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No. 68521-0

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

GLOBAL EDUCATION SERVICES, INC., on behalf of itself and all
others similarly situated,

Respondent/Appellees

vs.

MOBAL COMMUNICATIONS, INC.,

Petitioner/Appellant.

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I. SUMMARY OF ARGUMENTS

This appeal presents the quintessential example of “no good deed going unpunished.” All of the evidence in the record demonstrates that Mobal made reasonable, even extensive efforts to comply with the trial court’s order compelling answers to Global’s First Set of Interrogatories and Requests for Production. Mobal timely gave full and complete responses to the discovery requests actually propounded by Global, and then gratuitously provided even more information than the civil discovery rules or the court order required. Moreover, rather than provide the standard conclusory one-paragraph discovery certification, Mobal supported all of its responses with a five-page, detailed, sworn declaration from its president explaining the steps Mobal took to search for responsive information and documents and explaining why some company documents no longer exist. Upset that Mobal’s responses could not be used to support Global’s purported “class,” Global now asserts that Mobal committed “four principal violations” of the trial court’s order to compel. But importantly, Global fails to cite any *actual* discovery requests that would have yielded the information Global claims it was entitled to receive.

First, Global asserts that “Mobal plainly violated the order by failing to follow the interrogatories’ definition of ‘identify.’” Resp. Br. 10. This is a red herring, since Mobal’s answer to the narrow

interrogatories that Global actually asked was “None.” Mobal stated under oath that no individuals’ names and no documents in Mobal’s possession, custody, or control were responsive to Global’s interrogatories; Mobal thus was under no obligation to provide further identifying information. Nevertheless, to avoid the very type of motions practice that followed, Mobal *gratuitously* provided the names and positions of several former employees. As such, Global’s apparent position is that Mobal violated the order to compel when it did not “fully” identify the individuals it voluntarily named as unresponsive to Global’s narrowly drafted interrogatories. Such a position is without merit.

Second, Global asserts that “Mobal plainly violated the order by failing to disclose whether it had searched the telephone number that is at the heart of this case.” Resp. Br. 13. According to Global, that telephone number is 310-312-9972, which originates from Southern California. *Id.* at 14. But again, not one of Global’s discovery requests actually directed Mobal to search that number. The closest Global came to asking about any outgoing facsimile numbers was Interrogatory 11, which asked Mobal to identify outgoing facsimile numbers it used to send facsimiles similar to the one received by Global. Mobal was never directed, and was under no obligation, to search the records of a California phone number that was not Mobal’s. As such, Global’s assertion that Mobal failed to provide required

information on the California number is without merit.

Third, Global asserts that “Mobal plainly violated the order by concealing the manner in which it had searched its computers.” Resp. Br. 15. Specifically, Global disputes Mobal’s refusal to disclose its search terms just because Global’s counsel demanded them. *Id.* at 16. Yet Global is unable to identify any discovery request that asked for Mobal’s search terms, or any authority for its assertion that a party’s search terms are not work product. The two cases that Global cites are out-of-state, federal court opinions (including one unpublished opinion) that do not even stand for the proposition for which they are cited. As such, Global’s argument that Mobal violated the trial court’s order to compel because it refused to disclose its protected keyword search terms also is without sense or merit.

Fourth, Global asserts that “Mobal plainly violated the order by failing to explain why it had not contacted its former president and the manager of its marketing department.” Resp. Br. 17. Because Washington law is to the contrary, it is unsurprising that Global again fails to identify any legal authority or discovery request that required Mobal to contact *former* employees in preparing its discovery responses. Nonetheless, and contrary to Global’s claim that Mobal never attempted to contact Ms. Yagy, the record shows that Mobal gratuitously provided Global with a full explanation of its attempts to contact many of Mobal’s

former employees. Thus, Global's argument that Mobal violated the trial court order because it failed to contact Ms. Yagy is without merit.

In summary, Global cannot identify a single discovery request that Mobal failed to provide a full and complete answer to as directed by the trial court. Indeed, Mobal made extensive efforts to comply with the trial court's order, as evidenced by multiple additional disclosures of information Mobal made throughout the discovery process. As such, there is no evidence of a "plain violation," let alone "intentional disobedience" of the order to compel, and the trial court's order finding Mobal in contempt was an abuse of its discretion.

Global next argues that the trial court's contempt order contained the requisite findings of fact because it stated that Mobal's responses were either opaque *or* confusing, and failed to give either the steps of due diligence *or* complete information. Global's argument misses the mark. Contempt orders must contain findings of the specific acts of intentional noncompliance so that the offending party can understand and cure their alleged contumacy. Here, the trial court's language and reference to Global's motion for contempt left Mobal guessing about which of the trial court's criticisms and Global's arguments applied to which of Mobal's 27 discovery responses. The court's failure to offer more specific findings of Mobal's alleged contempt constitutes reversible error.

Finally, Global implies that because its attorney fee award was less than what it requested, it makes no difference how the trial court arrived at that number. Such a position is contrary to Washington law. In determining Global's attorney fee award, the trial court failed to use the required lodestar methodology and did not receive the contemporaneous billing records required of counsel. Accordingly, Global's attorney fee award was based on untenable speculation and should be reversed.

II. ARGUMENT

A. **Global Misstates Facts Regarding Mobal's General Timeliness and Cooperation.**

Just like its motions at the trial court level, Global's response brief is replete with errors and misstatements. Two such errors are particularly important, and Mobal will address them at the outset.

As an initial matter, Global's statement of the case inaccurately portrays Mobal as having baselessly refused to answer Global's discovery requests for "more than two years." Resp. Br. 2. In truth, once Mobal finally learned of the default judgment and retained defense counsel, Mobal informed Global of its desire to save resources and delay responding to discovery until the trial court ruled upon Mobal's motion to vacate the default judgment. CP 39. Global did not object to this. *Id.* When the trial court denied Mobal's motion to vacate on October 6, 2011, CP 6-7, Mobal timely appealed that denial and filed a cash supersedeas

with the court, CP 172, which Mobal understood would stay all related proceedings under RAP 8.1. Global nonetheless moved to compel answers to its discovery requests, which the trial court granted on November 28, 2011, giving Mobal 20 days to file its discovery responses. CP 98. Two days later, on November 30, Mobal filed an emergency motion to stay discovery pending its appeal, which was granted temporarily by the appellate court. CP 171. On December 27, this Court of Appeals lifted its temporary stay and denied Mobal's motion on the basis that "requiring Mobal to answer interrogatories directed to identifying potential class members does not appear to be unduly burdensome." CP 173. Accordingly, 10 calendar days later, on January 6, 2012, Mobal timely provided what it reasonably viewed to be full and complete responses to the actual discovery requests that the trial court ordered it to answer. CP 112-35, 152:4-5. Global's ever-shifting demands for different types of discovery, its motion for contempt, and its related request for attorney fees soon followed.

In addition, Global's brief falsely asserts that Mobal refused to meet and confer on Global's motion to compel discovery. Resp. Br. 3. In truth, it was Global's counsel that tried to bypass any meaningful communication by asking if Mobal's counsel agreed that the parties' exchange of emails met their meet and confer obligations. CP 38 ("Do

you agree that our exchange of emails on this matter satisfies out (sic) meet and confer obligations?”). Mobal’s counsel responded with a request to orally discuss the issues when he returned to town and could have the relevant materials before him:

Unfortunately, I cannot. I am traveling all week. I am in court now in New Jersey. I am in Texas later this week, until Saturday. I would like to have an oral discussion with you, but after I have the specific discovery requests in front of me.

Id. Global’s counsel refused this reasonable request, and filed Global’s motion to compel two days later. CP 8.

B. Global Mischaracterizes Mobal’s Arguments About the Trial Court’s Orders.

Global also misstates Mobal’s arguments about the trial court’s orders so that it can try to set up and shoot down arguments that Mobal never makes instead of confronting Mobal’s true arguments on their merits. Because Global fails to address or provide any authority to refute Mobal’s *actual* arguments, the Court should brush aside Global’s straw man analyses and reverse the trial court’s orders.

Global wrongly asserts: “*First*, Mobal argues that the Court’s underlying order [to compel] was not specific enough to provide a basis for contempt.” Resp. Br. 7. Not surprisingly, Global does not and cannot cite Mobal’s opening brief for this statement because Mobal makes no such argument. Rather, Mobal’s argument regarding the trial court’s order

to compel was that, “[f]aced with no other instructions on how to proceed, Mobal reasonably interpreted the phrase ‘full and complete’ to mean giving diligently researched and reasoned answers to those inquiries actually made by formal discovery request.” App. Br. 21. Such an understanding is consistent with both *Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp.*, 122 Wn.2d 299 (1999) and the civil discovery rules.

Global then wrongly asserts: “*Second*, Mobal argues that it could not comply with the discovery requests.” Resp. Br. 8, 19-20. Again, Global does not and cannot cite the opening brief for this statement because Mobal made no such argument.¹ To the contrary, Mobal expressly argued that it gave full and complete answers to those discovery requests actually made by Global, as evidenced by the fact that Mobal: (1) answered each of the discovery requests at issue without stating any objections thereto; (2) provided Global with all responsive, relevant documents and information within Mobal’s possession, custody, and control; and (3) submitted sworn testimony regarding both its diligent searches and why it could not produce (and indeed was not even aware of) any additional documents or information responsive to Global’s requests.

¹ Mobal does not dispute Global’s assertion that “the burden of showing one’s inability to comply with a court’s order is on the one alleging it.” Resp. Br. 19 (citing *State v. Mecca Twin Theatre & Film Exch., Inc.*, 82 Wn.2d 87, 92, 507 P.2d 1165 (1973)). The assertion is irrelevant, however, because Mobal has made no such allegation.

App. Br. 21-22 (citing CP 112-35, 175-80). Global just did not like that some of Mobal's responses were "None." Creating straw man arguments and then addressing them is no substitute for addressing Mobal's actual arguments.

C. Global Still Cannot Identify a Single Discovery Request That Asked for the Contact Information of All of Mobal's Former Employees.

Just as Global failed to do in its underlying briefing to the trial court, Global still cannot identify a single discovery request that asked for the contact information of all of Mobal's former employees. Global's response asserts that Mobal violated the trial court's order because it did not disclose "the "last known addresses and telephone numbers and present or last known employment status" of all of its former employees. Resp. Br. 13-15. But this argument is missing the essential element necessary to make a case for contempt: *identification of any interrogatory from Global's first set of discovery that actually asked Mobal to provide such information.* Global could have asked Mobal to identify all of its former employees, but for reasons of its own did not do this. Thus, Mobal was never ordered to identify all of its former employees, and Mobal cannot be held in contempt for not doing something it was never ordered to do. *See Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933-34, 113 P.3d 1041 (2005).

In alleged support of its argument that Mobal failed “to abide by the interrogatories’ definition of ‘identify’ and thus disclose its former employees’ contact information,” Resp. Br. 13, Global points only to:

INTERROGATORY NO. 6: Please identify all employees, consultants, or third party vendors *hired by defendant to send out copies of facsimiles identical or similar to the facsimile attached as Exhibit A to the Complaint.*

CP 177 (emphasis added). Contrary to Global’s representations, this interrogatory does not ask Mobal to identify *all* employees, period. Rather, it narrowly asks Mobal to identify *only* those employees that Mobal *specifically* hired to send out facsimiles identical or similar to the allegedly unsolicited facsimile received by Global. *Id.* Accordingly, Mobal began its answer by saying that there were *no* such employees:

None. Mobal has performed a diligent search in good faith and is unaware of any employees, consultants, or third parties that were specifically hired by Mobal to send out such facsimiles.

CP 118 (underline in original).² Contrary to Global’s assertion that Mobal failed to “explain” its answer, Resp. Br. 12, Mobal went on to give a detailed explanation—further supported by a five-page, sworn declaration by Mobal’s president—as to the inquiries it made and information it found to arrive at this answer, CP 118, 175-80.

² It is not surprising that Mobal did not “hire[]” employees to send unsolicited facsimiles, since it was against Mobal’s policies to create or solicit business in that way. CP 176:3-5.

Having fully answered Global's interrogatory, Mobal then voluntarily also provided the names and positions of eight former employees from its only U.S. office. CP 118. Mobal provided this additional, unrequired information purely in the spirit of cooperation and because it was motivated to avoid incurring the fees and costs associated with responding to additional discovery requests. Indeed, Mobal's response plainly states that *no* employees were hired for the specific purpose of sending out facsimiles similar to the one received by Global. Thus, Mobal was under no duty to provide *any* contact information for the eight former employees it voluntarily named, much less a duty to provide all of the information otherwise required by Global's definition of "identify." In retrospect, it appears that Mobal's real error was its desire to be helpful and gratuitously provide more information to Global than it was required to give in the first place.

After Mobal responded to Global's first set of discovery requests, it became clear that what Global *really* wanted was for Mobal to identify and interview all of its former employees on whether they sent unsolicited faxes during their employment.³ CP 140-45, 165:9-13. But Global never

³ As stated in Mobal's opening brief, although Global initially demanded that Mobal personally contact its former employees, Global then pulled an about-face, asserted that it was improper for Mobal to talk with its former employees, and demanded via email that Mobal provide Global with all of its former employees' contact information. CP 145.

propounded an interrogatory asking Mobal to identify all of its former employees, and despite multiple requests, Global has never identified any authority for its assertion that a corporate party is required to interview all of its former employees before responding to discovery requests.⁴ Global thus is attempting to reframe its discovery requests so it can claim it was entitled to answers to questions that, in fact, it never asked. But the discovery rules do not require a responding party to try and anticipate what other information a requesting party ultimately may want. Rather, Mobal was required to answer Global's requests as Global's counsel drafted them. That is exactly what Mobal did. Accordingly, Mobal's "failure" to provide contact information for all of its former employees was no failure at all. Mobal properly provided full and complete answers to Global's first set of discovery requests as asked, and the trial court abused its discretion when it ruled otherwise.

D. Not One of Global's Discovery Requests Required Mobal to Provide Information About the California Telephone Number.

Global argues for the *first time* in its response that Mobal also violated the trial court's order to compel because Mobal "did not say anything at all" about the California telephone number noted at the top of the facsimile received by Global. Resp. Br. 13. Yet, despite Global's

⁴ Indeed, the law is to the contrary. *See* Section F below.

assertion that it “propounded numerous interrogatories and requests that should have turned up information about that telephone number,” Resp. Br. 13, Global is unable to identify a single request that *actually* sought such information. Although Global broadly claims that four pages of its first set of discovery requests contain requests for information on the California number, *id.* (citing CP 21, 22, 24, 29), not one of the requests on those pages even mentions the California number. Indeed, the only interrogatory to ask about outgoing telephone lines is:

INTERROGATORY No. 11: Please identify all outgoing telephone lines (including the area code) which were used in transmitting facsimiles identical or similar to the facsimile attached as Exhibit A to the Complaint by or on your behalf at any time during the period beginning four years prior to the filing of the Complaint to the present.

CP 121. In response, Mobal identified the two telephone numbers installed in the company’s only U.S.-based sales and marketing office during the relevant time period, then clarified that based on “a diligent search in good faith,” it was “unaware of any instance in which these telephone numbers were used to transmit such facsimiles, other than the facsimile that is the subject of this litigation.”⁵ *Id.* Mobal then gave a detailed explanation—further supported by a five-page, sworn declaration

⁵ Mobal assumed that the fax received by Global was sent from its New York office because that was the only sales and marketing office that Mobal kept in the U.S. during the relevant time period.

by its president—as to the inquiries it made and the information it found to arrive at this answer. CP 118, 175-80. Mobal’s answer to Interrogatory No. 11 thus complied with the trial court’s order and the civil discovery rules because it was a full and accurate statement based on all information reasonably available to Mobal at the time.

Although Global now asserts that Mobal’s answer should have included information on a California number, Mobal had no reason to discuss it because: (1) Mobal did not own or control that number; and (2) Mobal’s diligent searches yielded no evidence that Mobal otherwise used that number for outgoing facsimiles. As Mobal *gratuitously* disclosed in its second supplementary responses to Global’s first set of discovery, Mobal has never had a California office. CP 533. Although Mobal had two employees who maintained and worked out of their California homes during at least portions of the relevant time period, extensive Internet searches and attempts at personal interviews of these employees have not revealed *any* additional information on the origin of the original fax or the California telephone number printed on it.⁶ CP 533-34. Thus, Mobal not only complied with its responsibility to perform a diligent inquiry into the facts and to provide Global with a full and complete answer, but

⁶ Indeed, the notation at the top of the facsimile at issue suggests it was added by the recipient (“Global Education Services”)’s fax machine, not the sender’s. CP 207.

consistently provided Global with updates on its own voluntary discovery efforts. Global's arguments to the contrary are unsupported by the record.

E. The Trial Court's Order to Compel in No Way Required Mobal to Disclose its Computer Search Terms.

Global's assertion that "Mobal's failure to disclose its key word searches constituted a plain violation" of the trial court's order again misstates both the facts of this case and legal authority.

As an initial matter, none of Global's discovery requests asked Mobal to disclose the terms it used to search its computers. As such, Mobal had no duty to provide this information just because Global's counsel demanded it later in emails. As Mobal pointed out to the trial court below, a party's search terms are queries for information protected by the work product doctrine. CP 443. Just as an attorney's private questions of a potential witness reflect his mental impressions, opinions, and legal theories of the case, so do the "questions" an attorney or its client asks a computer in search of information in litigation. *Cf.* CR 26(b); *Soter v. Cowles Pub. Co.*, 162 Wn. 2d 716, 744, 174 P.3d 60 (2007) (finding that notes taken while interviewing witnesses constitute opinion work product); *Hickman v. Taylor*, 329 U.S. 495, 67 S.Ct. 385, 91 L.Ed. 451 (1947) (finding that an attorney's interviews are his protected work product). Here, Mobal formulated its search terms not only to locate all

documents potentially responsive to Global's discovery requests, but also documents potentially relevant to Mobal's defense. Accordingly, Mobal's search terms constitute protected work product that, under the civil discovery rules,⁷ Mobal was under no obligation to disclose absent a specific court order to the contrary. No such order has been entered.

Global's attempt to argue that Mobal's search terms are not work product is unavailing. First, Global plainly was unable to locate any controlling case law in support of its position, as evidenced by the fact that the two cases it cites are out-of-state, federal court opinions, one of which is unpublished. *See* Resp. Br. 16 (citing *Smith v. Life Investors Ins. Co. of Am.*, No. 07-681, 2009 WL 2045197 (W.D. Pa. July 9, 2009) (unpublished); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251 (D. Md. 2008)). Second, despite Global's representation to this Court, neither court actually found that search terms are not work product. The courts found only that the responding parties had a duty to demonstrate that the keyword search they performed on their documents was "reasonable," and that sharing their lists of search terms would be *one of many possible* "step[s] in that direction." *Smith*, 2009 WL 2045197, at *7 (quoting *Victor Stanley*, 250 F.R.D. at 262). Mobal satisfied any

⁷ CR 26(b)(1) states in relevant part: "*In General*. Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action" (Bold added; italics in original.)

obligation to demonstrate the “reasonableness” of its discovery efforts when it provided Global with a five-page, sworn declaration from its president detailing the inquiries Mobal made, the history of why certain documents no longer exist, the searches it performed on its remaining documents, and the information it obtained from its inquiries. CP 175-79.

Notably, Global appears to have abandoned its argument that Mobal was in contempt for failing to give Global complete, unfettered access to its computers. As such, Mobal’s argument (that none of the discovery requests that Mobal was ordered to answer contemplated giving Global direct access to Mobal’s computers) is unopposed. Mobal’s position also is supported by the fact that, even after it entered the erroneous contempt order, the trial court granted Mobal’s motion for entry of a protective order from Global’s request for inspection. CP 546-48. If the trial court believed that Global’s desire for unlimited inspection already was approved by the court’s order to compel, presumably the trial court would not have entered a subsequent protective order limiting the procedure by which those computers could be searched.⁸ *Id.*

⁸ Notably, despite Global’s extensive efforts to gain access to Mobal’s computers, Global still has not contacted Mobal to proceed with the court-approved computer search. This is indicative of Global’s apparent true motivation ever since it received Mobal’s discovery responses: to punish Mobal by driving up its litigation costs and accusing it of acting improperly, all because Mobal failed to have the “smoking gun” evidence that Global had hoped to receive in support of its to-date-unsupported class action.

F. The Trial Court's Order Did Not Require Mobal to Contact Former Employee Yagy Before Answering Global's Discovery Requests.

Global baselessly argues that “Mobal plainly violated the order by failing to explain why it had not contacted its former president and the manager of its marketing department.” Resp. Br. 17. Despite the fact that not one of Global's discovery requests asked Mobal to identify all of its former employees, Mobal nevertheless voluntarily provided the name and position of former employee Yagy in its initial responses to Global's discovery requests. CP 119-20. Having received this unsolicited information in an intentional gesture of cooperation and transparency, Global now argues *for the first time* that Mobal's failure to contact Ms. Yagy in particular somehow violated the trial court's motion to compel.

Once again, Global cannot point to a single discovery request that required Mobal to contact Ms. Yagy.⁹ Moreover, despite countless requests from Mobal, Global still does not cite any legal authority for its position that a company is required to contact its former employees while preparing its discovery responses. Indeed it cannot, because the law is contrary to Global's position. CR 33(a) specifically limits a corporate

⁹ Moreover, Global's assertion that Mobal failed to “explain[] why it could not or did not contact Yagy” is disingenuous. Resp. Br. 17. As stated above, Mobal was under no obligation to contact any of its former employees. Nevertheless, Mobal ultimately expended significant time and expense attempting to locate and interview its former employees, and then shared the results of its searches with Global via email and Mobal's second supplementary discovery responses. CP 532-34.

party's obligation in answering interrogatories to "such information as is available to the party." Washington case law fully supports this. For example, in the recent case of *Diaz v. Wash. State Migrant Council*, the Washington Court of Appeals, Division III, did not include **former** employees in its discussion of who must provide information when an interrogatory is directed at a corporation. See 165 Wn. App. 59, 80, 265 P.3d 956 (2011) ("Where an interrogatory is directed at a corporation, the phrase 'such information as is available to the party' [in CR 33(a)] has been construed to mean all information available to the corporation's **officers, directors, employees and attorneys.**") (internal quotations and citations omitted) (emphasis added). CR 33(a) and the court's holding in *Diaz* both establish that a responding party has no obligation to gather information from former employees. Because those persons are no longer under the corporate "party" designation in CR 33(a), they are fact witnesses equally available to be interviewed or deposed by the party propounding the discovery requests. CR 26(b)(1)(B). In contrast, "the corporation's officers, directors, employees and attorneys" may reasonably be expected to answer on behalf of their company. 165 Wn. App. 59, 80, 265 P.3d 956 (2011). Thus, Global's argument that Mobal was required to contact Ms. Yagy is without merit.

G. The “Factual Findings” in the Contempt Order Failed to Offer Mobal the Required Guidance on How to Cure its Alleged Contumacy.

Global asserts that the trial court’s contempt order contains the requisite findings of fact because the order states that: (1) “defendant’s answers are *either* opaque *or* confusing; and (2) “[*e*]ither the steps of due diligence are not given, *or* incomplete information is given in the answers.” Resp. Br. 21 (citing CP 219) (emphasis added). But the above language provides neither the specific findings nor the sufficient guidance required for an order of contempt to survive appeal.

As stated in Mobal’s underlying brief, an order of contempt must indicate the *specific acts* the offending party took in violation of the court’s prior order so that the offending party has *sufficient guidance* on how to remedy its alleged contempt.¹⁰ Here, the trial court’s findings did not fulfill these explicit requirements because they failed to identify *which* of Mobal’s responses, or portions thereof, were “confusing” versus “opaque,” and which responses “lacked the steps for due diligence” as opposed to having “incomplete information.” The trial court cannot have intended for *all* of its findings to apply to *all* of Mobal’s responses, as indicated by, for example: (1) the court’s double use of the words “either”

¹⁰ App. Br. 25-26 (citing *Dunn v. Plese*, 134 Wash. 443, 449, 235 P. 961 (1925); *King v. Dep’t of Soc. & Health Servs.*, 110 Wn.2d 793, 800, 756 P.2d 1303 (1988); *Hildebrand v. Hildebrand*, 32 Wn.2d 311, 314, 201 P.2d 213 (1949)).

and “or”; and (2) the impossibility of these critiques applying to Mobal’s responses to Interrogatory No. 1 (identifying the persons who assisted with Mobal’s answers), Interrogatory No. 10 (answering “none” when asked about Mobal’s prior lawsuits), and Request for Production F (identifying and attaching Mobal’s only relevant insurance policy). CP 113-14, 121, 129. The trial court’s failure to specifically identify which responses were deficient and why—as it was required to do—left Mobal to guess which of the trial court’s criticisms applied to which of Mobal’s 27 discovery responses.

The trial court’s reference to Global’s motion for contempt further thwarted Mobal’s ability to identify and cure its alleged contumacy. Global’s contempt motion is a model of unorganized argument and unsubstantiated or false statements of “fact.” For example, it bounces between accusations that Mobal never spoke to its former employees, failed to produce all former employees’ contact information, and would not allow Global’s expert to search its computers. CP 102-08. The trial court’s failure to identify which of Global’s arguments it agreed with left Mobal to guess which ones applied.¹¹ Such lack of direction is exactly why courts are obligated to identify the specific act of *intentional*

¹¹ The trial court could not have meant that *all* of Global’s arguments applied, or else it would not later have entered Mobal’s requested protective order from Global’s CR 34(a)(2) request to inspect Mobal’s computers. CP 546-49.

noncompliance instead of broadly referencing documents filed by other parties. *Dunn*, 134 Wash. at 449-50, 235 P. 961. The trial court's contempt order should be reversed for its failure to contain the requisite findings.

H. Global Offers No Evidence That Its Attorney Fee Award Was Determined With the Required Method or Based on the Required Contemporaneous Records.

Finally, Global implies that because the ultimate size of its attorney fee award was so "modest," it makes no difference how the trial court arrived at that number. Resp. Br. 23. Such a position is without merit, and does not excuse the fact that the award (no matter its size) was erroneously determined without reference to the lodestar method or contemporaneous records as required by Washington law.

Despite the trial court's assertion that "[l]odestar rates are not usually used in discovery motions," CP 437, the Washington Supreme Court has directed that our courts "should be guided in calculating fee awards by the lodestar method in determining an award of attorney fees." *Mahler v. Szucs*, 135 Wn.2d 398, 433, 957 P.2d 632 (1998) (en banc) (citation omitted); see also *Helmets R Us v. Webber*, No. 05-2-02691-0, 2006 WL 4113418 (Wash. Super. Feb. 2, 2006) (Trial Order) ("The 'lodestar' method is the accepted starting point for *all* attorney fee determinations.") (emphasis added). Because the trial court's assertion suggests that it did

not use the lodestar method in calculating Global's attorney fee award, it could not have been determined with the required accuracy.

Global's assertion that the fee award did not have to be based on contemporaneous billing records is similarly unsupported. Washington case law clearly provides that when a party submits an attorney fee request, "[c]ounsel *must* provide contemporaneous records documenting the hours worked." *See Mahler*, 135 Wn.2d at 434, 957 P.2d 632 (emphasis added). Contemporaneous records allow a court to properly "exclude from the requested hours any wasteful or duplicative hours" and to "adjust" each attorney's hourly rate to reflect "the level of skill required by the litigation" and "the amount of the potential recovery." *See Mahler*, 135 Wn.2d at 433-34, 957 P.2d 632; *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983). Global's counsel's decision to provide only later created declarations with block billing prevented the trial court from making such determinations.

Although Global argues that deficient declarations such as its own still "may be accepted *with reservations*," Resp. Br. 25 (italics in original), one of its own case citations involved a trial court rejecting an attorney's *entire* fee request because, like here, the attorney provided only a sworn declaration of his approximate hours worked and the type of work completed. *See Int'l Union of Operating Engineers, Local 286 v. Port of*

Seattle, 164 Wn. App. 307, 326, 264 P.3d 268 (2011) (affirming the trial court's denial of attorney fees because "[w]ithout contemporaneous time records documenting [the attorney's] hours, the superior court lacked the documentation required to make an adequate determination about the reasonableness of the fees requested"). In light of this and Global's counsel's utter failure to distinguish how much time they spent on which task or to delegate the simpler tasks to more junior attorneys, a total denial of Global's attorney fees would be similarly appropriate here.

III. CONCLUSION

As discussed above, Global's response fails to cite any evidence in the record to justify the trial court's orders holding Mobal in contempt and awarding attorney fees to Global. Mobal provided Global with: (1) full and complete answers to the discovery requests that Global actually propounded; (2) a sworn declaration detailing why few documents from the company's U.S. operations still exist; and (3) a detailed account of the search Mobal could perform on the few remaining documents. Accordingly, the record is replete with evidence that Mobal did not *intentionally* fail to comply with the trial court's order compelling answers to Global's discovery, and the trial court abused its discretion when it found otherwise. Mobal thus requests that this Court reverse the trial court's orders for contempt and awarding attorney fees.

Respectfully submitted this 20th day of July, 2012.

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PROOF OF SERVICE

I caused a copy of the foregoing APPELLANT’S REPLY BRIEF to be served today, on the following via the method indicated:

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