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NO. 36151-5

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY
BY *[Signature]*

UNIFUND CCR PARTNERS,

Plaintiff/Respondent,

v.

JIM AYHAN

Defendant/Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant Jim Ayhan (“Ayhan”), a *pro se*, appeals the entry of summary judgment on a delinquent Providian credit card account that has been purchased by Plaintiff/Respondent. CP 177-178. Ayhan challenges the judgment in his brief contesting the sufficiency of the proof of his debt and finding error in the Trial Courts consideration of the pleadings considered prior to entry of Summary Judgment.

Contrary to Ayhan’s conclusory statements, the Trial Court did not err in granting Summary Judgment and, accordingly, should be affirmed.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court did not err in granting Summary Judgment in favor of the Plaintiff where Plaintiff had set forth a prima facie case and there were no material issues in dispute, making defendant’s motions (Motion to Dismiss 41(b), Motion to Strike Affidavits and Declarations of Plaintiff CR 56(e); Motion to Compel Discovery CR 37(a); Motion for Denial of Summary Judgment, or Continuance until Plaintiff Complies with Discovery and Disclosure, CR 56(f); or Motion for Findings of Fact and Conclusions of Law) moot.

2. The trial court did not err in its consideration of all facts and reasonable inferences submitted by the parties.

1
2 3. The trial court did not err in entering Summary Judgment in a
3 case in which a jury demand had been made where there were no material
4 facts at issue.

5 4 – 7. The trial court did not err in granting Plaintiff's motion for
6 Summary Judgment where no material facts were at issue, notwithstanding
7 Defendants motions (Motion to Dismiss 41(b), Motion to Strike Affidavits
8 and Declarations of Plaintiff CR 56(e); Motion to Compel Discovery CR
9 37(a); Motion for Denial of Summary Judgment, or Continuance until
10 Plaintiff Complies with Discovery and Disclosure, CR 56(f); or Motion
11 for Findings of Fact and Conclusions of Law).

12 8. The trial court did not err in awarding attorney fees to plaintiff
13 pursuant to the credit card agreement and which were reasonable and
14 based on the declaration of counsel.

15 9. The trial court did not err in granting Plaintiff's motion for
16 Summary Judgment where no material issues of fact existed.

17 10. The trial court did not err in deeming admitted Plaintiff's
18 Request for Admissions where Defendant failed to deny the Requests for
19 Admission.

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23 **III. STATEMENT OF THE CASE**

24 Plaintiff initiated suit against Ayhan in an effort to collect on a
25 delinquent credit card account by service of the Summons and Complaint
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2 upon the Appellant, Jim I. Ayhan, on June 17, 2005. CP 7. Having
3 received no response (either telephonic or written) or Answer from the
4 defendant, plaintiff made a Motion for Default Judgment on July 19, 2005.
5 CP 8-14. Judgment was entered on July 20, 2005. CP 15-16.

6
7 Ayhan then attempted to collect upon its judgment by issuing a
8 garnishment and conducting a Supplemental Proceedings examination.
9 CP 17-27. After filing multiple motions to set aside judgment and
10 dismiss improperly, and without show cause hearing, the court set a show
11 cause hearing for the defendant on January 20, 2007. CP 28-47, 54.
12 Plaintiff agreed to voluntarily vacate judgment but opposed dismissal of
13 the case. CP 60-61. An order granting Defendant's Motion to Vacate
14 Judgment was entered February 24, 2006. CP 65.

15
16 Because Defendant did not file an answer to the complaint,
17 Plaintiff noted a second motion for Default Judgment on March 16, 2006.
18 CP 66-91. Defendant filed his "Answer to Complaint and Counter-Motion
19 for Findings and Conclusions on Order Vacating Default Judgment" on
20 March 21, 2006; setting a hearing date of March 31, 2006. CP 92.
21 Because an answer had been filed, Plaintiff struck its motion for Default
22 Judgment.
23

24 Unifund filed a motion for summary judgment on or about May 16,
25 2006, noting a hearing for July 7, 2006. CP 107-130. The hearing was
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2 stricken because it was not confirmed. CP 138. Unifund re-noted the
3 motion on July 13, 2006, setting a hearing date of September 1, 2007. CP
4 139. Unifund's motion was supported by a declaration of Autumn
5 Hopkins that confirmed a debt of \$8064.70 with interest accruing at a rate
6 of 11.9900%, a copy of the credit card agreement and billing statements
7 for the account. Defendant filed a response to the Summary Judgment
8 motion on July 3, 2006. CP 132. Defendant also filed a Motion to
9 Compel on August 29, 2006. CP 148. Plaintiff responded to Defendant's
10 motion on August 29, 2006, requesting the court deny the motion based on
11 Defendant's failure to serve discovery and failure to conduct a CR 26(i)
12 conference. CP 148-153. Judge Laurie found there was a material issue of
13 fact regarding the balance owing on the account, due to the different
14 balances stated on the original creditor's billing statements, the Unifund
15 Billing Statement and the Affidavit of the Unifund Representative. CP
16 156-157. Defendant's motion to compel was denied because defendant
17 had not complied with the requirements of CR 26(i). CP 155.

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19
20 Plaintiff noted its second motion for Summary Judgment on
21 February 1, 2007, setting a hearing date of March 2, 2007. CP 166-213.
22 Plaintiff's motion was supported by an amended affidavit of Autumn
23 Hopkins with attached billing statements, credit card agreement and Bill
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2 of Sale, Request for Admissions to Defendant, Interrogatories and Request
3 for Production. CP 166-213.

4 Defendant filed a "Second Answer to Complaint and Counter-
5 Motion for Findings and Conclusions on Order Vacating Default
6 Judgment", "Response to Second Motion for Summary Judgment",
7 "Motion for Denial of Summary Judgment or for Continuance", "Motion
8 to Compel Discovery", "Motion to Strike Affidavits and Declarations of
9 Plaintiff" and "Motion and Affidavit to Dismiss" on February 15, 2007.
10 CP 214-245. Defendant also filed a "Motion for Voluntary Recusal of
11 Judge Laurie" on February 20, 2007. CP 247. Plaintiff filed a response to
12 Defendant's Motion to Dismiss and A response to Defendant's Second
13 Motion to Compel on February 27, 2007. CP 253-258. Additionally,
14 Defendant filed a "Declaration of Jim Ayhan" on March 2, 2007.

15
16
17 After considering the argument of counsel and the documents
18 submitted, Judge Karlynn Haberly granted the Plaintiff's Motion for
19 Summary Judgment. CP 261-262, 267.

20 This appeal ensued. CP 268. Mr. Ayhan seeks reversal of the
21 Summary Judgment and an Order that the Trial Court dismiss with
22 Prejudice and an award of costs, fees and sanctions in the amount of
23 \$2000.00. App.Brf. 20-21.
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IV. ARGUMENT

A. Summary of Argument

The judgment entered by the trial court was proper and should be affirmed, because (a) Ayhan's debt was verified by a sworn statement and Ayhan's account statements, (b) Ayhan admitted that he was the obligor on the Providian account that is the issue of this lawsuit and did not dispute a specific charge, payment, credit or debit made to his Providian account.

Ayhan's fallacious arguments, many based on misstatements of the record below, and his failure to produce any evidence or declaration supporting claims of fraud, reflect a desperate but failed attempt to avoid the debt at any cost. Summary judgment should be affirmed.

B. Standard of Review

When reviewing a summary judgment ruling adjudicating a claim or defense, this Court "conducts de novo review to determine if the record before the superior court, with all facts and inferences considered in the light most favorable to . . . the non-moving party, demonstrates that there is no genuine issue of material fact, and that [movant] is entitled to judgment as a matter of law." *Cochran Electric Co. v. Mahoney*, 129 Wn. App. 687, 692, 121 P.3d 747 (2005) (footnotes omitted), *rev. denied*, 157 Wn.2d 1010 (2006).

1
2 Trial courts exercise broad discretion when deciding evidentiary
3 matters, and will not be overturned unless there was a manifest abuse of
4 that discretion. *Sintra, Inc. v. City of Seattle*, 131 Wash.2d 640, 662-63,
5 935 P.2d 555 (1997) citing *Industrial Indem. Co. v. Kallevig*, 114 Wash.2d
6 907, 926, 792 P.2d 520, 7 A.L.R.5th 1014 (1990).

7
8 **C. Unifund Offered Competent Proof of Ayhan's Debt,**
9 **and There Were No Genuine Issues of Fact Precluding**
10 **Summary Judgment**

11 Ayhan argues that the trial court failed to consider his pleadings
12 and motions which proved Summary Judgment was barred as a matter of
13 law and thus was a manifest abuse of discretion. App.Brf. 8-9. Ayhan
14 repeatedly states conclusions of law in the voluminous pleadings
15 submitted to the trial court and again in this appeal. Unifund made a
16 *prima facie* showing of Ayhan's liability on the subject credit card account
17 by providing a declaration of a custodian of records and attached copies of
18 statements, a credit card agreement and a bill of sale. CP 166-209.

19 Ayhan's pedantic objections to Unifund's proof do not defeat
20 summary judgment or warrant a remand of this case. It is true that the
21 declarant, Autumn Hopkins, did not actually watch Ayhan make purchases
22 or payments on his account, nor did she key each monthly statements into
23 Providian's computer system. If that were required, creditors would not
24 be able to collect on most accounts, and commerce would be brought to a
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2 standstill. Instead, Ms. Hopkins' authenticated Unifund 's account records
3 and attested to Ayhan's debt based on her review of "the books and
4 records of Unifund with regard to account number 4121 3796 2606 6405,"
5 including many months of account statements that were appended to the
6 Hopkins' Declaration. CP 173-209. With this foundation, the
7 declarations were properly considered by the trial court. *Washington*
8 *Central Railroad Co. v. National Mediation Board*, 830 F. Supp. 1343,
9 1353 (E.D. Wash. 1993) ("Personal knowledge . . . is not strictly limited to
10 activities in which the declarant has personally participated. . . . [P]ersonal
11 knowledge can come from review of the contents of files and records.").

12
13 The uncontradicted account records that were submitted by
14 Ms. Hopkins were also admissible, and were competent evidence of
15 Ayhan's debt and were an account stated at the time of their creation.
16 Business records that are maintained in the regular course of business and
17 are created at or about the time of the relevant events are admissible to
18 show an "act, condition or event," including a debt. *Young v. Liddington*,
19 50 Wn.2d 78, 83, 309 P.2d 761 (1957) ("Such [business] records are
20 permitted in evidence to prove the truth and accuracy of accounts then
21 present and contemporaneously recorded. They are the routine product of
22 an efficient clerical system.").

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2 A party offering such records need only submit foundational
3 testimony from a “qualified witness,” a term that has been “broadly
4 interpreted” by Washington courts. *State v. Quincy*, 122 Wn. App. 395,
5 399, 95 P.3d 353 (2004), *rev. denied*, 153 Wn.2d 1028 (2005); *State v.*
6 *Ben-Neth*, 34 Wn App. 600, 603-605, 663 P.2d 156 (1983) (bank’s
7 computer records admitted over objections that foundation witnesses did
8 not create or supervise creation of computer records, did not understand
9 how records were assembled at the computer center, and had never been to
10 the computer center). Here, Hopkins’ Declaration adequately explain the
11 source of the relevant account records, that such records are regularly in
12 the custody of the declarant as part of her work, and that she had custody
13 and control over the relevant records in making her declaration. CP 173-
14 209.

15
16
17 Although Unifund would submit that there is no genuine dispute
18 as to the authenticity or admissibility of Ayhan’s account statements, the
19 admissibility of business records or other alleged hearsay is ultimately left
20 to the discretion of the court. The admissibility of the records “hinges
21 upon the opinion of the trial court” that the sources, method, and time of
22 preparation justify admission, *Ben-Neth*, 34 Wn. App. at 603, and, like
23 other evidentiary rulings, the court’s decision to consider a business record
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2 should only be reversed if there is a “manifest abuse of discretion.” *See*
3 *Sinatra, Inc.* at 662-63.

4 Here, a witness who regularly worked with Unifund’s account
5 records authenticated the relevant documents and spoke to their meaning;
6 in response, Ayhan did not deny that he received the statements on a
7 monthly basis or made the payments reflected therein, nor did he offer any
8 proof that the amounts reflected in the statements were not due and owing.
9 Civil Rule 56(e) plainly states that a party may not “rest upon the mere . . .
10 denials in his pleadings.”
11

12 Judge Haberly properly considered both the declaration and the
13 records submitted by Unifund, as well as Ayhan’s failure to refute the case
14 against him, and correctly concluded that on the record as of March 2,
15 2007, there were no genuine issues of disputed fact to be resolved.
16

17 **D. Defendant’s failure to respond to plaintiff’s Request for**
18 **Admissions effects an admission.**

19 Defendant was served Plaintiff’s Request for Admissions on
20 November 20, 2006. CP 191-195, 203-204. Defendant failed to reply to
21 the requests within thirty (30) days after service, as required by CR 36.
22 CP 169-170. Request for Admissions are deemed admitted against the
23 party who fails to respond or object in a timely manner. *See Sicklesteel*
24 *Cranes, Inc v. Coker Equipment, Inc.*, 111 Wash.App. 1038
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2 (Wash.App.Div.I. 2002) citing CR 36. By operation of Civil Rule 36, the
3 Request for Admissions to defendant became admissions by the defendant
4 on December 20, 2007.

5 Ayhan claims that the Trial Court erred in entering Summary
6 Judgment based in part upon his failure to deny Requests for Admission.
7 Ayhan claims that he had denied the admissions a number of times in
8 sworn affidavits of record. Specifically, Ayhan claims that he denied a
9 number of the requests in “Defendant’s Affidavit in Objection to
10 Plaintiff’s Interrogatories and Requests for Admission with Authorities”;
11 however, in that Affidavit, Ayhan simply stated that he has “affidavits of
12 record in this matter directly disputing much of what plaintiff has now
13 requested”. Again, Ayhan claims to have previously denied the truth of
14 the Requests for Admission but has not pointed to where, specifically, in
15 the record he so denied them. Based on the defendant’s failure to deny the
16 Requests for Admission, the court properly deemed those requests
17 admitted.
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20 **E. It was not a manifest abuse of discretion of the trial**
21 **court in denying Defendant’s motion to compel where**
22 **no CR 26(i) conference had been conducted by**
23 **Defendant.**

24 Plaintiff received Defendant’s discovery on February 3, 2007.
25 Notwithstanding this, Plaintiff attempted to engage in meet and confer
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2 conversations with the Defendant. CP 256-58. At the time defendant
3 specified that he would call Plaintiff, he did not. CP 256-58. Plaintiff's
4 counsel did not receive any further attempts to meet and confer by the
5 Defendant. Because Plaintiff's counsel and Defendant did not confer with
6 respect to Defendant's Motion to Compel, pursuant to 26(i), the trial court
7 properly did not consider the motion, which was not a manifest abuse of
8 discretion.
9

10 To the extent that Ayhan wished to forestall summary judgment
11 based on a need for evidence, it was incumbent upon Ayhan to submit an
12 affidavit stating the reasons he could not present facts essential to justify
13 his opposition. Civil Rule 56(f). While Ayhan made general complaints
14 about Unifund 's discovery responses that were properly rejected by the
15 trial court, at no time did he submit an affidavit or declaration that
16 specifically identified missing evidence essential to his defense as required
17 by CR 56(f). A trial court's denial of a CR 56(f) motion for continuance is
18 reviewed for manifest abuse of discretion. *Manteufel v. Safeco Ins. Co. of*
19 *America*, 117 Wn. App. 168, 175, 68 P.3d 1093, *rev. denied*, 150 Wn.2d
20 1021, 81 P.3d 119 (2003) *citing Molsness v. City of Walla Walla*, 84
21 Wash.App. 393, 400, 928 P.2d 1108 (1996). (Such discretion is not
22 abused if (1) the requesting party does not offer a good reason for the
23 delay in obtaining the desired evidence; (2) the requesting party does not
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2 state what evidence would be established through the additional discovery;
3 or (3) the desired evidence will not raise a genuine issue of material fact.
4 *Turner v. Kohler*, 54 Wash.App. 688, 693, 775 P.2d 474 (1989).

5 The trial court's decision to rule on Unifund's motion and enter
6 judgment was not a manifest abuse of its discretion where Defendant
7 failed to set forth what evidence would be established through his
8 discovery and how that evidence would raise a genuine issue of material
9 fact, and is not grounds for relieving Ayhan from same. *Manteufel*, 117
10 Wn. App. at 175.

11
12 **F. Attorneys Fees awarded were reasonable.**

13 The trial court awarded attorneys fees to Plaintiff pursuant to the
14 agreement and based on the declaration of Counsel. Ayhan has not set
15 forth information supporting his bald assertion that plaintiff's counsel
16 "misrepresented the amount of attorney's fees to which it was entitled".
17 App.Brf. 18. Ayhan cites *Waxman Indus., Inc v. Trustco Dev. Co.*, an
18 Indiana case, to support his assertion. 455 N.W.2d 376, 382 (Ind.Ct.App.
19 1983).

20
21 In Washington, generally, a trial court's fee award will not be
22 reversed absent a manifest abuse of discretion. *Scott Fetzer Co. v. Weeks*,
23 122 Wn.2d 141, 147, 859 P.2d 1210 (1993). Washington courts use the
24 "lodestar" method in determining the reasonableness of attorney fees in
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2 civil cases. The lodestar fee is calculated by multiplying the reasonable
3 hourly rate by the reasonable number of hours incurred, and may in rare
4 instances be adjusted upwards or downwards in the court's discretion.
5 *Mahler v. Szucs*, 135 Wn.2d 398, 434, 957 P.2d 632 (1998). Counsel must
6 provide contemporaneous records documenting the hours worked. *Mahler*,
7 135 Wn.2d at 434. However, a detailed analysis of each expense claimed
8 is not required as long as the trial court considered relevant facts and the
9 reasons given for the award are sufficient for review. *Steele v. Lundgren*,
10 96 Wn.App. 773, 786, 982 P.2d 619 (1999), review denied, 139 Wn.2d
11 1026 (2000).
12

13 In this case, counsel provided an hourly breakdown of the time
14 spent prosecuting Plaintiff's case. CP 170-72. The trial court award of
15 attorney fees in this case was not an abuse of discretion given the hourly
16 rate and number of hours involved.
17

18 **G. Unifund is Entitled Fees and Costs Incurred on Appeal**

19 Unifund requests that it be awarded fees and costs incurred in
20 connection with this appeal pursuant to RAP 18.1. Unifund brought this
21 action as the assignee of Providian under its card agreement that provides:
22 "You promise to pay us when due all amounts borrowed when you or
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2 someone else uses your Account (even if the amount charged exceeds
3 your permission), all other transaction and charges to your Account, and
4 all collection costs we incur including, but not limited to, reasonable
5 attorney's fees and court costs." CP 176. Fees and expenses are properly
6 awarded to Respondent on appeal as provided by contract. *Kirkpatrick v.*
7 *Cheff*, 118 Wn. App. 772, 779-780, 76 P.3d 1211 (2003) ("RCW 4.84.330
8 permits an award of attorney fees and costs on appeal in any action on a
9 contract that provides for attorney fees and costs to one of the parties.").

11 V. CONCLUSION

12 Merely denying responsibility is not enough to create a genuine
13 issue of material fact. *Grimwood v. Univ. of Puget Sound, Inc.*, 110
14 Wash.2d 355, 359-60, 753 P.2d 517 (1988) (citing *Amer. Linen Supply*
15 *Co. v. Nursing Home Bldg. Corp.*, 15 Wash.App. 757, 767, 551 P.2d 1038
16 (1976)). " 'The very object of a motion for summary judgment is to
17 separate what is formal or pretended in denial or averment from what is
18 genuine and substantial, so that only the latter may subject a suitor to the
19 burden of a trial.' " *Preston v. Duncan*, 55 Wash.2d 678, 684, 349 P.2d
20 605 (1960) (quoting Judge (later Justice) Cardozo in *Richard v. Credit*
21 *Suisse*, 242 N.Y. 346, 152 N.E. 110, 111, 45 A.L.R.1041 (1926)).

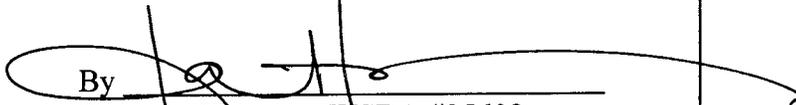
24 In this case, the trial court properly distinguished that which was
25 "pretended in denial" from genuine and substantial issues of fact and
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Unifund respectfully requests that the Court affirm the judgment entered
in its favor.

RESPECTFULLY SUBMITTED this 7th day of January, 2008.

SUTTELL & ASSOCIATES, P.S.
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Unifund CCR Partners

By 

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DIVISION II

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No. 36151-5

STATE OF WASHINGTON

BY _____
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

UNIFUND CCR ASSIGNEE OF PROVIDIAN, Respondent/Plaintiff, vs. JIM I AYHAN, Appellant/Defendant.	Kitsap Co. Cause No. 05-2-01700-9 No. 36151-5 DECLARATION OF MAILING
---	--

The undersigned declares and states as follows:

I am a citizen of the United States of America, and of the State of
Washington, over the age of twenty-one years, not a party to the above
entitled proceeding and competent to be a witness therein.

On 1/14/08 I mailed a copy of the

PLAINTIFF/RESPONDENT'S BRIEF in the above entitled action to:

DECLARATION OF MAILING--1

SUTTELL & ASSOCIATES P.S.
Attorneys at Law

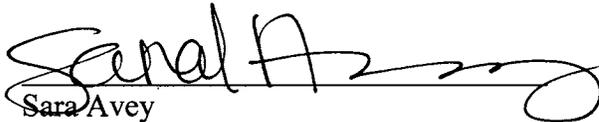
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Bellevue, Washington 98004
425•455•8220
F: 425•454•7884

1
2 JIM I AYHAN
3 8843 CLEARWATER LN SE
4 PORT ORCHARD WA 98367

5 placing said documents in a sealed envelope with first class postage fully
6 paid thereon.

7 Declarant states the foregoing is true and correct to the best of her
8 knowledge and belief, subject to the penalty of perjury under the laws of
9 the State of Washington.

10 DATED this 14th day of January, 2008, at Bellevue,
11 Washington.

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14 Sara Avey

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26 RESPONSE TO MOTION FOR EXTENSION --2
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