

70726-4

70726-4

NO. 70726-4-I

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

GRACE YIM YEE SIOU

Appellant,

v.

TSANG WONG LIM d/b/a TSANG WONG LIM & ASSOCIATES,

Respondent

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Schaffer

BRIEF OF RESPONDENT

CHRISTOPHER L. ANDERSON
Attorney for Respondent

LEE & LEE, PS
1001 4th Ave. Suite 4368
Seattle, WA 98154

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
FEB 11 12:40

I. INTRODUCTION.....	6
a. Did the court err in entering its June 6, 2013 Order of Default for Discovery Violations? CP 149.....	7
b. Did the court err in entering its July 1, 2013 Order of Default for an Amount Certain? CP 159.....	7
c. Did the trial court err in entering its July 24, 2013 Order Denying Grace Yim Yee Siou’s Motion for Reconsideration of the July 1, 2013 Order of Default for Amount Certain? CP 165.....	7
II. STATEMENT OF THE ISSUES.....	8
III. STATEMENT OF THE CASE.....	8
a. Factual History of the Case.....	8
b. Relevant procedural History-Discovery Violations.....	10
i. Interrogatories Served on June 15, 2012.....	10
ii. First Order Issued by the Court Compelling Discovery.....	11
iii. Second Court Order Issued by the Court Compelling Discovery.....	11
iv. Third Court Order Compelling Discovery regarding Discovery.....	11
v. Fourth Court Order Compelling Answers to Discovery.....	12
vi. Ms. Siou made no effort to pay sanctions ordered by the court.....	13
vii. Ms. Siou failed to answer interrogatories.....	13
viii. Defendant Grace Siou's willful failure to appear at deposition.....	13
IV. ARGUMENT IN RESPONSE.....	14

a. Default judgment for discovery violations was proper, the court found that the violations were willful, lesser sanctions were considered and imposed four previous orders, and the Respondent's ability to prepare for trial was prejudiced.....	14
i. Discovery sanctions are reviewed for abuse of discretion.....	14
ii. The trial court did not abuse its discretion in imposing a default judgment for discovery violations.....	15
iii. The defendant's discovery violations were willful.....	19
iv. Willful failure to appear at the deposition.....	20
v. The Respondent's ability to prepare for trial was substantially prejudiced.....	23
vi. The court has imposed and exhausted all lesser sanctions.....	33
vii. <i>Main v. Taggares</i> does not apply to the facts of this case and are clearly distinguishable.....	34
viii Ms. Siou concedes that knowledge of her licensing status is a distinguishing factor in <i>Main v. Tagarras</i> and <i>Grengo</i>	36
ix. Fraud, conversion, intentional misrepresentation and omission are causes of action in Washington State.....	40
x. The Amount of damages is correct and the numbers are from the handwritten payroll sheets and specifically itemize commissions shared and how much Ms. Siou received for each specific commission.....	41
xi. Denial of Motion for Reconsideration.....	44
V. CONCLUSION.....	45

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Mohundro</i> , 24 Wash.App. 569, 604 P.2d 181 (1979).....	15
--	----

<i>Burnet v. Spokane Ambulance</i> , 131 Wash. 2d 484, 494, 933 P.2d 1036 (1997)...	17
<i>Cloakey v. Bouslog</i> , 39 Wash.2d 66, 234 P.2d 880.....	39
<i>Cox v. O'Brien</i> , 150 Wash. App. 24, 36-37, 206 P.3d 682, 688 (2009).....	40
<i>Ermine v. City of Spokane</i> , 143 Wash.2d 636, 650, 23 P.3d 492 (2001).....	14
<i>Holbrook v. Weyerhaeuser Co.</i> , 118 Wash.2d 306, 315, 822 P.2d 271 (1992).....	14
<i>In Interest of Perry</i> , 31 Wa.App. 268, 641 P.2d 178 (1982).....	39
<i>Little v. King</i> , 160 Wash. 2d 696, 161 P.3d 345, 361 (2007).....	41
<i>Magana v. Hyundai Motor Am.</i> , 167 Wash. 2d 570, 582-83, 220 P.3d 191, 197 (2009).....	14
<i>Main v. Taggares</i> , 8 Wn.App. 6 (1972)	33, 34, 35
<i>Mayer v. Sto Indus., Inc.</i> , 156 Wash.2d 677, 684, 132 P.3d 115 (2006).....	13
<i>Miller v. Patterson</i> , 45 Wash. App. 450, 725 P.2d 1016 (1986).....	41
<i>Nat'l Hockey League v. Metro. Hockey Club, Inc.</i> , 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747	14
<i>Rhinehart v. KIRO, Inc.</i> , 44 Wash.App. 707, 710, 723 P.2d 22 (1986).....	15
<i>Rhinehart v. Seattle Times Co.</i> , 51 Wash.App. 561, 754 P.2d 1243,.....	15
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wash.2d 674, 41 P.3d 1175 (2002)	18
<i>Snedigar v. Hoddersen</i> , 114 Wash.2d 153, 170, 786 P.2d 781 (1990)	15, 32
<i>State v. Rohrich</i> , 149 Wash.2d 647, 654, 71 P.3d 638 (2003)	14
<i>Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wash.2d 299, 338, 858 P.2d 1054 1993.....	13,17
<i>In re G.W.-F.</i> , 170 Wash. App. 631, 637, 285 P.3d 208, 211 (2012)	21

Johnson v. Cash Store, 116 Wn. App. 833, 841, 68 P.3d 1099, rev. denied, 150 Wn.2d 1020, 81 P.3d 120 (2003) 22

Smith v. Behr Process Corp., 113 Wash. App. 306, 324, 54 P.3d 665 (2002).....16, 21, 35

Statutes

RCW 18.85.100..... 32

RCW 21.20.430..... 34

RCW 48.17.490..... 36, 40, 42

Other Authorities

74 ALR 3d 637 36

Am. Timber & Trading Co. v. Niedermeyer, 276 Or. 1135, 1156, 558 P.2d 1211, 1223 (1976) 38

Cal. Prac. Guide Civ. Pro. Trial Claims and Def. Ch. 3 (V)-E 38

Greenco Real Estate Investment Trust v. Nathaniel Greene Development Corporation, 218 Va. 228, (1977) 34

Remsen Partners, Ltd. v. Stephen A. Goldberg Co., 755 A.2d 412, 420-21 (D.C. 2000)..... 37

Vick Consol. School Dist. v. New, 208 Ark. 874, 187 SW2d 948 (1945). 36

Wilcox v. Lexington Eye Institute 130 Wash.App. 234, 122 P.3d 729, (2005) 43

Rules

CR 26(g)..... 13,18, 19

CR 37(d)..... 16

CR 59..... 42

I. INTRODUCTION

Grace Yim Yee Siou (herein, Ms. Siou) appeals the courts order of default judgment for discovery violations. Ms. Siou was employed by Tsang Wong Lim & Associates (herein, TWLA) from October 1998 to December 16, 2008. Tsang Wong Lim was a statutory employee of Northwestern Mutual along with her partner Rolf Christenson. Ms. Siou's primary responsibilities of employment were administrative work, filling out insurance application forms, communicating with underwriter and clients regarding medical underwriting. Her salary structure had two portions 1) a portion of her pay came from fixed salary 2) another portion came from bonuses which based on Ms. Lim and Mr. Christenson's production. The payment of bonus was conditioned upon Ms. Siou being licensed for life and disability insurance in the State of Washington and having Series 6 and 63 registration. Ms. Siou was terminated in December 2008 for poor performance, making false statements and forging signatures of Tsang Wong Lim, the owner of TWLA, on work related documents.

Ms. Siou misrepresented to TWLA that she was licensed for life and disability insurance in the State of Washington and that she had Series 6 and 63 registration. Ms. Siou benefited from her ongoing deception of being licensed and registered by receiving bonuses from Ms. Lim and Mr. Christensen based on a percentage of their commission earned.

Ms. Lim and Mr. Christensen would have never paid these bonuses had they been aware that Ms. Siou was unlicensed, in fact they were legally prohibited from paying bonuses based on a percentage of production to unlicensed individuals.

The respondent attempted for over a year to obtain discovery relevant to the issues claimed in the complaint and after four separate court orders compelling Ms. Siou to completely answer interrogatories, requests for admissions and to pay sanctions. Additionally, Ms. Siou failed to appear for her deposition. The court subsequently granted a motion for default judgment for discovery violations less than a month from the discovery cut off and only two months before trial. CP 149.

Ms. Siou argues that (1) there was no prejudice to the preparation of the trial because there is no cause of action to recover funds paid to an employee that made false representations to her employer to increase her compensation. The other claims are disputed issues of facts such as when (2) Ms. Lim discovered Ms. Siou's licensing status and (3) whether the court properly determined the damages.

II. STATEMENT OF ISSUES

- a. Did the court err in entering its June 6, 2013 Order of Default for Discovery Violations? CP 149
- b. Did the court err in entering its July 1, 2013 Order of Default for an Amount Certain? CP 159
- c. Did the trial court err in entering its July 24, 2013 Order Denying Grace Yim Yee Siou's Motion for Reconsideration of the July 1, 2013 Order of Default for Amount Certain? CP 165.

III. STATEMENT OF THE CASE

a. Factual History of the Case

Grace Siou was employed by TWLA from October 1998 to December 16, 2008. CP 4 Her salary structure had two portions 1) a portion of her pay came from fixed salary 2) another portion came from bonuses which was based on a percentage of Ms. Lim and Mr. Christenson's commission earned from selling insurance and investment related products . Id. The payment of the bonus portion was conditioned upon Ms. Siou being licensed for life and disability insurance in the State of Washington and having Series 6 and 63 registration. Id. Ms. Siou was terminated for poor performance, making false statements and forging signatures of Tsang Wong Lim, the owner of TWLA, on work related documents. Id.

Ms. Siou was paid bi-weekly from TWLA and the payroll process was that she would submit a handwritten payroll record/ calculation sheets that included her bi-weekly fixed pay, bonuses that were calculated based on a percentage of commission earned by Ms. Lim and Mr. Christenson from selling insurance and investment products in that pay period and the fees and costs associated with her employment—employers tax, labor and industries tax, State and Federal unemployment tax, Surepay fee (the payroll company) and medical insurance. Id.

Based on the bi-weekly payroll record/ calculation sheets provided by Ms. Siou, TWLA would cut a check for the gross amount including third party fees and

deposit that amount into a payroll account. Id. Surepay, a professional payroll company, would make the appropriate deductions from the payroll account and send a check minus appropriate withholdings and Surepay's processing fee to Ms. Siou. Id. This was the routine process of Ms. Siou's payroll from 1998 until 2004. Id. Surepay would file related payroll tax returns to the IRS and various state agency on a quarterly basis. Id.

In July of 2004 unbeknownst to TWLA, Ms. Siou had terminated Surepay without authorization and was collecting her gross salary, third party taxes and the processing fee from the payroll account by forging Tsang Wong Lim's signature and writing checks to herself. Id.

Ms. Siou would pocket the gross amount, including the Surepay fee and leave a portion of the FICA and other deductions underpaid and under report her earnings to the Internal Revenue Service. Id. Ms. Siou also filed fraudulent payroll related tax returns to the IRS by forging Ms. Lim's signature and failed to pay the quarterly business taxes for TWLA because she pocketed the money. Id.

After Ms. Siou was fired for poor performance, false representation and forgery, Tsang Wong Lim discovered that the payroll and employment records were missing. Id. These stolen records were found when the Bellevue Police Department executed a search warrant on Ms. Siou's residence on March 26, 2009. Id.

On March 3, 2009 the Bellevue Police Department conducted an investigation of Ms. Siou's embezzlement and charges were filed by the King County Prosecutor's Office in February of 2010. Id. Ms. Siou pled guilty to Theft in the First Degree and Forgery on June 24, 2010 and sentenced on August 13, 2010. Id. Restitution was ordered by the court of the embezzled withholdings. Id.

Tsang Wong Lim discovered March 24, 2009 that Grace Siou did not have Series 6 or series 63 registration and the license for life insurance and disability insurance since 2004. Id. Ms. Siou misrepresented to TWLA that she had the above professional licenses and through that deception collected compensation she would not have receive from 2004 through 2008. Id.

TWLA incurred significant accounting costs and attorney's fees in an effort to discover the fraud. Id. Due to her deception and subsequent theft of records her fraudulent and criminal activity was not discovered in its entirety until the filing of criminal charges 2010. Id.

b. Relevant Procedural History

Discovery Violations:

i. Interrogatories Served on June 15, 2012

On June 15, 2012 interrogatories were sent to Mr. Malcolm's Office via messenger service. (Defendant Grace Siou attorney at the time) The deadline for the interrogatories per CR 33 was July 15, 2012. CP 138 pg. 2

ii. First Order Issued by the Court Compelling Discovery Regarding Interrogatories.

The Honorable Judge Inveen issued an order compelling discovery, but not issuing sanctions due to defense counsel's confusion regarding the CR 26(i) conference. Interrogatories were received on August 31, 2012, but some of interrogatories were not answered and almost all were answered incompletely. CP 138 pg. 2; CP 18

iii. Second Court Order Compelling Discovery Regarding Interrogatories.

A second motion to compel was set for October 17, 2012 to compel defendant Grace Siou to provide complete responses to the interrogatories. On October 30, 2012 The Honorable Judge Inveen granted the motion to compel with sanctions of \$2033.00 and ordered defendant Grace Siou to "serve full responses to the interrogatories...by November 9, 2012." Again, the defendant Grace Siou willfully refused to comply with the courts order and November 9, 2012 came and went without any contact from defense counsel or defendant. CP 138 pg. 2; CP 23

iv. Third Court Order Compelling Discovery Regarding Interrogatories.

A third motion was set on December 11, 2012 for violation of the court's order compelling defendant Ms. Siou to answer the interrogatories. The Honorable Judge Inveen granted Respondents motion for sanctions and ordered Ms. Siou to pay

costs and fees of \$1796.25 by January 20, 2013 and furthermore held that “the defendant shall pay [sanctions] due to having willfully and intentionally failed to follow the court’s order of 10/30/12, by failing to answer interrogatories as ordered.” CP 138 pg. 2-3; CP 41

v. Fourth Court Order Compelling Answers to Interrogatories.

On March 22, 2013 the court ordered complete answers to interrogatory questions within (6) six days and to pay all sanctions within (6) six days of the date of the order. Sanctions were not paid, nor were answers provided to the interrogatories. Ms. Siou ignored a fourth order from the court to provide answers to interrogatories originally due July 12, 2012. CP 138.

vi. Ms. Siou has made no effort to pay sanctions as ordered by the court on October 30, 2012, January 10, 2013 and March 22, 2013.

Ms. Siou was required to pay sanctions beginning in October 2012, additional sanctions have been ordered and three separate deadlines to pay sanctions have been imposed by the court. CP 138. Ms. Siou has ignored these orders to pay sanctions and in fact Ms. Siou and Mr. Siou actively have conspired to subvert the courts orders by transferring community assets into separate assets, namely Ms. Siou quit claiming her property interest to Mr. Siou on October 30, 2012, the day

the first sanction order was signed. CP 138 Ms. Siou has made no payments toward her court ordered sanctions. CP 138 pg. 3.

vii. Ms. Siou failed to answer the interrogatories served on June 15, 2012, despite four court orders ordering complete answers and overruling her objections.

Ms. Siou has made every attempt to avoid answering these interrogatories. She submitted supplemental responses, which continue to avoid answering the interrogatories and raising the same objections that the court specifically overruled. CP 138 pg. 7

viii. Grace Siou's Wilfull Failure to Appear at Scheduled Deposition after Receiving Actual Notice.

In an attempt to get complete answers and confront Ms. Siou with the documentary evidence, a notice of deposition was sent via messenger for May 10, 2013 for a deposition date of May 22, 2013. CP 144, CP 138 Respondent's attorney spoke with Attorney Daniel Swedlow on the phone May 17 and 20¹, 2013. CP 144; CP 138 Respondent's counsel discussed the case and Mr. Swedlow was informed that a deposition was scheduled on May 22, 2013 at 10am. CP 144 Respondent's counsel again spoke to Mr. Swedlow on May 20, 2013 and he indicated that Ms. Siou would likely not be appearing for the deposition.

¹ CP 144 states "May 21, 2013" the correct date is CP 138 "May 20, 2013"

Respondent's counsel did not tell Mr. Swedlow that the deposition was cancelled and proceeded with the deposition as scheduled. CP 144 Mr. Swedlow did not provide any explanation as to why Ms. Siou would not be appearing. Id.

A court reporter appeared at 10am on May 22, 2013 and Respondent's counsel waited for thirty minutes before dismissing the court reporter. CP 138 Ms. Siou had twelve days notice in writing and actual notice from an attorney and she never contacted my office, nor has she made any attempt to reschedule the deposition. CP 144 Ms. Siou did send a letter on May 22, demanding that Respondent's provide more complete answers to her second set of requests for production. CP 144

IV. ARGUMENT IN RESPONSE

a. The default Judgment for discover violations was proper, the court found that the violations were willful, lesser sanctions were considered and imposed in four previous orders, and the Respondent's ability to prepare for trial was prejudiced.

i. Discovery Sanctions are reviewed for abused of discretion.

A trial court's discovery sanctions are reviewed for abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 338, 858 P.2d 1054 (1993). "A trial court exercises broad discretion in imposing discovery sanctions under CR 26(g) or 37(b), and its determination will not be disturbed absent a clear abuse of discretion." *Mayer v. Sto Indus., Inc.*, 156 Wash.2d 677, 684, 132 P.3d 115 (2006) (citing *Fisons*, 122 Wash.2d at 355–56, 858 P.2d 1054). "A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds." *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054 (citing *Holbrook v. Weyerhaeuser Co.*, 118 Wash.2d 306, 315, 822 P.2d 271 (1992)). "A discretionary decision rests on 'untenable

grounds' or is based on 'untenable reasons' if the trial court relies on unsupported facts or applies the wrong legal standard; the court's decision is 'manifestly unreasonable' if 'the court, despite applying the correct legal standard' to the supported facts, adopts a view 'that no reasonable person would take.' ” *Mayer*, 156 Wash.2d at 684, 132 P.3d 115 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wash.2d 647, 654, 71 P.3d 638 (2003) “There is a natural tendency on the part of reviewing courts, properly employing the benefit of hindsight, to be heavily influenced by the severity of outright dismissal as a sanction for failure to comply with a discovery order.” *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976). However since the trial court is in the best position to decide an issue, deference should normally be given to the trial court's decision. *Fisons*, 122 Wash.2d at 339, 858 P.2d 1054. A trial court's reasons for imposing discovery sanctions should “be clearly stated on the record so that meaningful review can be had on appeal.” *Burnet v. Spokane Ambulance*, 131 Wash.2d 484, 494, 933 P.2d 1036 (1997). If a trial court's findings of fact are clearly unsupported by the record, then an appellate court will find that the trial court abused its discretion. *Mayer*, 156 Wash.2d at 684, 132 P.3d 115. An appellate court can disturb a trial court's sanction only if it is clearly unsupported by the record. See *Ermine v. City of Spokane*, 143 Wash.2d 636, 650, 23 P.3d 492 (2001) (noting that a reasonable difference of opinion does not amount to abuse of discretion).

Magana v. Hyundai Motor Am., 167 Wash. 2d 570, 582-83, 220 P.3d 191, 197 (2009)

ii. The trial court did not abuse its discretion in imposing a default judgment for discovery violations.

The discretion that a trial judge exercises when considering whether to dismiss for discovery violations was described in *White v. Kent Med. Center Inc.*, 61 Wash. App. 163, 175-76, 810 P.2d 4 (1991). The court said:

CR 37(b) permits a trial court to order sanctions when a party or its attorney violates a discovery order. A trial court's choice of what sanction to impose is generally within the court's discretion. *E.g.*, *Rhinehart v. KIRO, Inc.*, 44 Wash.App. 707, 710, 723 P.2d 22 (1986), *review denied*, 108 Wash.2d 1008, *appeal dismissed sub nom. Rhinehart v. Tribune Pub'g Co.*, 484 U.S. 805, 108 S.Ct. 51, 98 L.Ed.2d 16 (1987). However, before resorting to default or dismissal, the most severe sanctions

available under the rule, the court must consider, on the record, whether a lesser sanction would suffice. *Snedigar v. Hoddersen*, 114 Wash.2d 153, 170, 786 P.2d 781 (1990). Additionally, due process considerations require that, before a trial court dismisses an action or counterclaim or renders a judgment by default, there must have been “a willful or deliberate refusal to obey a discovery order, which refusal substantially prejudices the opponent's ability to prepare for trial.” *Associated Mortgage Investors v. G.P. Kent Constr. Co.*, 15 Wash.App. 223, 228-29, 548 P.2d 558, *review denied*, 87 Wash.2d 1006 (1976). Finally, the trial court must make it clear on the record whether the factors of willfulness and prejudice are present before it enters a default or dismissal. *Snedigar*, 114 Wash.2d at 170 [786 P.2d 781].

Various cases are to the same effect. In each of them, the trial court dismissed a complaint with prejudice because of egregious noncompliance with discovery requirements, and the dismissal was affirmed on appeal. *Anderson v. Mohundro*, 24 Wash. App. 569, 604 P.2d 181 (1979), *review denied*, 93 W0ash.2d 1013 (1980); *Rhinehart v. KIRO Inc.*, 44 Wash.App. 707, 723 P.2d 22 (1986), *review denied*, 108 Wash.2d 1008, *appeal dismissed*, 484 U.S. 805, 108 S.Ct. 51, 98 L.Ed.2d 16 (1987); *Rhinehart v. Seattle Times Co.*, 51 Wash.App. 561, 754 P.2d 1243, *review denied*, 111 Wash.2d 1025 (1988), *cert. denied*, 490 U.S. 1015, 109 S.Ct. 1736, 104 L.Ed.2d 174 (1989); *Rhinehart v. Seattle Times Inc.*, 59 Wash.App. 332, 798 P.2d 1155 (1990). We hold that the trial court had authority to enter a dismissal with prejudice.

The *Anderson* case is particularly on point, the defendant in *Anderson* filed a motion to compel the Respondent to answer interrogatories. One day before the motion to compel hearing the Respondent produced incomplete interrogatories. A

second motion to compel was filed and the court ordered the Respondent to provide complete answers to the interrogatories. The Respondent failed to provide the interrogatories by the courts deadline and the court granted defendant's motion to dismiss for failure to provide definite answers to the interrogatories. The *Anderson* case only involved one order from the court compelling discovery and spanning four months of non-compliance with the courts order. *Anderson v. Mohundro* 24 Wash.App. 569, 604 P.2d 181 (1979). Ms. Siou has refused to comply with *four* prior court orders compelling her to provide answers to interrogatories, two of which included attorney's fees and costs spanning a period of non-compliance of almost a year since the original deadline for the interrogatories. CP 138

Under the authority of CR 37(d), the trial court entered a default judgment against the defendant. CP 138; CP 149. CR 37 sets forth the rules regarding sanctions when a party fails to make discovery. CR 37(d) authorizes a court to impose the sanctions in CR 37(b)(2), which range from exclusion of evidence to granting default judgment when a party fails to respond to interrogatories or appear for depositions. *See Smith v. Behr Process Corp.*, 113 Wash. App. 306, 324, 54 P.3d 665 (2002).

Broad discovery is permitted under CR 26. "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought

appears reasonably calculated to lead to the discovery of admissible evidence.” CR 26(b)(1). A party must answer or object to an interrogatory or a request for production. If the party does not, it must seek a protective order under CR 26(c). CR 37(d) The party cannot simply ignore or fail to respond to the request. “[A]n evasive or misleading answer is to be treated as a failure to answer.” CR 37(d). Ms. Siou never sought a protective order under CR 26(c) but ignored or evaded Respondent’s discovery requests by refusing to answer the questions or providing incomplete answers. CP 138

If a trial court imposes one of the more “harsher remedies” under CR 37(b), then the record must clearly show (1) one party willfully or deliberately violated the discovery rules and orders, (2) the opposing party was substantially prejudiced in its ability to prepare for trial, and (3) the trial court explicitly considered whether a lesser sanction would have sufficed. *Burnet v. Spokane Ambulance*, 131 Wash. 2d 484, 494, 933 P.2d 1036 (1997) “The purposes of sanctions orders are to deter, to punish, to compensate and to educate.” *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 356, 858 P.2d 1054, 1084 (1993)

iii. The defendant’s discovery violations were willful.

“A party's disregard of a court order without reasonable excuse or justification is deemed willful.” *Rivers v. Wash. State Conference of Mason Contractors*, 145

Wash.2d 674, 686–87, 41 P.3d 1175 (2002) (citing *Woodhead v. Disc. Waterbeds, Inc.*, 78 Wash.App. 125, 130, 896 P.2d 66 (1995)).

Ms. Siou had four different attorneys assisting her with her case and discovery requests. Ms. Siou was represented by Sean B. Malcolm, Richard Cole, David Swedlow and Daniel Ehrlich. CP 56, CP 162 Ms. Siou adeptly navigated the litigation process, she was incredibly active in retaining attorneys, filing motions, drafting responses and submitted (7) seven discovery requests. CP 138 pg. 7 Ms. Siou sent multiple letters before the Respondent's discovery requests were due indicating she will not accept late submissions and scheduling CR 26(i) conferences to inquire about answers provided. Id. Ms. Siou has claimed repeatedly throughout this case and in her appeal that she could not pay for a lawyer, or that she did not understand the questions asked. It only seems fair to note in response to these repeated claims that Ms. Siou was held in contempt in supplemental proceedings for the transfer of \$56,000.00² from an out of state account to her sister Im L. Ko and the liquidation of (9) different mutual funds for an undisclosed amount of money, within a few weeks of the entry of the default order on July 1, 2013.³ Additionally, Ms. Siou claimed in her opposition to entry of default judgment that she was “proficient in both English and Chinese,” and has ten years of insurance industry administrative experience and therefore could

² The \$56,000.00 was liquidated into a cashier's check 6 days after the entry of the default judgment. Supplemental Sub. no. 139, Supp. CP 139, see Declaration of Patrick McShea, Sub no. 207. Supp. CP 207

³ Sub. No 139. Supp. CP 139.

demand a competitive salary. CP 155, CP 156. The complexity of Ms. Siou fraud and her ability to conceal it from her employers is evidence enough of her sophistication and her claims of helplessness are not supported by the facts.⁴

There is no “reasonable excuse” for Ms. Siou’s failure for a year to provide answers to interrogatories and to refuse to answer requests for admissions. CP 138 pg. 7. Two Superior Court Judges determined that her discovery violations were “willful.” The court provided every opportunity to Ms. Siou to comply with discovery.

iv. Willful Failure to Appear at the Deposition.

Ms. Siou has consistently in her response to each separate discovery sanction motions filed by the Respondent claimed that she was unaware of CR 26(i) conferences, unprepared and/or not provided notice. CP 21, CP 34 CP 47, CP 71 and CP 143. Ms. Siou willful failure to appear for her deposition and reschedule her deposition, or make herself available for the re-noted June 5, 2013 deposition was a continuation of these tactics to delay and obstruct the discovery process. Respondent’s counsel spoke with Mr. Swedlow the 20th⁵ two days before the deposition was scheduled and he said “she [Ms. Siou] would likely not be appearing.” CP 144 pg. 7. Ms. Siou claims that the deposition was cancelled per the May 20, 2013 phone conversation, but to the contrary Respondent’s counsel

⁴ Ms. Siou filed bankruptcy to avoid collection of the default judgment and the U.S. Bankruptcy court denied the discharge of her debt based on fraudulent transfers and failing to disclose assets Case, see U.S. Bankruptcy Court No. 13-19864 Adversary No. 14-01152.

⁵ Mr. Swedlow never file a notice of appearance in the case.

did not call off the deposition and intended to go forward with the deposition. CP 144 After Ms. Siou failed to appear and the motion for default was filed, the Respondent's counsel confirmed with Mr. Swedlow that he never said the deposition would be cancelled and Mr. Swedlow agreed. CP 144 pg. 7 The trial date was August 6, 2013 and the summary judgment motion was due June 8, 2013. CP 1. Ms. Siou was given twelve days notice of the deposition. CP 138; CP 144. Another deposition was immediately noted and notice sent to Ms. Siou for a June 5, 2013 deposition. CP 144 pg. 7 Ms. Siou notified counsel she was not available for that date either and needed an interpreter. Id. **It was clear to the court that Ms. Siou had no intention of appearing for the deposition, in further support of the obvious delaying tactics Ms. Siou requested an interpreter for her deposition after failing to appear for her first deposition. CP 144 She never requested an interpreter throughout her criminal proceedings, including the entry of her guilty plea June 24, 2010. CP 64 pg. 11.**⁶

There were was conflicting testimony regarding what Ms. Siou "understood" after the phone conversation on May 20, 2013. CP 143 Respondent's counsel had no intention, nor did he state that he would be cancelling the deposition with only two months until the trial date and a month before the discovery cut off without an

⁶ Ms. Siou reported income as an interpreter in her bankruptcy schedules after her termination from TWLA, see U.S. Bankruptcy Court No. 13-19864.

alternate date or an explanation as to why Ms. Siou would not appear. CP 144 The court was fully aware of these fact prior to entry of the default. Id.

After Ms. Siou failed to appear for her deposition on May 22, 2013 she did not contact the office of Respondent's counsel to reschedule her deposition, she did however send a letter May 22, 2013, dated the day of her deposition, to Respondent's counsel office demanding more complete responses to her request for production. CP 138⁷ Additionally, a deposition was re-noted for June 5, 2013 and Ms. Siou informed counsel she was not available and needed an interpreter.⁸ CP 144 pg. 7.

“This [Appellate] Court defers to the trier of fact for resolution of conflicting testimony, evaluation of the evidence's persuasiveness, and assessment of the witnesses' credibility.” *In re G.W.-F.*, 170 Wash. App. 631, 637, 285 P.3d 208, 211 (2012) The court consider Ms. Siou's previous tactics and history of frivolous and false accusations throughout the discovery process⁹ and determined that her antics were merely intended to obstruct the discovery process.

The trial court resolved all conflicting testimony against Ms. Siou. “Th[e] [Appellate] Court defers to the trier of fact for resolution of conflicting

⁷ CP 138 Declaration of Chris Anderson pg. 6 sec. 18

⁸ Ms. Siou did not request an interpreter throughout her criminal proceedings, including the entry of her guilty plea June 24, 2010. CP 64 pg. 11, nor did she have an interpreter in her divorce proceedings after the filing of the lawsuit. CP 64 ex. 3

⁹ See CP 149

testimony...and assessment of the witnesses' credibility. *In re G.W.-F.*, 170 Wash. App. 631, 637, 285 P.3d 208, 211 (2012)” The court found that Ms. Siou was given notice of the deposition date and wilfully failed to appear. CP 149 pg. Ms. Siou’s failure to appear at the deposition, make efforts to reschedule and her further unavailability for the re-noted June 5, 2013 deposition was the last straw, in a long and arduous effort by the court to compel compliance with discovery.

v. The Respondent’s Ability to Prepare for Trial was Substantially Prejudiced

The second requirement in imposing a default sanction is substantial prejudice to the Respondent’s ability to prepare for trial. *Smith v. Behr*, 113 Wn. App. at 324-27. Prejudice depends on the facts of the case, but has been established where, as here, there was “reasonable evidentiary support” for the proposition that the undisclosed evidence was relevant; *i.e.*, it tended to strengthen the Respondent’s case, and weaken the defendant's case. *Id.* at 327-28. The withheld evidence went to the heart Respondent’s case and created enormous prejudice to the Respondent and to the administration of justice.

Washington courts have determined since at least 1897, when one party hides the truth, a fair trial is impossible. *See, e.g.*, cases from *Lowry v. Moore, supra*, through *Smith v. Behr, supra*. Justice is not done if hurried defaults are allowed, but neither is it done if continuing delays are permitted.” *Johnson v. Cash Store*, 116 Wn. App. 833, 841, 68 P.3d 1099, *rev. denied*, 150 Wn.2d 1020, 81 P.3d 120

(2003) (citing *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979)). The trial court did not hurry its default, it denied a previous motion for default to afford additional time for the Respondent to answer interrogatories. CP 51, CP 149 The court familiar with the facts of the case repeatedly indicated in its June 6, 2013 default order that the interrogatories and request for admissions were “unresponsive and incomplete as to key issues.” CP 149 pg. 2

Additionally, the court held that the answers to the request for admissions provided on May 5, 2013 were “similarly evasive and in many respects appear not only argumentative, but demonstrably inaccurate.” CP 149 pg. 3 Below are a few of the incomplete answers provided by Ms. Siou, it is by no means an exhaustive list.

Interrogatory No. 10 is a perfect example of Ms. Siou’s disregard for the courts orders that she provide complete answers and for obvious reasons if she answers these questions she will reveal where she deposited her payroll funds.

Interrogatory No. 10¹⁰

You indicate in your answer that you had authorization to sign checks for TWLA, did you sign your name to checks made payable to yourself or Ms. Lim’s?

What did you do with the taxes, surepay fee, medical insurance premium and other withholdings from your paychecks after terminating surepay until your termination 2008? If you deposited the funds into a bank account, identify the bank, co-signers on the account and which banking institution.

¹⁰ Grace Siou’s interrogatory answers cited below are in CP 138 exhibits 5, 6, 7.

After four separate court orders have overruling Ms. Siou's objections to this interrogatory and after two sets of supplemental answers Ms. Siou answer to Interrogatory No. 10 remained the same, after a lengthy stock objection Ms. Siou answers consisted of:

"I signed business checks as directed by Ms. Lim."

Interrogatory no. 10 is critical to trial preparation it revolves in part around where the embezzled funds were deposited claims in the criminal case and the civil case are part of the same payroll deposits. Additionally, the deposits were highly dispositive regarding Steven Siou's involvement and his personal and community liability for the civil claims. Ms. Siou entered into an Alford Plea in the criminal proceeding denying that she committed any of the acts alleged on the complaint. CP 64, see attached declaration of Chris Anderson, exhibit 2, Felony Judgment and Sentence.

Even with the pending default motion on June 5, 2013 Ms. Siou still failed to answer this interrogatory. CP 138.

Interrogatory No. 9¹¹

Did you terminate the services of the payroll company ADP, which changed its name to Surepay, (herein "Surepay") that managed your payroll deductions and reimbursements, while an employee of TWLA?

¹¹ CP 138 exhibits 5, 6, 7.

- a. *When did you terminate Surepay?*
- b. *What reason did you provide to Surepay for terminating their services?*
- c. *Did you notify anyone that you terminated Surepay's services? If, so please provide name and contact information.*
- d. *Did you continue to include the Surepay fee on your Payroll record and calculation sheets?*

After two supplemental answers provide Ms. Siou's answer to this question consisted of:

"I terminated Surepay under direction of Ms. Lim, because she told me to do so in the Summer of 2004. All Surepay transactions were reflected on the monthly bank statements received by Ms. Lim."

Interrogatory No. 16(b)¹²

Despite the fact you were not registered series 6 and 63 did you continue to receive compensation as an employee licensed series 6 and 63?

Ms. Siou answers after a lengthy objection claiming she had not had a chance to complete her investigation. She provides a non-responsive answer to a yes or no question. In three attempts to answer this question the end result is as follows:

Tsang hired me as her assistant never hired me to sell insurance and disability insurance while an employee of TWLA. Please see interrogatory # 7 for my duties and responsibilities as an employee of TWLA. Therefore the question is invalid.

The issue as to whether Ms. Siou received compensations she was not entitled to is essential in this litigation. Ms. Siou cannot simply refuse to answer

¹² CP 138 exhibits 5, 6, 7.

interrogatory questions because "...it tended to strengthen the Respondents case, and weaken the defendant's case." *Smith v. Behr*, 113 Wn. App. at 327-28. Ms. Siou should not be allowed to avoid straightforward questions that she alone has personal knowledge of and prevent Respondent in its attempts to prepare the case for trial and narrow the issues to be tried.

Similar to the defendant's answers to interrogatories Ms. Siou refuses to answer request for admission if they are at all probative to the facts of this case. Ms. Siou was asked on several occasions to admit that she was aware she was not licensed and aware that she unlawfully received commissions which is necessary to establish the elements of fraudulent misrepresentations and omissions.

Ms. Siou took the same approach in her requests for admission, below are a few examples of Ms. Siou's evasive and incomplete responses:

Request for Admission No. 2¹³ *Admit that attached exhibit list a true copy of your sentencing memorandum in case number 10-1-00431-5 SEA.*

Response: *Objection out of scope of lawsuit. Deny. I do not have enough information or knowledge. I am not aware of this document and my former attorney Drue Kirby never discussed this document with me before. I have never read this before. I don't know how Respondent got this.*

¹³ Grace Siou's answers to requests for admission referenced below CP 138, exhibit 8.

Request for Admission No. 7¹⁴ *Admit that you knew you were not entitled to receive/ share commissions for the sale, solicitation, negotiations, procurement of applications or the placing of kinds of insurance, pursuant to RCW 48.17.490(2).*

Response: *Deny, as my compensation from Tsang Wong Lim and Associates was not defined as commission. My compensation was per employment agreement signed by Tsang Wong Lim and Rolf Christensen.*

Ms. Siou avoids the question. She has worked in her field since 1995 and was previously registered to share commissions for insurance and security products and the highly probative fact is “was she aware that she was receiving compensation prohibited by statute.” Her answer is clearly evasive and non-responsive and clearly relevant to the claims in the amended complaint.

Request for Admission No. 9¹⁵ *Admit that the results of the test above was incomplete/fail. Without complete/pass this test, one cannot renew his/her series 6 and 63 registration.*

Response: *I do not have enough knowledge and information now to admit or deny...*

Ms. Siou personal knowledge of whether she was or was not licensed is critical to the elements of false misrepresentation. The Respondent is required to prove that the defendant “knowingly made a false statement.” CP 4. The response is not

¹⁴ Id.

¹⁵ CP 138, exhibit 8

only to delay but prevents the Respondent from any meaningful preparation as it provides no information to expand or focus discovery or deposition questions, but rather leaves the Respondent to endlessly speculate as to the facts in dispute or the nature of Ms. Siou's defense.

Request for Admission No. 11¹⁶ *Admit that you were not able to receive complete/pass status eventually in 2004, which is required to renew your series 6 and 63 registration.*

Response: *I do not have enough knowledge and information now to admit or deny...*

Request for Admission No. 13 *Admit that the attached payroll calculation sheets are true and correct copy and filled out by you.*

Response: *Partly admit and partly deny. At the beginning of my employment, the worksheet was filled out by the agents. Later on, they after (sic) the statements and Rolf Christensen and Tsang Wong Lim ask me to filled (sic). Each payroll worksheet was thoroughly reviewed and by agents. Both Rolf Christensen and Tsang Wong Lim have copies of their worksheet.*

All of the payroll calculation sheets are in the same handwriting. They are presumably filled out by Ms. Siou, but her response is "Partly admit and partly deny," but does not specify which part is admitted which is denied and fails to

¹⁶ CP 138, exhibit 8

actually answer the substantive question—are they true and correct copies of the payroll calculation sheets. The Respondent is completely unable to prepare for trial without knowing if Ms. Siou is going to acknowledge that she drafted the payroll sheets.

Ms. Siou effectively refused to answer any questions that will assist in narrowing issues for trial or assist in discovery of relevant evidence.

Request for Admission No. 17¹⁷ *admit the attached (exhibit 3, checks written from the account at Washington Mutual in the name of Tsang W. Lim and Rolf Christensen for your payroll purposes), include checks you forged with Tsang Wong Lim's signature deposited into your personal Washington Mutual Bank Account.*

Response: *Deny, checks I signed was per Tsang's direction and approval.*

Ms. Siou answer is clearly incomplete.

Request for Admission No. 18¹⁸ *admit that you were legally married to Stevie Siou from 2004-2008.*

Response: *Objection. Out of scope of this lawsuit. Respondent intentionally harass me on this personal information.*

¹⁷ CP 138, exhibit 8

¹⁸ Id.

Request for admission No. 22¹⁹ *Admit that you passed series 63 (uniformed security agent State law examination) in 1995, which included in the testing that unregistered persons are prohibited from receiving/sharing commission from the sale and service of security products.*

Response: *Objection out of scope of lawsuit. Without waiving objection Partly admit and partly deny. I passed series 63 in 1995 but it was a different company and none of Tsang Wong Lim's business. Deny as it was 18 years ago. Tsang has almost 20 years in insurance and investment business she knows all of the rules and regulations.*

The answer is non-responsive and confusing. As previously mentioned one of elements of fraud and intentional misrepresentation is knowingly making a false statement, see CP 4 sec. 4.2. The question was not whether Ms. Lim knows that unregistered persons are prohibited from sharing commissions, but whether Ms. Siou knew she was prohibited from sharing commissions and intentionally misrepresented her licensing to receive compensation that was prohibited.

Despite the repeated orders and the threat of a default judgment still did not make an attempt to answer the interrogatories and requests for admission. CP 143 Ms. Siou made the argument in her Response to the Motion hearing for default on June 5, 2013 that “[Respondent’s counsel] does not need the discovery; he already has the information, personal participation and subpoenas for all documents and private evidence.” *Id.* at sec. d.

¹⁹ *Id.*

The relevance and probative value of discovery is not for the defendant to arbitrarily decide. The trial court properly considered Ms. Siou's failure to answer interrogatories and requests for admission even after being ordered by four separate court orders and imposing three separate monetary sanctions. CP 138 pg. 7.

Ms. Siou knew that unanswered interrogatories and requests for admissions were highly probative and she inadvertently revealed their value through the incredible efforts she took to conceal them. Neither sanctions, nor the threat of default judgment moved her to provide answers that she claims Respondent already had. If Ms. Siou truly believed that Respondent had all the answers then for what plausible reason would she withhold that information at the risk of monetary sanctions and under the looming risk of default.

Ms. Siou suggest in her brief that there are only two issues before the court (1)... "either Washington supports a cause of action for recovery of commissions paid to an unlicensed person, or it does not. No evidence from Grace can support this." And (2) either Grace was properly licensed...or she was not." see Ms. Siou's appellate brief pg. 16.

Those most certainly are not the only issues related to the claims made in the amended complaint and completely over simplify the issues. Specifically, Ms. Siou personal knowledge which is an indispensable element of fraud, intentional misrepresentation, and fraudulent omission. CP 4

The burden is on the Respondent to prove each and every element of each cause of action alleged in the complaint. *Id.* Ms. Siou should not be allowed to conceal facts relevant to the claims alleged in violation of court orders and then claim on appeal that essentially had she answered those highly probative questions mentioned above they would not be relevant to the case.

vi. The court has imposed and exhausted all lesser sanctions.

The court must consider, on the record, whether a lesser sanction would suffice. *Snedigar v. Hoddersen*, 114 Wash.2d 153, 170, 786 P.2d 781 (1990). Here Ms. Siou has received four separate orders from the court compelling discovery, she has been monetarily sanctioned three times for failing to comply and the answers to the interrogatories and requests for admissions have still not been provided.

Ms. Siou's ignored four separate court orders issued on September 13, 2012, October 30, 2012, January 10, 2013 and March 22, 2013, each order overruled Ms. Siou's objections and ordered complete answers by a date certain, each deadline came and went without complete answers or payment of sanctions. CP 138 pg. 2-3

Not only did the court consider, lesser sanctions the court imposed a serious of lesser sanctions. The September 13, 2012 order from The Honorable Judge Inveen compelled answer, but ordered no monetary sanctions. CP 18 The next three orders compelled answers, but included monetary sanctions. CP 138 pg. 2. The Respondent made a motion for default for discovery sanctions and the court denied that motion on March 22, 2013 CP 149 pg. 3. Finally, after almost a year of

ignored court orders the court entered the default. The court considered in its findings that there was no lesser discovery sanction than the default order. CP 149 pg. 4 All lesser sanctions had been exhausted and were completely ineffective.

vii. *Main v. Taggares*, 8 Wn. App. 6 (1972) is distinguishable from the facts of the instance case.

Main v. Taggares, specifically deals with the application and interpretation of RCW 18.85.100, which states:

It shall be unlawful for any person to act as a real estate broker, associate real estate broker, or real estate salesman without first obtaining a license therefor, and otherwise complying with the provisions of this chapter.

No suit or action shall be brought for the collection of compensation as a real estate broker, associate real estate broker, or real estate salesman, without alleging and proving that the Respondent was a duly licensed real estate broker, associate real estate broker, or real estate salesman at the time the alleged cause of action arose.

RCW 18.85.100 (since amended by Laws of 1972, 1st Ex.Sess. ch. 139)

The court in Main v. Taggares held that “neither the statutes nor the case law give one who sells his land by an unlicensed broker the right to sue for refund of a commission once paid.” 8 Wa. App. 6, 11, 504 P.2d 309, 321 (1972)

There are two important distinctions that clearly distinguish the instant case and *Main v. Taggares*:

In *Main v. Taggares*, the Respondent **knew** that the real estate agent was unlicensed, but nevertheless entered into the agreement. Only after receiving the

benefit of the bargain did the defendant seek to recover the commission. *Id.* In the instant case, Ms. Siou intentionally misrepresented her licensing and therefore her qualification to receive a share of commissions that TWLA not only would not have paid her, but were prohibited by statute from paying her.

(1) An insurance company, insurance producer, or title insurance agent shall not pay a commission, service fee, or other valuable consideration to a person for selling, soliciting, or negotiating insurance in this state if that person is required to be licensed under this chapter or chapter 48.15 RCW and is not so licensed.

(2) A person shall not accept a commission, service fee, or other valuable consideration for selling, soliciting, or negotiating insurance in this state if that person is required to be licensed under this chapter or chapter 48.15 RCW and is not so licensed.

Wash. Rev. Code Ann. § 48.17.490

Ms. Siou's deception actually put her employers at risk of losing their respective licensing.

In *Main v. Taggares* the defendant performed and provided a purchaser for the property, which was the agreement and expectation of the parties. Ms. Siou did not perform as agreed or to any reasonable expectation, in fact as an employee of TWLA she embezzled funds, forged signatures, and deceiving her employers as to her qualifications and licensing all with the sole purpose of enriching herself at the expense of her employers. See CP 4, 3.3-3.8.

The defendant cites an additional case *Grengo Real Estate Investment Trust v. Nathaniel Greene Development Corporation*, 218 Va. 228, (1977) the case involves a contractor that constructed a building and performed fully under the contract without complaints regarding workmanship or performance. Additionally, Respondent knew that the contractor was not licensed when he signed the contract and accepted the benefit of the bargain. In the instant case TWLA was entirely unaware that Ms. Siou was not licensed because Ms. Siou intentionally misled and concealed those facts. Additionally, unlike the contractor in *Grengo* she did not perform as contracted. Ms. Siou was not hired to embezzle, forge documents and lie to her employers.

viii. Ms. Siou concedes that knowledge of her licensing status is a distinguishing factor in *Main v. Taggaras and Grengo*.

Ms. Siou concedes that knowledge of her licensing status is a distinguishing factor in her brief “[t]he facts in *Grengo* differ in that it *applied if the Respondent knew the contractor in that case was unlicensed*, and Tsang Wong Lim alleges not to have known Grace was unlicensed...” Appellate Brief pg. 14, emphasis added. Ms. Siou argues that she did know that Ms. Siou was not licensed. *Id.* The factual disputes were resolved with the default judgment. Ms. Siou had an opportunity to respond to the facts in discovery and at trial, but instead Ms. Siou took a calculated risk and disregarded the courts orders to gain an advantage at trial, unfortunately for Ms. Siou that strategy was unsuccessful. “A default judgment constitutes an

admission of all factual allegations necessary to establish the Respondent's claim for relief." *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 333; 54 P.3d 665 (2002). The admitted facts are that during Siou's criminal investigation, Ms. Lim discovered on March 24, 2009 that Grace Siou did not have series 6 or 63 registration and license to sell life insurance and disability insurance since 2004. CP 4 sec. 3.8. Ms. Siou was a trusted employee and Ms. Lim had no reason to question the representations made by Ms. Siou during the tenure of her employment.

"Under the discovery rule, the statute of limitation for [fraud or securities fraud] begins only when the aggrieved party discovers, or should have discovered by due diligence, the fact of fraud or securities fraud and sustained some actual damage." RCW 21.20.430(4)(b)

Ms. Siou's made similar arguments in her response to the motion for default citing *Grengo* and *Main*, supra. and 74 ALR 3d 637. CP 155 pg. 5. CP 155 Any reference to 74 A.L.R. 3d 637 is curiously absent from the appellate brief, possibly due to the fact that it specifically references that "...recovery [of commissions] may be allowed where the payee falsely represented himself to be licensed or where there is obvious chicanery." 74 A.L.R. 3d 637 sec. 5(a) Additionally, recovery was allowed for compensation to an unlicensed teacher where that compensation was forbidden by statute." *Id. citing, Vick Consol. School Dist. v. New*, 208 Ark. 874, 187 SW2d 948 (1945). Similarly, Pursuant RCW

48.17.490(2) the defendant Grace Siou was prohibited by statute from receiving or sharing any commissions based on the sale, procurement or negotiations of insurance products.

Additionally, other foreign jurisdictions have agreed that when employees make misrepresentation or act in bad faith the employers are allowed to recover funds paid in reliance on that fraud.

Circumstances weighing in favor of disgorgement include significant injury to the user as a result of acts of the type the statute was intended to protect against, ***bad faith or knowing violation of the law by the unlicensed broker...***

Circumstances weighing against disgorgement are largely the converse of the foregoing. They include such considerations as whether disgorgement would unjustly enrich the user of the services, whether the sanction of disgorgement would be disproportionate to the violation, ***whether the unlicensed broker acted in good faith and can retain the payments in equity and good conscience***, whether the user itself violated the law, especially if it was in *pari delicto*, whether the violation of law was merely **technical or was not a knowing violation**, and whether the user of services was knowledgeable and sophisticated.

Generally, the balancing of the equities in the light of relevant public policy is committed to the sound discretion of the trial court.

Remsen Partners, Ltd. v. Stephen A. Goldberg Co., 755 A.2d 412, 420-21 (D.C. 2000), *emphasis added*.

Disgorgement of salary, benefits and bonuses: [*Service Employees Int'l Union, Local 250 v. Colcord* (2008) 160 CA4th 362, 371, 72 CR3d 763, 769—disgorgement of salary and benefits is appropriate remedy when union representative breaches fiduciary duty to employer by secretly working to decertify union; *J.C. Peacock, Inc. v. Hasko* (1961) 196 CA2d

353, 358, 16 CR 518, 524—employer entitled to disgorgement of bonuses paid to employee who violated fundamental duty of loyalty; see Rest.2d Agency § 469—“An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty; if such conduct constitutes a wilful and deliberate breach of his contract of service, he is not entitled to compensation even for properly performed services for which no compensation is apportioned”]

Cal. Prac. Guide Civ. Pro. Trial Claims and Def. Ch. 3 (V)-E

In *Am. Timber & Trading Co. v. Niedermeyer*, the court held that the disgorgement of a corporate agent’s entire salary was appropriate:

The [employees] continuing series of deliberate diversions of corporate funds, secret accounting manipulations, and other wilful breaches of [his] fiduciary duties, which culminated in the looting of corporate assets through the exchange agreement, led almost inevitably to the collapse of AT&T. Rather than contributing to the success and profitability of the corporation, Ben's management of AT&T was largely responsible for its insolvency and eventual liquidation. Compare *Dale v. Thomas H. Temple Co.*, 186 Tenn. 69, 208 S.W.2d 344, 350 (1948):

‘The Courts below have concurred in finding that the only service that the Caldwells rendered Apex was the wrecking of that Corporation by misappropriation of its corporate assets for their personal benefit. Therefore, under well-settled law, they were not entitled to salaries during the time of their control, *Fletcher Cyc. Corp.*, *Perm. Ed.*, Vol. V, Ch. 16, sec. 2145, and their division of the spoils is to be disregarded.’

Am. Timber & Trading Co. v. Niedermeyer, 276 Or. 1135, 1156, 558 P.2d 1211, 1223 (1976)

Similarly, Ms. Siou was guilty of “deliberate diversion of funds, secret accounting manipulations, and other wilful breaches...” CP 4. Although, Ms. Lim

did not seek disgorgement of her entire salary, just the portion paid as a result of Ms. Siou's intentional misrepresentation regarding her licensing status. Id.

ix. Fraud, Conversion, Intentional Misrepresentation and Omission are Causes of Action in Washington State.

The terms "fraud" and "deceit" are often used interchangeably. "Fraud," in its general sense, is comprised of anything calculated to deceive, including all acts, omissions, and concealments involving the breach of legal or equitable duty, trust or confidence resulting in the damage to another. *In Interest of Perry*, 31 Wa.App. 268, 641 P.2d 178 (1982).

In an action for damages based upon fraud, the injured party is entitled to recover damages for losses proximately caused by the fraudulent conduct. *Lawson v. Vernon*, 38 Wash. 422, 80 P. 559; *Eyers v. Burbank Co.*, 97 Wash. 220, 166 P. 656; *Voellmeck v. Harding*, 166 Wash. 93, 6 P.2d 373, 84 A.L.R. 608; *Cloakey v. Bouslog*, 39 Wash.2d 66, 234 P.2d 880;

In the most basic terms, the Respondent paid money to Ms. Siou that she would not have been paid but for Ms. Siou fraud and deception. She lied to her employer to receive compensation above what she was entitled, funds that would have specifically been retained by TWLA, if not for Ms. Siou's deceit. The fraud was therefore a proximate cause of the Respondent's damages.

The defendant's argument that "an unlicensed employee who performed as promised was not unjustly enriched" Appellate Brief pg. 13 clearly does not apply to Ms. Siou as she did not perform as promised and the admitted facts pursuant to the default judgment are that Ms. Siou was fired for poor performance, forgery and false representation. CP 4 sec. 3.6 In addition to her grounds for termination, she

entered to an Alford Plea on June 24, 2010 for two felony counts of Theft in the First Degree and Forgery related to her employment at TWLA. CP 4 pg. 3.7 Any claim by Ms. Siou that she “performed as promised” is baseless.

Restatement (Third) of Restitution explains that a person who is unjustly enriched at the expense of another is liable in restitution to the other. *Dragt v. Dragt/DeTray, LLC*, 139 Wash.App. 560, 576, 161 P.3d 473 (2007) (citing, Restatement (Third) of Restitution and Unjust Enrichment § 1), *review denied*, 163 Wash.2d 1042, 187 P.3d 269 (2008). A person has been unjustly enriched when he has profited or enriched himself at another's expense, contrary to equity. *Dragt*, 139 Wash.App. at 576, 161 P.3d 473.

Cox v. O'Brien, 150 Wash. App. 24, 36-37, 206 P.3d 682, 688 (2009)

Ms. Siou intentional misrepresentations to receive a higher compensation from TWLA was unjust and as a result she was enriched with funds that would have been retained by TWLA. Ms. Siou assertions in her appellate brief that TWLA did not suffer any damages is simply unsupported by the facts.

If not for the intentional misrepresentations and omissions regarding her qualifications and licensing TWLA would have retained those funds, hired a more qualified applicant that would not have committed fraud or paid Ms. Siou less. TWLA certainly would not have paid the funds to Ms. Siou in violations of RCW 48.17.490(2). Ms. Siou's deception increased her compensation and decreased TWLA's income and put both employers at risk of losing their licensing due to their unwitting violation of RCW 48.27.490(2).

- x. **The Amount of damages is correct and the numbers are from the handwritten payroll sheets and specifically itemize commissions shared and how much Ms. Siou received for each specific commission.**

Tsang Wong Lim submitted a declaration CP 50. Attached to that declaration were Ms. Siou's personal payroll calculation sheets which list over five separate commissions and how much was paid on each commission. Ms. Siou hand wrote these sheets and each commission listed required licensing to receive those payments. See Declaration of Tsang Wong Lim, exhibit 3, CP 50.

A trial court has broad discretion in determining the appropriate damages award under CR 55(b)(2). The court has discretion to hold a hearing, bench trial, or even a jury trial. 4 Karl B. Tegland, *Washington Practice: Rules Practice CR 55*, at 339 (5th ed.2006). In this case, the trial court elected to enter a damages award based on the affidavits alone. This, too, was within its discretion. *See Miller v. Patterson*, 45 Wash. App. 450, 457, 725 P.2d 1016 (1986) (noting permissive language in CR 55(b)(2) that "the court may conduct such hearings as are deemed necessary")

Little v. King, 160 Wash. 2d 696, 726, 161 P.3d 345, 361 (2007), as amended on denial of reconsideration (Oct. 3, 2007)

The court had the sworn declaration of Ms. Lim and the actual hand written payroll calculation sheets filled out by Ms. Siou to determine to the penny what commissions that required licensing were shared with Ms. Siou. CP 50, exhibit 3.

Ms. Siou's argues that "these calculations are in error. The judgment sum includes all of Grace's bonuses from all sales by Lim in the dates Grace was not licensed, not just sales involving securities which arguably required a license." Ms. Siou appellate brief pg. 19. Sharing of commissions for the sale of securities

requires a license to sell those securities, specifically series 6 and 63 and sharing of commissions for the sale of insurance products also requires the license to sell life and disability insurance. There is nothing “arguable” about RCW 48.17.490(2) prohibition on the sharing of commissions. Furthermore, Ms. Siou fails to designate what commissions she received “arguably required a license.” Appellate brief pg. 19.

Additionally, Ms. Siou continues to make the contradictory and disingenuous argument regarding offsetting the criminal restitution paid with the default judgment award for commissions she received as a result of her intentional misrepresentations. Ms. Siou’s appellate brief pg. 19-20.

As stated in Ms. Siou’s own brief “Ms. Lim is only seeking recovery on the commissions Grace allegedly received and was not entitled to.” Ms. Siou’s brief pg. 16. The criminal restitution was for Ms. Siou’s rather sophisticated payroll scam which included firing the payroll company unbeknownst to Ms. Lim and paying herself an increased salary by pocketing the withholding taxes set aside for FICA, social security and Medicaid. CP 4; CP 64 exhibit 3, Bellevue Police Department Certification of Probable Cause. The embezzled commissions were only discovered after Ms. Siou was terminated and the extent of her fraud was revealed during the police investigation. CP 4 The default judgment amount of \$68, 504.23 is entirely separate from the restitution amount ordered by Judge Ramsdell.

The argument for offset is clearly misleading and again reveals the liberty that Ms. Siou will take with the facts even when clearly contradictory to her own previous statements and the evidence and how freely she accuses others of fraud.

ix. Denial of Motion for Reconsideration

The trial court denied Ms. Siou's motion for reconsideration on July 24, 2013. CP 165. The grounds for the denial was that it was untimely CR 59(b) states:

Time for Motion; Contents of Motion. A motion for a new trial or for reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision. The motion shall be noted at the time it is filed, to be heard or otherwise considered within 30 days after the entry of the judgment, order, or other decision, unless the court directs otherwise.

Wash. Super. Ct. Civ. R. 59

The default judgment was entered June 7, 2013; order of default for an amount certain on July 1, 2013 and the motion to reconsider was not filed until July 24, 2013.

The court also found that the motion to reconsider should be denied on the merits as well. The additional information provided by Ms. Siou could have been discovered and presented earlier with reasonable diligence. CR 59(a)(4). The motion reconsider was properly denied.

Motions for reconsideration are addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion, which occurs when its decision is based on untenable grounds or reasons. *Wilcox v. Lexington Eye Institute* 130 Wash.App. 234, 122 P.3d 729, (2005)

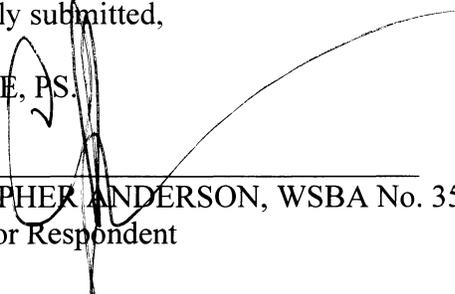
V. CONCLUSION

For the forgoing reasons, the court should affirm the trial court's order of default for discovery violations, order of default for an amount certain and the order denying defendant's motion for reconsideration.

DATED this 8 day of MAY 2015.

Respectfully submitted,

LEE & LEE, P.S.



CHRISTOPHER ANDERSON, WSBA No. 35206
Attorney for Respondent