to pay the bank back, save the jobs of the AuBeta employees and provide continuity of service to AuBeta customers. *Id.* A key piece of the puzzle was to discuss the situation with the customer base and specific contractual arrangements that needed to be made to make this a smooth transition. *Id.*

On March 27, 2009, IXC formalized an Asset Purchase Agreement with AuBeta, to purchase specific AuBeta assets. CP 254 ¶ 10, 276. On that same day, IXC issued a second press release advising all customers of AuBeta that IXC is requiring AuBeta customers to extend their contractual term due to the contractual commitment IXC is required to make to the

underlying carriers of AuBeta. CP 254 ¶¶ 10-11. IXC did not assume all the contracts of AuBeta, but entered into modified contracts with the customers who were willing to make a long-term commitment to IXC. CP 254 ¶ 12. However, the Asset Purchase Agreement, negotiated in part with Silicon Valley Bank, specifically stipulated that IXC would only acquire from AuBeta “each of the customer relationships with customers of Seller (“Seller Customers”) designated by Purchaser (subject to such Seller Customers entering into service agreements with Purchaser in form and substance satisfactory to Purchaser).” CP 255 ¶ 13-14, 278.

At the time of the Asset Purchase Agreement, AuBeta was significantly past due with its underlying telecommunications carriers. CP 256 ¶ 23. These carriers had sent disconnect notices to AuBeta because of the past due amounts on the AuBeta accounts. These carriers would keep these circuits up and running and transfer them to IXC only if the past due balances were satisfied. CP 256 ¶¶ 23-24, 331-36. This required IXC to make term commitments or payments for the circuits it wished to keep, including a 24 months term with Covad (valued at \$2.5 Million) and \$ 950,000 in payments to Qwest and AT&T. CP 256 ¶ 24, 331-36.

Contrary to statements of Appellant, IXC did not threaten to shut off Charlotte Russe circuits. CP 256 ¶ 26. IXC communicated that it could

not guarantee that the underlying carriers would not shut Charlotte Russe off if IXC did not agree to the carriers' terms and take ownership of the circuits. *Id.* Had IXC not intervened, Charlotte Russe's circuits would have been disconnected. *Id.* By entering into the Extension with Charlotte Russe and assuming the MSA, IXC was able to make commitments to prevent those circuits from being shut down. *Id.*

On March 30, 2009, representatives of IXC conducted a number of calls with Charlotte Russe's VP of Technology Giri Durbhakula, wherein it was explained that the underlying carriers would not transition circuits to IXC without a long term commitment made by IXC to those carriers. CP 255 ¶ 15. It was further explained that if IXC did not make such a commitment, services to Charlotte Russe would be terminated by those carriers. CP 255 ¶ 15. That same day, IXC forwarded a contract amendment and Extension to Giri Durbhakula. CP 255 ¶ 16, 296-98. Mr. Durbhakula revised the Extension from 36 months to 24 months, made other modifications, and returned the modified and final copy that he had executed. CP 255 ¶ 16. On that same day, IXC assumed Charlotte Russe's MSA in reliance on the Extension. CP 255 ¶ 17, 301-13. IXC would not have assumed the MSA without such an Extension, which was explained to Charlotte Russe at the time the Extension was signed. CP 255 ¶ 17.

It is commonly known in the Information Technology world that companies, such as Charlotte Russe, will have primary and secondary data connections for credit card processing to retail store locations. CP 255 ¶ 18, 314-15. While Charlotte Russe used primarily DSL connections from AuBeta/IXC to process credit card transactions, they also purchased analog modems from AuBeta as a backup credit card processing solution. CP 255 ¶ 20. Charlotte Russe also has analog telephone lines at each location through the local exchange carrier that could be used for emergency analog back-up credit processing. CP 255-56 ¶ 20. Several AuBeta customers decided not to sign up with IXC and installed alternative solutions while using their backup solution. *Id.* This was a reasonable and viable option for Charlotte Russe instead of fraudulently entering into a legal contract with IXC. *Id.* Alternatively, Charlotte Russe could have sought a temporary restraining order against the underlying carriers to prevent the deactivation of services.

Charlotte Russe signed the Extension on March 30, 2009, and did not communicate that it viewed the Extension as unenforceable until May 28, 2009, nearly 60 days later. CP 256-57 ¶ 27. In the mean time, on several occasions, IXC reached out to Charlotte Russe to arrange a personal meeting which was not granted until the end of May. *Id.* During the month of May, and unbeknown to IXC and in violation of the

Extension, Charlotte Russe began cancelling circuits that had been committed to by IXC. *Id.*

Charlotte Russe's breach of the Extension has caused significant financial harm to IXC. IXC relied on this Extension to make long-term commitments to support such a contract. CP 256 ¶ 21. IXC made commitments to Silicon Valley Bank, on the same day that it entered into the Extension with Charlotte Russe and the Assignment with AuBeta, with the knowledge that revenue from the Charlotte Russe Extension would help pay for such commitments. CP 256 ¶ 22, 316-27. As of June 2, 2009, Charlotte Russe unilaterally terminated all services under the MSA and communicated that it would not pay the early termination charges required under the MSA. *Id.*

IXC filed its complaint for breach of contract against Charlotte Russe on June 11, 2009, and service was made on Charlotte Russe's Washington registered agent on June 12, 2009.¹ CP 25 ¶ 2, 28-29. Charlotte Russe conducts business in the State of Washington and in King County. CP 25 ¶ 3. To date, Charlotte Russe has not answered the

¹ Defendant insists that IXC's summons and complaint was filed "immediately after" Charlotte Russe filed its claim in California in an "apparent attempt to forum shop." However, Telekenex was served with the California complaint on June 10, 2009, CP 95-96, and while IXC's complaint was filed on June 11, 2009, the document was signed by counsel for IXC on June 9, 2009. CP 2. IXC and counsel for IXC therefore did not know of the California complaint filed by Charlotte Russe prior to filing the Washington complaint.

complaint. Counsel for Charlotte Russe first contacted counsel for plaintiff on July 25, 2009. CP 217 ¶ 2. Prior to that, Charlotte Russe had made no acknowledgment of the Washington action pending against it to counsel for plaintiff. *Id.*

III. ARGUMENT

A motion to vacate an order of default or a default judgment is within the sound discretion of the trial court. *Seek Systems, Inc. v. Lincoln Moving/Global Van Lines, Inc.*, 63 Wash. App. 266, 271, 818 P.2d 618 (1991); *Lindgren v. Lindgren*, 58 Wash. App. 588, 595, 794 P.2d 526 (1990), *review denied*, 116 Wn.2d 1009, 805 P.2d 813 (1991). The trial court's decision will not be reversed on appeal unless it plainly appears that the trial court abused its discretion. *Lindgren*, 58 Wash. App. at 595. Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. *Id.* "[T]he discretionary judgment of a trial court of whether to vacate [an order] is a decision upon which reasonable minds can sometimes differ." *Lindgren*, 58 Wash. App. at 595. Thus, if the decision "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Id.*

However, trial courts have no discretion to refuse a motion to vacate a default judgment where the defendant is not in default. *Tiffin v.*

Hendricks, 44 Wn.2d 837, 847, 271 P.2d 683, 688 (1954). CR 55(a)(3) states that “[a]ny party who has appeared in the action for any purpose shall be served with a written notice of motion for default and the supporting affidavit at least 5 days before the hearing on the motion.” If a party’s action constitutes an “appearance,” they are entitled to notice of a default hearing and, if no notice is given or received, they are entitled to have the judgment set aside without further inquiry as the party cannot be said to be in default. *Morin v. Burris*, 160 Wn.2d 745, 754, 161 P.3d 956, 961 (2007); *Tiffin*, 44 Wn.2d at 847. But, if the party has not appeared, CR 55(a)(3) further provides that the party “is not entitled to a notice of the motion.”

As will be shown, the trial court’s decision must be sustained as (1) the defendant failed to appear in the suit in accordance with CR 55(a)(3) so the denial of the motion to vacate the default judgment was proper, and (2) the trial court acted within its discretionary judgment when it refused to set aside the default judgment.

A. The defendant failed to appear in the suit in accordance with CR 55(a)(3) so the denial of the motion to vacate a default judgment was proper.

This Court should sustain the default judgment as well as the denial of defendant’s motion to vacate the default judgment because

Charlotte Russe failed to appear in the action. Because the defendant failed to appear in the action, the entry of the default was proper under CR 55(a)(1) which states “[w]hen a party against whom a judgment for affirmative relief is sought has failed to appear, plead, or otherwise defend as provided by these rules and that fact is made to appear by motion and affidavit, a motion for default may be made.” Rule CR 55(a)(3) further provides that “[a]ny party who has appeared in the action for any purpose shall be served with a written notice of motion for default” and “[a]ny party who has not appeared before the motion for default and supporting affidavit are filed, is not entitled to a notice of the motion.”

This court is asked to review whether the trial courts granting of plaintiff’s motion for default was proper under CR 55(a) and specifically, if defendant Charlotte Russe “appeared” in court as defined by the rule.

This court reviews *de novo* questions of law, including whether, on undisputed facts, appearance has been established as a matter of law.

Rosander v. Nightrunner Transport, Ltd., 147 Win.App. 392, 399, 196 P.3d 956 (2007); *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). However, “[d]eterminations of when a party has or has not made an informal appearance are dependent on the specific facts of each case and will rarely be susceptible to determination as a matter of

law.” *Profl Marine v. Certain Underwriters*, 118 Wn. App. 694, 710, 77 P.3d 658, 667 (2003).

While some actions may be insufficient as a matter of law to constitute an appearance, the question of whether actions are sufficient to constitute an informal appearance will generally be a question of fact to be determined by the trial court. In reviewing such a determination, we will not substitute our judgment for that of the trial court.

Colacurcio v. Burger, 110 Wn. App. 488, 497, 41 P.3d 506 (2002), *review denied*, 148 Wn.2d 1003, 60 P.3d 1211 (2003).

Plaintiff argues that under Washington law, Charlotte Russe did not appear. Defendant correctly points out that a party need not file anything in court in order to appear in an action, *Tiffin*, 44 Wn.2d at 842, nor is the defendant required to serve a formal notice of appearance. However, “while a party need not appear formally by, for instance, filing an answer, it must appear *in court* in some way.” *Rosander*, 147 Win.App.at 399. Specifically, “defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*.” *Morin*, 106 Wn.2d at 756.

Charlotte Russe did not “appear” in the action because it did not acknowledge that the dispute existed in court. Counsel for Charlotte Russe first contacted counsel for plaintiff IXC on July 25, 2009, a full

twenty (20) days after the trial court granted plaintiff's motion for default judgment on July 9, 2009. *See* CP 217, ¶ 2, CP 125-6, ¶¶ 5-7.

In an attempt to obscure the admitted fact that defendant made no appearance and did not have any contact with IXC or counsel for IXC until twenty (20) days after the default judgment was granted, Charlotte Russe asks this Court to imply "appearance" through its actions in a separate lawsuit, in a different state, against a different party, with different attorneys. Charlotte Russe filed suit against Telekenex in California Superior Court on June 4, 2009, not IXC.

As stated in *Morin*, a "mere intent to defend, whether shown before or after a case is filed, is not enough; the defendant must go beyond merely acknowledging that a *dispute* exists and instead acknowledge that a dispute exists *in court*." 160 Wn.2d. at 756 (emphasis in original). The court in *Morin* specifically held that "parties cannot substantially comply with the appearance rules through prelitigation contacts." 160 Wn.2d. at 757.

But litigation is inherently formal. All parties are burdened by formal time limits and procedures. Complaints must be served and filed timely and in accordance with the rules, as must appearances, answers, subpoenas, and notices of appeal. Each has its purpose, and each purpose is served with a certain amount of formality monitored by judicial oversight to ensure fairness.

Morin, 160 Wn.2d. at 757.

Charlotte Russe continues to insist that it “acknowledged” the Washington lawsuit filed by IXC by referencing it in its lawsuit against Telekenex in California. Despite the fact that its “intentions” were only discussed in a different lawsuit, in a different state, against a different party, Charlotte Russe maintains this was an appearance under Washington law. However, its purported intent to defend in Washington was never communicated to IXC or counsel for IXC prior to the entry of the default judgment at issue in this case. Moreover, Charlotte Russe cannot cite a single case or other authority in Washington that stands for the proposition that suing a related party in another state constitutes an appearance in Washington. Instead, it attempts to create a new affirmative duty on the part of a plaintiff to track down unresponsive defendants, before seeking default. Such a requirement would be inequitable, rewarding unresponsive defendants and punishing plaintiffs who comply with their legal service obligations.

In a further effort to show “substantial compliance,” *see State ex rel. Trickel v. Superior Court*, 52 Wash. 13, 100 P. 155 (1909), defendant cites a number of cases where the court was asked to determine if a set of facts constituted an “appearance” under the rules regarding default judgments. However, none of the cases cited by defendant stand for the proposition that “appearance” is satisfied, as defined under CR 55(a),

when defendant files a lawsuit against a separate party, in a separate state and has no contact with plaintiff or plaintiff's counsel. In fact, in each of the cases, there was direct correspondence between the parties.² And while some of the cases cited by defendant involve implying an "appearance" from the actions in a different case, the cases still involved the same parties, in the same state and involved related issues.³

In reviewing the facts of the present case, the trial court found that defendant failed to demonstrate a single email, phone call or letter to plaintiff indicating its intention to defend the action filed by IXC on June 11, 2009. CP 239. Given these undisputed facts, the court held that

² *Tiffin*, 44 Wn.2d at 844 (held that plaintiffs' attorney receipt of a written notice of appearance from counsel for defendant was an "appearance" despite the fact that the defendant's counsel withdrew from representation twice); *Sacotte Constr., Inc. v. Nat'l Fire & Marine Ins. Co.*, 143 Wn. App. 410, 416, 177 P.3d 1147 (2008) (held that a phone call to counsel for plaintiff made after the complaint was filed specifically to avoid default without notice was an "appearance"); *Shreve v. Chamberlin*, 66 Wn. App. 728, 732-33, 832 P.2d 1355 (1992) (court held that defendant's timely answer of five (5) previous writs constituted an "appearance" in the action for purposes of the sixth); *Skilcraft*, 72 Wn. App. at 46 (court found an appearance on the part of the defendant where the defendant's primary contractor, but not the defendant, filed a notice of appearance in the lawsuit); *Trickel*, 52 Wash. at 15 (held that the service of interrogatories on the opposing party constituted an appearance).

³ *Gage v. Boeing Co.*, 55 Wn. App. 157, 163-64, 776 P.2d 991 (1989) (appearance was found where the defendant had contested all of the plaintiff's claims at the administrative level); *City of Des Moines v. \$81,231 in United States Currency*, 87 Wn. App. 689, 697, 943 P.2d 669 (1997) (held that the commencement of a separate forfeiture action constituted an appearance); *Civic Ctr. Square v. Ford (In re Roxford Foods)*, 12 F.3d 875,881 (9th Cir. Cal. 1993) (defendant's contacts with plaintiff in a related bankruptcy action were held to be an appearance); *Turner v. Salvatierra*, 580 F.2d 199, 201 (5th Cir. Fla. 1978) (defendant filed an answer and affirmative defenses and deposed prospective witnesses in connection with plaintiffs' first complaint but not the re-filled second complaint); *Press v. Forest Laboratories, Inc.*, 45 F.R.D. 354, 355-57 (D.N.Y. 1968) (appearance in one dispute constituted an appearance in another where the disputes were related, ongoing and involved the same parties and where plaintiff's attorney wrote defendants' attorney regarding settlement of the entire matter and served on them notices of taking depositions and interrogatories).

defendant failed to “appear” in the action and entry of the default judgment was therefore justified. *Id.* Defendant wishes to annex its actions in the California suit to the facts in this case. However, it remains undisputed that defendant never communicated with IXC or to counsel for IXC prior to the entry of the default judgment. As succinctly pointed out in *Morin*, “[p]arties formally served by a summons and complaint must respond to the summons and complain or suffer the consequences of a default judgment.” 160 Wn.2d. at 757.

B. The trial court acted within its discretionary judgment when it refused to set aside the default judgment.

This Court should sustain the decision of the trial court in denying defendant’s motion to vacate the default judgment because the decision was squarely within the discretionary judgment of the court. “Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable.” *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn.App. 93, 97, 900 P.2d 595, 597 (1995); *Lindgren*, 58 Wash. App. at 595. The findings of the trial court were based on the undisputed facts of the case and its decision was reasonable and justified.

Under CR 60(b), the requirements for setting aside a default judgment are: (1) That there is substantial evidence extant to support, at

least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party. *White v. Holm*, 73 Wn.2d 348, 352, 438 P.2d 581, 584 (1968). The first two factors being the primary factors which must be shown by the moving party. *Id.* As the plaintiff believes the two primary factors are dispositive of the case, they are discussed in detail below.

1. Charlotte Russe has no defense to this action.

Charlotte Russe entered into a negotiated Extension with IXC on March 30, 2009. CP 200 ¶ 16. It began unilaterally terminating services under that Extension two month later and completely terminated services under that Extension by the end of July. CP 201-02 ¶ 27. It now claims by way of defense to its clear breach that it entered into the Extension under economic duress. However, in Washington, to prove economic duress, or “business compulsion,” the threat must involve serious business loss⁴ in a situation so immediate as to render resolution in court impractical, and the

⁴ It is questionable to argue that interruption of credit card processing by DSL is a “serious business loss” where Charlotte Russe had a backup system in place. CP 200-01 ¶ 20.

“victim” must prove that both the immediate pressure and the underlying vulnerability of the victim to such pressure were attributable to the offending party. *Nord v. Eastside Asso*, 34 Wn. App. 796, 664 P.2d 4 (1983); *Barker v. Walter Hogan Enters*, 23 Wn. App. 450, 596 P.2d 1359 (1979). In this jurisdiction, the doctrine of business compulsion based on the theory of potentially serious business loss imposed by oppressive conduct can be successfully invoked only if the “victim” can prove both that the offending party applied the immediate pressure and also that it caused or contributed to the underlying circumstances which led to the victim's vulnerability. *Barker*, 23 Wn.App. at 453. In the present case, this test simply cannot be satisfied by Charlotte Russe.

The immediate pressure was caused by the underlying carriers who provided services to AuBeta for resale. CP 201 ¶ 23, 314-15. These carriers caused the underlying circumstances, not IXC. Indeed, IXC was upfront about the issues and the causes advising AuBeta customer to **“promptly contact the Telekenex IXC Transition Team as soon as possible to avoid potential service disruption to their existing service.”** CP 199 ¶ 9. IXC explained to potential customers the circumstances under which it could assist them (“Telekenex IXC is requiring AuBeta customers to extend their contractual term due to the contractual commitment Telekenex IXC is required to make to AuBeta’s underlying carriers.” CP

199 ¶ 11.) Although it may be true that the situation underlying Charlotte Russe's execution of the Extension may have been stressful and unsatisfactory for its IT department, a contract is not voidable solely because it was made under stress. *Nord*, 34 Wn.app at 798.

The only Washington⁵ authority regarding economic duress cited by Charlotte Russe to support its duress defense supports Plaintiff's position. In *Puget Sound Power & Light Co. v. Shulman*, the Supreme Court upheld the trial court's finding refusing to invalidate a contract under the doctrine of business compulsion, holding that:

In order to substantiate the allegation of economic duress or business compulsion, the moving party must go beyond the mere showing of a reluctance to accept and of financial embarrassment. There must be a showing of acts on the part of the non-moving party which produced these two factors [immediate pressure and that it caused or contributed to the underlying circumstances which led to the victim's vulnerability]. *The assertion of duress must be proven by evidence that the duress resulted from defendant's wrongful and oppressive conduct and not by plaintiff's necessities.*

The mere fact that a contract is entered into under stress of pecuniary necessity does not constitute business compulsion.

Puget Sound Power & Light Co. v. Shulman, 84 Wn.2d 433, 443, 526 P.2d 1210, 1216 (1974) (emphasis added).

In a very similar factual situation to the one before this Court, the Supreme Court in *Shulman* affirmed the trial court's findings that the

⁵ Section 18 of the MSA states that the Agreement and the Services provided thereunder will be governed and interpreted in accordance with the laws of Washington.

moving party had breached the contract when it refused to pay the liquidated damages provision for early termination under the contract. 84 Wn.2d at 443. This is precisely the sort of contractual terms that Plaintiff seeks to enforce.

IXC provided an opportunity to Charlotte Russe to avoid a negative consequence in its dealings with a third party. Telekenex had nothing to do with those circumstances. Charlotte Russe took advantage of IXC's offer of assistance by entering into an agreement with IXC (the Extension.) IXC relied on the Extension to enter into long term commitments with Charlotte Russe's underlying carriers. Now, IXC is in the position of paying for services on behalf of Charlotte Russe, while Charlotte Russe claims no responsibility for those charges. Such a result is patently unfair and causes a substantial hardship to IXC.

The trial court's decision that defendant could not present any reasonable interpretation of facts that would demonstrate economic duress was squarely within its discretionary judgment. Its decision was not manifestly unreasonable.

2. Charlotte Russe's failure to answer summons and complaint was not due to excusable neglect.

While the law requires that trial courts review *prima facie* defenses in light most favorable to the defendant, the trial court has broad discretion

over the issue of excusable neglect and may make credibility determinations and weigh facts in order to resolve it. *Rosander*, 147 Win. App. at 406; *See Johnson v. Cash Store*, 116 Wn. App. 833, 847-49, 68 P.3d 1099 (upholding trial court's holding that neglect was inexcusable base on credibility determination and weight of evidence), *review denied*, 150 Wn.2d 1020 (2003). Courts determine excusable neglect on a case-by-case basis. *Rosander*, 147 Win. App. at 406; *Gutz v. Johnson*, 128 Wn. App. 901, 918-19, 117 P.3d 390 (2005).

In *Prest*, a summons and complaint was served on defendant's commissioner who then sent a copy of the complaint to the general counsel for defendant. 79 Wn. App. at 95. The general counsel had been assigned to a new position prior to service being made so the complaint was never forwarded to the proper person. *Prest*, 79 Wn. App. at 96. Defendant asserted that it had unintentionally "mislaid" the complaint and that such neglect was excusable. *Prest*, 79 Wn. App. at 100. The court disagreed and held that defendant's failure to forward the summons and complaint to the proper personnel in time was not excusable. *Id.*

Similarly, defendant Charlotte Russe "mislaid" the summons and complaint filed by IXC. Plaintiff properly served its complaint on defendant's designated registered agent who promptly sent the summons and complaint to Charlotte Russe where it was received and signed for in

the mail room. Identical to *Prest*, defendant's failure to respond properly to a served summons and complaint was due to a breakdown in internal office procedure.

“Judicial decisions have repeatedly held that if a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable.” *TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 165 P.3d 1271 (2007). “This rule applies with equal force to a company's receipt of properly sent notice.” *Rosander*, 147 Win.App.at 407. “If a company fails to respond to a complaint because someone other than general counsel accepted service of process and then neglected to forward the complaint, the company's failure to respond is deemed due to inexcusable neglect. *Johnson v. Cash Store*, 116 Wn. App. 833, 848, 68 P.3d 1099 (2003); *see also Beckman v. Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 11 P.3d 313 (2000) (neglect in failing to institute office management procedures to “catch” administrative errors was inexcusable); *B&J Roofing, Inc. v. Board of Indus. Ins. Appeals*, 66 Wn. App. 871, 832 P.2d 1386 (1992) (excusable neglect does not include “secretarial error” for mailing a petition for review to the wrong address).

While defendant categorizes their loss of the summons and complaint as an “innocent mistake,” “simply a mistake,” and “inadvertent

failure,” the fact remains that the neglect was due to a breakdown of internal office procedure and therefore is not excusable. Defendant cites *Showalter*, 124 Win. App. at 514, where an internal miscommunication resulted in the “loss” of a summons, as supportive of their argument that defendant’s actions constituted an excusable neglect. However, the court in *PETCO* specifically distinguished the facts in *Showalter* and went on to say “the [court in Showalter’s] decision finding that the trial court did not abuse its discretion does not necessarily indicate that the trial court would have abused its discretion by denying a motion to vacate under similar circumstance.” 140 W. App. at 213. Here, the trial court acted well within its broad discretion in making credibility determinations over the issue of excusable neglect. Its decision was certainly not “manifestly unreasonable” and should therefore not be overturned.

IV. CONCLUSION

For all the foregoing reasons, this Court should sustain the trial court’s default judgment together with its denial of defendant’s motion to vacate that judgment as the judgment was well within the sound discretion of the trial court.

CERTIFICATE OF SERVICE

The undersigned certifies that on December 16, 2009, I caused a true and correct copy of the foregoing document, together with one (1) copy to be filed with the Court of Appeals, Division One and caused true and correct copies of the same documents to be served via messenger on the following party:

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Dated this 16th day of December, 2009 at Seattle, Washington.



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