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No. 67907-4

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

LORI S. HASKELL.

Appellant,

v.

BYERS & ANDERSON, INC. and LAUREL TERRY,

Respondents.

RESPONDENTS' BRIEF

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I. INTRODUCTION AND OVERVIEW

The Director of the Washington State Licensing Department has promulgated licensing rules that include professional standards for certified court reporters. Those rules, set forth at WAC 308-14-130, require court reporters to, among other, things:

(1) Offer arrangements on a case concerning court reporting services or fees to all parties on equal terms.

* * *

(5) Provide transcripts on agreed delivery dates, and give notification of any delays.

* * *

(10) Notify all involved parties when transcripts are ordered.

* * *

(12) Supply certified copies of transcripts to any involved party, upon appropriate request.

The primary question before this Court is whether this regulatory scheme requires court reporters to provide transcripts to attorneys or parties without assurance of payment. Encompassed within this question is whether a court reporter's decision to extend credit to one qualified party or attorney requires the court reporter to automatically extend credit to the opposing party or attorney, regardless of any differences in credit history. The answer to both questions is "no".

Attorney Lori Haskell commenced this lawsuit against the court reporting business Byers & Anderson, Inc. and certified court reporter Laurel Terry¹ after they provided court reporting services for the deposition of Haskell's client, Susan G. Reiter. Reiter, though never a party or witness in this action, is the plaintiff in a UIM Arbitration; and her deposition was scheduled by the attorney defending the insurance company. The defense attorney ordered a transcript at the close of the deposition.

When Haskell verbally requested a copy of the ordered transcript, she was asked to complete a Transcript Order Form, which required her to provide a credit card number and sign the credit card authorization on the form. Haskell was asked to complete the form and provide credit card information because, at the time of the deposition, she did not have an established positive payment history with Byers & Anderson. Byers & Anderson had only twice before provided transcripts to Haskell; on the last occasion, Haskell did not pay for the transcript until three months after she was invoiced. The information was appropriately requested for the purpose of guaranteeing payment. The defense attorney who conducted the

¹ Since Haskell's claims are primarily directed at Byers & Anderson's business practices regarding credit, the response brief appropriately focuses on those challenged practices. Terry did no more than present Byers & Anderson's forms.

deposition was not asked to complete the form, since his firm already had a well-established and long-standing positive payment history with Byers & Anderson spanning nine years. Moreover, information was obtained from the defense attorney in advance when the deposition was scheduled.

Haskell refused to even look at the Transcript Order Form, much less complete it. Since Haskell did not complete an Order Form, when the transcript was ready Byers & Anderson promptly contacted Haskell by phone. A voice message was left advising Haskell that the transcript was ready and available and, if Haskell would return the call with a verbal assurance to pay for the transcript within 30 days, the transcript would be sent to her without advance payment. A notification letter advising that the transcript was available was mailed the same day.

Seven days later, having received no response from Haskell, Byers & Anderson called her again. This time Haskell responded, not with the requested verbal payment assurance, but to express her anger. Even though Haskell refused to provide even an assurance that she would pay for the transcript, Byers & Anderson emailed the transcript to Haskell. Haskell did pay for the transcript upon receipt of an invoice.

Unfortunately, the matter did not end there. After the transcript was emailed, Haskell filed a lawsuit. Haskell asserts in this lawsuit that the only reason she was asked to provide credit card information is her status as a sole practitioner. She asserts that, regardless of differences in credit history, if credit is extended to one party, it must automatically be extended to all without further question. Haskell claims that the mere act of requesting her credit card information (or even verbal assurance of payment) as a condition of providing a transcript gives rise to a legal claim that entitles her to injunctive relief and damages.

Byers & Anderson disputes that they only require sole practitioners to provide credit card information before delivering an ordered transcript. Though many sole practitioners are asked to provide credit card information, many are not. Likewise, not all attorneys who are asked to complete the credit card form are sole practitioners. The business practice is directed to all clients, sole practitioners and firms of all sizes, for whom Byers & Anderson does not have an established positive credit history. It is a reasonable business practice that is intended to better ensure payment for services provided. Byers & Anderson is not elevating business practice over “professional conduct,” but is engaged in a sound business

practice that is also wholly consistent with the regulatory requirement to furnish transcripts upon “equal terms” and “appropriate request.”

Byers & Anderson charges the same rates to all parties to a deposition, whether plaintiff or defendant, and whether represented by a sole practitioner, a small firm or large firm or not represented at all. That is all they are required to do. Byers & Anderson extends services on account to attorneys with an established credit history merely as a professional courtesy. Upon establishment and continuation of a positive payment history, Byers & Anderson will extend credit to any attorney, whether solo or a member of a large firm. The terms for credit are equal, but credit is not automatic. Attorneys must qualify for the courtesy of credit. No provision of WAC 308-14-130 obligates Byers & Anderson to assume the risk of extending credit to attorneys with whom they have no meaningful history.

The Honorable Michael Heavey correctly concluded that Byers & Anderson’s (and Terry’s) conduct was neither wrongful nor a violation of WAC 308-14-130 and, further, that the parties, Ms. Reiter and Farmers Insurance, were treated equally.² Judge Heavey, as well as Commissioner Carlos Velategui, also appropriately concluded that, while Haskell may have perceived an insult, her lawsuit does not

² See Report of Proceeding (RP) 18.

present a viable cause of action.³ This Court should conclude the same and affirm the trial court's summary judgment

II. FACTS

A. Byers & Anderson And Their Conditions For Extending Credit

Byers & Anderson has been in the business of providing court reporting services since 1980. They have offices in both Tacoma and Seattle and provide court reporting services throughout Western Washington. They also provide services in the Spokane and Yakima areas. In their 31 years of service, Byers & Anderson has built a large clientele consisting of law firms of all sizes and many sole practitioners. (CP 60-61.)

Though not required to do so, Byers & Anderson extends credit to many of their customers, and does not require payment until 30 days after their services have been provided and the client is invoiced. Unfortunately, they have learned from their decades of experience that a significant number of lawyers will not return the courtesy of credit with the courtesy of timely payment. In far too many instances, Byers & Anderson and their court reporters have never been paid for their

³ See RP 18, CP 161-62.

valuable services.⁴ CP 56.) As a result, Byers & Anderson has developed a business practice in which they voluntarily extend credit only to attorneys or firms that have established a positive billing history. New clients, those who have yet to establish a positive payment history, are asked to provide credit card information and authorization (or at least verbal assurance) in advance of providing services, as are clients with poor payment histories. If a new client calls to book a court reporter for a deposition he or she is conducting, the credit card information and authorization are obtained at that time. (CP 56.)

However, at the time a court reporter is booked, Byers & Anderson is frequently unaware of the identity of the attorneys representing the other parties in the litigation and does not know which or even how many attorneys will be in attendance. Often, Byers & Anderson does not learn the identity of those attorneys until they appear at the deposition. In such instances, the court reporters are required to obtain all necessary information from the attending attorneys at the deposition. (CP 57.)

⁴ All of Byers & Anderson's court reporters are independent contractors. The court reporters only receive payment for services actually rendered and then, only if and when the customer pays. (CP 56.)

The court reporters are instructed to obtain each attorney's name, the name of his or her firm (if any) and all contact information, to include address, phone number and email address. If the attorney, or his or her firm, is not a client that has established a positive payment history with Byers & Anderson, or has a poor payment history, the court reporters or the office personnel of Byers & Anderson have the attorney complete a Transcript Order Form. (CP 57, 66-67.) To complete the form, the attorney must provide credit card information (either personally or for his or her firm) and sign the form so as to authorize Byers & Anderson to charge the credit card for services rendered. (*Id.*)

The purpose of the practice is to better guarantee that Byers & Anderson (and the court reporter) will be paid for the transcripts they provide. Byers & Anderson does not require that their new clients actually pay by credit card.⁵ The attorney may advise the court reporter that she or her firm prefers to pay for the transcript copy by check. The attorney is nonetheless asked to provide the credit card information and authorization so that payment is better ensured in the

⁵ In fact, it would be Byers & Anderson's preference that none of their clients pay by credit card, since they must pay the credit card provider a fee each time such payment is accepted. Byers & Anderson would have less expenses, and a correspondingly greater profit, if payment was always made by check or cash. The realities of the marketplace, however, make acceptance of credit card payments a necessity; and many of Byers & Anderson's clients elect to pay by credit card. (CP 57-58.)

event the attorney, or his or her firm, fails to pay for the transcript within 30 days of being invoiced, or the check is returned for insufficient funds. In such case, the credit card will be charged for the transcript, but only after the 30 days have elapsed without payment. (CP 57-58.)

If the identity of the attending attorney (the attorney defending the deposition) is known at the time the court reporter is booked, Byers & Anderson will advise the court reporter by email of the attorney's name and, if the attorney or his or her firm does not have an established positive payment history, instruct the court reporter to have the attorney complete and sign a Transcript Order Form. If the identity of the attending attorney is not known until the day of the deposition, the court reporter is instructed to have the attorney complete the Transcript Order Form unless the court reporter is certain that the attorney or his or her firm has a positive payment history. Court reporters are instructed to present the form anytime they are in doubt or unsure of the payment history. Attorneys in attendance who have a known positive payment history, or are with a firm with such a history, will not be asked to complete the form. (CP 58, see *also* CP 209-10.) Thus, there may be instances in which some but not all of

the attorneys attending the deposition will be asked to complete the form.

Court reporters are sometimes faced with a situation in which the attorney refuses to complete and sign the form, or advises that she does not have the required information with her at the deposition. In such instances, Byers & Anderson court reporters are instructed to do their best to obtain a completed form, but if unable to do so, promptly email the billing department to advise that a transcript has been ordered by a client without an established billing history and that credit card information was not obtained. The Byers & Anderson billing department will then follow up with the attorney or his or her firm to obtain the requisite credit card information and authorization. In some cases, where the attorney continues to resist providing credit card information, Byers & Anderson will agree to provide the transcript if the attorney will simply provide verbal assurance that payment will be made within 30 days of invoicing. Interestingly, Byers & Anderson has found from experience that the simple act of obtaining a verbal promise to pay increases the likelihood of payment. (CP 58-59.)

Byers & Anderson's business practice of obtaining credit card authorization or a verbal payment assurance is not directed solely at sole practitioners. (CP 59, 355-6, 389-94.) Advance payment, via

credit card or cash on delivery, is required for all clients that have a poor payment history. (CP 59.) Credit card authorization and payment assurance is also required from firms – large or small – that do not have an established positive payment history. (CP 59.) Credit card information is frequently required from out-of state attorneys, even those from very large firms, since they do not have an established financial relationship with Byers & Anderson. (CP 59, 355-56, 389-94, 209.) In fact, review of the Byers & Anderson files in the course of this lawsuit revealed that the majority of signed and completed forms were completed by out-of-state firms. (CP 356.)

Candidly, the form is often presented to sole practitioners. (CP 59.) This is not because sole practitioners generally do not pay their bills. Byers & Anderson has many, many sole practitioner clients who responsibly pay their invoices. Those attorneys are valued clients and they are extended services and provided transcripts on account without the need for further payment assurances. (CP 59-60, 355, 387, 209.) However, the large number of sole practitioners and their fluid entry into and exit from the profession make it more likely that a sole practitioner (and their creditworthiness) will be unknown to Byers & Anderson. It is also true that a substantial number of the Byers &

Anderson customers with unacceptable payment histories are sole practitioners. (CP 59-60, 209-10.)

Because of this practical reality, sole practitioners are often asked to complete the Transcript Order Form and the business practice may at times even be referred to as a policy regarding sole practitioners. (CP 59-60, 209-10.) Even in those instances, however, the instruction to obtain completed and signed forms from sole practitioners is limited to those practitioners with whom Byers & Anderson does not have an established financial relationship. (See CP 210 (“we will require credit card information from ALL sole practitioners with whom we do not already have an established financial relationship or the transcript will be sent COD.”); CP 209 (“So I’m asking you all to be vigilant about sole practitioners with whom you have never worked who are ordering transcripts.”).)

Nonetheless, Byers & Anderson’s reasonable business practice of obtaining payment guarantees or assurances from clients without an established positive payment history is a practice applied to all clients, whether the client is a sole practitioner or a small, medium, large or even mega-sized firm. Byers & Anderson is required to and does charge all parties to a deposition the same rates. (CP 60.) Byers & Anderson is not, however, required to extend credit to all parties and

attorneys regardless of whether Byers & Anderson has the benefit of a known payment history for the various customers. (*Id.*)

B. The Haskell / Reiter Deposition

Byers & Anderson's services were retained for the deposition of Susan Reiter, who is the plaintiff in a UIM Arbitration. The deposition was requested and Byers & Anderson was retained by Michael Abrahamson, with the law firm Hollenbeck, Lancaster, Miller & Andrews, who was representing the defendant Farmers Insurance Company. (CP 60-61.) Byers & Anderson has provided court reporter services for the law firm Hollenbeck, Lancaster, Miller & Andrews since 2003, and has successfully billed and received payment for hundreds of invoices. (CP 60-61, 114, 354.) Byers & Anderson also has a long-established positive billing history with Farmers Insurance Company. (CP 61.)

The deposition was scheduled for April 29, 2011, and court reporter Laurel Terry was assigned to serve as the court reporter. (CP 61, 114.) At the conclusion of the deposition, Abrahamson ordered the transcript. Since Hollenbeck, Lancaster, Miller & Andrews had a long-standing positive credit history with Byers & Anderson, Abrahamson was not asked to provide credit card information or any

payment assurance either at the time the deposition was scheduled or when the transcript was ordered.⁶ (CP 61, 115.)

Reiter was represented by attorney Lori Haskell, who is the plaintiff in this lawsuit. Byers & Anderson's records revealed that they had only limited business experience with Haskell when the deposition was scheduled. She was invoiced for a transcript copy on October 21, 2009, and paid the invoice on November 23, 2009. She was also invoiced for a transcript copy on January 4, 2010, and paid that invoice on March 29, 2010. Thus, over the prior three years, Haskell had only been invoiced twice, and only one of the invoices was timely paid within 30 days as required. (CP 61, 69, 123-24, 129.) This did not constitute an established positive payment history.

As a result, when Haskell ordered a copy of the Reiter transcript, she was asked to complete a Transcript Order Form and provide credit card information.⁷ (CP 61-62, 115.) Haskell refused to take or even look at the form, much less complete it. (CP 115, 195.)

⁶ Byers & Anderson sent the invoice for the Reiter deposition attendance fee and transcript to Abrahamson and Hollenbeck Lancaster Miller on May 16, 2011. Byers & Anderson promptly received payment for the invoice on May 24, 2011, only 8 days after the invoice was sent. Their payment of this invoice is wholly consistent with their well-established good credit history. (CP 354, 366-67.)

⁷ Haskell asserts in her Complaint that she was advised she was required to sign a "contract" because she is a sole practitioner. (CP 8.) Terry did make reference to the fact that Haskell was a sole practitioner. (CP 115.) As noted earlier, a significant portion of new clients with whom Byers & Anderson does not have previously established payment histories are sole practitioners. (CP 59-60.) Regardless of whether Terry referenced Haskell's status as a sole practitioner, it cannot be disputed that Haskell did not have an established payment history. (CP 61, 69.)

Though Haskell's alleged "injuries" now focus on the perceived insult or embarrassment of being asked for credit card information in the presence of her client (see Appellant's Brief at p. 27), Haskell admitted in her sworn declaration that she was not even aware that credit card information was being requested when she was presented the Transcript Order Form.⁸ (CP 195.) In any event, following Haskell's response at the deposition, Terry notified Byers & Anderson's billing department of the order and the need to follow up to have the form completed. (CP 115, 121.)

Consistent with their practice, Byers & Anderson attempted to follow-up with Haskell by phone. (CP 123.) Notification that the deposition had been transcribed and was available at Byers & Anderson's offices for her client's review was mailed on May 5, 2011. (CP 123, 126-27, 62.) Before the notifications were mailed, however, a member of the billing staff called Haskell's office to confirm her order and obtain verbal payment assurance. Haskell's service advised that Haskell was out of the office for a week tending to an emergency. Byers & Anderson was nonetheless allowed to leave a voice message to inform Haskell that a transcript would be promptly provided if

⁸ It would appear that that Haskell remained unaware of the initial request for credit card information at the time of the subsequent May 16, 2011 complaint letter she sent in response to the request for verbal payment assurance. Haskell makes no mention of a request for credit card authorization in her letter. (See CP 201-02.)

Haskell would call back with a verbal assurance that she would pay the transcript invoice within 30 days of receipt. (CP 123, 129, 62.) Byers & Anderson was waiving their requirement for credit card information and simply asking for the courtesy of assurance of payment.⁹ The Byers & Anderson billing staff confirmed this action through a follow-up email to Terry. (CP 129.)

When Byers & Anderson received no response, the billing staff called again on May 16, 2011, leaving another similar message. (CP 123-24. 62.) Byers & Anderson did receive a return call to the second message. Haskell was angry, was unwilling to listen to an explanation for the request, and ultimately refused to provide the requested assurance. (*Id.*)

The next day, on May 17, 2011, Byers & Anderson received a letter from Haskell dated May 12, 2011. (CP 71-72.) Though it appears that the letter was mailed to Byers & Anderson's Seattle address on or around May 12th; Byers & Anderson did not become aware of the letter until May 17th. Since the Seattle office is not regularly staffed and their official mailing address is in Tacoma, the mail at that office is checked sporadically. (CP 62-63, 71-72.) In any

⁹ Haskell acknowledges this fact as paragraph 10 of her Complaint where she asserts: ". . . plaintiff received a voice mail from 'Meagan at Byers & Anderson'. Meagan stated that plaintiff would have to call and 'promise to pay' for the transcript before it would be released to plaintiff." (CP 8.)

event, Haskell expressed in this letter her perception that she was being treated unfairly because she is a sole practitioner. (CP 71-72.)

Customer satisfaction and positive client relationships are important to Byers & Anderson. Thus, upon receiving the letter, the President of Byers & Anderson, Jennifer Anderson, personally responded that same morning. Anderson called Haskell at 9:45 a.m. and, when Haskell did not answer, left a detailed voice message advising the transcript would be emailed that morning. (CP 63.) She then followed up with an email at 11:10 a.m. to apologize for any unintended confusion or misperception that may have been created by her office, offer a detailed explanation for the requested payment assurance, and advise Haskell that, even without the requested payment assurance, the transcript was already delivered via email. (CP 63, 74.) Consistent with Anderson's representation, the E-Transcript was emailed to Haskell at 10:52 that same morning and Byers & Anderson received an automated confirmation that the email was successfully delivered. (CP 63, 76.)

C. Haskell Filed Suit And Unsuccessfully Sought A Restraining Order

Receipt of the transcript and Anderson's apologies for any misunderstanding were insufficient to satisfy Haskell. At 2:17 p.m., well after the transcript was emailed and after she received a voice

message and an additional email confirming the transcript had already been provided to her, Haskell e-filed a Complaint for injunctive Relief and for Damages under the above caption. (CP 130, 133.) At 5:10 p.m., three hours after filing the complaint and after the close of the business day, Haskell began faxing to Byers & Anderson the Summons & Complaint, as well as a Motion and Declaration for (1) Temporary Restraining Order and (2) Order to Show Cause, under the following cover message:

Due to your illegal withholding of the transcript of Susan Reiter in *Reiter v. Farmers* a lawsuit has been filed against Byers & Anderson. The lawsuit also names Laurel Terry individually. I am seeking a Temporary Restraining Order in King County Superior Court tomorrow morning. I suggest you promptly provide these papers to your counsel and to Ms. Terry.

(CP 80-108.)

Byers & Anderson immediately contacted the undersigned counsel to address the newly filed lawsuit and the imminent motion for temporary restraining order. Haskell asserted in her Complaint that she had not received the Reiter transcript. Counsel forwarded to Haskell the same email sent by Byers & Anderson earlier that day delivering the E-Transcript (along with the automated delivery verification), and requested Haskell to withdraw her motion for a temporary restraining order. (CP 140-41, 143-46.) Haskell declined

the request and advised that, even though she had received the transcript, she intended to present her motion at the Commissioner's *ex parte* docket the following morning between 10:00 and 10:30 a.m. (CP 148-49, 151.) Haskell sought an order restraining Byers & Anderson from requiring credit card authorization and/or payment assurance from any attorney as a condition of delivering transcripts. Haskell thus sought to force Byers & Anderson to extend credit for its services, regardless of any risk of nonpayment. (See CP 95-96.) Haskell seeks the same injunctive relief, but permanent, in this lawsuit. (See CP 11.)

Haskell did, in fact, appear before the Honorable Commissioner Carlos Velategui on May 18, 2011. (See CP 154.) Commissioner Velategui not only denied the requested restraining order, but advised Haskell that her lawsuit did not present a viable claim. (CP 161-63.) Commissioner Velategui stated that Byers & Anderson was free to choose its business model and, if he had jurisdiction to do so, he would dismiss the case. (CP 161-62.) After the Commissioner ruled, an order was entered denying the requested restraining order. (CP 166-67.)

Both Byers & Anderson and Terry had hoped that, with the benefit of Commissioner Velategui's opinion on the merits of the case,

the litigation would proceed no further. At the time of the Commissioner's ruling, the lawsuit had not been served on either defendant and was not formally commenced. Unfortunately, nearly three weeks later, Haskell filed an amended complaint (CP 7-13) and served it on Byers & Anderson. (CP 63-64.)

D. The Trial Court Dismissed Haskell's Claims On Summary Judgment.

Haskell asserted nine causes of action in her amended complaint ranging from violation of the Consumer Protection Act to breach of fiduciary duty to the tort of outrage. (CP 10-11.) Some of her causes were based upon unrecognizable legal theories (e.g., intentional, malicious and willful interference with the administration of justice; breach of public policy to further confidence in the legal system). (*Id.*)

Through their counsel, Byers & Anderson and Terry advised Haskell on July 22, 2011 of their intent to file a motion for summary judgment for hearing on October 14, 2011. (CP 169.) Haskell was thus provided 94 days notice of the motion, 56 days more than the 28 days required by Civil Rule 56. The substantial advance notice was provided to ensure that Haskell had a fair opportunity to conduct discovery in advance of her response deadline, should she choose to do so.

The Honorable Michael Heavey dismissed Haskell's claim on summary judgment. (CP 441-43.) Contrary to Haskell's assertion, Judge Heavey did not conclude Haskell was treated differently. Haskell quotes the trial court's prefatory comments (RP 17), which, read in context, appear to be more of a statement of the issue before it, rather than a statement of the ultimate conclusion. Ultimately, Judge Heavey held that Byers & Anderson's (and Terry's) conduct was not wrongful and, further, that the parties to the deposition, Reiter and Farmers Insurance, were treated equally. (RP 18.) Judge Heavey concluded:

This Court finds that as a matter of law that a court reporter agency exercising reasonable business judgments regarding the extension of credit does not violate Washington Administrative Code 308-14-130(1); that treating attorneys differently based upon unknown payment histories or known payment histories or treating them differently by unknown credit history of credit applicants does not mean that Farmers and Ms. Reiter were treated differently. (RP 18.)

Haskell timely appealed. (CP 444-48.) On appeal, Haskell has abandoned most of her original claims, and challenges only the court's decision with regard to compliance with WAC 308-14-130 and dismissal of Haskell's Consumer Protection Act and tortious interference with a business relation claims. The trial court's decisions in this regard, however, are consistent with the law and should be affirmed.

III. ARGUMENT

A. The Trial Court Correctly Held That Byers & Anderson's Practices Are Consistent With The Applicable Statutory And Regulatory Requirements.

1. The Court Reporting Act and its associated regulations.

The profession of court reporting is governed by the Washington Court Reporter Act, chapter 18.45 RCW. The primary purpose of the Act is to regulate certification of court reporters to ensure that court reporters have the minimum necessary skills and competency. This intention is clearly stated through express legislative findings:

The legislature finds it is necessary to regulate the practice of court reporting at the level of certification to protect the public safety and well-being. The legislature intends that only individuals who meet and maintain minimum standards of competence may represent themselves as court reporters.

RCW 18.145.005. Toward achieving this purpose, the Act empowers the Director of the State Department of Licensing to promulgate consistent rules as necessary to implement the Act. RCW 18.145.050.

In addition to providing certification requirements, the Act specifically describes with some particularity nine categories of conduct that the Legislature has deemed unprofessional conduct for court reporters (e.g. commission of an act involving moral turpitude relating to the practice of court reporting; incompetence or negligence).

RCW 18.145.130. The Act also provides that it is unprofessional conduct for a court reporter to violate “any state or federal statute or administrative rule regulating the profession.” RCW 18.45.130(6). Haskell exclusively relies on this provision, which incorporates implementing regulations, to claim that Byers & Anderson’s request for credit card information violated the Act. (See, CP 8, 12-13.)

Consistent with his authority, the Director has promulgated regulations to implement the certification requirements and other provisions of the Court Reporter Act; those regulations are set forth in Title 308-14 WAC. The rules include professional standards. Relevant to this appeal, WAC 308-14-130 provides that court reporters shall:

(1) Offer arrangements on a case concerning court reporting services or fees to all parties on equal terms.

* * *

(5) Provide transcripts on agreed delivery dates, and give notification of any delays.

* * *

(7) Disclose conflicts, potential conflicts, or appearance of conflicts to all involved parties.

* * *

(10) Notify all involved parties when transcripts are ordered.

* * *

(12) Supply certified copies of transcripts to any involved party, upon appropriate request.

Finally, with regard to provision of and payment for transcripts, further guidance is found in Civil Rule 30(f)(2). This rule provides: “Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition transcript to any party or the deponent.” (Emphasis added.) This rule was interpreted in *Easterday v. South Columbia Basin Irrigation Dist*, to authorize a court reporter to require payment before delivery of a transcript copy. 49 Wn. App. 746, 752-53, 745 P.2d 1322 (1987). Pursuant to CR 30(f)(2), absent exigent circumstances, a court reporter is under no obligation to deliver a transcript copy without first receiving payment. *Id.* at 752-53.

2. Byers & Anderson did not violate the regulations governing court reporting.

Without consideration of and essentially to the exclusion of its companion provisions, Haskell relies heavily on WAC 308-14-130(1). She argues that “equal terms” requires that all parties must receive transcript copies at the same time, regardless of whether payment has been secured or a requested payment assurance has been refused. Haskell also asserts that, if credit is extended to one party’s attorney, the court reporter must also automatically extend credit to the other party’s attorney, regardless of their respective payment histories. Haskell essentially argues that “equal terms” requires “equal results,” even if an attorney does not qualify for credit. Haskell’s arguments are

a strained and unreasonable expansion of the requirements of WAC 308-14-130(1), and give no consideration to the fact that WAC 308-14-130(12) only requires a court reporter to provide a transcript “upon appropriate request.” The burdens Haskell attempts to unilaterally impose on Byers & Anderson certainly do not qualify as an “appropriate request” for a transcript as contemplated by WAC 308-14-130(12).

Preliminarily, it should be noted that Haskell “ordered” the Reiter transcript by saying that she “wanted a copy of the transcript.” (CP 195.) She did so without knowing or even asking about the cost. Haskell’s “order” was not conditioned on approval or even notice of the transcript cost. Haskell ordered the transcript without having an established positive payment history with Byers & Anderson and without offering any assurance of payment. Though now offended by the request for credit card information, at the time she did not even look at the order form and was unaware of its content. (CP 115, 195.) Haskell’s expectation was that receipt of Byers & Anderson’s product required no more from her than a pronouncement that she “wanted a copy of the transcript.” Haskell wanted a transcript copy on credit, even though she was virtually unknown to Byers & Anderson.

Haskell has never denied that she did not have an established positive payment history with B&A – she cannot, since she had only been invoiced twice previously, and one of the invoices was paid late. (CP 61.) Likewise, Haskell has not disputed that Farmers Insurance (as well as its counsel) did have a well-established positive billing history with B&A. There are no accusations that the fees charged to Farmers were different than the fees charged to Haskell. The sole accusation of “unequal treatment” – the accusation upon which all her claims depend – is that one party (basically unknown to the vendor) was asked to provide payment assurance before the product was sent, and the other party (with a long-standing account in good standing) was not.

No doubt WAC 308-14-130(1) requires Byers & Anderson to charge all parties in a lawsuit the same fees. Byers & Anderson complies with that requirement (CP 60) and Haskell makes no allegation to the contrary. WAC 308-14-130(1) does not, however, direct that if one party gets a transcript on credit all parties must. It only requires that credit be available on the same terms. Under the Byers & Anderson policy, no attorney will receive a transcript until the court reporter has some reasonable assurance of prompt payment. That reasonable assurance may come from the attorney’s known

positive credit history; it may come from advance payment, proffer of a credit card for payment, agreement to receive the transcript COD, or some other acceptable commitment to pay for the transcript.

Not all attorneys may qualify for receiving a transcript on credit, but they are all offered credit on the same terms. If a court reporter is willing to extend the courtesy of credit, it is in the court reporter's sole discretion to establish the terms or criteria under which she is willing to accept the risk associated with credit. Quite frankly, this business discretion would even include the right to limit the extension of credit to firms of a certain size, tenure or with a defined minimum annual profit or income to debt ratio. The business, not the customer, holds the discretion to set credit terms. There is no language in WAC 308-14-130 that denies a court reporter this discretion, or that exercise of such business discretion constitutes unprofessional conduct.

Haskell claims there was a violation of the regulations because she did not receive notification that the Reiter transcript was ready on the same day as her opposing counsel. Notably, WAC 308-14-130 does not require simultaneous notification that a transcript is completed. Subsection (10) requires that all parties be notified when a transcript is ordered and subsection (5) provides that transcripts be delivered on the "agreed to delivery date," with notification of delays,

but there is no requirement for simultaneous notification that a transcript is complete.

Moreover, Byers & Anderson did attempt to promptly notify Haskell by phone to confirm her “order,” since she refused to complete the Transcript Order Form, and to obtain verbal assurance of payment, but they were advised by Haskell’s service that she was out of the office for a week. (CP 123, 129.) The record reflects that Haskell was not available to receive notification, not that Byers & Anderson failed to timely confer notification. Regardless, Byers & Anderson did not violate the requirements of WAC 308-14-130.

Finally, there is no evidence (much less evidence to create a genuine issue of material fact) that Byers & Anderson failed to “disclose conflicts, potential conflicts, or appearance of conflicts to all involved parties.” There is no evidence that a “conflict” as contemplated by WAC 308-14-130(7) even existed. That Haskell objected to the request that she provide a payment guarantee for the ordered transcript in no imaginable way gives rise to a “conflict” with regard to the court reporter’s duty to accurately record and transcribe the deposition. Nor would a situation in which one attorney qualifies for credit and another does not pose a court reporting conflict. Surely Haskell does not advocate that a court reporter must, or even should,

announce to all parties which parties have a positive payment history and which do not. To the contrary, Haskell seems to argue in her tortious business interference claim that even the slightest mention of differing credit requirements will serve to “impugn her integrity and creditworthiness.” (Appellant’s Brief at p. 27.) There was no conflict and no disclosure requirement. Byers & Anderson’s actions violated no applicable regulations.

3. Haskell’s “experts” support different treatment of customers with different credit histories.

Haskell filed declarations of two court reporters (one retired and one part-time) who offer their interpretations of the law. (CP 232-37.) The declarations are comprised solely of inadmissible legal opinions in that they purport to opine whether Byers & Anderson complied with the applicable law.¹⁰ *Washington State Physicians Ins. Exchange & Ass’n v. Fisons Co.*, 126 Wn.2d 50, 102, 858 P.2d 1054 (1993); *Hiskey v. City of Seattle*, 44 Wn. App. 110, 113, 720 P.2d 867 (1985); *State v. Olmedo*, 112 Wn. App. 525, 532, 49 P.3d 960 (2002). Such legal determinations are exclusively within the purview of the court. *Id.* But

¹⁰ Byers & Anderson moved to strike the declarations as improper opinion testimony, since they were primarily comprised of legal opinions (CP 328-36.) The trial court denied the motion to strike, but deemed the declarations as not helpful to resolve the issues presented. (CP 440-41.) More specifically, Judge Heavey concluded: “While Cannon and Larsen are experts on court reporting, they are not experts on credit practices in court reporting or business in general. Their declarations were not helpful to this court.” (CP440.)

even if taken at face value, the declarations prove the absurdity of Haskell's position.

Both declarants opine that a demand for credit card information from an attorney with a problematic payment history violates the law, yet both also opine that it is lawful in such circumstances to send a transcript to that attorney COD. (CP 233, 236-37.) When a transcript is sent COD the attorney does not receive it until payment is made; when a credit card is required, the attorney does not receive the transcript until payment is assured. Both methods of assuring payment are identical in effect. If COD delivery is acceptable, so too must be a request for a credit card payment guarantee. In short, Haskell's court reporter witnesses confirm that it is lawful to require credit card information in advance, even though they personally dislike the practice.

4. Byers & Anderson has not implemented a discriminatory payment scheme.

Haskell infers that Byers & Anderson created and implemented a discriminatory payment scheme for sole practitioners. She relies upon Byers & Anderson emails (CP 209-15) and three attorney declarations (CP 238-43). The proffered evidence does not support Haskell's claim.

The Byers & Anderson emails expressly acknowledge that many sole practitioners with positive credit histories routinely receive transcripts without a credit card authorization: “Certainly we work for lots of terrific sole practitioners who pay their bills promptly – but really the great majority of the problem lies with sole practitioners.” (CP 209). Subsequent emails were the same. On February 25, 2010, Byers & Anderson court reporters were told: “Effective immediately, we will require a credit card from ALL sole practitioners with whom we do not already have an established financial relationship or the transcript will be sent COD.” (CP 210.)

The attorney declarations are addressed in detail in the Supplemental Declaration of Jennifer Anderson at paragraphs 7-19, Exhibits E through K. (CP 356-63, 396-418.) These declarations provide inadmissible and uncorroborated hearsay narrative descriptions of emails purportedly advising that transcripts would not be provided without credit card information. Byers & Anderson produced the actual emails (CP 396-418), and those emails belie the narrative descriptions.

Even taken at face value, the declarations do not support Haskell’s claim. None of the attorneys claim a positive payment history with Byers & Anderson. To the contrary, one attorney had an

established poor credit history (taking as long as 10 months to pay one invoice) (CP256-58); another had no credit history whatsoever (CP 360-63); the third had no credit history in the prior three years and only very minimal history in the prior 5 years (CP 358-60). None of the attorneys testify that they were asked for credit card information or advance payment because they were sole practitioners. Their experiences only confirm Byers & Anderson's consistent practice of obtaining payment assurance when credit uncertainties are present.

5. Haskell does not have a private cause of action under WAC 308-14-130.

Recognizing that neither the Court Reporter Act, chapter 18.145 RCW, nor the implementing regulations authorize a private cause of action for damages, Haskell argues that her cause of action may be implied. The asserted cause of action does not qualify as an implied cause of action under the criteria articulated in *Bennett v. Hardy*, 113 Wn.2d 912, 748 P.2d 1258 (1990), which are:

- (1) whether the plaintiff is within the class for whose "especial" benefit the statute was enacted;
- (2) whether legislative intent, explicitly or implicitly, supports creating or denying a remedy; and
- (3) whether implying a remedy is consistent with the underlying purpose of the legislation.

Analysis of this question must start with examination of the expressly stated legislative purpose of the Court Reporter Act. As

noted earlier, the primary purpose of the Act is to ensure that court reporters are certified to have certain minimum competence and skills:

The legislature finds it is necessary to regulate the practice of court reporting at the level of certification to protect the public safety and well-being. The legislature intends that only individuals who meet and maintain minimum standards of competence may represent themselves as court reporters.

RCW 18.145.005 (emphasis added.) The Act is not intended to primarily regulate monetary business or credit practices, but to ensure that court reporters have the requisite skills to accurately and objectively document official proceedings.

In light of this stated purpose, there is no logical basis for concluding that, in passing this certification Act, the Legislature intended to create a private cause of action to enforce the Director-created regulation requiring court reporters to “offer arrangements on a case concerning court reporting services or fees to all parties on equal terms.” WAC 308-14-130(1). Implying a private cause of action to enforce this regulation with a damages action would not further the stated statutory purpose of this certification statute. See *Crimson v. Pierce County Fire Protection Dist. No. 21*, 115 Wn. App 16, 23-24, 60 P.3d 652 (2002); *Davenport v. Washington Educ. Ass’n*, 147 Wn. App. 704, 719, 197 P.3d 686 (2008).

Moreover, the Legislature provided a well-defined enforcement mechanism to carry out the purpose of the Act. The Legislature charged the Washington Department of Licensing with enforcement responsibilities and provided its Director with authority to promulgate consistent rules as necessary to implement the Act. RCW 18.145.050. Notably, it is one of the Director's promulgated rules, as opposed to an express statutory provision, that Haskell wishes to convert to a private cause of action.

The Act, however, empowered the Director, not private citizens, to investigate and evaluate complaints against court reporters to determine if rules were violated and whether corrective or punitive action is appropriate. RCW 18.145.120. Following a hearing conducted under the Administrative Procedure Act, chapter 34.05 RCW, and upon a finding that a court reporter has committed unprofessional conduct or is unable to practice with reasonable skill, the Director may invoke a wide range of remedies, including revocation of the court reporter's certification, imposition of conditions or corrective action, supervision and monitoring and refund of fees billed to or collected from the consumer. *Id.* This statutory scheme, to include the various remedies, demonstrates that the legislature did not intend to create a private cause of action to enforce the Act, but

intended the Director to be the enforcer. See *Crimson*, 115 Wn. App. at 24.

Byers & Anderson did not violate the Court Reporter Act or any of the implementing regulations. Even if there were a violation of WAC 308-14-130 as Haskell alleges, the law will not support implication of a private cause of action to recover damages.

B. Haskell Failed To Present A Viable Consumer Protection Act Claim.

To establish a Consumer Protection Act (“CPA”) violation, the plaintiff must prove five elements: (1) an unfair or deceptive act or practice that (2) occurs in trade or commerce, (3) impacts the public interest, (4) causes injury to the plaintiff in her business or property, and (5) the injury is causally linked to the unfair or deceptive act. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 602 (2009). Whether a particular action gives rise to a CPA violation is a question of law. *Leingang v. Pierce County Medical Bureau, Inc.*, 131 Wn.2d 133, 150 (1997). See also, *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 815, 239 P.3d 602 (2010). Thus, if there is no dispute with regard to the facts regarding the challenged conduct, whether that conduct constitutes an unfair or deceptive act can be decided as a question of law. *Leingang*, 131 Wn.2d at 150. “Acts performed in good faith under an arguable interpretation of existing law do not constitute

unfair conduct violative of the [CPA].” *Leingang*, 131 Wn.2d at 155, 930 P.2d 288 (1997); *Seattle Pump Co., Inc. v. Traders and General Ins. Co.*, 93 Wn. App. 743, 753, 970 P.2d 361 (1999).

Here, Byers & Anderson’s business practice with regard to extending credit cannot be deemed a deceptive or unfair practice. Even if Byers & Anderson exercised its business discretion to decline credit to any sole practitioners, there is no law to support that the exercise of such business discretion constitutes a deceptive or unfair practice prohibited by the CPA. Haskell relies exclusively upon her asserted violation of WAC 308-14-130 to satisfy this element. But as demonstrated above, there is no such violation. She likewise presents no evidence that Byers & Anderson’s reasonable business practice was anything other than a practice believed in good faith to be wholly consistent with court reporting professional standards. As a matter of law, Haskell does not present a viable CPA claim.

Moreover, Haskell can present no evidence that Byers & Anderson’s business practice, even if arguably deceptive, caused Haskell any measurable injury. Haskell seeks both general and special damages (CP 11), though the Complaint contains only two paragraphs with any description of perceived “harm”:

21. Defendants’ actions proximately caused plaintiff to explain to her client that she would be

deprived of the normal amount of time to review her deposition.

22. Defendants' actions proximately caused plaintiff to explain to her client that this treatment is due to plaintiff's status as a sole practitioner.

(CP 10.) In her brief to this Court, she states: "Ms. Haskell spent at least 30 hours in time in a frantic attempt to obtain a copy of the deposition transcript so that she could provide it to her client within 30 days of issuance of the deposition transcript." (Appellant's Brief at 24.) These 30 hours include time pursuing a temporary restraining order after Haskell had already received the transcript by email. (CP 199, 63-64, 74-78, 80-112, 130-31, 133, 140-41, 143-52.) Haskell's actions were unnecessary and of her own volition, and do not constitute injury under the CPA. If she sustained injury, it was self-inflicted, rather than the result of unfair or deceptive practices by Byers & Anderson..

To begin, Haskell's client was not, in fact, "deprived of the normal amount of time to review her deposition." At the same time defense counsel was mailed the transcript copy, Byers & Anderson also attempted to contact Haskell by phone to advise that the transcript was available upon verbal assurance to pay for the transcript. (CP 123, 129.) Haskell was out of her office that week (*id.*), unavailable to receive the call, listen to the message or apparently

make further arrangements to obtain the transcript; but the transcript was nonetheless fully and immediately available upon a positive response to the requested payment assurance. Likewise, it is difficult to believe that Haskell was indeed “frantic” as asserted in her brief, since she initially elected to respond to the request for verbal payment assurance by mailing a written letter (CP 62, 71-72, 197), rather than utilizing more expeditious communication methods such as a fax, email or telephone call.

Further, notice was timely mailed to Haskell advising that the transcript was available for her client’s review at Byers & Anderson’s offices. (CP 123, 126-27.) *Easterday, supra*, provides that, where advance payment is not provided, making the transcript available in this manner is sufficient to satisfy the court reporter’s obligation to furnish the transcript for review. 49 Wn. App. at 752-53. Moreover, Commissioner Velategui correctly noted that any diminution of review time was caused by Haskell. The Commissioner explained to Haskell: “You’re the one who decided that, as a matter of principle, you weren’t going to sign the contract and you weren’t giving them the time of day.” (CP 162.) Haskell even refused to provide the requested verbal assurance that she would pay for the transcript she was requesting.

Finally, in response to Haskell's stated grievance, after Haskell received the transcript, Byers & Anderson voluntarily issued a revised Signature Procedure Instruction setting the review period to 30 days following the revised notification. (CP 64, 110-12.) Despite Haskell's actions, her client received no less time than normally allowed to review the transcript and, in fact, was afforded substantially more time.

Haskell next argues that her injury was that she was required to explain the situation to her client. Setting aside that the circumstances and cause for explanation arose from Haskell's unilateral decision to refuse payment assurances, lawyers are frequently required to explain difficult situations to clients. A client discussion, even if considered difficult, cannot be deemed an injury under the CPA.

All of Haskell's perceived injuries were self-inflicted. Through a positive response to a reasonable request - requiring no more than the simple act of verbally assuring she will pay for the ordered transcript - Haskell could have readily avoided her "frantic" expenditure of time and any purportedly uncomfortable conversations with her client. As a matter of law, Haskell has failed to present a viable CPA claim.

C. Haskell Failed To Present A Viable Tortious Business Interference Claim.

A prima facie case for the tort of intentional interference with a business relationship requires proof of all five of the following elements:

- (1) the existence of a valid contractual relationship or business expectancy;
- (2) that defendants had knowledge of the contractual relationship or business expectancy;
- (3) intentional interference inducing or causing a breach or termination of the relationship or business expectancy;
- (4) defendants interfered for an improper purpose or used improper means; and
- (5) resultant damages.

Havsey v. Flynn, 88 Wn. App. 514, 518-19, 945 P.2d 221 (1997) (affirming CR 12(B)(6) dismissal of intentional interference claim).

Intentional interference requires an improper objective or the use of wrongful means that in fact cause injury to the person's contractual relationship. *Schmerer v. Darcy*, 80 Wn. App. 499, 505, 910 P.2d 498 (1996). Exercising in good faith one's legal interests is not improper interference. *Id.* at 506. No evidence or law was presented to support the claim that the sound (and common) business practice of obtaining payment assurance in advance of

releasing a valuable product was improper conduct, or a “tactic” deliberately used to strain Haskell’s relationship with her client. The speculative allegation without evidence cannot support a tortious business interference claim. Likewise, there is no legal authority or evidence to support a claim that Byers & Anderson’s exercise of their business discretion to set the terms and criteria for extending credit was done with an improper objective or through improper means (or contrary to applicable professional standards). Haskell’s tortious interference claim fails as a matter of law.

Moreover, in this case, the Court need look no further than the fact that Haskell’s business relationship with her client Susan Reiter was not terminated. Haskell states in her appellate brief that, as a result of Byers & Anderson’s request for credit card information, or alternatively a verbal assurance, Byers & Anderson “impugned her integrity and credit worthiness.” Haskell argues that because of this, and the self-inflicted possibility that her client might review the transcript at Byers & Anderson’s office, Reiter did not pursue her UIM claim against Farmers. (Appellant’s Brief at p. 27.)

Haskell does not and cannot cite to sworn testimony by Reiter, herself or anyone else to support this unbelievable claim. Instead, Haskell cites to an unsubstantiated and vague assertion in her own

prior legal brief (CP 188). The unsubstantiated assertion is devoid of credibility. Assuming (without evidence) that Reiter did abandon her UIM claim, it is implausible that Reiter would forfeit a potential recovery simply because her attorney was asked to provide payment assurance for an ordered transcript. No evidence is presented to remove the assertion from the realm of wild and unreasonable speculation. In any event, the UIM claim exclusively belonged to Reiter, who is neither a party nor participant of any kind in this action.

With regard to Haskell's business relationship with Reiter, in the single declaration Haskell provided, there is no mention whatsoever of the status or quality of the client relationship, much less a description of client communications or testimony that the client relationship was terminated, or even strained.

D. Even If She Prevails, Haskell Cannot Recover Attorneys' Fees On Appeal

Haskell appeals entry of a summary judgment dismissing her CPA claim, along with all of her other claims. Haskell did not cross move for summary judgment. On this appeal, she seeks no more than reversal of the summary judgment order entered in Byers & Anderson and Terry's favor. Haskell's best hope from this appeal is to have the matter remanded at trial.

The Consumer Protection Act only authorizes attorneys' fees to a party that actually prevails on their CPA claim. RCW 19.86.090. No authority supports an attorney fee award to a party that merely obtains reversal of a summary judgment so as to retain an un-litigated claim and the right to a trial.¹¹ The trial court's summary judgment should not be reversed. But even if it were, the reversal would not give rise to an attorney fee award.

E. Haskell's Appeal Is Frivolous And Byers & Anderson and Terry Should Be Awarded Their Attorneys' Fees Incurred Defending This Appeal. RAP 18.9 Attorneys' Fees Request.

On her motion for a temporary restraining order Haskell was advised by the Superior Court Commissioner that she has no viable cause of action. Notably, even before the lawsuit was filed and the restraining order was sought, Haskell already had in her possession the requested transcript and had sustained no damage. Haskell nonetheless insisted on pursuing the restraining order and thereafter prosecuting her lawsuit. The trial court confirmed that Haskell's claims are unsustainable and dismissed the lawsuit on summary judgment. Under the circumstances, Haskell's most recent appeal and continued pursuit of this action is remarkable.

¹¹ Haskell cites *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 675 P.2d 193 (1993). The *Bower* court, however, addressed an attorney fee award to a plaintiff who established a Consumer Protection Act claim on summary judgment as a matter of law.

RAP 18.9 authorizes this Court to award attorneys fees as compensatory damages against a party who files a frivolous appeal. See also, *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003).) 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, *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691, 732 P.2d 510 (1987).

Haskell's appeal is frivolous because all of her arguments could not possibly result in reversal. Given the history, it would appear that the appeal was filed for the sole purpose of prolonging the litigation and forcing respondents to incur even more attorneys' fees and cost to finally bring the matter to a close. Such an appeal is an abuse of the legal system. This Court should award attorneys' fees pursuant to RAP 18.9.

IV. CONCLUSION

Byers & Anderson provides transcripts to all parties on equal terms. The rates are identical, and delivery is predicated upon Byers & Anderson having or receiving reasonable assurance of payment. Byers & Anderson does not have a policy of sending transcripts to insurance companies before sole practitioners. Their practice is to promptly send

transcripts when payment is assured. This is not favoritism; it is not unfair; and it is certainly not illegal.

Haskell has no viable claims. This Court should affirm the trial court's summary judgment dismissing Haskell's claims with prejudice.

Dated this 25th day of May, 2012.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

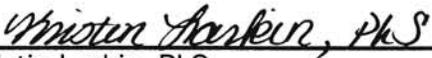
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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on May 25, 2012 I did serve via email and U.S. Mail, true and correct copies of the foregoing by addressing and directing for delivery to the following:

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