

**FILED**

AUG 06 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 303802

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

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GREGORY ROSE and CATHERINE ROSE, and the marital community  
comprised thereof,

Plaintiffs,

v.

FMS, INC. d/b/a OKLAHOMA FMS, INC., an Oklahoma Corporation,

Defendant/Respondent,

v.

ROBERT W. MITCHELL,

Appellant.

---

BRIEF OF RESPONDENT FMS, INC. d/b/a OKLAHOMA FMS, INC.

---

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**ORIGINAL**

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## I. INTRODUCTION

Attorney Robert W. Mitchell's appeal arises from the well supported findings of the trial court of a deliberate and systematic pattern of egregious misconduct by Mr. Mitchell in all aspects of the case. That misconduct was admittedly designed to bully defendant/respondent FMS, Inc. ("FMS") into a roughly \$5,000 settlement of frivolous claims Mr. Mitchell filed on behalf of plaintiffs Catherine and Gregory Rose. As reflected in the trial court's two letter orders and a final judgment entered in the Superior Court in Stevens County, the Honorable Rebecca Baker issued her rulings after long and careful consideration and deliberation based on a voluminous record documenting Mr. Mitchell's misconduct – along with her observations of what happened in her courtroom. Her rulings should be affirmed in all respects.

Although Mr. Mitchell disputed his initial violation of CR 11(a) for filing a frivolous complaint (claiming that he had conducted a reasonable investigation), he disputed none of the underlying facts asserted by FMS in support of its motion for sanctions nor did he dispute the trial court's findings. Those findings concern: (1) a violation of CR 11(a) for failing to conduct a reasonable investigation of the facts and the law before

filing the complaint, (2) additional violations of CR 11 for multiple unnecessary filings after the hearing on the motion for sanctions, (3) violations of CR 26(g) in both the discovery he served and the discovery he answered, (4) violations of CR 56(g) regarding Mr. Mitchell's filings on summary judgment, and most egregiously (5) that "there were misrepresentations of fact in Mr. Mitchell's oral statements made to the court" at the hearing of FMS's motion for sanctions. Because Mr. Mitchell failed to dispute the facts below or the trial court's findings and conclusions based on those conceded facts, they are verities on appeal. Thus, no additional findings of fact are necessary and remand for further findings would be a useless exercise.

In sum, the present appeal is objectively frivolous, and the trial court's imposition of sanctions should be affirmed in all respects. That is not to say Mr. Mitchell's appeal is without purpose, as he continues to carry out his earlier threat to "litigate this case in perpetuity." CP 476. While no one can stop him from appealing this matter to the Supreme Court if he wishes, he should not be allowed to continue to run up FMS's attorneys' fees and costs with impunity. Therefore, FMS requests an award of its fees and costs on the present appeal pursuant to RAP 18.9(a),

CR 11(a), CR 26(g), and/or CR 56(g).

## II. STATEMENT OF THE CASE

This case concerns sanctions imposed against attorney Robert W. Mitchell arising from his bad faith filing and prosecution of a lawsuit on behalf of plaintiffs Catherine and Gregory Rose against defendant/respondent FMS. *See* CP 3-15; CP 235-38; CP 996-99; CP 1135-36.

Because Mr. Mitchell takes issue with the trial court's findings and the evidentiary support for them, a somewhat detailed overview of what happened is necessary. There is insufficient space in this brief to provide a full and complete recitation of all the evidence of Mr. Mitchell's misconduct in the record. Consequently, only the most egregious examples related to each of the Civil Rules violated are presented. *But see* CP 594-625 (FMS's Motion); CP 290-92 (Martens decl.); CP 293-383 (Martin decl.); CP 384-593 (Stolle decl.); CP 1183-93 (FMS's Reply).

Contrary to Mr. Mitchell's assertions in his statement of the case, the complaint against FMS was served after the Roses documented 32 – not 149 – attempts to contact them by phone, including only two completed telephone calls: one to Mrs. Rose at her work, which she answered, and one to her home, where a voice message was left. *See* CP

3-15. While FMS's call log (CP 60-66) reflects that 149 attempts were eventually made, there is no evidence that the Roses were aware of any calls beyond the first 32 until the log was produced in discovery.

Similarly, there is no evidence that they were aware of all of those 32 calls when they were made.<sup>1</sup> Indeed, almost none of the telephone calls were answered.

After the initial successful call was received by Mrs. Rose, Gregory Rose called Mr. Mitchell, who was already representing the Roses in another matter, asking him to put a stop to the calls. *See* CP 398-400; CP 407-08 at 51:19-54:10. Mr. Mitchell easily could have done so by faxing a one sentence letter to FMS directing it to cease all contact. *See* 15 U.S.C. §1692c(c). But Mr. Mitchell chose a different path.

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<sup>1</sup> While Mr. Mitchell tries to make much of the fact FMS tried to contact the Roses 149 times, FMS moved for summary judgment that the unanswered calls were not "intended to harass or annoy" and were not even "communications" under the statutes at issue. *See* CP 106-23. The trial court did not reach the issue. *See* RP 22-24. But, while the CAA does not define "communication," it is proper to look to "related statutes which disclose legislative intent about the provision in question." *Jongeward v. BNSF Railway Co.*, No. 85781-4, 278 P.3d 157, 161 (Wash. 2012). Here, a related statute concerning both first and third party collection activities on small loans and bad checks provides that a "communication" does not include, "[a]n unanswered telephone call in which no message (other than a caller ID) is left..." RCW 31.45.082(6)(b). Here, the legislature, which "enact[s] legislation in light of existing statutes," would not have intended whether an unanswered phone call was a "communication" to depend upon whether the debt was based on a credit card or a check. *Jongeward*, 278 P.3d at 161. So FMS had only five "communications" with the Roses about the debt: three letters and two phone calls – one of which was answered by Mrs. Rose and one of which left a message.

Instead of stopping FMS's efforts to contact the Roses, Mr. Mitchell advised them to keep a log of the calls. *See* CP 403 at 36:1-10. Once the Roses had a log of 32 attempts to contact them – only *one* of which was successful – the log was provided to Mr. Mitchell, who prepared a summons and complaint, asserting statutory claims under the federal Fair Debt Collection Practices Act (“FDCPA”), the Washington Collection Agency Act (“CAA”), and the Washington Consumer Protection Act (“CPA”), in addition to common law tort claims for emotional distress. *See* CP 3–15. There was no factual investigation or legal analysis of the merits of the allegations before suit was filed.

In the meantime, FMS was still attempting to reach the Roses both by telephone and mail. *See* CP 302-13. Yet Mr. Mitchell never contacted FMS to “stop the calls” until serving the unfiled summons and complaint on FMS's registered agent for service in Washington. Only then – in a cover letter dated April 22, 2010, attached to the summons and complaint received by FMS on May 29, 2010 – did Mr. Mitchell even initiate contact with FMS. *See* CP 296, ¶ 7; CP 314-15. Surprisingly, Mr. Mitchell never actually tells FMS to stop attempting to contact his clients – the one thing his clients undisputedly asked him to do – but instead suggests a monetary

settlement. *See id.*

**A. Mr. Mitchell Failed to Conduct a Pre-Filing Investigation Concerning Whether the Roses' Debt was "In Default."**

FMS's general counsel, Kathryn Martin, responded to Mr. Mitchell by email and attached a letter of June 15, 2010, stating, *inter alia*, that the "account was neither in default nor otherwise 'charged off,' but merely outstanding." CP 316-20, *compare* CP 5, ¶ 4.2. Mr. Mitchell asked no questions in response to this information, but by return email again suggested a monetary settlement. *See id.*; *see also*, CP 322.

Mr. Mitchell continued inquiring via email concerning a response to his settlement demand. On June 25, 2010, Ms. Martin provided FMS's response, once again disputing any liability, but offering to resolve the matter for nuisance value. *See* CP 323-35. Two days later, Mr. Mitchell sent a return email, including ten attachments, including voluminous discovery requests and notice of CR 30(b)(6) deposition of FMS in Spokane. *See* CP 323-77.

Ms. Martin, being unfamiliar with Washington civil procedure, emailed Mr. Mitchell that she was not FMS's agent for service of process. *See* CP 383. At the close of his emailed response, Mr. Mitchell bragged:

This is not my first rodeo. I practice in this state and I understand Washington law and civil procedure. I am familiar with the Court that will hear this case. FMS missed the deadline to remove this case to federal court. As a result, this case is not going to turn out the way you hope.

CP 382. Here, Mr. Mitchell openly asserted that – based on his stated familiarity with the superior court in Stevens County – FMS was going to get less favorable treatment before the Washington superior court than it would have received before a judge in the Federal District Court for the Eastern District of Washington in Spokane. *See id.*<sup>2</sup>

In all of the communications between FMS and Mr. Mitchell before filing the complaint, Mr. Mitchell never disputed Ms. Martin’s assertion that the debt was not “in default” when transferred to FMS, never questioned the significance of that fact, and, indeed, was solely focused on bullying a settlement from FMS. *See* CP 322-35; CP 380.

The complaint was filed on or about June 29, 2010. *See* CP 3. FMS turned this matter over to its insurer, which appointed counsel to

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<sup>2</sup> While plaintiffs can bring suit in any proper forum of their choice, it is notable that the FDCPA claim conveyed original jurisdiction in federal court, and the federal courthouse for the Eastern District of Washington is less than one mile from Mr. Mitchell’s office in Spokane. *See* CP 3-15. Yet, Mr. Mitchell chose to file suit in the Superior Court in Colville, Stevens County, some seventy miles away. *See id.*; CP 331.

defend on or about July 9, 2010. CP 385, ¶ 4.<sup>3</sup>

**B. Mr. Mitchell's Discovery Misconduct Demonstrates an Intent to Needlessly Increase the Cost of Defense and Delay Resolution on Summary Judgment.**

**1. Mr. Mitchell served voluminous discovery unnecessary to the needs of the case and wrongfully noticed FMS's CR 30(b)(6) deposition in Spokane – all for the improper purpose of harassing FMS into settlement.**

Upon assignment of the case FMS's insurance carrier transmitted a copy of the complaint and Mr. Mitchell's demand letter. *See* CP 385, ¶ 4. Because the correspondence from the carrier did not include copies of plaintiffs' voluminous discovery requests (*see* CP 332-80), these were not answered or otherwise responded to before inquiry was made by Mr. Mitchell after the discovery was past due. *See* CP 414-16.

The only discovery that was in any manner tailored to this case were the highly repetitive Request for Admissions Nos. 8 through 45. *See* CP 353-68, pp. 6-12. Number 45 actually repeats Request No. 10 word for word, and Request No. 11 begins a series of requests to FMS to the effect: "admit you called once, admit you called twice, admit you called

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<sup>3</sup> As Mr. Mitchell was aware from production of FMS's insurance policy in discovery, FMS has a \$25,000 self-insured retention, i.e., it is responsible for the first \$25,000 of fees, costs, and/or payments for defense. *See* CP 385, ¶ 3; CP 412-13. So much of the fees and costs incurred in defending this case is not insurance money, but out of pocket to FMS.

three times...” on up to Request No. 44 (seeking admission that FMS “telephoned plaintiffs more than 35 times...”). *Id.* The bulk of the rest of the requests sought admissions as to what portions of the various statutes at issue say or mean, which are legal conclusions improper for requests for admissions under CR 36. *See id.*; *Santos v. Dean*, 96 Wn. App. 849, 982 P.2d 632 (1999).

Counsel held a CR 26(i) conference on August 10, 2010, and, on August 17, FMS responded to all of plaintiffs’ voluminous interrogatories, requests for production, and requests for admissions, producing some 268 pages of responsive documents along with the audio recording of the lone telephone call between an FMS representative and Catherine Rose on March 18, 2010. *See* CP 386, ¶8. Nevertheless, three days later on August 20, Mr. Mitchell emailed that he wanted a CR 26(i) conference concerning FMS’s responses to plaintiffs’ requests. *See* CP 425-26. When FMS’s counsel inquired as to the alleged deficiencies in FMS’s answers and responses, Mr. Mitchell responded that “[t]he lack of responses and numerous frivolous objections make the deficiencies too numerous to list in a single email.” CP 428-30. Still, after FMS’s counsel insisted that the alleged deficiencies be identified to allow FMS an opportunity to cure

them, Mr. Mitchell relented, adding “[t]his case should be settled. Please give me your bottom line.” CP 432. This led to more unproductive back and forth between Mr. Mitchell and counsel for FMS. *See* CP 434-36.

Finally, FMS’s counsel noted to Mr. Mitchell that, “while you can take any settlement position you wish, you and I both know that you do not have \$4,900 into this case. If you wish to elicit a better offer from my client, you will have to actually negotiate, as I will never advise a client to bid against itself.” CP 438. Mr. Mitchell responded, in part:

My clients are not “negotiating.” \$4,900 is my clients’ bottom line... Your client does not need to bid against itself because this is a take-it or leave-it offer... **I never claimed to have \$4,900 into this litigation. However, \$4,900 is a considerable bargain over the amount this litigation is going to cost your client if it refuses to do the right thing.**

CP 440 (Emphasis added). Thus, in case Mr. Mitchell did not make himself “clear before,” he effectively had a price for this case that had nothing to do with his fees and costs or his clients’ alleged damages. *See id.* It was simply the price FMS would have to pay – short of summary judgment – to stop the meter running on its own fees and costs. *See id.*

In the end, after all of Mr. Mitchell’s demands and threats in discovery, the only materials Mr. Mitchell submitted in support of

plaintiffs' motion for summary judgment – other than statements in plaintiffs' joint declaration – were FMS's call log, a transcript of the telephone call with Mrs. Rose, and one page of FMS's responses to plaintiffs' discovery requests. *See* CP 38-56.

**2. Mr. Mitchell prepared and signed false and misleading answers to FMS's written discovery.**

On September 28, 2010, FMS served plaintiffs with one set of interrogatories and requests for production of documents and one set of requests for admission. *See* CP 388, ¶ 24. Answers and responses from plaintiffs were received on October 29, 2010. *See* CP 487-529. While most of the answers to interrogatories simply cited back to plaintiffs' complaint and were therefore improper, those answers were non-responsive, rather than false and misleading, which a number of the other answers were – as later events demonstrated. *See id.*

For example, Interrogatory No. 6 sought information concerning the credit card account at issue, and accompanying Request for Production (“RFP”) No. 2 sought, “a correct and complete copy of all documents and materials (including billing statements and correspondence) referred to, reviewed, and/or relied upon in answering the preceding interrogatory.” CP 492-93. In response to both requests, plaintiffs answered that they “did

not retain copies of the documents.” *Id.* This response was made and never corrected, even though at his November 12, 2010, deposition, plaintiff Gregory Rose testified under oath that his wife, Catherine Rose, kept files of their Kohl’s credit card bills and he had never heard that they had been thrown out. *See* CP 401 at 26:11–27:7.

Similarly, in RFP No. 6, FMS sought discovery concerning plaintiffs’ telephone records which were relevant to how plaintiffs kept track of incoming calls, which numbers belonged to which phones, and – possibly – when Mr. Rose had called Mr. Mitchell concerning FMS’s attempts to contact Mrs. Rose. *See* CP 496. The response drafted by Mr. Mitchell was that “plaintiffs do not retain copies of their telephone bills.” *Id.* Yet, in testimony under oath, Mr. Rose again contradicted the assertion that relevant documents were thrown out or otherwise “not retained,” confirming that his wife kept files of their telephone billing records and she had never informed him that they had been thrown out. *See* CP 402 at 27:8-25. Later in the deposition, FMS’s counsel asked Mr. Rose to check for those records at home and provide any such records to Mr. Mitchell. *See id.* at 29:10-18.

In answer to Interrogatory No. 10, which sought “the date on which

you first contacted your attorney, Robert Mitchell,” plaintiffs refused to answer, asserting the date was “privileged.” CP 495. However, the date of even a privileged communication must be disclosed in a privilege log. In fact, Mr. Rose confirmed at his deposition that Mr. Mitchell already represented the Roses on another continuing dispute with their mortgagee, ReconTrust. *See* CP 398 at 16:2-17:24. With this information, the refusal to answer as to the date Mr. Mitchell was first contacted takes on new meaning, as the falsity of other interrogatory answers becomes apparent.

FMS also asked several interrogatories regarding plaintiffs’ alleged damages in this case. They were asked and answered, in pertinent part, as follows:

Interrogatory No. 17 sought information supporting plaintiffs’ contention in their complaint that “the Plaintiffs were damaged in their property by Defendant’s actions.” CP 500. Plaintiffs answered: “The damage to Plaintiffs’ property occurred when Plaintiffs were forced to take time away from economically productive business activities to seek out and obtain an attorney to put an end to Defendant’s collection harassment. The loss of income and loss of business opportunity is the damage to Plaintiffs’ property referred to in Plaintiffs’ complaint.” *Id.* Simply put,

plaintiffs had no damages incurred to “seek out and obtain an attorney” as Mr. Mitchell was already their attorney. Thus, both the allegation in the complaint and the answer to Interrogatory No. 17 were false.

Interrogatory No. 20 is similar: “Please identify in complete detail the actual damages you claim in this case.” CP 502. Plaintiffs’ answer: “Plaintiffs were forced to spend time away from work and other economically productive activities to seek out and retain an attorney to put an end to Defendant’s harassment.” *Id.* Again, this was false, and Mr. Mitchell certainly must have known it.

Interrogatory No. 23 asks: “Please identify in complete detail all “actual and compensatory damages” you claim in this case, as requested in the prayer for relief, paragraph F, of the complaint.” CP 504. Plaintiffs answered: “see answer to Interrogatory No. 20 above.” *Id.*

Finally, Interrogatory No. 25 asks: “Please identify in complete detail all “Incidental and Consequential damages” you claim in this case, as requested in the prayer for relief, paragraph I, of the complaint.” CP 505. Plaintiffs answered that they “travelled (sic) 20 miles round trip to their lawyer’s office in order to retain an attorney to put an end to Defendant’s collection harassment.” *Id.* Yet, not only was Mr. Mitchell

already plaintiffs' lawyer, he confirmed on the record that he has no written fee agreement with the Roses, stating, "I can go on the record as saying that we haven't signed a contract. We haven't entered into one yet. Mr. Rose simply asked me to make your client stop calling them." CP 407 at 50:3-6; *see also, id.* at 50:15-51:2.

FMS's counsel had previously sent a letter to Mr. Mitchell regarding plaintiffs' discovery answers and a CR 26(i) conference had been held on November 9, 2010. *See* CP 530-36. FMS's counsel narrowed the many discovery deficiencies identified in the letter to only those most important to FMS's positions on summary judgment, that is, telephone and credit card billing statements and the timing of the plaintiffs' retention of Mr. Mitchell and their fee arrangement, much of which counsel was willing to get through Mr. Rose's deposition testimony. *See id.*

After Mr. Rose's deposition, FMS's counsel asked for confirmation whether or not the Roses actually had the responsive telephone and credit card records in their files at home. *See* CP 538-40. Mr. Mitchell never responded to either confirm or deny plaintiffs' possession of the responsive telephone or credit card records, nor did

plaintiffs – apparently – ever use the forms provided by FMS’s counsel to obtain the missing records. Instead, the records were simply never produced. *See* CP 389, ¶ 28.

**C. Mr. Mitchell’s Misrepresentations in Briefing on Summary Judgment and Motion for Reconsideration Violated CR 11 and CR 56(g).**

**1. Mr. Mitchell submitted false declarations on summary judgment.**

The Roses’ joint declaration in support of summary judgment, prepared by Mr. Mitchell, falsely stated that calls were made to Mr. Rose’s cell phone and that FMS called Mrs. Rose at work after she asked them not to call that number when FMS reached her at work on March 18<sup>th</sup>. *See* CP 543, ln. 18-19. Mr. Mitchell knew from Mr. Rose’s deposition testimony – to the extent he did not know when the declaration was filed – that those allegations in his client’s declaration were false. *See* CP 405 at 42:7-45:17; CP 408 at 55:11-56:12. Yet, Mr. Mitchell never attempted to correct the record before the trial court. In fact, roughly a week later, Mr. Mitchell served (but apparently never filed) plaintiffs’ opposition to FMS’s motion for summary judgment, asserting that FMS had continued to call Mrs. Rose at work – not just once, as alleged in the joint declaration, but “at least four times after being instructed to cease.” CP

391, ¶ 35, CP 572. That simply was not true.

Mr. Mitchell also falsely asserted for the first time on summary judgment that FMS had left “at least 19 more voicemail messages.” CP 571, ¶ 2.6. This, too, was simply a misreading of the call log, which Mr. Mitchell knew or should have known – at the latest – by Mr. Rose’s deposition. *See* CP 405 at 42:15-45:17. Yet, the false assertion of fact was made, and FMS was obliged to devote a portion of its reply to debunking Mr. Mitchell’s misrepresentations of fact. *See* CP 221-34.

In sum, despite the fact that FMS eventually obtained sufficient discovery to prevail on summary judgment, it did so despite Mr. Mitchell’s pattern of improper obstructionism in discovery and on summary judgment. And Mr. Mitchell denied none of the factual assertions as supported by evidence put in the record by FMS. *See generally* CP 626-64.

**2. Mr. Mitchell continued to violate Civil Rules 11 and 56 even after summary judgment in filing plaintiffs’ motion for reconsideration.**

On December 10, 2010, Mr. Mitchell filed plaintiffs’ motion for reconsideration of the summary judgment rulings, notice of hearing, memorandum of authorities, and supporting declaration of counsel. *See*

CP 238-89. Attached to Mr. Mitchell's declaration was a new declaration from Catherine Rose asserting that "following the November 30 hearing in this case," she fortuitously stumbled upon at least some of the very Kohl's records plaintiffs previously represented in discovery had been thrown out. CP 390, ¶ 32; CP 548-51. She also claimed to have found a copy of the "Kohl's standard Credit Card Agreement" on the internet.<sup>4</sup> *Id.*

Based on this "newly discovered evidence," Mr. Mitchell argued in his motion that the credit card agreement and billing records were, in fact, newly discovered because:

Defendant has refused to provide the documents. Defendants insisted that Plaintiffs enter a stipulated protective order to obtain such documents. Plaintiffs executed the protective order and order was subsequently entered into (sic) this Court. However, Defendant has yet to provide billing statements or a copy of the Kohl's Credit Card Agreement between Kohl's and Plaintiffs.

CP 241, ln. 14-20 (citations omitted). All of this was patently false and an

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<sup>4</sup> Mr. Mitchell already had the same card agreement before plaintiffs' opposition to summary judgment was due. FMS's counsel obtained a sample Kohl's credit card agreement off the internet prior to Mr. Rose's deposition on November 12, 2010, and introduced it as Exhibit 1 to Mr. Rose's deposition over Mr. Mitchell's objection. *See* CP 401 at 28:1-29:6; CP 390-91, ¶34, Exhibit 32 at CP 564-67. That agreement is identical to the agreement submitted in support of Mr. Mitchell's motion for reconsideration. *Compare* CP 564-67 *with* CP 283-85. So the asserted agreement was not "newly discovered" after the summary judgment hearing.

attempted fraud on the trial court.

For support, Mr. Mitchell attached plaintiffs' requests for production *without FMS's responses* and simply lied about what the responses were. *See* CP 249-50, Exhibit A at CP 251-59. FMS's actual responses to plaintiffs' discovery show that the card agreement and billing statements would be responsive to plaintiffs' RFP Nos. 1 & 2, and FMS agreed to provide the documents it had without a protective order. *See* CP 553-63, p. 5. But, in fact, FMS *did not have* the Kohl's card agreement or billing statements, as Mr. Mitchell knew very well. *See* CP 531-34. That is why FMS was so determined that plaintiffs provide them, insisting they obtain copies from Kohl's if need be. *See id.* Thus, Mr. Mitchell put unanswered discovery in the record, then misrepresented to the court how FMS answered it to support an argument of "newly discovered evidence" to justify a motion for reconsideration.

Of course, FMS would have addressed all these issues earlier in the case, but Mr. Mitchell intentionally or unintentionally neglected to serve counsel for FMS with plaintiffs' motion for reconsideration or other papers. Thus, FMS's counsel was entirely unaware of the motion and January 4<sup>th</sup> hearing until January 28, 2011 long after it was noted. *See* CP

389-90, ¶¶ 31-32. Although the trial court apparently recognized from the certificate of service that the motion was served late and denied the motion as untimely, Judge Baker did not know that FMS was never served at all and was not a “no show” for the hearing, but simply had no notice as required under the Rules. *See* CP 1182. Shortly thereafter, on February 7, 2011, FMS filed its motion for sanctions against Mr. Mitchell.<sup>5</sup> CP 594-625.

**D. Mr. Mitchell Violated CR 11 in Responding to FMS’s Motion for Sanctions and Continuing to File Improper “Supplemental” Responses.**

Mr. Mitchell made a number of false assertions of fact for the first time at the hearing on FMS’s motion for sanctions on February 15, 2011. At the time, FMS could not actually prove those to be false for lack of rebuttal evidence in the record. *See generally* RP 28-55. However, Mr. Mitchell’s untimely filing of inappropriate supplemental briefing after the hearing in violation of CR 6 and Stevens County LCR 6 provided FMS with the opportunity to bring those misrepresentations and the evidence establishing those misrepresentations to the trial court’s attention. *See*

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<sup>5</sup>Although Mr. Mitchell highlights the timing of FMS’s sanctions motion as “after the time for appeal of the summary judgment order lapsed” to imply mal-intent on FMS’s part (Appellant’s Br. 8), the deadline for appeal had not even begun to run, as FMS’s counterclaim had not been dismissed at the time FMS filed its motion for sanctions.

*generally* CP 665-823; CP 882-992.

First, with regard to the subpoena to Kohl's, a copy of which FMS never received, Mitchell represented to the trial court that he had served a subpoena on Kohl's "months ago," suggesting he had attempted to obtain evidence from Kohl's before the summary judgment in this case. RP 46, *compare* CP 706-07, ¶ 2. In fact, Kohl's confirmed that it received his subpoena only on January 10, 2011. *See* CP 718-20. So the argument to the trial court was at least misleading – even if one construes "months" to equal less than five weeks.

Then Mr. Mitchell represented to the trial court that the Roses believed they had thrown out the Kohl's billing statements responsive to FMS's discovery requests "when [they] moved." RP 46. This statement was patently false, as all statements attached to Mr. Mitchell's declaration list the same home address that plaintiffs provided in discovery, the address listed on the FMS call log, and the current address Mrs. Rose listed in her declaration in support of Plaintiffs' First Motion for Reconsideration. *Compare* CP 723-32, *with* CP 490-91, *with* CP 261-63, *and with* CP 303-09. In short, the Roses never moved. And Mr. Mitchell knew that.

Mr. Mitchell also misrepresented to the trial court at oral argument that he had lowered plaintiffs' settlement demand to \$4,500 and the case could have settled, but for FMS's intransigence. *See* RP 37; *see also* CP 647, ¶ 2, Exhibit A at CP 653-61. FMS's counsel pointed out in rebuttal that Mr. Mitchell's new and reduced settlement price came on November 8, 2010 – after FMS filed its motion for summary judgment and had already incurred most of its fees. FMS submitted evidence regarding the timing of plaintiffs' reduced demand with its surreply to Mr. Mitchell's supplemental submission. *See* CP 712.

Mr. Mitchell filed yet another declaration on April 11, 2011, but did not take the opportunity to deny or even address any of the factual misrepresentations identified and substantiated by FMS. *See* CP 863-65.<sup>6</sup>

The above evidence and more was put in the record on FMS's motion for sanctions, filed on February 7, 2011. *See* CP 594-625 (FMS's Motion); CP 290-92 (Martens decl.); CP 293-383 (Martin decl.); CP 384-593 (Stolle decl.); CP 1183-93 (FMS's Reply).

Based on all of the above, as evidenced in the record, in a detailed July 11, 2011, letter order, Judge Baker made the following findings:

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<sup>6</sup> Although this filing was subject to the court's ruling striking Mr. Mitchell's late filings, the court did consider it on the issue of whether he lied in open court. *See* CP 997-98.

- With regard to CR 11(a): “Mr. Mitchell filed the suit without sufficient research, factual or legal, into the question of whether the account was “in default” as that term of art applies to the various causes of action sued under.”
- With regard to CR 26(g): “the discovery violations defendant has claimed plaintiff’s counsel committed are established. Mr. Mitchell did not make the efforts required by the discovery rules but instead answered the interrogatories and requests for admission and production in an offhand way, in a blatant attempt to thwart the reasonable discovery efforts of the defendant. And Mr. Mitchell promulgated burdensome and unnecessary discovery in an effort to bully the defendant into a settlement.”
- With regard to further violations of CR 11(a): “there were misrepresentations of fact in Mr. Mitchell’s oral statements made to the court on February 15, 2011, as argued in [FMS’s second surreply] listed above. Further, Mr. Mitchell’s incessant filing of declaration after declaration was clearly designed to delay the inevitable as well as increase the costs of the litigation for the defendant.” The court also found that, as to the more recent filings

outside the rule [the motion for sanctions should be granted] on the basis that the filings needlessly increased the costs of the litigation.”

- With regard to CR 56(g): “with respect to the materials submitted in regard to the summary judgment issues, for the reasons stated in the defendant’s motion for this basis.”

CP 998. The order listed all the materials considered and those that were stricken and not considered. *See* CP 996-97. The court subsequently entered a second letter order on the amount of sanctions with further findings. CP 1135-36. And these were incorporated into a final order entered on October 13, 2011. CP 1142-46. From these, Mr. Mitchell appeals.

### **III. ARGUMENT**

Mr. Mitchell’s opening brief raises one threshold issue that requires clarification because it repeatedly refers to FMS’s admissions that it is a debt collector. To be clear, FMS is in the business of collecting debts. So it would be disingenuous for FMS to deny that it is a debt collector. However, that was not the issue before the trial court.

Under the FDCPA, there is an exception to the applicability of the

statute, which depends, not on the character of the person attempting to collect the debt, but on the status of the debt as either “in default” or not “in default.” *See* 15 U.S.C. §1692a(6)(F)(iii). While Mr. Mitchell suggests that a debt collector is always a debt collector, that is not the way the statute is written or interpreted. *See Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86-7 (2d Cir. 2003) (holding “under §1692a(6)(F)(iii), the classification of debt collector depends upon the status of a debt, rather than the type of collection activities used”). Under the statutory scheme, the issue before the trial court was the “in default” or non-default status of the Roses’ debt to Kohl’s at the time the account was assigned to FMS, not whether FMS is in the business of collecting debts.<sup>7</sup> Thus, the trial court’s determination on summary judgment, based on the undisputed facts of record, that the debt was not in default was dispositive of plaintiffs’ claims.

**A. Standard of Review of an Order on Sanctions.**

The trial court’s imposition of sanctions, whether under CR 11, CR

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<sup>7</sup> In the introduction to his opening brief, Mr. Mitchell falsely accuses FMS of “unilaterally declaring” that the Roses’ account was not “in default.” Appellant’s Br. 1. Respectfully, there is no evidence that FMS did any such thing. The evidentiary basis for FMS’s assertion that the debt was not “in default” based on communications from Kohl’s is in the record. *See* CP 293-94 ¶ 4, *citing* CP 301. Rather, it is undisputed that it was up to Kohl’s whether to declare a default, which is the very factual circumstance Mr. Mitchell failed to investigate prior to filing the complaint.

26(g), CR 56(g), or the court's inherent power to control the litigation, is reviewed for abuse of discretion. *See Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law." *Id.* at 339 (citations omitted). Judge Baker did not have an erroneous view of the law. Her discretionary rulings were not manifestly unreasonable or based on untenable grounds.

Under Washington law, there is a presumption in favor of the trial court's findings, and the party claiming error has the burden of showing they are not supported by substantial evidence. *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369, 798 P.2d 799 (1990).

RAP 10.3(g) provides, in part:

A separate assignment of error for each finding of fact a party contends was improperly made *must* be included with reference to the finding by number. *The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.* (Emphasis added.)

Argument unsupported by an assignment of error does not present

an issue for review. *See Rutter v. Rutter*, 59 Wn.2d 781, 788, 370 P.2d 862 (1962). Unchallenged factual findings are considered verities on appeal and are treated as the established facts of the case. *See, e.g., In Re Estate of Lint*, 135 Wn.2d 518, 532-33, 957 P.2d 755 (1998); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Failure to abide by the mandates of the Rules of Appellate Procedure waives all challenges on appeal. *See, e.g., Harrington v. Pailthorp*, 67 Wn. App. 901, 911, 841 P.2d 1258 (1992), *rev. denied*, 121 Wn.2d 1018 (1993); *State v. Slanaker*, 58 Wn. App. 161, 165-66, 791 P.2d 575, *rev. denied*, 115 Wn.2d 1031 (1990); *see also In Re J.K.*, 49 Wn. App. 670, 676, 745 P.2d 1304 (1987) (failure to set forth the text of findings precludes review), *rev. denied*, 110 Wn.2d 1009 (1988).

Unchallenged conclusions of law are treated as the law of the case. *See State v. Moore*, 73 Wn. App. 805, 811, 871 P.2d 1086 (1994); *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716-17, 846 P.2d 550 (1993). Failure to assign error to the trial court's conclusions of law precludes consideration on appeal. *See Halvorsen v. Ferguson*, 46 Wn. App. 708, 722, 735 P.2d 675 (1986).

Each of these black letter rules applies in this case. Nevertheless,

when confronted with a veritable mountain of evidence in the record supporting the trial court's findings of fact, Mr. Mitchell resorts to disingenuously denying the existence of the findings. *See* Appellant's Br. 2, 24-25; *but see* CP 996-99, CP 1135-36, & CP 1142-46.

**B. The Trial Court's Conclusion that Mr. Mitchell Violated CR 11(a) by Filing a Frivolous Complaint Should Be Affirmed.**

Mr. Mitchell asserts on appeal that the trial court abused its discretion in sanctioning him for his initial CR 11(a) violation in filing a frivolous complaint because the trial court exercised its discretion based on an erroneous view of the law. Appellant's Br. 10. This should be rejected for a number of reasons, both procedural and substantive.

**1. Mr. Mitchell is barred from arguing that the Roses' debt to Kohl's was "in default" when referred to FMS.**

Mr. Mitchell's only disputed fact on appeal is whether the Roses' debt to Kohl's was in default at the time it was transferred to FMS for rehabilitation. *See* Appellant's Br. 10. Having failed to convince the trial court that he conducted a reasonable pre-filing investigation of the facts and applicable law under CR 11(a), Mr. Mitchell now reverses course and argues – for the first time on appeal – that the Roses' debt to Kohl's actually was "in default." This argument should be rejected for at least

two reasons.

First, Mr. Mitchell did *not* dispute before the trial court on FMS's motion for sanctions that the Roses' debt to Kohl's was not "in default" at the time the account was assigned to FMS. *See* CP 626-64; RP 34-50. Rather, he argued that he had conducted a reasonable investigation of the facts and the law by supposedly talking to several other people who agreed with him, although what they told him was hearsay and he never said whether that was before or after he filed the complaint. *See* CP 630; CP 635. He also claimed to have done legal research (which he did not share) that "proved Defendant's defense was untenable." *Id.*; *see also* RP 38. Mr. Mitchell never argued that the debt actually was "in default." *See generally* CP 626-45. In fact, in his opposition to FMS's motion for sanctions, Mr. Mitchell acknowledged and did not allege any error in the trial court's ruling on summary judgment that the debt was not "in default" when the account was assigned to FMS. *Id.* Accordingly, that argument is waived on the present appeal. *See New Meadows Holding Co. v. Wash. Water Power Co.*, 34 Wn. App. 25, 29, 659 P.2d 1113 (Div. III, 1983) ("This court will not consider arguments raised for the first time on appeal."); *Brundridge v. Fluor Fed. Servs., Inc.*, 164 Wn.2d 432, 191 P.3d

879 (2008) (“A party who fails to raise an issue at trial normally waives the right to raise the issue on appeal.”).<sup>8</sup>

Second, Mr. Mitchell actually engages in a collateral attack on the trial court’s ruling on summary judgment that the debt was not in default. But the doctrine of collateral estoppel, which “prevents relitigation of an issue or determination of fact after the party sought to be estopped has had a full and fair opportunity to present his or her case,” precludes Mr. Mitchell from re-litigating that issue here. *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 114, 829 P.2d 746 (1992), *citing Jensen v. Torr*, 44 Wn. App. 207, 213, 721 P.2d 992 (1986). To apply collateral estoppel, four conditions must be met:

(1) the issues in the two actions must be identical; (2) there must have been a final judgment in the first action; (3) the party against whom the estoppel is pleaded must have been a party or in privity with a party to the first action; and (4) application of the doctrine cannot work an injustice on the party against whom it is pleaded.

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<sup>8</sup> Mr. Mitchell may try to argue that this argument was raised to the trial court. But he did not do so on the motion for sanctions. *See* CP 626-64. Rather, he did so on the motion for reconsideration of the summary judgment order, which was denied as untimely and then withdrawn by Mr. Mitchell. *See* RP 28-29. He also argued the debt was “in default” in supplemental materials filed after the sanctions hearing, but those materials were stricken by the court, and Mr. Mitchell did not appeal that portion of the order striking those materials. *See* CP 997. So none of those materials are properly before this Court.

*Lutheran Day Care*, 119 Wn.2d at 115. Here, all four conditions are met:

(1) The issue of whether the Roses' debt was in default is identical to the fundamental issue decided by the trial court on summary judgment; (2) the finding on summary judgment that the debt was not in default became a final judgment when FMS dismissed its counterclaim on April 19, 2011; (3) Mr. Mitchell, as the Roses' attorney of record who submitted all of their materials on summary judgment, was in privity with the Roses; and (4) application of the doctrine does not work an injustice on Mr. Mitchell, as he had a full and fair opportunity to litigate the issue on summary judgment to the same extent as his clients, who did not timely appeal. As such, this Court should apply the doctrine of collateral estoppel to preclude Mr. Mitchell from arguing that the Roses' debt to Kohl's was in default when it was referred to FMS (Mr. Mitchell's first issue pertaining to assignment of error).

**2. That the Roses' debt to Kohl's was not in default is a factual finding supported by substantial evidence.**

Even if this Court declines to apply the doctrines of waiver or collateral estoppel, Mr. Mitchell's argument that the debt actually was in default is without merit.

First, that the Roses' debt to Kohl's was not in default at the time

of transfer to FMS was initially a question of fact. *See Crane Co. v. Musgrave & Blake*, 102 Wash. 59, 67, 172 P. 866 (1918). As the record on summary judgment reflects, that the debt was not in default was an undisputed fact. *See* CP 42; CP 183-98. Only at the hearing on summary judgment – after the briefing was complete and the evidence was submitted – did Mr. Mitchell for the first time assert, contrary to his own clients’ joint declaration under penalty of perjury and submitted by him on his pleading paper, that the debt was in default. *See* RP 13-16. He cited no evidence and provided no legal authority. *See generally* RP 2-4; RP 12-22. Accordingly, based on the undisputed facts before her in the declarations on the parties’ cross-motions for summary judgment, Judge Baker resolved the issue of fact as a matter of law and granted summary judgment to FMS as the non-moving party on the Roses’ motion because (1) the debt at issue was not in default and (2) for the additional reason that the Roses failed to submit any evidence to establish that the debt at issue was a consumer debt. *See* RP 22-24.

On findings based on disputed facts, the appellate court’s role is limited to determining whether the findings of fact are supported by substantial evidence. *See Green v. Normandy Park*, 137 Wn. App. 665,

689, 151 P.3d 1038 (2007). “Substantial evidence” is evidence sufficient to persuade a fair minded person of the truth of the declared premise. *Green*, 137 Wn. App. at 689. The substantial evidence standard is viewed in the light most favorable to the respondent, FMS. *See P.U.D. No. 2 of Grant County v. NAFTZI*, 159 Wn.2d 555, 576, 151 P.3d 176 (2007). An appellate court will not substitute its judgment, even if it might have resolved disputed facts differently. *Id.*

Here, the declarations submitted by the parties on summary judgment agreed that the debt was not in default when it was referred to FMS, and Mr. Rose confirmed that belief in his deposition. *See* CP 42, ln. 6; CP 58; CP 67-68; CP 174-75. Even if this Court considers Mr. Mitchell’s naked argument at the hearing on summary judgment as disputing this fact, in the absence of any evidence or authority, the trial court’s resolution of the issue is unassailable. Moreover, FMS submitted additional evidence that the debt was not in default when it filed its motion for sanctions. *See* CP 293-95; CP 300-01. This is substantial evidence on the material fact of default, which was not disputed by Mr. Mitchell.

It is axiomatic that when both parties agree on a material fact, there is no genuine issue of material fact. Therefore, there was no error by the

trial court in ruling that the debt at issue was not in default. Accordingly, this Court should reject Mr. Mitchell's first issue pertaining to assignment of error. *See* Appellant's Br. 2.

**3. The trial court's finding that Mr. Mitchell failed to conduct a reasonable investigation of the facts and the law is supported by substantial evidence.**

Having already found that the debt at issue was not in default when referred to FMS, which was dispositive of the Roses' claims under the FDCPA and Washington CAA, the trial court made a finding of fact that "Mr. Mitchell filed the suit without sufficient research, factual or legal, into the question of whether the account was 'in default' as that term of art applies to the various causes of action sued under." CP 998. As discussed *supra*, whether the account was in default was a question of fact, requiring a factual inquiry into the status of the account with Kohl's. It cannot be disputed that Mr. Mitchell never made any such inquiry into the status of the debt. Rather, he claimed to have consulted with a couple of other attorneys and a debt collector he knew without saying whether it was before or after filing suit. *See* CP 630; CP 635; CP 650. Similarly, he stated that he conducted legal research, again without saying when, that he claimed supported his position. *Id.* And with regard to these inquiries,

Mr. Mitchell did not even assert, much less show, that they were conducted pre-filing of the complaint. *Id.* Based on this evidence, a fair minded person could easily and reasonably conclude, as did Judge Baker, that Mr. Mitchell filed the suit without sufficient research, factual or legal, into whether the account was in default, which, as it turned out, it wasn't. Thus, substantial evidence supports the trial court's finding, and the finding supports the conclusion that Mr. Mitchell violated CR 11(a) by filing a frivolous lawsuit.

**4. Mr. Mitchell's argument regarding the Washington Collection Agency Act ("CAA") is barred.**

For at least the two reasons mentioned with regard to application of the FDCPA *supra*, Mr. Mitchell may not now argue for the first time that "no default or declaration of default is necessary to trigger application of the CAA" (Appellant's Br. 10 and Mr. Mitchell's second issue pertaining to assignment of error), when he never raised this argument before the trial court. As a result, this argument is waived on appeal. Appellant's Br. 10. In addition, he should be collaterally estopped from raising this issue now as (1) Judge Baker decided this very issue, holding that the CAA does not apply in this case; (2) the ruling on summary judgment that the CAA does not apply became a final judgment when FMS dismissed its counterclaim

on April 19, 2011; (3) Mr. Mitchell, as the Roses' attorney of record who submitted all of their materials on summary judgment, was in privity with the Roses; and (4) application of the doctrine does not work an injustice on Mr. Mitchell, as he failed to raise this issue before the trial court although he had a full and fair opportunity to do just that both on summary judgment and in response to the motion for sanctions. Accordingly, both the issue of default and application of the CAA were waived, and Mr. Mitchell's arguments to the contrary should be disregarded both because of waiver and by application of collateral estoppel.

Even had the trial court's ruling as to application of the CAA been erroneous, it would be invited error because Mr. Mitchell never responded after FMS had fully briefed the issue on summary judgment. *Compare* CP 157-59, with CP 124-27; *see Casper v. Esteb Enters., Inc.*, 119 Wn. App. 759, 771, 82 P.3d 1223 (2004); *see also, Sovak v. Chugai Pharm. Co.*, 280 F.3d 1266, 1270 (9<sup>th</sup> Cir. 2002) (holding "one cannot complain of errors below for which he is responsible").<sup>9</sup>

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<sup>9</sup> Mr. Mitchell also raises an entirely new issue not even briefed by FMS below, asserting that FMS did not satisfy the definition of "out-of-state collection agency" to then qualify for the exception because it "was collecting on a debt from a client located within the state," as the Roses purchased merchandise from the Kohl's "Spokane North" store. Appellant's Br. 21-22. Even if the Court were to consider this rather bizarre and entirely new argument, the client was the corporate entity, Kohl's Department Stores, Inc., which is located in Wisconsin, not Washington. *See* CP 60.

For any or all of the above reasons, this Court should reject Mr. Mitchell's second issue pertaining to assignment of error.

With regard to the trial court's imposition of further CR 11 sanctions and sanctions under CR 26(g) and CR 56(g), Mr. Mitchell baldly asserts on appeal that "the requisite factual findings are lacking," and that the trial court "fails to explicitly identify the ostensibly sanctionable conduct except in general terms." Appellant's Br. 24-25. This argument should similarly be rejected, as the trial court made specific findings of fact supporting the conclusion that each of the rules was violated, and each such finding was supported by substantial evidence in the record. As to those findings, Mr. Mitchell fails to challenge that they are supported by substantial evidence. Therefore, to the extent the Court agrees with FMS that they exist, they are unchallenged verities on appeal. *See Moreman v. Butcher*, 126 Wn.2d 36, 39, 891 P.2d 725 (1995); *Zunino v. Rajewski*, 140 Wn. App. 215, 220, 165 P.3d 57 (2007).

C. **The Trial Court's Imposition of Sanctions for Additional Violations of CR 11 Should Be Affirmed.**

In the July 11, 2011, order, the trial court sanctioned Mr. Mitchell separately under CR 11 and the court's inherent authority to control the litigation for numerous "supplemental" filings after the hearing on the

motion for sanctions “on the basis that the filings needlessly increased the costs of the litigation.” CP 998. This is a finding of fact. As the trial court indicated in the order, there were 22 filings on the motion, and Mr. Mitchell should not have filed anything after item number 8. *See* CP 996-97. The number of filings indicated in the order, the volume of such filings, and the cost Mr. Mitchell obliged FMS to incur in responding to them is obvious from the record. *See* CP 996-99; CP 293-823; CP 882-87; CP 972-79; CP 989-92; CP 1000-06; CP 1173-77. Thus, the finding was well supported by substantial evidence in the record.

**D. The Trial Court’s Imposition of Sanctions under Civil Rule 26(g) for Discovery Violations Should Be Affirmed.**

In the July 11, 2011, order, the trial court concluded that Mr. Mitchell should be sanctioned under CR 26(g), entering the following findings of fact:

Mr. Mitchell did not make the efforts required by the discovery rules but instead answered [FMS’s] interrogatories and requests for admission and production in an offhand way, in a blatant attempt to thwart the reasonable discovery efforts of the defendant. And, Mr. Mitchell promulgated burdensome and unnecessary discovery in an effort to bully the defendant into a settlement.

CP 998. These findings of fact were well supported by substantial and voluminous evidence in the record, as discussed in part in FMS's Statement of the Case, *supra*. See CP 594-625; CP 384-578.

In sum, not only is there no error in the trial court's ruling, but Mr. Mitchell's bare assertion that "the requisite findings are lacking" is frivolous. Appellant's Br. 24.

**E. The Trial Court's Imposition of Sanctions under CR 56(g) Should be Affirmed.**

The closest Mr. Mitchell can come to an alleged lack of findings in the order is with regard to the violation of CR 56(g), which the trial court imposed, "for the reasons stated in the defendant's motion for this basis [for sanctions]." CP 998. However, the reasons stated in FMS's motion, that Mr. Mitchell submitted false statements of material fact on summary judgment and in his motion for reconsideration of the order on summary judgment, are in the record. See CP 620-23. And they occurred in Judge Baker's courtroom. See RP 47-49. These included specific and demonstrably false assertions in the plaintiffs' joint declaration that FMS had continued calling Catherine Rose's work number at least four more times after being asked not to and the assertion in Mr. Mitchell's declaration that FMS had left "at least 19 more voicemail messages" at the

Roses' home number. *Id.*

In addition, Mr. Mitchell filed a motion for reconsideration that he failed to serve on FMS's counsel. *See* CP 614; CP 389-90, ¶¶ 31-32.

With that motion, Mr. Mitchell submitted a declaration attaching plaintiffs' discovery requests to FMS without FMS answers, then lied to the trial court about what FMS's answers were. *See* CP 613. Even though the trial court denied the motion for reconsideration before FMS was aware of it, FMS had to address the false assertions when it brought its motion for sanctions. *See* CP 612-14.

Therefore, because the trial court found that FMS's factual allegations supporting violations of CR 56(g) were substantiated, those are the operative findings before this Court on appeal. And they are sufficient to facilitate this Court's review.

**F. The Court Did Not Abuse Its Discretion by Sanctioning Mr. Mitchell and Awarding Attorney Fees and Costs, Including a Lodestar Adjustment, to FMS.**

Mr. Mitchell fails to cite to or discuss in any meaningful way the two orders regarding the amount of fees and costs awarded by the trial court. *See* CP 1135-36; CP 1142-46. These are cited only on page 2 of Mr. Mitchell's brief, in the assignment of error, and on page 24, following

the conclusory statement that, “the requisite findings are lacking.” Mr. Mitchell’s brief does not quote them or offer any analysis or authority supporting the allegation that they are in any way deficient.

In fact, Judge Baker made a number of findings in the September 21, 2011, letter order, which she then requested FMS’s counsel incorporate into a final order. *See* CP 1135-36. This was done, and the final order included clearly enumerated findings of fact and conclusions of law, numbered 1 through 9. *See* CP 1143-45. Because Mr. Mitchell simply denies they exist, failing to identify and establish that any single one of the enumerated findings or resulting conclusions is lacking sufficient evidentiary or legal support in the record, each of these findings and conclusions are verities on the present appeal. *See, e.g., In Re Estate of Lint*, 135 Wn.2d 518, 532-33, 957 P.2d 755 (1998); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *Zunino*, 140 Wn. App. at 220.

**G. This Court Should Award Respondent’s Attorney Fees Incurred on This Appeal.**

RAP 18.9(a) allows for “terms or compensatory damages” against a party “who uses these rules for the purposes of delay” or “files a frivolous appeal.” “An appeal is frivolous when the appeal presents no debatable issues on which reasonable minds could differ and is so lacking

in merit that there is no possibility of reversal.” *Stiles v. Kearney*, 277 P.3d 9, 17 (2012), citing *Mahoney v. Shinpoch*, 107 Wn.2d 679 691, 732 P.2d 510 (1987). In this case, Mr. Mitchell had no reasonable possibility of obtaining a reversal of the trial court based on the record on appeal. Thus, his appeal is frivolous and FMS should be awarded its fees and costs.

Moreover, Mr. Mitchell threatened to “litigate this case in perpetuity.” CP 476. Even if the Court finds that this appeal was not frivolous under RAP 18.9, this Court can still award FMS its fees and costs on appeal because Mr. Mitchell utilized this appeal, like his incessant filings in the trial court, simply to “delay the inevitable.” CP 998.

In addition, the Court may allow attorneys fees pursuant to RAP 18.1(a), “if applicable law grants to a party the right to recover reasonable attorney fees or expenses on review.” This Court recently considered this very issue in *Wash. Motorsports Ltd. P’ship v. Spokane Raceway Park, Inc.*, No. 29872-8-III, – P.3d –, 2012 WL 2989267 (2012). There, counsel appealed the trial court’s imposition of monetary sanctions for violations of CR 26(g). This Court affirmed and granted respondent attorney fees on appeal pursuant to CR 26(g), “which provide that an appropriate sanction

may include an order to pay reasonable expenses incurred because of the violation, including a reasonable attorney fee.” *Id.* at 5.

To determine whether appellant should be sanctioned by paying respondent’s fees on appeal, the Court relied upon *Magaña v. Hyundai Motor America*, 167 Wn.2d 570, 220 P.3d 191 (2009). There, the Washington Supreme Court upheld the trial court’s sanctions for CR 37(d) discovery violations, and held “that the plaintiff should recover attorney fees and expenses under RAP 18.1(a) for responding to the appeal ‘because CR 37(d) is the applicable rule that grants the right to recovery of attorney fees and expenses.’” *Wash. Motorsports*, at 5, citing *Magaña*, 167 Wn.2d at 593. Just as CR 37(d) permitted attorney fees on appeal of sanctions of attorney fees arising out of discovery violations, so too does CR 26(g) permit attorney fees on appeal of sanctions of attorney fees arising out of discovery violations. Further, under *Magana* and *Wash. Motorsports*, this Court can and should award fees on appeal under CR 11 and CR 56(g), as those rules also provide for awards of attorneys’ fees for their violation, and should similarly allow for such an award on appeal.

As this appeal is frivolous and/or attorney fees are permitted under RAP 18.9(a), CR 11, CR 26(g), and CR 56(g), respondent FMS

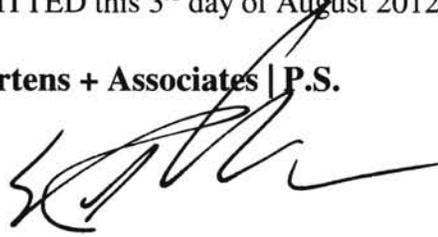
respectfully requests that this Court award it attorneys' fees and costs incurred on this appeal.

### **CONCLUSION**

For the foregoing reasons, respondent FMS respectfully requests this Court affirm the trial court's \$70,546.44 award of sanctions against appellant Robert Mitchell, and grant FMS its fees and costs on this appeal.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of August 2012.

**Martens + Associates | P.S.**



By \_\_\_\_\_  
Richard L. Martens, WSBA # 4737  
Steven A. Stolle, WSBA # 30807  
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Attorneys for Respondent FMS, Inc. d/b/a  
Oklahoma FMS, Inc.

**CERTIFICATE OF SERVICE**

I certify that on the day and date indicated below, I caused to be filed and served the foregoing, including Appendix 1-9, on behalf of Respondent FMS, Inc. d/b/a Oklahoma FMS, Inc. on the following counsel as indicated below.

**Counsel for Appellant**

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- U.S. Mail
- Telefax
- Hand Delivery
- Overnight Delivery
- E-mail

I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 3<sup>rd</sup> day of August, 2012 at Seattle, Washington.

  
\_\_\_\_\_  
Leelwa McFadden  
Paralegal for Martens + Associates | P.S.

# **APPENDIX 1**

West's Revised Code of Washington Annotated  
Part IV Rules for Superior Court  
Superior Court Civil Rules (Cr)  
3. Pleadings and Motions (Rules 7-16)

Superior Court Civil Rules, CR 11

RULE 11. SIGNING AND DRAFTING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA; SANCTIONS

Currentness

**(a)** Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum, and that to the best of the party's or attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact ; (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law; (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

**(b)** In helping to draft a pleading, motion or document filed by the otherwise self-represented person, the attorney certifies that the attorney has read the pleading, motion, or legal memorandum, and that to the best of the attorney's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is well grounded in fact, (2) it is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law, (3) it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief. The attorney in providing such drafting assistance may rely on the otherwise self-represented person's representation of facts, unless the attorney has reason to believe that such representations are false or materially insufficient, in which instance the attorney shall make an independent reasonable inquiry into the facts.

**Credits**

[Amended effective January 1, 1974; September 1, 1985; September 1, 1990; September 17, 1993; amended effective October 29, 2002; September 1, 2005.]

Notes of Decisions (183)

CR 11, WA R SUPER CT CIV CR 11

Current with amendments received through 11/15/11

## **APPENDIX 2**

West's Revised Code of Washington Annotated  
Part IV Rules for Superior Court  
Superior Court Civil Rules (Cr)  
5. Depositions and Discovery (Rules 26-37)

Superior Court Civil Rules, CR 26

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

Currentness

**(a) Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

**(b) Discovery Scope and Limits.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The frequency or extent of use of the discovery methods set forth in section (a) shall be limited by the court if it determines that: (A) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (B) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (C) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under section (c).

(2) *Insurance Agreements.* A party may obtain discovery and production of: (i) the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment; and (ii) any documents affecting coverage (such as denying coverage, extending coverage, or reserving rights) from or on behalf of such person to the covered person or the covered person's representative. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this section, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Structured Settlements and Awards.* In a case where a settlement or final award provides for all or part of the recovery to be paid in the future, a party entitled to such payments may obtain disclosure of the actual cost to the defendant of making such payments. This disclosure may be obtained during settlement negotiations upon written demand by a party entitled to such payments. If disclosure of cost is demanded, the defendant may withdraw the offer of a structured settlement at any time before the offer is accepted.

(4) *Trial Preparation: Materials.* Subject to the provisions of subsection (b)(5) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subsection (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials

**RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY, WA R SUPER CT CIV...**

in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this section, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(5) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subsection (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules. (ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial.

(B) A party may discover facts known or opinions held by an expert who is not expected to be called as a witness at trial, only as provided in rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subsections (b)(5)(A)(ii) and (b)(5)(B) of this rule; and (ii) with respect to discovery obtained under subsection (b)(5)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subsection (b)(5)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) *Claims of Privilege or Protection as Trial-Preparation Materials for Information Produced.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim. The producing party must preserve the information until the claim is resolved.

(7) *Discovery From Treating Health Care Providers.* The party seeking discovery from a treating health care provider shall pay a reasonable fee for the reasonable time spent in responding to the discovery. If no agreement for the amount of the fee is reached in advance, absent an order to the contrary under section (c), the discovery shall occur and the health care provider or any party may later seek an order setting the amount of the fee to be paid by the party who sought the discovery. This subsection shall not apply to the provision of records under RCW 70.02 or any similar statute, nor to discovery authorized under any rules for criminal matters.

(8) *Treaties or Conventions.* If the methods of discovery provided by applicable treaty or convention are inadequate or inequitable and additional discovery is not prohibited by the treaty or convention, a party may employ the discovery methods described in these rules to supplement the discovery method provided by such treaty or convention.

**(c) Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that the contents of a deposition not be disclosed or be disclosed only in a designated way; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

**(d) Sequence and Timing of Discovery.** Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

**(e) Supplementation of Responses.** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(4) Failure to seasonably supplement in accordance with this rule will subject the party to such terms and conditions as the trial court may deem appropriate.

**(f) Discovery Conference.** At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion.

## RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY, WA R SUPER CT CIV...

Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by rule 16.

**(g) Signing of Discovery Requests, Responses, and Objections.** Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state his address. The signature of the attorney or party constitutes a certification that he has read the request, response, or objection, and that to the best of his knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee.

**(h) Use of Discovery Materials.** A party filing discovery materials on order of the court or for use in a proceeding or trial shall file only those portions upon which the party relies and may file a copy in lieu of the original.

**(i) Motions; Conference of Counsel Required.** The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. If the court finds that counsel for any party, upon whom a motion or objection in respect to matters covered by such rules has been served, has willfully refused or failed to confer in good faith, the court may apply the sanctions provided under rule 37(b). Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

**(j) Access to Discovery Materials Under RCW 4.24.**

(1) *In General.* For purposes of this rule, "discovery materials" means depositions, answers to interrogatories, documents or electronic data produced and physically exchanged in response to requests for production, and admissions pursuant to rules 26-37.

(2) *Motion.* The motion for access to discovery materials under the provisions of RCW 4.24 shall be filed in the court that heard the action in which the discovery took place. The person seeking access shall serve a copy of the motion on every party to the action, and on nonparties if ordered by the court.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY, WA R SUPER CT CIV...

(3) *Decision.* The provisions of RCW 4.24 shall determine whether the motion for access to discovery materials should be granted.

**Credits**

[Amended effective July 1, 1972; September 1, 1985; September 1, 1989; December 28, 1990; September 1, 1992; September 17, 1993; September 1, 1995; January 12, 2010.]

Notes of Decisions (302)

CR 26, WA R SUPER CT CIV CR 26

Current with amendments received through 11/15/11

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## **APPENDIX 3**

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS, WA R SUPER CT CIV CR 37

West's Revised Code of Washington Annotated  
Part IV Rules for Superior Court  
Superior Court Civil Rules (Cr)  
5. Depositions and Discovery (Rules 26-37)

Superior Court Civil Rules, CR 37

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

Currentness

**(a) Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, and upon a showing of compliance with rule 26(i), may apply to the court in the county where the deposition was taken, or in the county where the action is pending, for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under rules 30 or 31, or a corporation or other entity fails to make a designation under rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under rule 33, or if a party, in response to a request for inspection submitted under rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, any party may move for an order compelling an answer or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this section an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

**(b) Failure to Comply With Order.**

(1) *Sanctions by Court in County Where Deposition Is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS, WA R SUPER CT CIV CR 37

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against the disobedient party;
- (D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;
- (E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

**(c) Expenses on Failure to Admit.** If a party fails to admit the genuineness of any document or the truth of any matter as requested under rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe the fact was not true or the document was not genuine, or (4) there was other good reason for the failure to admit.

**(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Production or Inspection.** If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for production of documents or inspection submitted under rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under sections (A), (B), and (C) of subsection (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising the party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subsection may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by rule 26(c). For purposes of this section, an evasive or misleading answer is to be treated as a failure to answer.

**(e) Failure to Participate in the Framing of a Discovery Plan.** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by rule 26(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable expenses, including attorney fees, caused by the failure.

**RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS, WA R SUPER CT CIV CR 37**

**Credits**

[Amended effective July 1, 1972; September 1, 1985; September 1, 1992; September 1, 1993.]

Notes of Decisions (148)

**CR 37, WA R SUPER CT CIV CR 37**

Current with amendments received through 11/15/11

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## **APPENDIX 4**

West's Revised Code of Washington Annotated  
Part IV Rules for Superior Court  
Superior Court Civil Rules (Cr)  
7. Judgment (Rules 54-63)

Superior Court Civil Rules, CR 56

RULE 56. SUMMARY JUDGMENT

Currentness

**(a) For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross claim, or to obtain a declaratory judgment may, after the expiration of the period within which the defendant is required to appear, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

**(b) For Defending Party.** A party against whom a claim, counterclaim, or cross claim is asserted or a declaratory judgment is sought may move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

**(c) Motion and Proceedings.** The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve any rebuttal documents not later than 5 calendar days prior to the hearing. If the date for filing either the response or rebuttal falls on a Saturday, Sunday, or legal holiday, then it shall be filed and served not later than the next day nearer the hearing which is neither a Saturday, Sunday, or legal holiday. Summary judgment motions shall be heard more than 14 calendar days before the date set for trial unless leave of court is granted to allow otherwise. Confirmation of the hearing may be required by local rules. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

**(d) Case Not Fully Adjudicated on Motion.** If on motion under the rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action, the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

**(e) Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

**(f) When Affidavits Are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot, for reasons stated, present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment

**RULE 56. SUMMARY JUDGMENT, WA R SUPER CT CIV CR 56**

or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

**(g) Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.

**(h) Form of Order.** The order granting or denying the motion for summary judgment shall designate the documents and other evidence called to the attention of the trial court before the order on summary judgment was entered.

**Credits**

[Amended effective September 1, 1978; September 1, 1985; September 1, 1988; September 1, 1990; September 1, 1993.]

Notes of Decisions (746)

CR 56, WA R SUPER CT CIV CR 56

Current with amendments received through 11/15/11

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## **APPENDIX 5**

West's Revised Code of Washington Annotated  
Title 31. Miscellaneous Loan Agencies (Refs & Annos)  
Chapter 31.45. Check Cashers and Sellers

West's RCWA 31.45.082

31.45.082. Delinquent small loan--Restrictions on collection by licensee or third party--Definitions

Currentness

(1) A licensee shall comply with all applicable state and federal laws when collecting a delinquent small loan. A licensee may charge a one-time fee as determined in rule by the director to any borrower in default on any loan or loans where the borrower's check has been returned unpaid by the financial institution upon which it was drawn. A licensee may take civil action under Title 62A RCW to collect upon a check that has been dishonored. If the licensee takes civil action, a licensee may charge the borrower the cost of collection as allowed under RCW 62A.3-515, but may not collect attorneys' fees or any other interest or damages as allowed under RCW 62A.3-515. A licensee may not threaten criminal prosecution as a method of collecting a delinquent small loan or threaten to take any legal action against the borrower which the licensee may not legally take.

(2) Unless invited by the borrower, a licensee may not visit a borrower's residence or place of employment for the purpose of collecting a delinquent small loan. A licensee may not impersonate a law enforcement official, or make any statements which might be construed as indicating an official connection with any federal, state, county, or city law enforcement agency, or any other governmental agency, while engaged in collecting a small loan.

(3) A licensee may not communicate with a borrower in such a manner as to harass, intimidate, abuse, or embarrass a borrower, including but not limited to communication at an unreasonable hour, with unreasonable frequency, by threats of force or violence, or by use of offensive language. A communication shall be presumed to have been made for the purposes of harassment if it is initiated by the licensee for the purposes of collection and:

(a) It is made with a borrower or spouse in any form, manner, or place, more than three times in a single week;

(b) It is made with a borrower at his or her place of employment more than one time in a single week or made to a borrower after the licensee has been informed that the borrower's employer prohibits such communications;

(c) It is made with the borrower or spouse at his or her place of residence between the hours of 9:00 p.m. and 7:30 a.m.; or

(d) It is made to a party other than the borrower, the borrower's attorney, the licensee's attorney, or a consumer reporting agency if otherwise permitted by law except for purposes of acquiring location or contact information about the borrower.

(4) A licensee is required to maintain a communication log of all telephone and written communications with a borrower initiated by the licensee regarding any collection efforts including date, time, and the nature of each communication.

(5) If a dishonored check is assigned to any third party for collection, this section applies to the third party for the collection of the dishonored check.

(6) For the purposes of this section, "communication" includes any contact with a borrower, initiated by the licensee, in person, by telephone, or in writing (including e-mails, text messages, and other electronic writing) regarding the collection of a delinquent small loan, but does not include any of the following:

(a) Communication while a borrower is physically present in the licensee's place of business;

**31.45.082. Delinquent small loan--Restrictions on collection by..., WA ST 31.45.082**

(b) An unanswered telephone call in which no message (other than a caller ID) is left, unless the telephone call violates subsection (3)(c) of this section; and

(c) An initial letter to the borrower that includes disclosures intended to comply with the federal fair debt collection practices act.

(7) For the purposes of this section, (a) a communication occurs at the time it is initiated by a licensee regardless of the time it is received or accessed by the borrower, and (b) a call to a number that the licensee reasonably believes is the borrower's cell phone will not constitute a communication with a borrower at the borrower's place of employment.

(8) For the purposes of this section, "week" means a series of seven consecutive days beginning on a Sunday.

**Credits**

[2009 c 13 § 1, eff. July 26, 2009; 2003 c 86 § 11, eff. July 27, 2003.]

West's RCWA 31.45.082, WA ST 31.45.082

Current with all Legislation from the 2011 2nd Special Session and all 2012 Legislation

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## **APPENDIX 6**

United States Code Annotated  
Title 15. Commerce and Trade  
Chapter 41. Consumer Credit Protection (Refs & Annos)  
Subchapter V. Debt Collection Practices (Refs & Annos)

15 U.S.C.A. § 1692a

§ 1692a. Definitions

Currentness

As used in this subchapter--

- (1) The term "Bureau" means the Bureau of Consumer Financial Protection.
- (2) The term "communication" means the conveying of information regarding a debt directly or indirectly to any person through any medium.
- (3) The term "consumer" means any natural person obligated or allegedly obligated to pay any debt.
- (4) The term "creditor" means any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.
- (5) The term "debt" means any obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.
- (6) The term "debt collector" means any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests. The term does not include--
  - (A) any officer or employee of a creditor while, in the name of the creditor, collecting debts for such creditor;
  - (B) any person while acting as a debt collector for another person, both of whom are related by common ownership or affiliated by corporate control, if the person acting as a debt collector does so only for persons to whom it is so related or affiliated and if the principal business of such person is not the collection of debts;
  - (C) any officer or employee of the United States or any State to the extent that collecting or attempting to collect any debt is in the performance of his official duties;
  - (D) any person while serving or attempting to serve legal process on any other person in connection with the judicial enforcement of any debt;

(E) any nonprofit organization which, at the request of consumers, performs bona fide consumer credit counseling and assists consumers in the liquidation of their debts by receiving payments from such consumers and distributing such amounts to creditors; and

(F) any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity (i) is incidental to a bona fide fiduciary obligation or a bona fide escrow arrangement; (ii) concerns a debt which was originated by such person; (iii) concerns a debt which was not in default at the time it was obtained by such person; or (iv) concerns a debt obtained by such person as a secured party in a commercial credit transaction involving the creditor.

(7) The term “location information” means a consumer's place of abode and his telephone number at such place, or his place of employment.

(8) The term “State” means any State, territory, or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any political subdivision of any of the foregoing.

**Credits**

(Pub.L. 90-321, Title VIII, § 803, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 875; amended Pub.L. 99-361, July 9, 1986, 100 Stat. 768; Pub.L. 111-203, Title X, § 1089(2), July 21, 2010, 124 Stat. 2092.)

Notes of Decisions (352)

15 U.S.C.A. § 1692a, 15 USCA § 1692a

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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# **APPENDIX 7**

United States Code Annotated  
Title 15. Commerce and Trade  
Chapter 41. Consumer Credit Protection (Refs & Annos)  
Subchapter V. Debt Collection Practices (Refs & Annos)

15 U.S.C.A. § 1692c

§ 1692c. Communication in connection with debt collection

Currentness

(a) Communication with the consumer generally

Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt--

- (1) at any unusual time or place or a time or place known or which should be known to be inconvenient to the consumer. In the absence of knowledge of circumstances to the contrary, a debt collector shall assume that the convenient time for communicating with a consumer is after 8 o'clock antemeridian and before 9 o'clock postmeridian, local time at the consumer's location;
- (2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer; or
- (3) at the consumer's place of employment if the debt collector knows or has reason to know that the consumer's employer prohibits the consumer from receiving such communication.

(b) Communication with third parties

Except as provided in section 1692b of this title, without the prior consent of the consumer given directly to the debt collector, or the express permission of a court of competent jurisdiction, or as reasonably necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

(c) Ceasing communication

If a consumer notifies a debt collector in writing that the consumer refuses to pay a debt or that the consumer wishes the debt collector to cease further communication with the consumer, the debt collector shall not communicate further with the consumer with respect to such debt, except--

- (1) to advise the consumer that the debt collector's further efforts are being terminated;
- (2) to notify the consumer that the debt collector or creditor may invoke specified remedies which are ordinarily invoked by such debt collector or creditor; or
- (3) where applicable, to notify the consumer that the debt collector or creditor intends to invoke a specified remedy.

If such notice from the consumer is made by mail, notification shall be complete upon receipt.

(d) "Consumer" defined

**§ 1692c. Communication in connection with debt collection, 15 USCA § 1692c**

For the purpose of this section, the term “consumer” includes the consumer's spouse, parent (if the consumer is a minor), guardian, executor, or administrator.

**Credits**

(Pub.L. 90-321, Title VIII, § 805, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 876.)

Notes of Decisions (77)

15 U.S.C.A. § 1692c, 15 USCA § 1692c

Current through P.L. 112-142 (excluding P.L. 112-140 and 112-141) approved 7-9-12

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## **APPENDIX 8**

333 F.3d 82  
United States Court of Appeals,  
Second Circuit.

David ALIBRANDI, On behalf of himself and  
all others similarly situated, Plaintiff-Appellant,

v.

FINANCIAL OUTSOURCING  
SERVICES, INC., Defendant-Appellee.

Docket No. 02-7540. | Argued: Feb.  
20, 2003. | Decided: June 18, 2003.

Debtor brought action against debt collection agency, alleging violation of the Fair Debt Collection Practices Act (FDCPA). The United States District Court for the Eastern District of New York, Joanna Seybert, J., granted summary judgment in favor of debt collection agency. Debtor appealed. The Court of Appeals held that: (1) debt was not in default, for purposes of FDCPA, on date that payment became due, and (2) prior default status of debt could not be altered by subsequent agreement between creditor and collection agency to service debt.

Vacated and remanded.

**Attorneys and Law Firms**

\*82 Lawrence Katz (Lance A. Raphael, of counsel), Katz & Kleinman, Uniondale, NY, for Plaintiff-Appellant.

\*83 Ian Chesir-Teran, Ohrenstein & Brown, LLP, New York, NY, for Defendant-Appellee.

Before: OAKES, KEARSE, and B.D. PARKER, Jr., Circuit Judges.

**Opinion**

PER CURIAM.

David Alibrandi appeals from a judgment of the United States District Court for the Eastern District of New York (Joanna Seybert, *Judge*), granting Financial Outsourcing Services, Inc. summary judgment and dismissing Alibrandi's claim under the Fair Debt Collection Practices Act (the "FDCPA" or the "Act"), 15 U.S.C. § 1692 *et seq.* Alibrandi alleged that in a January 27, 2000 letter seeking payment of a debt he owed to First Union National Bank, Financial Outsourcing did not include the warnings and declarations of debtor rights that

the Act requires to be included in correspondence from debt collectors. *See* 15 U.S.C. §§ 1692c(11), 1692g(a) (1997).

The district court found that, because First Union and Financial Outsourcing deemed Alibrandi's debts not to be in default when Financial Outsourcing wrote to him, Financial Outsourcing was not a "debt collector" and the FDCPA did not require the January 27, 2000 letter to contain the statutory warnings. Accordingly, the court granted Financial Outsourcing's motion for summary judgment and dismissed the case. Alibrandi appealed. We hold that if First Union retained North Shore Agency, Inc., and, by reason of a letter that North Shore as its agent sent to Alibrandi, in effect declared Alibrandi's debt to be in default before First Union referred his account to Financial Outsourcing, the January 27, 2000 letter was required to include the warnings. Because it does not appear at this point that Alibrandi's contentions as to First Union's retention of North Shore and North Shore's communication with him are undisputed, we vacate the judgment and remand for further proceedings.

**BACKGROUND**

In October 1999 at the conclusion of an automobile lease, First Union, the lessor, concluded that Alibrandi owed it \$543.98 due to excess wear and tear on the vehicle. Apparently, First Union retained North Shore to help collect the money and, on November 10, 1999, North Shore wrote to Alibrandi on behalf of First Union seeking payment. In this letter, North Shore stated that it was a debt collector and cautioned Alibrandi that "[s]erious collection of your account with our client, First Union National Bank, begins with this letter." The letter contained the warnings that the FDCPA requires to be included in debt-collector correspondence. *See* 15 U.S.C. §§ 1692c(11), 1692g. For example, it informed Alibrandi that he could challenge the debt's validity, that there would be consequences for his failure to do so, and that any information North Shore obtained would be used for collection purposes.

[1] As of January 21, 2000, Alibrandi had neither disputed nor paid the debt, and First Union apparently shifted collection responsibility from North Shore to Financial Outsourcing. In structuring its relationship with Financial Outsourcing, First Union envisioned Financial Outsourcing not as a debt collector but as a debt "service provider" whose job was to remind account holders to pay debts that were outstanding but not in default. Significantly, if Financial Outsourcing were a debt service provider, its correspondence with debtors would not have to include the statutory warnings.

Debt servicing can be conducted before a debt goes into default, and the FDCPA only requires the warnings to be included in correspondence by \*84 “debt collectors” who, by definition, attempt to collect debts in default. According to Financial Outsourcing's contract with First Union:

1. First Union National Bank does not consider these accounts delinquent. Financial [Outsourcing] shall act as a service provider and not a collection agency when handling these accounts. Financial shall not make numerous phone calls at early or late hours nor send numerous letters to such customers. All form letters must be preapproved by First Union.
2. Undisputed accounts that are not paid within 120 days will be recalled and assigned to a collection agency for resolution.

(Letter from Stein to Myers of Jan. 15, 1998 (“Jan. 15, 1998 Letter”), at 1).

On January 27, 2000, Financial Outsourcing wrote Alibrandi, seeking payment of the money he owed First Union. At this time, Financial Outsourcing was unaware of North Shore's letter to Alibrandi. The Financial Outsourcing letter stated:

We are servicing the above referenced account on behalf of First Union National Bank. Your account is not in default.

Your recently expired lease has a deficiency balance which is noted above. This is in accordance with the contract terms that you signed at the lease inception. The balance due is a result of either excess mileage[,] wear and tear[,] or other fees associated with the terms of your lease.

Please remit payment using the enclosed envelope.

Should you have any questions, please contact our office, toll-free, ... as our staff is prepared to assist you.

(Letter from Financial Outsourcing to Alibrandi of Jan. 27, 2000, at 1.)

Financial Outsourcing's key phrases were that it was “servicing” Alibrandi's account and that the account was “not in default.” Had Financial Outsourcing been “collecting” rather than “servicing” the debt and had the debt been in “default” as opposed to simply carrying a “deficiency balance,” Financial Outsourcing would have been required to provide Alibrandi the warnings required of debt collectors. See 15 U.S.C. §§ 1692c(11), 1692g.

Alibrandi sued Financial Outsourcing, alleging violations of the FDCPA and seeking damages on behalf of himself and a purported class. Specifically, Alibrandi alleged that he had defaulted on his obligation to First Union as of October 1999 and that Financial Outsourcing's January 27, 2000 letter did not contain the warnings the Act requires of debt collectors' correspondence. In response, Financial Outsourcing maintained that it was not a “debt collector” under the FDCPA because it had agreed in its contract with First Union that it was not one and had also agreed that debts such as Alibrandi's would not be considered “delinquent,” much less in default.

In granting Financial Outsourcing summary judgment, the district court rejected Alibrandi's argument that a debt goes into default immediately after it becomes due. The court further concluded that, in January 2000, Financial Outsourcing was not a “debt collector” under the FDCPA and, consequently, its correspondence was not governed by the requirements of the FDCPA. The court accordingly dismissed the case pursuant to Federal Rules of Civil Procedure 12(b) (1), 12(c), and 56.<sup>1</sup> Alibrandi appealed. We now vacate.

#### \*85 DISCUSSION

We review a grant of summary judgment *de novo*, construing the evidence in the light most favorable to the non-moving party and drawing all reasonable inferences in its favor. *Int'l Bus. Machines Corp. v. Liberty Mut. Fire Ins. Co.*, 303 F.3d 419, 423 (2d Cir.2002). “Summary judgment is appropriate only if it can be established that ‘there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.’ ” *Id.* (quoting Fed.R.Civ.P. 56(c)).

This case turns on the definition of “default” for the purposes of the FDCPA. If Alibrandi's debt was not in default when Financial Outsourcing wrote to him, Financial Outsourcing could not have been a debt collector under the Act, and the contents of its January 27, 2000 letter would not have to contain the statutory warnings. On appeal, Alibrandi advances two theories as to why Financial Outsourcing was a debt collector: (1) his debt was in default immediately after it became due; and (2) prior to Financial Outsourcing's letter, First Union, through North Shore, had already declared Alibrandi's debt to be in default by virtue of North Shore's self-identification as a “debt collector.”

[2] Congress designed the FDCPA “to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses.” 15 U.S.C. § 1692(e) (1997). Although creditors generally are not subject to the FDCPA, *see Aubert v. Am. Gen. Fin., Inc.*, 137 F.3d 976, 978 (7th Cir.1998), the Act subjects third-party debt collectors to limitations on the content and nature of their correspondence with debtors, *see* 15 U.S.C. §§ 1692e(11),<sup>2</sup> 1692g(a).<sup>3</sup>

**\*86** For the purposes of the FDCPA, a “debt collector” is one who

uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another. Notwithstanding the exclusion provided by clause (F) of the last sentence of this paragraph, the term includes any creditor who, in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts. For the purpose of section 1692f(6) of this title, such term also includes any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the enforcement of security interests.

15 U.S.C. § 1692a(6) (1997).

The FDCPA, however, provides a number of exceptions to this definition. One such exception is “any person collecting or attempting to collect any debt owed or due or asserted to be owed or due another to the extent such activity... (iii) concerns a debt *which was not in default* at the time it was obtained by such person.” 15 U.S.C. § 1692a(6)(F) (emphasis added). Thus, under § 1692a(6)(F)(iii), the classification of debt collector depends upon the status of a debt, rather than the type of collection activities used.

Unfortunately, the FDCPA does not define so key a term as “default.” In its March 2001 annual report on the FDCPA,

the Federal Trade Commission (the “FTC”) formally recommended that Congress amend § 1692a(6)(F)(iii) “so that its applicability will depend upon the nature of the overall business conducted by the party to be exempted rather than the status of individual obligations when the party obtained them.” FTC Annual Report: FDCPA, <http://www.ftc.gov/os/2001/03/fdcpaar2000.htm> (Mar.2001). Congress has not acted on the FTC's recommendation.

Insisting that a debt goes into default as soon as it is due, Alibrandi relies on Black's Law Dictionary, which defines default as “an ‘omission or failure to perform a legal or contractual duty ... [or] to observe a promise or discharge an obligation (e.g., to pay interest or principal on a debt when due).’ ” (Br. for Plaintiff-Appellant at 4 (quoting Black's Law Dictionary 376 (5th ed. 1979))). Although classifying a debt as in default immediately after it first becomes due may have a certain facile appeal, this approach is at odds with how the term is generally understood.

In applying the FDCPA, courts have repeatedly distinguished between a debt that is in default and a debt that is merely outstanding,<sup>4</sup> emphasizing that only after some period of time does an outstanding debt go into default. *See, e.g., \*87 Skerry v. Mass. Higher Educ. Assistance Corp.*, 73 F.Supp.2d 47, 51 (D.Mass.1999); *Jones v. Intuition, Inc.*, 12 F.Supp.2d 775, 779 (W.D.Tenn.1998) (“Prior to the default period, the unpaid loan installment is considered delinquent.”). In cases involving student loan collections under the FDCPA, for example, courts have regularly imported a Federal Family Education Loan Program (“FFELP”) definition of “default,” 34 C.F.R. § 682.200(b) (1998), under which a debt that is repayable in monthly installments goes into default after 180 days of delinquency. *See, e.g., Skerry*, 73 F.Supp.2d at 51; *Pelfrey v. Educ. Credit Mgmt. Corp.*, 71 F.Supp.2d 1161, 1180 (N.D.Ala.1999) (stating that the “specific requirements of the FFELP and attendant regulations take preference over any general inconsistencies with the FDCPA”); *Jones*, 12 F.Supp.2d at 779; *Games v. Cavazos*, 737 F.Supp. 1368, 1391 (D.Del.1990). Likewise, various other federal regulations have defined default as commencing anywhere between thirty and 270 days after a debt becomes due. *See, e.g.,* 7 C.F.R. § 762.141(a) (1999) (30 days for farm loans); 12 C.F.R. § 336.3(c) (1999) (90 days for loans by federal insured depository institutions to Federal Deposit Insurance Corporation employees); 34 C.F.R. § 685.102(b) (1999) (270 days for certain student loans). Although these judicial decisions and regulations reflect inconsistent periods of time preceding default, they all agree that default does not occur until well after a debt becomes outstanding. Significantly,

other than the dictionary, Alibrandi cites no authority for the proposition that default occurs *immediately* after a debt becomes due.

[3] [4] Given the persistent ambiguity of the term “default,” we look to the underlying purpose of the statute. See *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995). We conclude that the FDCPA’s broad, pro-debtor objectives would not be served if we adopted Alibrandi’s argument that default occurs immediately after payment becomes due. Alibrandi’s position involves a curious role reversal—a debtor arguing that his debt was in default at the earliest possible time—and has the paradoxical effect of immediately exposing debtors to the sort of adverse measures, such as acceleration, repossession, increased interest rates, and negative reports to credit bureaus, from which the Act intended to afford debtors a measure of protection. We believe it ill-advised to adopt an approach that precipitously visits these consequences upon debtors.<sup>5</sup>

Our rejection of Alibrandi’s definition does not end the matter. Advancing an alternative argument, Alibrandi maintains that, prior to Financial Outsourcing’s involvement, First Union had already declared the debt to be in default when North Shore, on behalf of First Union, specifically informed him that it, North Shore, was a “debt collector.” Construing the facts in the light most favorable to Alibrandi, we agree. As we have seen, the North Shore letter contained the warnings and disclaimers required of debt collectors by the Act and apparently underscored a change in First Union’s approach to the debt in question, cautioning Alibrandi that “[s]erious collection of your account with our client, First

Union National Bank, begins \*88 with this letter.” Under the Act an entity cannot be a debt collector unless the debt it attempts to collect is in default. See 15 U.S.C. § 1692a(6)(F)(iii). If First Union hired North Shore to pursue Alibrandi’s debt, North Shore’s self-identification as a debt collector constituted a declaration by First Union that Alibrandi’s debt was in default.

[5] Financial Outsourcing contends that, irrespective of any arrangement First Union may have had with North Shore, it agreed with First Union that it would act only “as a service provider and not a collection agency” when handling the accounts that First Union forwarded for collection. But if Alibrandi’s debt was in default when Financial Outsourcing obtained it, Financial Outsourcing had no ability to change that status through an agreement with First Union. The status of the debt would not have been alterable by the expedient of a letter agreement between First Union and Financial Outsourcing. Financial Outsourcing may sincerely have believed it was servicing a debt that was not in default, but that is irrelevant. If First Union had, through North Shore, declared Alibrandi’s outstanding debt to be in default, then the default would have continued during Financial Outsourcing’s subsequent collection efforts and Financial Outsourcing would have been obligated to include in its correspondence with Alibrandi the warnings required by the Act.

## CONCLUSION

The judgment is vacated, and the case is remanded for further proceedings consistent with this opinion.

## Footnotes

1 Although the district court dismissed this case in part on jurisdictional grounds under Rule 12(b)(1), apparently because it concluded that Financial Outsourcing was not a “debt collector” within the meaning of the FDCPA, we note that federal subject matter jurisdiction existed by virtue of Alibrandi’s seeking relief under the FDCPA in his complaint. See *Carlson v. Principal Fin. Group*, 320 F.3d 301, 305-07 (2d Cir.2003) (holding that where complaint, on its face, seeks relief under federal statute, district court has subject matter jurisdiction, regardless of claim’s validity). Nevertheless, Alibrandi does not appeal on this ground.

2 Under § 1692e:

A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:

...

(11) The failure to disclose in the initial written communication with the consumer and, in addition, if the initial communication with the consumer is oral, in that initial oral communication, that the debt collector is attempting to collect a debt and that any information obtained will be used for that purpose, and the failure to disclose in subsequent communications that the communication is from a debt collector, except that this paragraph shall not apply to a formal pleading made in connection with a legal action.

3 Section 1692g(a) provides:

Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing-

- (1) the amount of the debt;
- (2) the name of the creditor to whom the debt is owed;
- (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
- (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
- (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

4 According to the terms of First Union's contract with Financial Outsourcing, First Union did not even consider Alibrandi's account "delinquent," much less in default, for the first 120 days after it came due. (Jan. 15, 1998 Letter at 1.) For the purposes of this opinion, we will use the word "outstanding" to refer to debts that are past due.

5 Until Congress ends the statutory silence surrounding the term "default," we conclude that the interests of debtors, creditors, collectors, and debt service providers will best be served by affording creditors and debtors considerable leeway contractually to define their own periods of default, according to their respective circumstances and business interests. Once the parties have contractually set the period of delinquency preceding default, it will be a relatively simple matter to determine whether the Act applies.

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## **APPENDIX 9**

280 F.3d 1266  
United States Court of Appeals,  
Ninth Circuit.

Milos SOVAK, M.D.; Biophysica,  
Inc., Plaintiffs–Appellants,

v.

CHUGAI PHARMACEUTICAL CO., a corporation  
of the Empire of Japan; Cook Imaging Corporation,  
an Indiana corporation, Defendants–Appellees.

No. 00–55298. | Argued and Submitted  
Oct. 4, 2001. | Filed Feb. 19, 2002.

Former chairman of pharmaceutical company brought suit against company, and Japanese firm, alleging breach of stock redemption agreement he had entered with company after he stepped down as chairman. After pharmaceutical company successfully moved to dismiss pending arbitration, and arbitration award in its favor was entered, chairman moved to vacate award. The United States District Court for the Southern District of California, Rudi M. Brewster, J., denied motion and dismissed claims against Japanese firm. Chairman appealed. The Court of Appeals, O’Scannlain, Circuit Judge, held that: (1) choice-of-law clause contained in arbitration provision of stock redemption agreement simply supplied state substantive decisional law under agreement, which incorporated procedural rules of Federal Arbitration Act (FAA); (2) error in applying Illinois law, rather than FAA, in determining whether right to compel arbitration had been waived, was not invited; (3) successful motion to dismiss earlier complaint did not result in waiver of right to arbitration; and (4) panel plausibly interpreted stock redemption agreement.

Affirmed.

**Attorneys and Law Firms**

\*1268 Lawrence E. Eden (argued), Lawrence R. Goerke, Encinitas, CA, for the plaintiffs-appellants.

Dean T. Janis (argued), Jonathan S. Dabbieri, San Diego, CA; Edward W. Harris III (argued), Steven S. Shockley, Maggie L. Smith, Indianapolis, IN, for the defendants-appellees.

Appeal from the United States District Court for the Southern District of California, Rudi M. Brewster, District Judge, Presiding. D.C. No. CV–96–01617RMB(CGA)

Before: O’SCANNLAIN and PAEZ, Circuit Judges and KING, \* District Judge.

**Opinion**

**OPINION**

O’SCANNLAIN, Circuit Judge.

We must decide whether federal or state law governs the right to compel arbitration when the underlying agreement contains only a general state choice-of-law clause.

**I**

In 1986, Milos Sovak, while chairman of the board of Cook Imaging Corporation (“Cook”), co-invented an x-ray enhancing drug called “Ioxilan.” Sovak promptly assigned his patent rights to Ioxilan in the United States and Japan to Cook.

In 1987, Sovak, on behalf of Cook, contracted with Chugai Pharmaceutical Company (“Chugai”) for assistance in obtaining approval from the Japanese Ministry of Health and Welfare (the “Ministry”) for the sale of Ioxilan in Japan. Under the Ioxilan contract, Chugai agreed to perform clinical trials in Japan and to file an application for final approval with the Ministry. Upon final approval, Chugai had the option of becoming Cook’s exclusive licensee to sell Ioxilan in Japan in exchange for the payment of royalties. Chugai also had the option of terminating the contract at any time upon sixty days written notice.

In 1991, Sovak stepped down as chairman of Cook. Sovak and Cook entered into a Stock Redemption Agreement under which Cook agreed to pay Sovak thirty-three percent of any royalties received under the Ioxilan contract with Chugai. The parties also agreed to arbitrate all disagreements in Chicago pursuant to Illinois law and the rules of the American Arbitration Association.

In 1993, Chugai completed the clinical trials of Ioxilan in Japan and filed an application for final approval with the Ministry. While that application was pending, Chugai gave written notice to Cook that it intended to exercise its option to terminate the Ioxilan contract. In other words, Chugai opted not to become Cook’s exclusive licensee for the sale of Ioxilan in Japan, and therefore would not be obligated to pay any royalties to Cook.

With the application still pending, Cook entered into a contract with Japanese Tobacco, Inc., which agreed to pay \$5 million for the exclusive right to sell Ioxilan when the Ministry issued its final approval, which indeed a month later, it did.

Not surprisingly, Sovak was not pleased with the way events had unfolded. The Stock Redemption Agreement provided that he would receive a percentage of the \*1269 royalties paid by Chugai to Cook, but of course Chugai would not pay any royalties to Cook because it opted to terminate the Ioxilan contract. Further, Cook refused to share with him any portion of the \$5 million received from Japanese Tobacco. Sovak apparently would receive no compensation at all from the sale of Ioxilan in Japan.

In 1996, Sovak sued Chugai in California state court, alleging that Chugai breached the Ioxilan contract with Cook. Chugai successfully removed the action to federal court, and the district court dismissed Sovak's claims without prejudice. Sovak later filed a second amended complaint (the "SAC"), asserting conversion claims against Cook. He claimed that the Stock Redemption Agreement gave him an equitable lien on any payments made to Cook relating to the sale of Ioxilan in Japan. Sovak claimed, therefore, that Cook converted part of the \$5 million paid by Japanese Tobacco by not sharing any of it with him. Cook successfully moved to dismiss the second amendment complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6).

Sovak subsequently filed a third amended complaint alleging various claims against Cook and Chugai. Significantly, Sovak claimed that Cook breached the Stock Redemption Agreement by not sharing any portion of the payment from Japanese Tobacco. Cook moved to dismiss Sovak's claims in favor of arbitration, relying upon its arbitration provision. Sovak argued that Cook had waived its right to compel arbitration by previously successfully moving to dismiss the second amended complaint for failure to state a claim. The court dismissed Sovak's claims, compelled arbitration, and stayed the proceedings as to Chugai pending the arbitration.

Pursuant to the court's order, Sovak and Cook proceeded to arbitration in Chicago, Illinois. The arbitration panel issued an award in favor of Cook, without allowing Sovak an opportunity for a hearing. Sovak then filed a motion with the district court to vacate the award. The court denied the motion and dismissed the claims against Chugai. Sovak filed this timely appeal.

## II

### A

Sovak claims that Cook waived its right to compel arbitration by successfully moving to dismiss the second amendment complaint for failure to state a claim. The parties initially disagree about the applicable law governing waiver: Sovak argues that Illinois law applies, while Cook contends that federal law governs.

[1] [2] Parties may agree to state law rules for arbitration even if such rules are inconsistent with those set forth in the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 1–16. *See Volt Info. Scis., Inc., v. Bd. of Trs.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). However, parties must clearly evidence their intent to be bound by such rules. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61–62, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995); *Chiron Corp. v. Ortho Diagnostic Sys., Inc.*, 207 F.3d 1126, 1131 (9th Cir.2000). In other words, the strong default presumption is that the FAA, not state law, supplies the rules for arbitration. *See Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1213 (9th Cir.1998); *see also Roadway Package Sys. v. Kayser*, 257 F.3d 287, 293 (3d Cir.2001) (stating that parties must evidence a "clear intent" to incorporate state law rules for arbitration).

[3] [4] Sovak claims that Illinois law supplies the rules for arbitration because the Stock Redemption Agreement's arbitration \*1270 provision contains an Illinois choice-of-law clause. But, a general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration. *See Wolsey, Ltd.*, 144 F.3d at 1213 (stating that "*Mastrobuono* dictates that general choice-of-law clauses do not incorporate state rules" for arbitration); *see also Chiron Corp.*, 207 F.3d at 1131 (same). Rather, we will interpret the choice-of-law clause as simply supplying state substantive, decisional law, and not state law rules for arbitration. Therefore, we must conclude that the Agreement incorporates the FAA's rules for arbitration, but Illinois substantive law applies in all other respects.

[5] [6] We further conclude that waiver of the right to compel arbitration is a rule for arbitration, such that the FAA controls. Rules for arbitration include principles that affect the "allocation of power between alternative tribunals." *Mastrobuono*, 514 U.S. at 60, 115 S.Ct. 1212. Waiver, in the

arbitration context, involves the circumstances under which a party is foreclosed from electing an arbitration forum. Therefore, the question of whether a party has waived its right to compel arbitration directly concerns the allocation of power between courts and arbitrators. *Cf. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (explaining that “an allegation of waiver” must be resolved in light of the FAA’s preference for arbitration). Accordingly, the FAA, and not Illinois law, supplies the standard for waiver.

[7] Sovak, however, argues that Cook is nonetheless foreclosed from arguing that the FAA applies. The district court applied Illinois law in determining that Cook had not waived its right to compel arbitration. Sovak claims that Cook invited the district court’s error, and therefore is precluded from arguing otherwise on appeal here.

[8] [9] The invited error doctrine holds that “[O]ne may not complain on review of errors below for which he is responsible,” *Deland v. Old Republic Life Ins. Co.*, 758 F.2d 1331, 1336–37 (9th Cir.1985) (internal quotation marks omitted), and extends to choice of law questions. *See Portland Gen. Elec. Co. v. U.S. Bank Trust Nat’l Ass’n*, 218 F.3d 1085, 1089 (9th Cir.2000). In its motion to dismiss in favor of arbitration, Cook expressly stated that Illinois law, and not the FAA, generally applied to its motion. However, Cook provided a lengthy description of federal waiver jurisprudence in responding to Sovak’s waiver argument, and it specifically relied upon the FAA. Accordingly, Cook did not invite the district court’s error in applying Illinois law.

### B

[10] Sovak asserts that Cook waived its right to compel arbitration under the FAA by successfully moving to dismiss the second amended complaint for failure to state a claim. In order to prevail, Sovak must show (1) Cook had knowledge of its existing right to compel arbitration; (2) Cook acted inconsistently with that existing right; and (3) he suffered prejudice from Cook’s delay in moving to compel arbitration. *See Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir.1990). Sovak bears a “heavy burden of proof” in showing these elements. *Id.*

[11] We conclude that Sovak has not met his burden because he has not shown how he was prejudiced by Cook’s delay in moving to compel arbitration. Indeed, Sovak has made no attempt on appeal to articulate how he was prejudiced.

Accordingly, we hold that Cook did not waive its \*1271 right to compel arbitration under the FAA.<sup>1</sup>

### III

Sovak also challenges the district court’s denial of his motion to vacate the arbitration award. Specifically, he claims that the arbitration panel misconstrued the Stock Redemption Agreement and that he was denied a fundamentally fair hearing.

### A

[12] [13] Judicial review of an arbitration panel’s decision is “extremely narrow.” *Employers Ins. of Wausau v. Nat’l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1485 (9th Cir.1991). “If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced.” *Sheet Metal Workers Int’l Ass’n, Local 359 v. Ariz. Mech. & Stainless, Inc.*, 863 F.2d 647, 653 (9th Cir.1988). Sovak cannot meet this high burden of showing that the panel misconstrued the Agreement.

Cook agreed to provide Sovak “thirty-three percent (33%) of the royalties and other compensation received by[Cook] ... under [the Ioxilan] contract between [Cook] and Chugai.” Sovak contends that the approved Ministry application to sell Ioxilan in Japan represents “other compensation.” He therefore claims that he is entitled to its fair market value. Nevertheless, it is plausible to construe the term “other compensation” to refer to amounts directly received in connection with the sale of Ioxilan in Japan. Because this plausible interpretation excludes the final Ministry application, Sovak is not entitled to relief.

### B

[14] Sovak also claims that the arbitration proceedings were fundamentally unfair because the panel denied him an oral hearing. Sovak does not contend that he lacked the opportunity to submit any relevant written materials, nor can he show any provision of the FAA which guarantees oral presentation. The panel’s decision shows that it carefully considered Sovak’s claims. In short, we cannot conclude that a party is denied a fundamentally fair hearing simply because he was denied oral presentation.

### IV

Sovak v. Chugai Pharmaceutical Co., 280 F.3d 1266 (2002)  
02 Cal. Daily Op. Serv. 1553, 2002 Daily Journal D.A.R. 1901...

In his reply brief, Sovak argues that the district court erred in dismissing his claims against Chugai. Because Sovak did not argue this issue in his opening brief, we decline to consider it. *See, e.g., Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir.1994) (“We review only issues which are argued specifically and distinctly in a party’s opening brief.”).

AFFIRMED.

**Parallel Citations**

02 Cal. Daily Op. Serv. 1553, 2002 Daily Journal D.A.R. 1901, 2002 Daily Journal D.A.R. 3749

**Footnotes**

- \* The Honorable Samuel P. King, Senior United States District Judge for the District of Hawaii, sitting by designation.
- 1 Apart from waiver, Sovak does not challenge the district court’s order compelling arbitration. Therefore, we express no view as to whether the district court properly compelled arbitration in Chicago, even though the federal action was filed in California. *Compare Cont’l Grain Co. v. Dant & Russell*, 118 F.2d 967, 968–69 (9th Cir.1941) (holding that § 4 of the FAA limits a court to ordering arbitration within the district in which the suit was filed) with *Dupuy–Busching Gen. Agency v. Ambassador Ins. Co.*, 524 F.2d 1275, 1276–78 (5th Cir.1975) (concluding that § 4 bars ordering arbitration in another judicial district only when the party seeking to compel arbitration filed the federal suit).

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