HONORABLE BRUCE A. SPANNER

SUPERIOR COURT OF WASHINGTON
FOR BENTON COUNTY

JULIE M. ATWOOD,

Plaintiff,

vs.

MISSION SUPPORT ALLIANCE, LLC, STEVE YOUNG, an individual, and DAVID RUSCITTO, an individual,

Defendants.

Case No.: 15-2-01914-4

PLAINTIFF'S MEMORANDUM IN SUPPORT OF SECOND AMENDED MOTION FOR SANCTIONS UNDER CR 37 AND CR 26(g)

Noted for Hearing: May 12, 2017

ORAL ARGUMENT REQUESTED
OVER TEN MINUTES

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I. INTRODUCTION

Judge Runge was correct in calling out Defendants for sharp practices, referencing their "game-playing" in her recent letter of recusal. Sub #221.[1] The improper game-playing continues with Defendants' prejudicial withholding of documents in discovery. On Monday, April 17, 2017—the same date the parties were to file the Trial Management Report and their respective Trial Briefs —Defendants released yet another dump of documents responsive to Plaintiff's requests for records of other complaints and investigations of gender discrimination. These records include, among other things, a trove of witness statements taken down from witnesses, some of whom were already deposed, and other who have not been previously contacted or deposed. In the context of this gender-bias investigation, one witness alleged, for example, that MSA's President (Frank Armijo) and the Chief Operating Officer (Dave Ruscitto) are known as "the Big Boys Club," while a senior executive disclosed that Fowler had early on made allegations to him of "gender-bias in the Company, particularly about Frank [Armijo] and Dave [Ruscitto]. She had used an acronym of 'FOF' meaning 'friends of Frank,'" which the executive apparently failed to report or investigate.

On February 2, 2017, more than ten weeks before MSA produced these documents, and weeks after Plaintiff filed her motion to compel, MSA served written discovery answers affirming, "***MSA … has provided documentations regarding of*** [sic] ***all complaints that alleged gender discrimination*** and/or retaliation during the time that Plaintiff was employed at MSA, and including complaints raised by Ms. DeVere"; and promising to "produce documentation … through the date Ms. Atwood filed this above captioned lawsuit" (*i.e.*, through August 21, 2015). Sheridan Dec., Ex. 2, Interrogatory No. 16-17.

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[1] Judge Runge recused herself, at MSA's request, after disclosing "extremely limited contacts" over the years with Chris Jensen, a witness who is *adverse to Ms. Atwood*. Id. Judge Runge referred to the request as "nothing more than game-playing," noting that "MSA does not raise a claim that I would be biased against MSA because of Mr. Jensen being associated with MSA"; nor would the court be called upon to assess Mr. Jensen's credibility given that this case will be presented to a jury."

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The next day, **February 3**, 2017, the Honorable Carrie Runge enter an order compelling Defendant to produce all such documents (and more) "**without further delay**." Defendant then moved unsuccessfully on February 7, 2017, to quash a subpoena Plaintiff issued to Ms. Fowler, a female former executive and General Counsel at MSA. Defendant argued Plaintiff's request for "claims by Ms. Fowler against MSA … was ***nothing more than a fishing expedition*** designed to harass MSA" and "not calculated to lead to the discovery of admissible evidence."[2] The Honorable Bruce Spanner declined to quash the subpoena to Fowler and the following day, February 8, 2017, MSA produced a mere 16 pages of documents concerning complaints Fowler made about gender discrimination and retaliation. Days later, on February 10, Ms. Fowler was deposed.

The discovery cut-off and deadline for taking depositions and completing written discovery was February 24, 2017; over two months ago. With trial less than two weeks away, Defendants on Monday, April 17, 2017, disclosed 126 pages of investigative files regarding Sandra Fowler, which were only the most recent among several waves of belated document dumps by Defendants and which make clear that Plaintiff was on anything but a fishing expedition. The most recent production includes witness statements from MSA's internal investigation of Ms. Fowler's complaint of gender discrimination. These documents were not previously produced, despite being responsive to Plaintiff's discovery requests served in July 2016, and to the rulings made by Judge Runge and Judge Spanner in early February. Among the documents just disclosed are communications showing that in March 2015, Ms. Fowler made a written complaint to the Vice President of Human Resources, Todd Beyers, that another executive (Stan Bensussen, counsel for MSA in this matter) "used derogatory and/or demeaning characterization or language toward [her]. **He called or implied that Frank** [**Armijo**] **and Dave** [**Ruscitto**] **thought I was** '**a man-hater**', and made a statement, '... if he

[2] Ashbaugh Dec. In Support of Motion for Shorten Time and To Quash (Sub # 85), ¶ 6.

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was I, I should kiss the ground that Frank and Dave walked on...'. I find them very misogynistic, demeaning, gender-biased, etc."

MSA President Frank Armijo, Chief Operating Officer Dave Ruscitto, and the V.P. of Human Resources Todd Beyers were all involved in the decision to terminate Plaintiff Julie Atwood.[3] The documents just disclosed reveal that Todd Beyers, the V.P. of Human Resources, failed to adequately address Ms. Fowler's complaint of "gender-bias" when reported to him in March 2015; as Mr. Beyers in May 2015 was himself interviewed regarding his so-called "investigation" and follow-up on Fowler's report to him. The documents showing MSA's "investigation-of-the-investigation" again were only just produced on April 17, 2017—the same date the Trial Management Report and trial briefs were filed.

Defendant's ongoing failure to produce responsive records "without further delay"—including but not limited to its failure to provide any of its investigative files regarding Ms. Fowler's complaint until 2 weeks before trial—can only be viewed as "willful" misconduct lacking any reasonable excuse. Counsel for MSA in this matter has always known of the Fowler investigation records. One of MSA's attorneys here (Stan Bensussen) was the ***subject*** of the complaint, who was twice interviewed in May 2015 about Ms. Fowler's complaint of gender discrimination and retaliation; and another of the attorneys (Denise Ashbaugh) appeared on behalf of MSA to defend against Ms. Fowler's claims of discrimination, beginning in October 2015, with her engagement continuing through June 2016, when Ms. Ashbaugh wrote the EEOC on behalf of MSA in response to Ms. Fowler's formal Charge of Discrimination.[4]

As outlined herein, Defendant has engaged in a pattern of sharp practices, disregard of the discovery rules, and disregard for the Court's order compelling discovery. If the Court fails to take action in response to this misbehavior, Defendants' belated document dumps and

[3] Def.'s Answer to Interrogatory No. 9, Sub # 185 (Sheridan Dec., 3/23/17), Ex. 2.
[4] *See* Sub # 234 (Ashbaugh Dec., ¶ 4); Sub #233 (Mot.) at 11:1-5; Rose Dec., ¶¶ 12-14.

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belated disclosures of expert witnesses will severely prejudice Plaintiff's ability to prepare trial. She will be left in the impossible position of having to start all over with discovery, just days before trial. Defendant should not be so rewarded for its misdeeds. Enough is enough. At this juncture, the Court should find that no sanction short of default judgment will suffice "to deter, to punish, to compensate and to educate."

For these reasons, Plaintiff respectfully moves the Court for an order (1) finding Defendant Mission Support Alliance, LLC and its counsel violated CR 26(g) and the Court's order compelling production of documents; (2) finding that MSA willfully failed to produce documents properly requested in July 2016; including only producing a few documents related to Sandra Fowler after it became clear that MSA's motion to quash the Fowler subpoena was denied, so the few documents MSA disclosed February 8 would be produced by Ms. Fowler at her deposition, while continuing to withhold more than 100 pages of internal records of MSA's investigation that Fowler did not possess, until long after the depositions of Ms. Fowler and other relevant witnesses were completed and the period for completing discovery was past; (3) finding that Plaintiff is substantially prejudiced in her ability to prepare for trial based on Defendant's pattern of withholding evidence; (4) and finding, as in *Magaña*, that no lesser sanction than a default judgment will suffice and set a May 2017 date for trial on damages.

If the Court declines to enter a default judgment, then in the alternative, in addition to the foregoing findings (1) through (3), Plaintiff seeks an order:

> (4) directing MSA's counsel to certify the company is withholding no further documentation responsive to Plaintiff's Interrogatory Nos. 16-17 and to the Court's discovery order;
>
> (5) granting a 60-day continuance of the trial date to Monday, July 3, 2017, and requiring the company to accept trial subpoenas on behalf of all current employees;
>
> (6) allowing Plaintiff until June 19, 2017 to amend its list of witnesses and exhibits in the Trial Management Report;

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(7) authorizing Plaintiff to continue the depositions of:

(i) Sandra Fowler;
(ii) Todd Beyers;
(iii) Steve Young;
(iv) Chris Jensen
(v) Christine DeVere;
(vi) Wendy Robbins;
(vii) Kadi Bence; and
(viii) Cindy Protsman;

and to take the depositions of:

(i) Stanley Bensussen;
(ii) Greg Jones;

with MSA obligated to make the company's employees available for deposition, absent documentation of a medical issue or out-of-town vacation;

(9) extending for 60-days (to June 30) the Commission to Take Deposition Outside the State of Washington, Sub #201, for purposes of deposing former President Frank Armijo;

(10) requiring MSA to pay Plaintiff's reasonable attorney's fees and all costs incurred through the present;

(11) requiring MSA to pay Plaintiff's reasonable attorney's fees and all costs related to the motion for sanctions and the additional discovery caused by MSA's improper actions;

(12) requiring MSA and its counsel to pay for the discovery violations a penalty of $100,000 each to the Legal Foundation of Washington or to the Benton and Franklin Counties Superior Court Administration; and

(13) awarding any other relief the Court deems just and necessary "to deter, to punish, to compensate and to educate."

II. EVIDENCE RELIED UPON

This motion is based on the Declaration of John P. Sheridan filed 2/17/17 ("Sheridan Dec."); the Supplemental Declaration of John P. Sheridan filed 2/22/17 ("Supp'l Sheridan Dec."); the Second Supplemental Declaration of John P. Sheridan dated 5/2/17 ("2nd Supp'l Sheridan Dec."); Declaration of Mark W. Rose filed herewith ("Rose Dec."); the Declaration of

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Julie Atwood filed herewith ("Atwood Dec."); and the Fourth Supplemental Declaration of Christine Moreland ("4th Supp'l Moreland Dec.").

III. STATEMENT OF FACTS

A. Defendant's Discovery Answers Promised to Produce Records Related to Complaints of Gender Discrimination and Retaliation

In July 2016, Plaintiff served Interrogatory Nos. 16 and 17, which asked for the relevant time period (February 10, 2010 through the date of trial) that MSA identify "every complaint made against MSA, for any reason," including among other things, "all outside investigators and/or EEO investigators who have investigated and/or examined any complaints." Rose Dec., ¶ 1, Ex. 1. Defendant MSA responded on August 31, 2016, representing that MSA was producing "*all complaints that alleged gender discrimination and/or retaliation during the time that Plaintiff was employed at MSA*[.]" Sheridan Dec., ¶ 1, Ex. 1. The Defendant's response acknowledged Defendant's agreement as to the relevance, for discovery purposes, of the gender discrimination and retaliation complaints, but sought to unilaterally carve out complaints made after Ms. Atwood's forced termination from MSA after September 2013. *See id*., Ex. 1, at pp. 2-3; Sub# 2, 13 (Compl. and Answer, ¶ 1.2).

On January 31, 2017, after serving her with a subpoena, Jack Sheridan spoke with Sandra Fowler, MSA's former General Counsel, who disclosed to Mr. Sheridan that she had filed an EEOC claim against MSA, which was still pending. Sheridan Dec., ¶ 2. MSA had not produced this complaint and disclosed no information about it in answer to Plaintiff's interrogatories. *Id*.

On February 1, 2017, Plaintiff's counsel summarized a meet and confer, and confronted MSA's counsel with her client's failure to disclose information and documents that Plaintiff knew existed, writing in relevant part, as follows:

> I also said that I was seeking any complaints [Sandra Fowler] may have filed against MSA as outlined in the subpoena. MSA has not produced any such documents.

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> I want you to be on notice that if you are withholding such documents, and such documents are produced at her deposition pursuant to the subpoena, I will seek sanctions. Also, you have not produced any complaints by Ms. DeVere have you? The same will be true if such complaints are revealed at her deposition on Thursday.

Sheridan Dec., ¶ 3.

The next day, February 2, 2017, almost two weeks after Plaintiff filed her motion seeking further response to Interrogatories No. 16-17, and the related requests for production, Defendant served a supplemental answer to Interrogatory Nos. 16-17, which stated:

> **SUPPLEMENTAL ANSWER**: Objection. This interrogatory is overly broad, unduly burdensome, and vague as to the term "complaint." Without waiving this objection, MSA responds it will produce documentation regarding of all complaints raised to Employee Concerns and/or the EEO Officer that alleged gender discrimination, retaliation, or misuse of MSA resources from 2010 through the date Ms. Atwood filed this above-captioned lawsuit, approximately two years after she was employed, including complaints raised by Ms. DeVere.

Id., ¶ 5; *id.*, Ex. 5.

Ms. Atwood filed her lawsuit on August 21, 2015, and the scheduling order set the original trial date for August 22, 2016. Sub #2; Sub #7.

The 2/2/17 supplemental answer to Interrogatory Nos. 16-17 was accompanied by production of a report of investigation into EEO Officer **Christine DeVere's** complaint of retaliation against Vice President of Human Resources Todd Beyers. Sheridan Dec., ¶ 4. The report referenced witness statements and other underlying documentation from the investigation that were not included in the 2/2/17 production. *Id.*

B. Judge Runge Issued a Discovery Order and After The Parties Appeared Before Judge Spanner, MSA Produced a Few Records Related to Sandra Fowler's Gender Discrimination and Retaliation Complaints, But Withheld Most Until the Eve of Trial

Defendant's 2/2/17 supplemental production failed to include any documents or disclosure of information related to the gender discrimination complaint made by **Sandra Fowler**. Sheridan Dec., ¶ 6. That day, Defendant MSA filed a motion to shorten time for hearing a motion to quash the subpoena issued to Ms. Fowler, and in the underlying motion to

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quash, claimed:

> Ms. Fowler's own claims against MSA after *voluntarily leaving* for another position over two years after Plaintiff s employment ended is not crucial to her case. MSA has provided (and is supplementing) complaints wholly unrelated to Plaintiff of gender discrimination, retaliation and alleged misuse of funds for a period of five years (from 2010 through August 21, 2015). Discovery is not unlimited and MSA's production is more than appropriate.

Sheridan Dec., ¶ 6; *accord* Sub # 87, at p.12.

On February 3, 2017, the Court entered an order granting Plaintiff's Motion to Compel Defendant Mission Support Alliance to Respond to Plaintiff's Written Discovery Requests. *See* Sub #105; Sheridan Dec., Ex. 3 (requiring Defendant to answer "Interrogatory Nos. 15-17, and 19, and Request For Production Nos. 93-95, 97, 102, 105-107, 112-116 and 118, ***without further delay***, and no later than February 1, 2017").

Since receiving the Court's **February 3**, 2017 order, Defendant has not provided any amended or supplemental written answer to Interrogatory Nos. 16-17,. *Id.*, ¶ 19.

Later on February 3, after the Court issued its ruling, Plaintiff's counsel emailed defense counsel asking MSA, "**Please send Fowler complaint immediately**." Sheridan Dec., Ex. 4. MSA's counsel replied, "We will be moving for [re]consideration on Monday or Tuesday of the Court's ruling" and further stated that MSA "will be going to ex parte on Tuesday at 8:15 am on our motion to shorten time for a hearing before Friday on the Fowler deposition." *Id*. MSA did not file a motion for reconsideration on Monday or Tuesday. *Id*., ¶ 9.

The Fowler deposition was set for Friday, February 10. Sheridan Dec., ¶ 12. The subpoena duces tecum was served on MSA and included a request for the production of documents as follows:

> 1. Any and all documents of any nature pertaining to any and all claims made by you against Mission Support Alliance, LLC, or any individual manager of MSA including, but not limited to, all documents filed with any agency or any court, emails, correspondence, and notes. This request is intended to also include all

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documents pertaining to the settlement of any claims by you against MSA or its managers.

Sub # 85 (Dec. of Denise Ashbaugh, dated 2/2/17), ¶ 4, Ex. 4.

On Tuesday, February 7, 2017, the parties appeared before the Honorable Bruce A. Spanner on Defendant's motion to hear the motion to quash Plaintiff's subpoena for testimony and documents from MSA's former General Counsel, Sandra Fowler, on shortened time. Sheridan Dec., ¶ 10.

In support of the motion to quash, MSA Counsel Denise Ashbaugh signed a sworn statement stating in part that, "any claims by Ms. Fowler against MSA, who voluntarily left MSA over two years after Ms. Atwood's employment ended, was nothing more than a fishing expedition designed to harass MSA" and "not calculated to lead to the discovery of admissible evidence.'" Ashbaugh Dec. In Support of Motion for Shorten Time and To Quash (Sub # 85), ¶ 6.

At the time that Ms. Ashbaugh and MSA represented to the Court that plaintiff was on a "fishing expedition," MSA possessed documentation of Ms. Fowler's EEOC Charge in which she clearly alleged she was subject to discrimination as early as August 2013; claimed she apprised members of MSA's Board "how Frank Armijo/Dave Ruscitto/Todd Beyers … had unlawfully treated me"; and claimed she did not leave voluntarily but was "constructively discharged on August 13, 2015." Supp'l Sheridan Dec., ¶ 1. This documentation, which MSA was withholding, "contradicted the position" taken by the company in opposing the documents release, and contradicted Ms. Ashbaugh's sworn statement to the Court. *Compare id. with* Sub # 85 (Ashbaugh Dec.), ¶ 6.

Judge Spanner was assigned to Ex Parte on February 7, and heard MSA's motion in chambers. In chambers, Ms. Atwood repeated her sworn declaration statement that the Fowler subpoena, "was nothing more than a fishing expedition," and she raised claims that the content

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of her document production and testimony would be subject to attorney client privilege. 2nd Supp'l Sheridan Dec.

After hearing the positions of the parties, Judge Spanner suggested that perhaps it would be okay for Ms. Fowler's documents to be given to MSA's counsel in advance of the Fowler deposition, to review for attorney-client privilege, and so that MSA could provide a privilege log for any pages or portions of pages that MSA objected to Ms. Fowler producing and asked her to withhold; a process to which Plaintiff's counsel agreed. Sheridan Dec., ¶ 10. Judge Spanner issued no written ruling, but allowed the Fowler deposition to go forward. *Id*.

The next day, February 8, 2017, **Defendant produced a mere 16 pages of records related to complaints of gender discrimination and retaliation made by Sandra Fowler.** Sheridan Dec., ¶ 11. That production included a gender-based discrimination complaint stamped-received by "Employee Concern" August 17, 2015 (MSA-ATWOOD007222) and related documents, which fell plainly within the time frame for records Defendant claimed in its February 2, 2017 supplemental discovery answer that it agreed to produce, yet did not produce – and in fact objected to producing through the motion to quash. *Id.* The Fowler records produced on February 8th also showed that Ms. Fowler signed an EEOC Charge in April 2016, claiming that she was subject not only to gender discrimination, but also retaliation, beginning in August 2013, when Plaintiff Julie Atwood was still employed at MSA. *Id.*

Ms. Fowler's deposition occurred on Friday, February 10, 2017. *Id*., ¶ 12. When the deposition began, Plaintiff's counsel had received none of the documents Ms. Fowler provided MSA's counsel to review for attorney-client privilege prior to the deposition. *Id*. At some point later in the morning, MSA's counsel gave Plaintiff's counsel the first half of the documents, and near 12:00 p.m. Plaintiff was given the second half of Ms. Fowler's documents. *Id*. There were 293 pages of documents in total that were produced. *Id*. MSA provided Plaintiff only one

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copy of the documents, which it had Bates-stamped. *Id*. As Plaintiff's counsel had not looked at the documents before, he stated for the record:

> Because we have 200 documents to review, we need to do something about that anyway. So we now have some 200 documents to review, which I don't want to have to race through. So, given the fact that we now have a privilege issue that has to be resolved by the court, and will be resolved by the court, and the fact that we also have an issue of reviewing the documents, we're going to postpone your deposition and finish it at another time.

Sheridan Dec., ¶ 12.

MSA's counsel objected to any continuance of Ms. Fowler's deposition on the production of documents basis. Sheridan Dec., ¶ 13.

That same day, February 10, Defendant filed a motion for reconsideration of Judge Runge's discovery order, asking the Court to "hold that MSA's discovery responses are properly limited to other complaints of gender discrimination, retaliation, and misuse of government resources-the only types of claims Plaintiff raises-from 2010 (the year Plaintiff began working at MSA) through August 2015 (when she filed the lawsuit, nearly two years after she stopped working at MSA). Sub #125, at pp. 2, 5. ***The motion for reconsideration did not seek to stay the production of documents pending a ruling by the Court***. *See id*. Moreover, even if MSA had sought a stay, it would have had to have done so on a shortened time basis to avoid production. In any event, MSA carved out from its motion for reconsideration, "other complaints of gender discrimination, retaliation, and misuse of government resources-the only types of claims." *Id*. As will be outlined below, many of the documents withheld after the Court's Order compelling production, are documents related to such claims. Thus, under any theory, MSA was required to follow Judge Runge's order compelling discovery and produce responsive documents "***without further delay.***"

After attending the Fowler deposition on February 10, Ms. Fowler sent Defendant's counsel a copy of a "document [she] was using this morning to recall information." Sheridan

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Dec., Ex. 5. This was Ms. Fowler's rebuttal to the MSA response to her EEOC complaint. *Id*., ¶ 17, Ex. 6. Ms. Fowler wrote to MSA's counsel she failed to "email this to you previously," but made clear that the record "would be responsive to the SDT" [subpoena duces tecum]. *Id*. After receiving Ms. Fowler's February 10th email, MSA's counsel did not notify Plaintiff's counsel that MSA had received additional records responsive to the SDT from Ms. Fowler, which was also responsive to Plaintiff's Interrogatory No. 16 and to Judge Runge's discovery order. *Id.*, ¶ 15. As a result, Plaintiff was unaware that additional responsive records existed. *Id.*

On Wednesday, February 15, 2017, Plaintiff's counsel sent Ms. Fowler a copy of the records that MSA had Bates-stamped and produced on Fowler's behalf in response to the subpoena, and asked Fowler to check if any documents were missing. Sheridan Dec., ¶ 16. Fowler confirmed that her 11-page response to MSA's position statement on her EEOC complaint, which she had emailed to MSA's counsel, was not included in the records MSA produced, although she had expected MSA to forward it to Plaintiff. *Id*.; Ex. 6. Fowler provided the document to Plaintiff's counsel directly on February 16, 2017. The document was not referenced on MSA's privilege log as having been withheld. *Id.*, ¶ 17. The document shows that Ms. Fowler's allegations of gender discrimination and retaliation involve both the same time period and cast of characters relevant to Ms. Atwood's complaint. *See generally* Sheridan Dec., **Ex. 6** (*e.g.,* "MSA demonstrated gender bias (for all intents and purposes only male VPs has an office on the Third Floor, only male VPS were asked to play golf at charity events, and of course disparity in pay)"; "An example of bias can be found, however in the performance review from [Frank] Armijo and Ruscitto dated February 2013"; "In October 2012 Todd Beyers called a meeting with Frank Armijo and Dave Ruscitto unknown to Ms. Fowler; Todd began to accuse her of filing a gender discrimination claim against MSA due to her request for a salary review"; alleging pay disparity based, in part, on preferential treatment of Steve Young versus female comparator).

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On February 23, 2017, nearly two weeks after Plaintiff took the deposition of Sandra Fowler, MSA produced an additional 33 pages of documents related to Ms. Fowler's complaint of gender discrimination, including emails between Fowler and President Bill Johnson that were not previously produced. Rose Dec., ¶ 4.

Since the February 24, 2017 deadline for completing discovery, MSA produced nearly 6,500 pages of "supplemental production." Rose Dec., ¶ 15.

On April 17, 2017—more than ***ten weeks*** after Judge Runge's Order, and on the same date that the parties were filing their joint Trial Management Report and respective Trial Briefs —Defendants produced **126** pages of documents related to Ms. Fowler's complaints and allegations of gender discrimination and/or retaliation by another MSA executive, Stanley Bensussen (one of MSA's attorneys in this litigation), as well as top executives, Frank Armijo and Dave Ruscitto. Rose Dec., ¶ 12. The records show that in March 2015, Fowler emailed Todd Beyers, the V.P. of Human Resources, claiming that Mr. Bensussen "used derogatory and/or demeaning characterization or language toward me. **He called or implied that Frank [Armijo] and Dave [Ruscitto] thought I was 'a man-hater'**, and made a statement, '... if he was I, I should kiss the ground that Frank and Dave walked on...'. I find them very misogynistic, demeaning, gender-biased, etc." *Id*. The documents also reveal that Mr. Beyers, the V.P. of Human Resources, failed to adequately address Fowler's complaint of "gender-bias" when reported to him in March 2015; as Mr. Beyers in May 2015 was himself interviewed regarding his "investigation" and follow-up on Fowler's report to him. *Id*. The newly disclosed documents show that Fowler also went to MSA's Presidents Frank Armijo and Bill Johnson complaining of discriminatory treatment in January and May 2015, respectively. *Id.*

The 126 pages of investigation into Fowler's complaint produced on April 17 include, among other things: copies of the questions investigators prepared for interviewing eight

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witnesses (including two Vice Presidents); the handwritten notes from ten witness interviews (which included two interviews each for Ms. Fowler and Mr. Bensussen); typed summaries from each witness interview; notes of the investigator's phone call with President Bill Johnson; two timelines developed by investigators; emails copied to the file as evidence in the investigation; and several pages of findings and conclusions that formed MSA's Investigative Summary Report. Rose Dec., ¶ 13. The records also reveal that in Mr. Bensussen's interview, he told the investigators that **Ms**. **Fowler** "**started saying things to** [**him**] **about gender-bias in the Company, particularly about Frank [Armijo] and Dave [Ruscitto]. She had used an acronym of 'FOF' meaning 'friends of Frank'**. **These comments continued unabated.**" *Id*. There is no evidence in the records produced that Bensussen acted on Fowler's complaints of gender-bias against Armijo and Ruscitto—executives involved in the termination of Plaintiff Julie Atwood. *Id*. Another witness interviewed in the May 2015 investigation into Ms. Fowler's complaints reported that President Armijo and his Chief Operating Officer, Mr. Ruscitto, are known as "the *Big Boys Club*." *Id*. This witness was not previously identified, and as a result she has not been interviewed or deposed by Plaintiff. *Id*.

C. Records Responsive to The Discovery Order That Related to Todd Beyers Were Not Produced by MSA Prior to Mr. Beyers' Deposition

Plaintiff deposed Todd Beyers on February 9, 2017. Sheridan Dec., ¶ 21.Since the February 24, 2017 deadline for completing discovery, MSA produced nearly 6,500 pages of "supplemental production," some of which included documents withheld from production related to HR Manager Todd Beyer, who was a participant in meeting in which Ms. Atwood was told she could resign or be fired. Rose Dec., ¶ 16; Sub # 76, Ex. 1 (Young Dep., 59:1-16); Sub # 145, Ex. 1 (Answer to Interrogatory No. 9), *id*. Ex. 3 (Beyers Dep., 8:6-16; 25:21-22)

Notwithstanding Judge Runge's discovery order, documents responsive to Interrogatory Nos. 16-17, which were addressed at length in Plaintiff's motion to compel, were not produced before the February 9, 2017 deposition of Todd Beyers, including witness statements and other

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underlying documentation from the investigation into Ms. DeVere's retaliation complaint against Mr. Beyers. Sheridan Dec., ¶ 20; *accord* Sub # 111 (Plaintiff's reply brief supporting motion to compel).

During the deposition of Mr. Beyers taken on February 9, 2017, Plaintiff's counsel reiterated to Defendant's counsel that there are "a bunch of attachments" (*e.g.*, witness statements) referenced in the report of investigation of Ms. DeVere's retaliation complaint that Defendant produced on February 2, which still had not been produced and which Plaintiff was requesting. *Id*., ¶ 21, Ex. 7. In response, Defendant's counsel simply said, "[We'll] Take it under advisement[.]" Counsel for Ms. Atwood replied, "And also, there's a second investigative report regarding this witness that also has been ordered by the Court produced and has not been produced. So we'd like – it's actually impeding my ability to examine this witness." *Id*.

On April 20, 2017, three days after the Fowler investigative files were produced, and more than two months after Plaintiff originally filed the motion for sanctions seeking, in part, the continuation of Todd Beyers' deposition, Defendant's counsel sent an unsolicited email, stating:

> With the move in trial date and **noting some of Plaintiff's stated concerns**, MSA is to work with Plaintiff on continuing Mr. Beyers' deposition at a mutually convenient date and time. In doing so, MSA is not waiving any arguments or positions in Court or in any way admitting to any wrongdoing.

Rose Dec., ¶ 14, Ex. 9.

D. From the Discovery Cut-off Up Until April 17th, MSA Dumped Thousands of Pages of Documents, And It Continues to Withhold Relevant Documents

There is a chart summarizing the waves of supplemental production of documents that MSA has produced over the past three months in the Declaration of Mark W. Rose, at ¶ 15. MSA's former EEO Officer, Christine DeVere (known now as Christine Moreland), has reviewed thousands of pages from MSA's recent production and testifies that despite the many

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documents MSA has produced to date, many documents, including Ms. DeVere's handwritten notes of witness interviews and her summary reports of investigation, remain missing. *See* 4th Supp'l Dec. of Christine Moreland. Ms. DeVere testifies that the missing notes related not just to the investigative files MSA produced for third parties; DeVere also testifies that notes of her September 16, 2013 interview with Plaintiff Julie Atwood—three days before MSA terminated Ms. Atwood—are also missing. *See* 4th Supp'l Moreland Dec., p. 10, line 5 ("There was definitely more with Julie. We spent a good two hours with her."). Such contention is supported not only by the fact that DeVere found notes and reports missing in many of the investigation files MSA produced, but also due to the fact that DeVere, in her reviewing Defendant's waves of untimely production came across a set of witness interview notes that she took ***in the same investigation in which Ms. Atwood was interviewed***, which MSA failed to produce until March 29, when it produced them in a Bates-range separate from other records in the Young/Atwood investigation. *See id.*, ¶ 9.

1. Records Relevant to the Testimony of Mr. Beyers, Mr. Jensen, Ms. Robbins, and Ms. DeVere Were Withheld Until After Their Depositions

Plaintiff deposed Wendy Robbins (the Employee Concerns Program Manager and investigator) in October 2016. Rose Dec., ¶ 2. Plaintiff then deposed Chris Jensen (the Director of MSA's Employee Concerns Program) on February 7, 2017; Todd Beyers (the Vice President of Human Resources) on February 9, 2017; and Christine DeVere (the former EEO Officer) on February 27, 2017. *Id*. In advance of these depositions, Defendant failed to produce a substantial number of communications and investigative records, which were relevant to the testimony of these witnesses, among others, and responsive to Plaintiff's discovery requests. *Id*.

On **February 17**, 2017, a week before the deadline for completing discovery, Defendant produced **1,138** pages of "supplemental production" without explanation, index, or any other description of the documents being produced. Rose Dec., ¶ 3, Ex. 2. A sampling of the documents reveals that the 2/17 production includes records of complaints and

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investigations involving allegations of gender discrimination, harassment/hostile work environment, and retaliation. *Id*., ¶ 3. The 2/17 production includes records written to, by, or referencing Todd Beyers, Chris Jensen, Christine DeVere, and Wendy Robbins, among other witnesses in this matter. *Id*.

The deadline for completing discovery under the Second Amended Case Schedule was **February 24**, 2017. Sub # 62. That day, MSA produced an additional **1,532** pages of supplemental production without explanation, index, or other description of the documents produced. Rose Dec., ¶ 5, Ex. 3. A sampling of the documents reveals that the 2/24 production again includes records of complaints and investigations involving allegations of gender discrimination, harassment/hostile work environment, and retaliation. *Id*. The 2/24 production again includes records written to, by, or referencing Todd Beyers, Chris Jensen, Christine DeVere, and Wendy Robbins, among other witnesses in this matter. *Id*.

On **March 10**, 2017, Defendant produced **120 pages** of "supplemental production" without explanation, index, or other description of the documents produced. Rose Dec., ¶ 6, Ex. 4. The 3/10 production, with the exception of two pages, relates entirely to an investigation of an alleged hostile work environment in the Human Resources group, which includes **Todd Beyers** and **Christine DeVere**, as well as some of the investigative files from DeVere's subsequent complaint of retaliation filed against Mr. Beyers, the V.P. of Human Resource, in June 2013. *Id*., ¶ 6. The 3/10/17 production includes, for example, Ms. DeVere's "witness statement" and some of the other documents cited as "Attachments" to the investigation report concerning her retaliation complaint, which Defendant failed to provide when it produced the report on the retaliation complaint on February 2. *Id*. Even though Plaintiff explicitly called out MSA's ongoing failure to produce the attachments in the Reply in Support of Motion to Compel filed on February 3, 2017, Sub # 111, at 3:13-18 (*citing* Sub # 110, ¶ 5) – and despite the fact Judge Runge ordered MSA to produce the documents "without further delay" that same

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day – Defendant failed to produce these documents for 5 more weeks; until long after both Mr. Beyers and Ms. DeVere's depositions were taken. Rose Dec., ¶ 6.

On March 28, 2017, Judge Runge entered the Order Denying Defendant's Motion for Reconsideration. Sub #199.

On **March 29**, 2017, Defendant produced another **598** pages of "supplemental production" without explanation, index, or other description of the documents produced. Rose Dec., ¶ 8, Ex. 5. A sampling of the documents reveals that the 3/29 production again includes records of complaints and investigations involving allegations of gender discrimination, harassment/hostile work environment, and retaliation. Rose Dec., ¶ 8. The 3/29 production again includes records written to, by, or referencing Todd Beyers, Chris Jensen, Christine DeVere, and Wendy Robbins, among other witnesses in this matter. *Id*.

On April 3, 2017, pursuant to the case schedule and LCR 16, Plaintiff served the initial draft of the Trial Management Report, listing Plaintiff's witnesses and exhibits for trial. Rose Dec., ¶ 9.

On April 12, 2017, Defendant produced another **2,535** pages of "supplemental production" without explanation, index, or other description of the documents produced. Rose Dec., ¶ 10, Ex. 6 A sampling of the documents reveals that the 4/12 production again includes records of complaints and investigations involving allegations of gender discrimination, harassment/hostile work environment, and retaliation. Rose Dec., ¶ 10. The 4/12 production again includes records written to, by, or referencing Todd Beyers, Chris Jensen, Christine DeVere, and Wendy Robbins, among other witnesses in this matter. *Id*. The 4/12 production includes, for example, Mr. Beyers's "witness statement"— another "attachment" to the report of investigation report for Ms. DeVere's retaliation complaint that Defendant failed to provide when it produced the report 10 weeks earlier. Rose Dec., ¶ 10. It also includes records of an investigation into whether President Armijo violated EEO or other applicable laws when he

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hired Chris Jensen for the Director of MSA's Employee Concerns Program without posting or advertising the position. *Id*.

Three days later, on Saturday, April 15, 2017, Defendant served by email an additional **1,555** pages of "supplemental production," along with a cover letter stating that "[t]hese documents are being produced in response to the Court's March 28, 2017 Order on the Motion for Reconsideration." Rose Dec., ¶ 11, Ex. 7. Nevertheless, a sampling of the documents reveals that the 4/15 production again includes records of complaints and investigations involving allegations of harassment/hostile work environment and retaliation. Rose Dec., ¶ 11. The 4/15 production also includes records written to, by, or referencing Todd Beyers, Chris Jensen, and Christine DeVere, among other witnesses in this matter, including Wendy Robbins. *Id*. One of the retaliation investigation files just produced includes, for example, a key comparator document, showing that Todd Beyers—the V.P. who gave Plaintiff Julie Atwood notice of her termination—issued a male manager a **two-week suspension** after "several occasions [the male was] shown to be unethical in [his] behavior regarding a lack of discretion with sensitive business information and [to] have intentionally made [him]self a conduit of information to negatively affect not only individual MSA employees but MSA as a viable contractor…." *Id*.

E. MSA Discloses Vocational Expert After the Case Schedule Deadline

Under the 1st Amended Civil Case Schedule Order, the deadline for Defendant's Disclosure of Lay and Expert Witnesses, which for experts requires "[a] summary of the expert's opinions and the basis therefor," was September 26, 2016. Sub #42; LCR 4(h)(1)(C)(iii). Defendant served a "supplemental" disclosure of lay and expert witnesses, which identified John Fountaine, a vocational counselor retained to "provide expert testimony regarding the Plaintiffs failure to adequately mitigate her damages and the reasonable amount of time it should have taken for to find alternate employment," on February 1, 2017. Rose Dec.,

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¶ 19, Ex. 12. No report or other information was included with the disclosure other than Mr. Fountaine's resume. *Id*. On March 23, 2017, Defendant served a second "supplemental" disclosure, which provided the following information:

> Mr. Fountaine will provide expert testimony regarding Plaintiffs failure to adequately mitigate her damages and the reasonable amount of time it should have taken for her to find alternate employment. Mr. Fountaine will opine that given Plaintiffs experience, she should have been able to find new employment in her field of work within three to six months following the end of her MSA employment. He will testify regarding jobs that are currently available for which Plaintiff is qualified. He will also testify that Plaintiffs job search to date is inadequate and does not represent a reasonable job search, given Plaintiffs field of work and level of experience. Mr. Fountaine will further testify regarding what a reasonable job search for Plaintiff would entail given her experience and field of work. A copy of Mr. Fountaine's resume was previously provided.

Id., Ex. 13.

On April 17, 2017, Defendant's counsel provided its "correspondence with expert John Fountaine, as well as documents provided to him over the course of the litigation." These records were responsive to Plaintiff's request for production No. 162, seeking "all documents which any expert or potential expert has consulted or reviewed as a result or in preparation of this litigation," which Defendant answered two months earlier on February 13, 2017. *Id*., ¶ 21, Ex. 14.

F. There is Evidence of Prejudice

This case was filed in August 2015, and has been continued now twice. Sub #2; Sub #42; Sub #62. Owing to some perceived or actual conflicts of interest among the Superior Court judiciary, this motion, which was filed in February 2017, was not heard until May 2017. The most recent trial date was set for May 1, 2017. For a variety of reasons, that date passed before this and other motions could be heard.

Plaintiff's counsel, Jack Sheridan, has submitted a sworn statement indicating the actions of the defendant have impaired his ability to prepare for trial.

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Mr. Sheridan has indicated that since he began representing Ms. Atwood his firm has generated over $325,000 in fees (most of which are contingent), and that Ms. Atwood has incurred over $36,000 in costs. 2nd Supp'l Sheridan Dec., ¶ 2. Mr. Sheridan has either conducted or attended more than 20 depositions in this case, and his staff has reviewed over nearly fifteen thousand pages of documents produced in discovery, over 6,500 of which were produced in the weeks before the May 1 trial date. *Id*.

Mr. Sheridan has two to three-week jury trials set in other matters in July, October, November and December 2017. 2nd Supp'l Sheridan Dec., ¶ 3. He and his staff have blocked out most of August for vacations. Mr. Sheridan has indicated that resetting this case in May or June would not give him time to do additional discovery justified by these late disclosure of over 6,500 new documents. *Id*. Many of those newly disclosed documents relate to investigations conducted by Wendy Robbins (an investigator in this case) and/or Christine DeVere (another investigator in this case). Ms. Robbins will need to be re-deposed on the new documents, and Ms. DeVere, who will be vacationing in Europe for most of May, will need to be interviewed on them on as well (Ms. DeVere has submitted a declaration in support of this motion that addresses what is still missing, but Mr. Sheridan states she has not been interviewed on the substantive aspects of the documents). In addition, the 6,500 pages of document production implicate some of the same managers as are implicated in this case (including Todd Beyers, Chris Jensen, Dave Ruscitto, and Frank Amijo) in claims made by others and other investigations. Mr. Sheridan has indicated that unless he can bump another case already set for trial, and assuming he can depose, re-depose, or interview about ten witnesses in this case (and any additional witnesses that the discovery uncovers), and submit and obtain prompt responses to additional interrogatories and requests for production which may flow from the 6,500 documents and the resulting depositions, he cannot take this case to trial this year. 2nd Supp'l Sheridan Dec., ¶ 3. Moreover, the time necessary to conduct the

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work needed will take from his ability to represent other clients who also require his time, and impact his ability to take on new clients. *Id*. Given the need for overnight travel, and the costs associated with depositions and videotaped depositions, Mr. Sheridan estimates that completing this work could easily cost another $20,000 to $30,000 in costs and an additional $50,000.00 to $150,000 in fees (100-300 hours in fees). *Id*.

Ms. Atwood has submitted a separate declaration indicating that she has been unemployed since her termination, and that she has paid out over $36,000 in costs drawing from savings and retirement to do so. Atwood Dec. She states that the costs of continuing this litigation is a hardship, and that she believes that until this case is resolved, she will not be able to find work. In support of this contention, Ms. Atwood has noted that she has contacted other contractors at Hanford in an attempt to secure similar employment, but has been unsuccessful in obtaining other employment. *Id.* One DOE program manager at Hanford, Jon Peschong, was asked in his deposition if he had knowledge or comments about "blacklisting" that would prevent Ms. Atwood from getting alternate employment, and Peschong testified that **"**DOE senior managers told me that they heard [Atwood] had committed timecard fraud." Rose Dec., Ex. 10. Another witness, Ben Lindholm, testifies that while working for another contractor at Hanford, Longenecker & Associates (L&A), Lindholm was tasked with helping to recruit resources to perform the work required by the General Support Services Contract, and that he gave L & A Ms. Atwood's name, and only Ms. Atwood's name, with respect to procurement for a waste modeling scope of work; but that Ms. Atwood's name was removed from consideration and that the company interviewed two other candidates, one of whom it ultimately submitted to perform the scope of work. *See* Rose Dec., Ex 11 (Lindholm Dep.) at 9:5; 14:8-15:4; 18:13-20:14; 24:10-20.

MSA, for its part, is a billion dollar company. Atwood Dec., ¶ 3, Ex. 1.

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IV. STATEMENT OF ISSUES

1. Should the Court find that Defendant MSA and its counsel violated CR 26(g) and the Court's order compelling production of documents?

2. Should the Court find that MSA willfully failed to produce documents properly requested in July 2016, including only producing a few documents related to Sandra Fowler after it became clear that MSA's motion to quash the Fowler subpoena was denied, so the few documents MSA disclosed February 8 would be produced by Ms. Fowler at her deposition, while continuing to withhold more than 100 pages of internal records of MSA's investigation that Fowler did not possess, until long after the depositions of Ms. Fowler and other relevant witnesses were completed and period for completing discovery was past?

3. Should the Court find that Plaintiff is substantially prejudiced in her ability to prepare for trial based on Defendant's withholding?

4. Should the Court find, as in *Magaña*, that no lesser sanction than a default judgment will suffice and set a date for trial on damages in May 2017?

***While the Court should find in the affirmative as to Issue No. 4 and enter a default judgment, the following sanctions should be addressed as alternative bases for relief*:**

5. Should the Court direct MSA's counsel to certify that the company is withholding no further documentation responsive to Plaintiff's Interrogatory Nos. 16 and 17 and to the Court's discovery order?

6. Should the Court grant a 60-day continuance of the trial date to Monday, July 3, 2017, and require the company to accept trial subpoenas on behalf of all current employees?

7. Should the Court allow Plaintiff until June 19, 2017 to amend its list of witnesses and exhibits in the Trial Management Report?

8. Should the Court authorize Plaintiff to continue the depositions of:

(i) Sandra Fowler;
(ii) Todd Beyers;
(iii) Steve Young;
(iv) Chris Jensen

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(v) Christine DeVere;
(vi) Wendy Robbins;
(vii) Kadi Bence; and
(viii) Cindy Protsman;

and to initiate the depositions of:

(i) Stanley Bensussen;
(ii) Greg Jones;

with MSA obligated to make the company's employees available absent documentation of a medical issue or out-of-town vacation?

9. Should the Court extend for 60-days (to June 30) the Commission to Take Deposition Outside the State of Washington, Sub #201, for purposes of deposing former President Frank Armijo?

10. Should the Court require MSA to pay Plaintiff's reasonable attorney's fees and all costs incurred through the present?

11. Should the Court require MSA to pay Plaintiff's reasonable attorney's fees and all costs related to additional discovery caused by MSA's improper actions?

12. Should the Court require MSA and its counsel to pay for the discovery violations a penalty of $100,000 each to the Legal Foundation of Washington or to the Benton and Franklin Counties Superior Court Administration?

13. Should the Court award other relief that the Court deems just and necessary "to deter, to punish, to compensate and to educate"?

V. AUTHORITY

A. Standard for Sanctions under CR 26(g) and CR 37

This Court has broad discretion in determining the imposition of sanctions under CR 26(g) or CR 37(b), and an appellate court will not disturb the determination absent a clear abuse of discretion. Magaña v. Hyundai Motor Am., 167 Wn.2d 570, 582, 220 P.3d 191 (2009).

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CR 26(g) makes the imposition of sanctions for discovery abuses **mandatory**, stating, in relevant part: "If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, ***shall*** impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney fee." CR 26(g) (emphasis added); Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wn.2d 299, 342, 858 P.2d 1054 (1993) (stating that CR 26(g) creates an "affirmative duty" to comply with the "spirit and purpose" of the discovery rules).

"CR 37 sets forth the rules regarding sanctions when a party fails to make discovery," and "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 and requests for production." Magaña, 167 Wn.2d at 593-94; and CR 37(b)(2)(C) (authorizing "rendering a judgment by default against the disobedient party"). CR 37(d) provides that "**an evasive or misleading answer is to be treated as a failure to answer**" and permits the trial court to impose any of the sanctions identified in CR 37(b)(2). Similar to CR 26(g), CR 37(b) mandates the imposition of sanctions in appropriate cases, stating if a party fails to comply with an order compelling discovery responses, the Court "***shall*** require the party failing to obey the order or the attorney advising him or her or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." CR 37 (b)(2); *see, e.g.*, Magaña, 167 Wn.2d at 592 (affirming award of "fees and costs incurred because of … discovery violations").

"**[I]ntent need not be shown before sanctions are mandated**." Fisons, 122 Wn.2d at 342, 345 (holding court erred when it denied discovery sanctions, in part, due to finding that

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"[t]he evidence did not support a finding that the drug company *intentionally* misfiled documents to avoid discovery"). The issue under CR 26(g) is only whether counsel's beliefs were "formed after a reasonable inquiry." *Id*., at 343.

> 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, 131 Wn.2d at 494, 933 P.2d 1036. '***The purposes of sanctions orders are to deter, to punish, to compensate and to educate***." Fisons, 122 Wn.2d at 356, 858 P.2d 1054.

Magaña, 167 Wn.2d at 584.

"The discovery rules are intended to make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." Taylor v. Cessna Aircraft Co., Inc., 39 Wn. App. 828, 835, 696 P.2d 28 (1985). "While the sanctions to be imposed are a matter of trial court discretion, this discretion is not unbridled. Imposition of unduly light sanctions will only encourage litigants to employ tactics of evasion and delay, in contravention of the spirit and letter of the discovery rules." *Id*., at 836.

B. **The Discovery Answers Are Misleading or Evasive; Violate the Spirit and Purpose of the Rules; and Violate the Order to Produce Records** "**Without Further Delay**"

Under Brundridge v. Fluor Fed. Servs., Inc., 164 Wn.2d 432, 445, 191 P.3d 879 (2008) and ER 404(b), "evidence of employer treatment of other employees is not impermissible character evidence; rather it may be admissible to show motive or intent for harassment or discharge." *Id*. Thus, "the documents requested were relevant. [Defendant] did not have the option of determining what it would produce or answer, once discovery requests were made." Fisons, 122 Wn.2d 299, 354, n.89 (citing "Gammon v. Clark Equip. Co., 38 Wn. App. 274, 281, 686 P.2d 1102 (1984), *aff'd,* 104 Wash.2d 613, 707 P.2d 685 (1985) (defendant may not unilaterally determine what is relevant to plaintiff's claim and defendant's remedy, if any, was to seek a protective order pursuant to CR 26(c)); Taylor, 39 Wn. App. at 836 (defendant and its

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counsel could not unilaterally decide what was relevant in a particular case, defendant's remedy was to seek a protective order, not to withhold discoverable material), *review denied,* 103 Wn.2d 1040 (1985)").

Instead of moving for a protective order in response to Plaintiff's requests concerning other complaints and investigations into allegations of discrimination and retaliation, MSA first attempted to evade the scope of Plaintiff's requests by unilaterally deciding in August 2016 that MSA "***has provided*** documentations regarding of ***all complaints that alleged gender discrimination and/or retaliation*** during the time that Plaintiff was employed at MSA, and including complaints raised by Ms. DeVere – even though those occurred after Plaintiff left MSA." Sheridan Dec., Ex. 1. "Ms. Atwood was employed by [MSA] from February 2010 to September 19, 2013,"[5] and during that time period, Christine DeVere filed a retaliation complaint against the V.P. of Human Resources, Todd Beyers. Rose Dec., ¶ 6. Yet, Defendant did not produce this retaliation complaint or the related documentation in response to Interrogatory Nos. 16-17. *See* Sub #65 (Sheridan Dec. 1/20/17), at Ex. 2 (Letter of January 13, 2017), p. 2. The August 2016 answer signed by Ms. Ashbaugh thus violates CR 26(g) and *Fisons.* See Sheridan Dec., Ex. 1, at p. 12.

After Plaintiff's counsel filed a motion to compel (Sub # 63-64) and then emailed counsel threatening sanctions for MSA's failure to produce complaints filed by Sandra Fowler and Christine DeVere (Sheridan Dec., ¶ 3), MSA amended its discovery answer, certifying that "it will produce documentation regarding of all complaints raised to Employee Concerns and/or the EEO Officer that alleged gender discrimination, retaliation, or misuse of MSA resources *from 2010 through the date Ms. Atwood filed this above-captioned lawsuit* [*August 21, 2015*] … including complaints raised by Ms. DeVere." Sheridan Dec., ¶ 5, Ex. 5. Yet, when MSA served this amended answer on February 2, it still produced only a few pages about Ms.

[5] Sub# 2, 13 (Compl. and Answer, ¶ 1.2).

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DeVere's complaint, omitting dozens of related records, including the complaint itself and witness statements taken by the investigator, which MSA failed to produce until March 10 and April 12—long after Judge Runge's February 3rd order compelling the production of such records "without further delay"—and well after Ms. DeVere's February 27th deposition. *See* Sheridan Dec., ¶¶ 4, 20-21; Rose Dec., ¶¶ 2, 6, 10. By that time, the subject of the DeVere complaint, Mr. Beyers, had also been deposed already. Rose Dec., ¶¶ 2, 6. Had Defendant abided by the February 3rd discovery order and produced the documents "without further delay," Plaintiff would have had the records regarding Beyers for use at his February 9th deposition. Sheridan Dec., ¶ 20; Rose Dec., ¶¶ 6, 10.

Defendant's conduct in withholding records related to the gender bias and retaliation complaints of Sandra Fowler, among others, was similarly egregious and in violation of CR 26(g). Records related to Ms. Fowler's complaints were again responsive to the discovery requests served in July 2016, Rose Dec., ¶ 1. Ms. Fowler's complaint, alleging gender discrimination and retaliation by the same cast of characters and during the same time period that Ms. Atwood alleges MSA discriminated and retaliated against her, is plainly relevant and should have been identified by MSA in its original answer to Interrogatory Nos. 16-17 served in August 2016. Instead, Defendant failed to acknowledge the existence of the complaint made by Fowler until after Plaintiff's counsel learned of the complaint, confronted MSA about its failure to disclose the complaint, and served a subpoena on Fowler summoning her to produce the documentation of her complaint. *See* Sheridan Dec., ¶¶ 2-3, 6. The manner in which the discoverable information was unearthed by Plaintiff, without any assistance by Defendant, is similar to *Fisons*. *See* Fisons, 122 Wn.2d at 337 ("Although interrogatories and requests for production should have led to the discovery of the 'smoking gun' documents, their existence was not revealed to the doctor until one of them was anonymously delivered to his attorneys.") Even after MSA was confronted with its withholding, the company continued to withhold the

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documentation of Fowler's complaint, moving to quash the subpoena to Fowler while representing to the Court that "any claims by Ms. Fowler against MSA, who *voluntarily left MSA* over two years after Ms. Atwood's employment ended, was nothing more than a fishing expedition designed to harass MSA" and "not calculated to lead to the discovery of admissible evidence.'" Ashbaugh Dec. In Support of Motion for Shorten Time and To Quash (Sub # 85), ¶ 6. At the time MSA represented that Fowler "voluntarily left MSA," it possessed documentation of her EEOC Charge in which she clearly alleged she was subject to discrimination as early as August 2013; claimed she apprised members of MSA's Board "how **Frank Armijo/Dave Ruscitto/Todd Beyers** … had unlawfully treated me"; and claimed she did not leave voluntarily but was "**constructively discharged** on **August 13, 2015**." Supp'l Sheridan Dec., ¶ 1. This documentation, which MSA was withholding, "contradicted the position" taken by the company in opposing the documents release. *Compare with* Fisons, 122 Wn.2d at 338 ("documents contradicted the position taken by the drug company in the litigation").

MSA and its counsel in the February 2 discovery answer certified under CR 26(g) that Defendant was producing all gender and retaliation complaints "from 2010 through the date Ms. Atwood filed this above-captioned lawsuit [August 21, 2015]," which was misleading, since MSA refused to produce the Fowler documentation "immediately" when requested by Plaintiff -- even after Judge Runge ordered MSA to produce such records "without further delay" on February 3. Instead, Defendant disregarded the order and failed to produce its records of Fowler's complaint responsive to Interrogatory Nos. 16-17, hedging its bets until it knew that records of Fowler's complaint were going to be produced by Ms. Fowler herself, after MSA failed to persuade Judge Spanner to grant MSA an order quashing the subpoena issued to Ms. Fowler. Only after MSA knew that Fowler would be producing her own records of the complaint did MSA begin to comply with the discovery order and produce 16 pages of records

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about Fowler's complaints of gender discrimination and retaliation. *See* Sheridan Dec., ¶ 11. Defendant should not have waited for Judge Spanner's ruling before it produced records of Ms. Fowler's complaint. "[A] spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." Fisons, 122 Wn.2d at 342; *compare id*., 122 Wn.2d at 346, 352 ("The drug company was persistent in its resistance to discovery requests. Fair and reasoned resistance to discovery is not sanctionable. Rather it is the misleading nature of the drug company's responses that is contrary to the purposes of discovery and which is most damaging to the fairness of the litigation process. …The drug company's responses and answers to discovery requests are misleading. The answers state that all information regarding Somophyllin Oral Liquid which had been requested would be provided. They further imply that all documents which are relevant to the plaintiffs' claims were being produced. … They state that there is no relevant information within the cromolyn sodium product files.")

When the parties appeared before Judge Spanner on February 7, 2017, regarding the motion to quash the subpoena, Plaintiff had to present her case in the dark, lacking the documents needed to contest MSA's misleading characterization of a "fishing expedition." Plaintiff could only provide the Court a hearsay offer of proof from Plaintiff's counsel as to what Ms. Fowler represented she had complained about. In spite of MSA having supplemented its answer to Interrogatory Nos. 16-17 to certify that "MSA has provided (and is supplementing) complaints wholly unrelated to Plaintiff of gender discrimination… for a period of five years (from 2010 through August 21, 2015)," MSA had still not produced the Fowler complaint alleging constructive discharge on August 13, 2015. Only after Judge Spanner declined to quash the subpoena did MSA produce a few pages about Fowler's complaints in advance of her February 10 deposition.

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Yet, the bulk of MSA's file on Fowler—its *entire record of investigation*, including documents showing the allegations Fowler presented to Todd Beyers in March 2015, notes and statements from witnesses interviewed in May 2015, and the Investigative Summary Report, were all silently withheld. Defendant failed to include those records among any of its belated document dumps until April 17th—the date the parties were filing their trial briefs and the Trial Management Report listing exhibits for trial. Rose Dec., ¶¶ 12-13.

In spite of the fact that Judge Runge's discovery order was unequivocal that documents be produced "without further delay," MSA has continued to "employ tactics of evasion and delay, in contravention of the spirit and letter of the discovery rules." Taylor, 39 Wn. App. at 836. The declaration of Christine Moreland (formerly DeVere) catalogs the many responsive records that MSA has *still* not been produced, including notes from witness interviews and summary investigative reports in which DeVere was involved, confirming that MSA's "game-playing" and evasive conduct in discovery continues through the present. See 4th Supp'l Moreland Dec. Under CR 37(d), MSA's "evasive or misleading answers" are "to be treated as a failure to answer," permitting the Court to impose any sanctions identified in CR 37(b)(2).

C. MSA's Discovery Violations Are "Willful"

To reiterate, "intent need not be shown before sanctions are mandated." Fisons, 122 Wn.2d at 342, 345. However, if the "court imposes one of the more 'harsher remedies' under CR 37(b), then the record must clearly show … one party willfully or deliberately violated the discovery rules and orders." Magaña, 167 Wn.2d at 584. The term "willful" has a narrow meaning in the context of the discovery rules. "A party's disregard of a court order ***without reasonable excuse*** or justification is deemed willful." Magaña, 167 Wn.2d at 584.

Under the facts here, Defendant's conduct can only viewed as willful disregard of the discovery rules and a discovery order. Judge Runge ordered Defendant to provide documents responsive to Interrogatory Nos. 16-17 "without further delay," yet Defendant refused to

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provide Fowler's complaint "immediately" upon request, allegedly because MSA intended to move for reconsideration of Judge Runge's order. *See* Sheridan Dec., Ex. 4. Yet, on February 8th, after Judge Spanner ruled that the subpoena to Fowler would not be quashed, so Fowler would be producing her records to Plaintiff—and *before any motion for reconsideration was filed*—Defendant produced 16 pages of records related to Fowler's complaint in its possession that were responsive to Interrogatory Nos. 16-17 and to Judge Runge's order. *See id.*, ¶ 11. When Defendant later filed a motion for reconsideration, it only asked Judge Runge to limit the discovery of complaints of gender discrimination through August 2015; so the *motion for reconsideration had no effect on whether Defendant was required to produce Fowler's complaint (or other gender complaints), which MSA received through August 2015*. *See* Sub #125, at pp. 2, 5 (Mot. for Reconsideration filed 2/10/17); and Sheridan Dec., ¶ 11. Thus, having no excuse for failing to produce Fowler's complaint immediately upon request (other than to deprive Plaintiff of information she might use to oppose the motion to quash the subpoena issued to Fowler), MSA's disregard of the discovery order can only be viewed as willful.

Even more egregious, MSA has no excuse for its failure to produce its record of investigation into Ms. Fowler's complaints prior to April 17th. Counsel for MSA in this matter has always known of the Fowler investigation. One of MSA's attorneys here (Stan Bensussen) was the ***subject*** of that investigation, who was twice interviewed in May 2015 about Ms. Fowler's complaint of gender discrimination and retaliation; and another of the attorneys (Denise Ashbaugh) appeared on behalf of MSA to defend against Ms. Fowler's claims of discrimination, beginning in October 2015, with her engagement continuing through June 2016, when Ms. Ashbaugh wrote the EEOC on behalf of MSA in response to Ms. Fowler's formal Charge of Discrimination.[6] Plaintiff threatened sanctions for not producing the Fowler

[6] *See* Sub # 234 (Ashbaugh Dec., ¶ 4); Sub #233 (Mot.) at 11:1-5; Rose Dec., ¶¶ 12-14.

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complaint files on February 1; then in the wake of Judge Runge's discovery order, he asked for immediate production of the records of Fowler's complaint on February 3; yet Defendant silently withheld the entire record of investigation until April 17—long after the period for discovery was complete. There is no excuse for such disregard of the discovery rules and the Court's order.

The declaration of Ms. DeVere (now Ms. Moreland) shows that the tactics of evasion and delay that MSA has employed in responding to Plaintiff's requests for the complaints initiated by Ms. DeVere and Ms. Fowler fit a much larger pattern of the company failing to provide full and complete copies of its records of investigations. The inference to be drawn from that pattern is that MSA's conduct in discovery is willful.

D. Plaintiff Is Substantially Prejudiced In Her Ability to Prepare for Trial by MSA's Discovery Abuses

Plaintiff served her discovery requests in July 2016. By producing nearly 6,500 pages of "supplemental production" since the February 24, 2017 deadline for completing discovery, MSA effectively deprived Plaintiff of any opportunity to follow-up on the information contained in these documents. *See* Rose Dec., ¶ 16. "The discovery violations here prevented the plaintiff[] from doing what the law really allows [her] to do, and that's to follow up on leads from developed facts." *See* Smith v. Behr Process Corp., 113 Wn. App. 306, 325, 54 P.3d 665 (2002). MSA's evasion of the July 2016 discovery requests and its untimely production of documents responsive thereto, "casts doubt on the discovery that has gone on before." *Id.* Due to Defendant's tactics of evasion and delay, documents written to, by, or with reference to Todd Beyers, Chris Jensen, Christine DeVere, Wendy Robbins, and Sandra Fowler, among other witnesses, were not disclosed prior to the witnesses' depositions. Rose Dec., ¶¶ 2-3, 5, 8, 10-12. A witness who reported to investigators that President Armijo and his Chief Operating Officer (Mr. Ruscitto) are known as "the Big Boys Club," was not interviewed, nor deposed. Now, Plaintiff must effectively start discovery anew, reopening nearly all of the previous depositions

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(including those of Beyers, Jensen, DeVere, Robbins, and Fowler, among others) and take additional depositions of individuals not previously understood to be necessary. *See* Magana v. Hyundai Motor Am., 167 Wn.2d 570, 588, 220 P.3d 191 (2009) ("Reasonable opportunity to conduct discovery is a fundamental part of due process of law. If disclosed [earlier] the information regarding other seat back failures in Hyundai vehicles would have been investigated and further evidence would have been developed by the plaintiff."). Under these facts, there can be no question that Defendant has stymied Plaintiff's ability to investigate the facts and thereby prejudiced her ability to prepare for trial.

E. Defendant's Discovery Violations Warrant a Default Judgment

In this case, where MSA willfully disregard the discovery order to produce responsive documents "without further delay," only a default judgment will fulfill the role of discovery sanctions "to deter, to punish, to compensate and to educate."

In Rivers v. Washington State Conference of Mason Contractors, 145 Wn.2d 674, 699, 41 P.3d 1175 (2002), the Supreme Court reviewed dismissal of plaintiff's discrimination complaint "because she did not comply with a court order directing her to follow a discovery order and case event schedule deadlines." The Court reversed the lower courts and remanded for further proceedings in which the trial court would make specific findings by applying the *Burnet* factors. In doing so, the Supreme Court acknowledged that the plaintiff had "manifested a somewhat casual disregard for the rules of discovery and her obligation to comply with the orders of the court under those rules," writing further that:

> **The circumstances in this case might well justify the sanction of dismissal** imposed against Petitioner. Petitioner was granted several deadline extensions for discovery but failed to comply with those extended deadlines. **Petitioner failed to comply with trial court discovery orders. Under CR 37, the trial court might impose the sanction of dismissal of Petitioner's complaint**, but the court must explain on the record that it has considered less harsh alternative sanctions.

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145 Wn.2d at 699.

While Plaintiff maintains that MSA's delayed production and continual withholding of documents violates Judge Runge's February 3rd discovery order, that showing, while adequate, is not necessary for entry of a default judgment, as the Court in Magaña made clear:

> Magaña was entitled to the discovery he requested. Hyundai never requested a protective order, and the discovery requests were reasonably calculated to lead to the production of admissible evidence. The discovery requested should have been given to Magaña in a timely manner. **Magaña need not have continually requested more discovery and updates on existing requests. Additionally**, **Magaña should not have needed to file a motion for an order to compel Hyundai to produce the documents Hyundai was required to produce by the discovery requests themselves, nor does this opinion rest on the existence of a discovery order**.

Magaña, 167 Wn.2d at 588.

F. **Lesser Sanctions Will Not Suffice**

"[T]he purposes of sanctions orders are to deter, to punish, to compensate and to educate. Where compensation to litigants is appropriate, then sanctions should include a compensation award." Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 690, 132 P.3d 115 (2006).

If the Court declines to enter a default judgment and to hold a trial on damages only, then MSA would still be able to reap the rewards of its misconduct. Absent a default judgment, Plaintiff is placed in the unenviable position of rushing (at great expense) to restart discovery and complete a substantial number of depositions while at the same time preparing her case for trial. Ordinarily, discovery would be completed 2.5 months before trial, with Plaintiff not submitting her final witness and exhibits lists, motions in limine, and trial brief until two months after the discovery period closes. *See* LCR 4(f)(2).

If the Court sanctions MSA in a manner short of a default judgment, for example, ordering a continuation of the trial date to allow Plaintiff to conduct additional discovery, such sanctions will have little to no impact on MSA, a large federal contractor with near limitless resources, as compared with the adverse impact that such delay and additional costs from

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discovery would have on Ms. Atwood. Since the time of her termination in September 2013, Ms. Atwood has been unable to find other employment, having been "blacklisted" under false rumors in the Hanford community that she was let go from MSA due to time accounting fraud. Sub #2 (Compl., ¶ 2.67). Thus, lacking the financial resources of her opponent, to start discovery anew as though MSA had complied with the spirit and purpose of the discovery rules and fully answered Plaintiff's requests in August 2016 would be far more punishing to Ms. Atwood than to MSA, given the expense of more delay and more depositions. In an effort to alleviate the financial imbalance, if a default judgment is not granted and the trial date is continued for plaintiff to reopen discovery, then the Court should require MSA to pay Plaintiff's reasonable attorney's fees and all costs incurred through the present; and order it to pay the reasonable attorney's fees and all costs related to the additional discovery caused by Defendant's misconduct. *See* Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 692, 132 P.3d 115 (2006) ("The trial court did not abuse its discretion in determining that the Mayers should be fully compensated for the money wasted [in attorney fees and expenses] on the first trial and for the loss of use of that sum for the period of time described in the judgment.")

Even still, to the extent responsive records remain missing from MSA's production, as Ms. DeVere outlines in her declaration, the problem remains that Plaintiff lacks the documentation necessary to complete discovery once it is reopened for Ms. Atwood. While the Court might, as one sanction, direct MSA's counsel to certify that the company is withholding no further documentation responsive to Plaintiff's discovery requests and to the Court's discovery order, Plaintiff cannot reasonably rely upon such a certification, given that similar certifications made under CR 26(g) have already proven worthless. If the Court were to award a substantial monetary fine as a penalty, that could potentially assist in deterring further misconduct and reinforce the value of such certification. *See, e.g.*, Magana, 167 Wn.2d at 591 (listing a "monetary fine" as one of the "lesser sanctions" available); Camicia v. Howard S.

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Wright Const. Co., No. 74048-2-I (issued Feb. 21, 2017) (unpublished) (affirming order that "City and Defense Counsel pay a fine of $10,000 to the Legal Foundation of Washington … for the provision of legal services to those with financial need" to "deter future discover violations, and to punish for the violations");[7] and CR 37(b)(2) (identifying monetary sanctions as an award made "in lieu of" or "in addition" to the orders described in CR 37(b)(2)(A)-(E)). In this case, Plaintiff suggests an appropriate fine for the discovery violations of MSA and its counsel would require that each pay a penalty of $100,000 to the Legal Foundation of Washington or to the Benton and Franklin Counties Superior Court Administration.

However, like the trial court in Magaña, it remains "difficult to know what amount [monetary fine] would be suitable since '[MSA] is a $3.4 billion-dollar corporation.'" Magana, 167 Wn.2d at 592; Atwood Dec., ¶ 3, Ex. 1. Any monetary sanction would still fail to address the prejudice to Plaintiff or to the judicial system. Granting a continuance to allow Plaintiff to conduct additional discovery is not an adequate sanction. Sanctions for discovery violations should not reward the party who has committed the violations and granting a continuance would only exacerbate the situation. If Defendant were allowed to have the trial date and discovery continued, the cost-benefit analysis from the company's perspective would always favor misconduct, because they have unlimited resources and unlimited time. Plaintiff on the other hand has finite resources and can be driven into the ground by being forced to devote her time, attention and resources to an endless battle regarding Defendant's deficiencies in discovery. Only a default judgment can balance the scales and hold Defendant MSA accountable in this situation.

[7] The recent unpublished Camicia decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the court deems appropriate. GR 14.1.

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VI. CONCLUSION

For the reasons outlined, Defendant is in violation of the Court's discovery order and has violated CR 26(g) and CR 37. The Court should enter an order in which it (1) finds MSA violated CR 26(g) and the Court's order compelling production of documents; (2) finds that MSA willfully failed to produce documents properly requested in July 2016; including but not limited to producing only a few documents related to Sandra Fowler after it became clear that MSA's motion to quash the Fowler subpoena was denied, so the few documents MSA disclosed February 8 would be produced by Ms. Fowler at her deposition, while continuing to withhold more than 100 pages of internal records of MSA's investigation that Fowler did not possess, until long after the depositions of Ms. Fowler and other relevant witnesses were completed and the period for completing discovery was past; (3) finds that Plaintiff is substantially prejudiced in her ability to prepare for trial based on Defendant's pattern of withholding evidence; (4) and finds, as in *Magaña*, that no lesser sanction than a default judgment will suffice and set a date for trial on damages in May 2017. If the declines to enter a default judgment, then in the alternative, in addition to the foregoing findings (1) through (3), the Court should grant all of the alternative relief, numbered (4) through (13) detailed in the Introduction, *supra*.

Dated this 2nd day of May, 2017.

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CERTIFICATE OF SERVICE

I, Melanie Kent, certify under penalty of perjury under the laws of the State of Washington that on May 2, 2017, I served the document to which this Certificate is attached to the party listed below in the manner shown.

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