Exhibit A

3/4/05

FILE COPY

BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

SANDRA JUDD, et al., Complainants, v. AT&T COMMUNICATIONS OF THE PACIFIC NORTHWEST, INC.; and T-NETIX, INC., Respondents.	DOCKET NO. UT-042022 COMPLAINANTS' FIRST DATA REQUESTS TO T-NETIX, INC.

TO: T-NETIX, INC.

Pursuant to WAC 480-07-400, Complainants request that T-NETIX, INC., provide responses to the following data requests to the undersigned no later than April 4, 2005.

DEFINITIONS

As used herein, the following terms have the meaning set forth below:

1. The terms "T-Netix," "you," and "your" shall include T-Netix, Inc. and their attorneys, employees, servants, agents and representatives, and any person acting on their behalf for any purpose.

2. The term "Exhibit" refers to exhibits attached to AT&T's Motion for Summary Determination, filed on or about December 15, 2004.

3. The term "inmate-initiated calls" means all intrastate, long-distance telephone calls initiated by Washington state inmates from June 20, 1996 to the present,

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using "Inmate Public Telephones" as that term is defined in Exhibit 7, page 2 to AT&T's Motion for Summary Determination, filed on or about December 15, 2004.

4. The term "institution" or "institutions" means all Washington correctional institutions covered by Exhibit 7, page 2 to AT&T's Motion for Summary Determination, filed on or about December 15, 2004, and any amendments thereto.

5. The term "T-Netix institutions" means all Washington correctional institutions for which T-Netix was contractually responsible for providing services in connection with inmate-initiated calls.

6. The term "contract" or "contracts" or "subcontract" or "subcontracts" means all contractual agreements governing the provision of inmate-initiated calls.

7. The term "operator services" is to be construed identically to the definition of operator services in WAC 480-120-021 (1991), WAC 480-120-021 (1999), and WAC 480-120-262 (2003).

8. The term "consumer" or "consumers" is to be construed identically to the definition of "consumer" in WAC 480-120-021 (1991), WAC 480-120-021 (1999), and WAC 480-120-262 (2003).

9. The term "CenturyTel" means CenturyTel of Washington, Inc., CenturyTel Telephone Utilities, Inc., Northwest Telecommunications, Inc., or PTI Communications, Inc.

10. The terms "document" or "documents" means any writing of any description including without limitation paper, electronic, digital and other forms of recording, email and other electronic documents that may reside on hard drives, servers or

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other storage media of any description that are under the control of or within the power of T-Netix, Inc. to gain access.

11. The term "identify," when used with reference to a person, means to state his or her full name, present or last known address, present or last known telephone number, present or last known place of employment, position or business affiliation, his or her position or business affiliation at the time in question, and a general description of the business in which he or she is engaged.

12. The term "state the basis" for an allegation, contention, conclusion, position or answer means: (a) identify and specify the sources therefore; (b) identify and specify all facts on which you rely or intend to rely in support of the allegation, contention, conclusion, position or answer; and (c) set forth and explain the nature and application to the relevant facts of all pertinent legal theories upon which you rely for your knowledge, information and/or belief that there are good grounds to support such allegation, contention, conclusion, position or answer.

13. The term "carrier" means any provider of telecommunications services.

INSTRUCTIONS

A. "Each data response must state the date the response is produced, the name of the person who prepared the response, and the name of any witness who is knowledgeable about and can respond to questions concerning the response." WAC 480-07-405(7)(c).

B. These data requests shall be deemed to be continuing. You are required to "immediately supplement any response to a data request, record requisition, or bench request upon learning that the prior response was incorrect or incomplete when made or

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upon learning that a response, correct and complete when made, is no longer correct or complete." WAC 480-07-405(8).

C. If you find the "meaning or scope of a request to be unclear," you "must immediately initiate a clarification call" to complainant's counsel. "Lack of clarity is not a basis for objection to a data request unless the responding party has made a good faith effort to obtain clarification." WAC 480-07-405(5).

D. If you object to any part of a request, answer all parts of such requests to which you do not object, and as to each part to which you do object, separately set forth the specific basis for the objection.

DATA REQUESTS

1. Please produce all documents that comprise part of the contracts between T-Netix and AT&T relating to the provision of inmate telephone services in Washington State.

2. Please produce all documents that relate to the negotiation, interpretation, implementation, or performance of the contracts between T-Netix and AT&T relating to the provision of inmate telephone services in Washington State.

3. Please produce any signed versions of Exhibit 12.

4. Please produce copies of any filings with the WUTC, with other state regulatory bodies, or with the FCC, in which you have asserted that you provide operator services for inmate telephone calls (not just "inmate-initiated calls").

5. Please produce any orders, waivers, responses, replies, or other documents that directly relate to the filings described in the preceding data request.

6. Please produce all documents relating to prison or inmate security issues that are relevant to the provision of operator services for inmate-initiated calls.

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7. Please describe in detail and in sequence every step and link in how inmate-initiated calls are routed from the inmate to the called party, including: the local exchange and interexchange lines, switches, call control and billing hardware and software, signaling

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Exhibit B

Supreme Court of Washington, En Banc.
WASHINGTON STATE PHYSICIANS INSURANCE EXCHANGE & ASSOCIATION, d/b/a Physicians Insurance, and James A. Klicpera, M.D., Respondents,
v.
FISONS CORPORATION, Appellant.
No. 57696-3.

Sept. 16, 1993.

In medical malpractice action for injuries sustained from adverse reaction to prescribed drug, prescribing physician filed cross claim against company which manufactured the drug. Following settlement of medical malpractice action, the Superior Court, Snohomish County, Stuart C. French, J., awarded physician damages for loss of professional consultations, injury to professional reputation and for physical and mental pain and suffering, and denied physician's medical malpractice insurer recovery for fraud against drug company. Drug company sought direct review. The Supreme Court, Andersen, C.J., held that: (1) physician had standing to bring Consumer Protection Act (CPA) claim; (2) physician who prescribes drug which injures patient does not have cause of action to recover from drug company for his or her own emotional pain and suffering under Product Liability Act (PLA); (3) PLA preempts common-law remedies for product-related harms; (4) insurer's contribution claim against drug company was extinguished by settlement; (5) alleged "habit" evidence was properly excluded; (6) state law claims were not preempted by Federal Food and Drug Administration (FDA) guidelines; (7) damage award for loss of reputation was not excessive; (8) trial court did not abuse its discretion in its calculation of attorney fee award under CPA; and (9) trial court should have sanctioned drug company and/or its attorneys for discovery abuse.

Affirmed in part, reversed in part and remanded.

Brachtenbach, J., concurred in part and dissented in part and filed opinion in which Johnson and Utter, JJ., joined.

West Headnotes

[1] Antitrust and Trade Regulation 29T ⚿290

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk287 Persons Entitled to Sue or Seek Remedy
29Tk290 k. Private Entities or Individuals. Most Cited Cases
(Formerly 92Hk36.1 Consumer Protection)
Physician who prescribed drug which injured patient had standing under Consumer Protection Act (CPA) to sue drug company for engaging in unfair or deceptive trade practice by failing to warn physician of dangers of drug about which it had notice. West's RCWA 19.86.090.

[2] Antitrust and Trade Regulation 29T ⚿134

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(A) In General
29Tk133 Nature and Elements
29Tk134 k. In General. Most Cited Cases
(Formerly 92Hk4 Consumer Protection)
Elements of private claim under Consumer Protection Act (CPA) are: unfair or deceptive act or practice; which occurs in trade or commerce; that impacts public interest; which causes injury to plaintiff in his or her business or property; and which injury is causally linked to unfair or deceptive act. West's RCWA 19.86.090.

[3] Products Liability 313A ⚿46.2

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak46 Health Care and Medical Products

313Ak46.2 k. Drugs in General. Most Cited Cases
(Formerly 138k18 Drugs and Narcotics)
Under learned intermediary doctrine, drug company fulfills its duty by giving warnings regarding prescription drugs to physician rather than to patient.

[4] Negligence 272 ⚿1713

272 Negligence
272XVIII Actions
272XVIII(D) Questions for Jury and Directed Verdicts
272k1712 Proximate Cause
272k1713 k. In General. Most Cited Cases
(Formerly 272k136(25))
Existence of factual causation is generally question for jury.

[5] Antitrust and Trade Regulation 29T ⚿363

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)5 Actions
29Tk361 Proceedings; Trial
29Tk363 k. Questions of Law or Fact. Most Cited Cases
(Formerly 92Hk36.1 Consumer Protection)
Whether physician who prescribed drug which injured patient would have acted differently had he been adequately warned by drug company, as required to establish causation element of physician's Consumer Protection Act (CPA) claim against drug company, was for jury. West's RCWA 19.86.090.

[6] Antitrust and Trade Regulation 29T ⚿389(1)

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk387 Monetary Relief; Damages
29Tk389 Grounds and Subjects
29Tk389(1) k. In General. Most Cited Cases
(Formerly 92Hk40 Consumer Protection)
Damage to professional reputation is compensable under Consumer Protection Act (CPA). West's RCWA 19.86.090.

[7] Antitrust and Trade Regulation 29T ⚿290

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)1 In General
29Tk287 Persons Entitled to Sue or Seek Remedy
29Tk290 k. Private Entities or Individuals. Most Cited Cases
(Formerly 92Hk32 Consumer Protection)
Jury's determination that physician was 3.3 percent contributorily negligent in prescribing drug which injured patient did not bar his cause of action under Consumer Protection Act (CPA) based on drug company's unfair or deceptive acts or practices; physician's claim was an independent action. West's RCWA 19.86.090.

[8] Antitrust and Trade Regulation 29T ⚿389(1)

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk387 Monetary Relief; Damages
29Tk389 Grounds and Subjects
29Tk389(1) k. In General. Most Cited Cases
(Formerly 92Hk40 Consumer Protection)
Damages for pain and suffering may not be awarded under Consumer Protection Act (CPA). West's RCWA 19.86.010 et seq.

[9] Damages 115 ⚿57.12

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emo-

tional Distress
115k57.12 k. Particular Cases in General. Most Cited Cases
(Formerly 115k49.10)
Physician who prescribes drug which injures patient does not have cause of action to recover from drug company for his or her own emotional pain and suffering under Product Liability Act (PLA). West's RCWA 7.72.030(1).

[10] Products Liability 313A 1

313A Products Liability
313AI Scope in General
313AI(A) Products in General
313Ak1 k. Nature and Elements in General. Most Cited Cases
Products Liability Act (PLA) preempts common-law remedies for product-related harms. West's RCWA 7.72.010(4).

[11] Contribution 96 8

96 Contribution
96k8 k. Defenses. Most Cited Cases
Drug company's settlement of claim of patient injured by drug extinguished any contribution claim against company by physician who prescribed the drug and any contribution claim against drug company by physician's medical malpractice insurer for amounts paid in settlement of claim against physician who prescribed the drug. West's RCWA 4.22.040.

[12] Evidence 157 138

157 Evidence
157IV Admissibility in General
157IV(C) Similar Facts and Transactions
157k138 k. Part of Series Showing System or Habit. Most Cited Cases
Testimony of drug company's sales representative that it was his habit to discuss dangers of theophylline and particular study which included information about risks of theophylline when he visited physicians and therefore must have discussed those risks with physician who prescribed drug was properly excluded on ground that sales representative's behavior did not rise to level of habit; sales representative admitted he did not have copy of drug study to give physician on date he noted physician was "impressed" with it. ER 406.

[13] Products Liability 313A 46.2

313A Products Liability
313AI Scope in General
313AI(B) Particular Products, Application to
313Ak46 Health Care and Medical Products
313Ak46.2 k. Drugs in General. Most Cited Cases
(Formerly 138k20.1 Drugs and Narcotics)

States 360 18.65

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.65 k. Product Safety; Food and Drug Laws. Most Cited Cases
State law claims of prescribing physician against drug company for injuries allegedly resulting from drug company's failure to give proper warning of dangers of drug were not impliedly preempted by Federal Food and Drug Administration (FDA) guidelines.

[14] States 360 18.3

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 k. Preemption in General. Most Cited Cases
Federal preemption of state law may occur if Congress passes statute that expressly preempts state law, if Congress preempts state law by occupation of entire field of regulation or if state law conflicts with federal law due to impossibility of compliance with state and federal law or when state law acts as obstacle to accomplishment of federal purpose.

[15] States 360 18.3

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.3 k. Preemption in General. Most Cited Cases
There is strong presumption against finding federal

preemption in ambiguous case, and burden of proof is on party claiming preemption; presumption against preemption is even stronger with state regulation of health and safety.

[16] States 360 ⚿18.11

360 States
360I Political Status and Relations
360I(B) Federal Supremacy; Preemption
360k18.11 k. Congressional Intent. Most Cited Cases
State laws are not superseded by federal law unless that is clear and manifest purpose of Congress.

[17] Action 13 ⚿3

13 Action
13I Grounds and Conditions Precedent
13k3 k. Statutory Rights of Action. Most Cited Cases
(Formerly 178k25, 138k20.1 Drugs and Narcotics)
Federal Food, Drug and Cosmetic Act does not create any private right of action. Federal Food, Drug, and Cosmetic Act § 521, as amended, 21 U.S.C.A. § 360k.

[18] New Trial 275 ⚿0.5

275 New Trial
275I Nature and Scope of Remedy
275k0.5 k. Nature and Scope of Remedy in General. Most Cited Cases
(Formerly 275k1/2)
Verdict is strengthened by denial of new trial by trial court.

[19] Appeal and Error 30 ⚿1140(2)

30 Appeal and Error
30XVII Determination and Disposition of Cause
30XVII(B) Affirmance
30k1140 Remission of Part of Recovery
30k1140(2) k. Power to Direct Remission. Most Cited Cases

New Trial 275 ⚿76(1)

275 New Trial
275II Grounds
275II(F) Verdict or Findings Contrary to Law or Evidence
275k76 Excessive Damages
275k76(1) k. In General. Most Cited Cases

New Trial 275 ⚿162(1)

275 New Trial
275III Proceedings to Procure New Trial
275k162 Remission or Reduction of Excess of Recovery
275k162(1) k. In General. Most Cited Cases
Either trial court or appellate court has power to reduce award or order new trial based on excessive damages, but appellate review is most narrow and restrained and appellate court rarely exercises this power.

[20] Damages 115 ⚿137

115 Damages
115VII Amount Awarded
115VII(C) Injuries to Property
115k137 k. In General. Most Cited Cases
Award against drug company and for physician of $1,085,000 for injury to professional reputation suffered when patient had adverse reaction to drug he had prescribed was supported by sufficient evidence.

[21] Damages 115 ⚿163(1)

115 Damages
115IX Evidence
115k163 Presumptions and Burden of Proof
115k163(1) k. Necessity of Proof as to Damages in General. Most Cited Cases
There was no evidence to support award to physician for income loss due to lost consultations after patient had adverse reaction to drug he had prescribed.

[22] Trial 388 ⚿121(1)

388 Trial
388V Arguments and Conduct of Counsel
388k113 Statements as to Facts, Comments, and Arguments

388k121 Comments on Evidence or Witnesses
388k121(1) k. In General. Most Cited Cases
Attorneys' closing argument did not violate court order disallowing reference to discovery disputes; court order allowed evidence regarding whether certain documents were known to plaintiffs prior to settlement and whether experts had access to discovery documents when opinions were expressed.

[23] Appeal and Error 30 ⚿230

30 Appeal and Error
30V Presentation and Reservation in Lower Court of Grounds of Review
30V(B) Objections and Motions, and Rulings Thereon
30k230 k. Necessity of Timely Objection. Most Cited Cases
Even when portions of closing argument are improper or inaccurate, failure to make contemporaneous objection usually waives any error unless argument was so flagrant and prejudicial as not to be subject to curative instruction; this is especially true when trial court instructs jury that arguments are not evidence and that argument not supported by evidence is to be disregarded.

[24] Appeal and Error 30 ⚿1004(5)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)2 Verdicts
30k1004 Amount of Recovery
30k1004(5) k. Mistake, Passion or Prejudice; Shocking Conscience or Sense of Justice. Most Cited Cases
In order to overturn jury's verdict based on passion and prejudice, it must be of such manifest clarity as to make it unmistakable.

[25] Antitrust and Trade Regulation 29T ⚿397

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk397 k. Attorney Fees. Most Cited Cases
(Formerly 92Hk42 Consumer Protection)

Antitrust and Trade Regulation 29T ⚿398

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk398 k. Proceedings to Impose; Evidence. Most Cited Cases
(Formerly 92Hk42 Consumer Protection)
Award of attorney fees under Consumer Protection Act (CPA) is calculated by establishing "lodestar" fee by multiplying reasonable hourly rate by number of hours reasonably expended on theories necessary to establish elements of CPA cause of action, and adjusting that lodestar up or down based upon contingent nature of success and, in exceptional circumstances, based also on quality of work performed; burden of justifying any deviation from lodestar rests on party proposing such alteration. West's RCWA 19.86.090.

[26] Costs 102 ⚿198

102 Costs
102IX Taxation
102k198 k. Form and Requisites of Application in General. Most Cited Cases

Costs 102 ⚿207

102 Costs
102IX Taxation
102k207 k. Evidence as to Items. Most Cited Cases
Attorneys seeking fees must provide reasonable documentation of work performed to calculate number of hours, and when attorneys have established rate for billing clients, that rate will likely be considered reasonable.

[27] Antitrust and Trade Regulation 29T ⚿397

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk397 k. Attorney Fees. Most Cited Cases
(Formerly 92Hk42 Consumer Protection)
In calculating attorney fees under Consumer Protection Act (CPA) in physician's action against drug company arising out of medical malpractice claim against him, trial court did not abuse its discretion in establishing hourly fee by averaging reduced rate charged by attorneys in medical malpractice defense cases with hourly rate charged in their other practice, and did not abuse its discretion in multiplying that hourly fee by 50 percent of hours expended during entire case, as amount attributable to theories necessary to prove CPA claim. West's RCWA 19.86.090.

[28] Antitrust and Trade Regulation 29T 397

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk397 k. Attorney Fees. Most Cited Cases
(Formerly 92Hk42 Consumer Protection)
In calculating attorney fees under Consumer Protection Act (CPA) in action arising out of medical malpractice claim against physician, trial court did not abuse its discretion in multiplying lodestar amount by 1.5 based upon fact that part of the fees were contingent upon success and quality of work performed. West's RCWA 19.86.090.

[29] Costs 102 194.18

102 Costs
102VIII Attorney Fees
102k194.18 k. Items and Amount; Hours; Rate. Most Cited Cases
Quality can be valid factor for enhancing lodestar attorney fee when representation is unusually good, taking into account level of skill normally expected of attorney commanding the hourly rate used to compute the lodestar.

[30] Antitrust and Trade Regulation 29T 397

29T Antitrust and Trade Regulation
29TIII Statutory Unfair Trade Practices and Consumer Protection
29TIII(E) Enforcement and Remedies
29TIII(E)7 Relief
29Tk395 Costs
29Tk397 k. Attorney Fees. Most Cited Cases
(Formerly 92Hk42 Consumer Protection)
Attorney fees on appeal are recoverable under Consumer Protection Act (CPA). West's RCWA 19.86.090.

[31] Appeal and Error 30 961

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k961 k. Depositions, Affidavits, or Discovery. Most Cited Cases
Trial court's decision whether to impose sanction for discovery abuse is reviewed for abuse of discretion, rather than de novo. CR 11, 26(g).

[32] Appeal and Error 30 946

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k944 Power to Review
30k946 k. Abuse of Discretion. Most Cited Cases
Trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds; trial court would necessarily abuse its discretion if it based its ruling on erroneous view of law.

[33] Costs 102 2

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In General. Most Cited Cases
Rule 11 sanctions are not appropriate where other court rules more properly applied. CR 11.

[34] Costs 102 ⚿2

102 Costs
102I Nature, Grounds, and Extent of Right in General
102k1 Nature and Grounds of Right
102k2 k. In General. Most Cited Cases
Sanctions provided for failure to make or cooperate in discovery do not apply where more specific sanction rule better fits the situation. CR 37.

[35] Attorney and Client 45 ⚿24

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k24 k. Liability for Costs; Sanctions. Most Cited Cases
Whether attorney has made reasonable inquiry required by discovery sanctions rule is to be judged by objective standards; subjective belief or good faith alone does not shield attorney from sanctions. CR 26(g).

[36] Attorney and Client 45 ⚿24

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k24 k. Liability for Costs; Sanctions. Most Cited Cases
In determining whether attorney has complied with discovery rule requiring reasonable inquiry, court should consider all surrounding circumstances, importance of evidence to its proponent, and ability of opposing party to formulate response or to comply with request. CR 26(g).

[37] Attorney and Client 45 ⚿24

45 Attorney and Client
45I The Office of Attorney
45I(B) Privileges, Disabilities, and Liabilities
45k24 k. Liability for Costs; Sanctions. Most Cited Cases

Pretrial Procedure 307A ⚿44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
In determining whether to impose sanction for abuse of discovery, trial court should not have considered opinions of attorneys and others as to whether sanctions should be imposed; court should have asked whether attorney's certification to responses to interrogatories and requests for production were made after reasonable inquiry and were consistent with the rules, were not interposed for any improper purpose and were not unreasonable or unduly burdensome or expensive. CR 26(g).

[38] Pretrial Procedure 307A ⚿44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
Motion to compel compliance with discovery rules is not prerequisite to motion for sanctions. CR 26(g).

[39] Pretrial Procedure 307A ⚿44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
In ruling on motion for discovery sanctions, conduct is to be measured against spirit and purpose of discovery rules, not against standard of practice in local bar. CR 26(g).

[40] Appeal and Error 30 ⚿1008.3(1)

30 Appeal and Error
30XVI Review
30XVI(I) Questions of Fact, Verdicts, and Findings
30XVI(I)3 Findings of Court
30k1008 Conclusiveness in General
30k1008.3 Where Evidence Was in Writing
30k1008.3(1) k. In General. Most

Cited Cases
Where trial judge has applied wrong legal standard to evidence consisting entirely of written documents and argument of counsel, appellate court may independently review evidence to determine whether attorney signing discovery response has violated certification rule. CR 26(g).

[41] Pretrial Procedure 307A 434

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(E) Production of Documents and Things and Entry on Land
307AII(E)6 Failure to Comply; Sanctions
307Ak434 k. In General. Most Cited Cases
Sanctions for drug company's abuse of discovery were warranted by company's failure to disclose documents contradicting its position that it did not know that theophylline based medications were potentially dangerous when given to children with viral infections; discovery requests should have led to production of documents, and company's responses and answers to discovery requests were misleading. CR 26(g).

[42] Pretrial Procedure 307A 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
Least severe discovery sanction that will be adequate to serve purpose of particular sanction should be imposed. CR 26(g).

[43] Pretrial Procedure 307A 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
Discovery sanction must not be so minimal that it undermines purpose of discovery. CR 26(g).

[44] Pretrial Procedure 307A 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
Discovery sanction should insure that wrongdoer does not profit from the wrong. CR 26(g).

[45] Pretrial Procedure 307A 44.1

307A Pretrial Procedure
307AII Depositions and Discovery
307AII(A) Discovery in General
307Ak44 Failure to Disclose; Sanctions
307Ak44.1 k. In General. Most Cited Cases
Wrongdoer's lack of intent to violate discovery rules and other party's failure to mitigate may be considered by trial court in fashioning discovery sanctions. CR 26(g).

****1058 *306** Bogle & Gates, Ronald E. McKinstry, Ronald T. Schaps, Guy P. Michelson, Kevin C. Baumgardner, Karen McGaffey, William Helsell, Seattle, for appellant.
Williams, Kastner & Gibbs, Mary H. Spillane, Margaret A. Sundberg, Carney, Badley, Smith & Spellman, P.S., James E. Lobsenz, Stephen A. Saltzburg, Seattle, for respondents.
Laurie Kohli, Constance Gould, Russell C. Love, Seattle, for amicus curiae on behalf of Washington Defense Trial Lawyers.
Halleck H. Hodgins, Bryan P. Harnetiaux, Mary Ellen Gaffney-Brown, Gary N. Bloom, Spokane, for amicus curiae for respondent on behalf of Washington State Trial Lawyers Ass'n.
ANDERSEN, Chief Justice.

FACTS OF CASE

We are asked in this case to decide whether a physician has a cause of action against a drug company for personal and professional injuries which he suffered when his patient had an adverse reaction to a drug he had prescribed. The physician claimed the drug company failed to warn him of the risks associated with the drug. If such action is legally ***307** cognizable,

we are then asked to determine whether damages awarded by the jury were excessive and whether attorneys' fees were properly awarded by the trial court. We are also asked to rule that the trial court erred in denying sanctions against the drug company for certain abuses in the discovery process.

The physician's action began as part of a malpractice and product liability suit brought on behalf of a child who was the physician's patient. On January 18, 1986, 2-year-old Jennifer Pollock suffered seizures which resulted in severe and permanent brain damage. It was determined that the seizures were caused by an excessive amount of theophylline in her system. The Pollocks sued Dr. James Klicpera (Jennifer's pediatrician), who had prescribed the drug, as well as Fisons Corporation (the drug manufacturer and hereafter drug company) which produced Somophyllin Oral Liquid, the theophylline-based medication prescribed for Jennifer.

Dr. Klicpera cross-claimed against the drug company both for contribution and for damages and attorneys' fees under the Consumer Protection Act as well as for damages for emotional distress.

In January 1989, after nearly 3 years of discovery, Dr. Klicpera, his partner and the Everett Clinic settled with the Pollocks. The settlement agreement essentially provided that the doctors' insurer, Washington State Physicians Insurance Exchange and Association (WSPIE), would loan $500,000 to the Pollocks which would be contributed in the event of a settlement between the Pollocks and the drug company. The Pollocks were guaranteed a minimum total recovery of $1 million, and in the event of trial Dr. Klicpera agreed to remain as a party and to pay a maximum of $1 million. The settlement between the Pollocks and Dr. Klicpera was determined by the trial court to be reasonable pursuant to RCW 4.22.060.

More than 1 year after this settlement, an attorney for the Pollocks provided Dr. Klicpera's attorney a copy of a letter received from an anonymous source. The letter, dated ***308** June 30, 1981, indicated that the drug company was aware in 1981 of "life-threatening theophylline toxicity" in children who received the drug while suffering from viral infections. The letter was sent from the drug company to only a small number of what the company considered influential physicians. The letter stated that physicians needed to understand that theophylline can be a "capricious drug".

The Pollocks and Dr. Klicpera contended that their discovery requests should have produced the June 1981 letter and they moved for sanctions against the drug company. The request for sanctions was initially heard by a special discovery master, who denied sanctions, but who required the ****1059** drug company to deliver all documents requested which related to theophylline. Documents that the drug company and its counsel had immediately available were to be produced by the day following the hearing before the special master. The remainder of the documents were to be produced within 2 weeks. The trial court subsequently denied Dr. Klicpera's request to reverse the discovery master's denial of sanctions and at the close of trial denied a renewed motion for sanctions.

The day after the hearing on sanctions, the drug company delivered approximately 10,000 documents to Dr. Klicpera's and Pollocks' attorneys. Among the documents provided was a July 10, 1985 memorandum from Cedric Grigg, director of medical communications for the drug company, to Bruce Simpson, vice president of sales and marketing for the company.

This 1985 memorandum referred to a dramatic increase in reports of serious toxicity to theophylline in early 1985 and also referred to the current recommended dosage as a significant "mistake" or "poor clinical judgment". The memo alluded to the "sinister aspect" that the physician who was the "pope" of theophylline dosage recommendation was a consultant to the pharmaceutical company that was the leading manufacturer of the drug and that this consultant was "heavily into [that company's] stocks". The memo also noted that the toxicity reports were not reported in the journal***309** read by those who most often prescribed the drug and concluded that those physicians may not be aware of the "alarming increase in adverse reactions such as seizures, permanent brain damage and death". The memo concluded that the "epidemic of theophylline toxicity provides strong justification for our corporate decision to cease promotional activities with our theophylline line of products." The record at trial showed that the drug company continued to promote and sell theophylline after the date of this memo.

On April 27, 1990, shortly after the 1985 memo was revealed, the drug company settled with the Pollocks for $6.9 million. The trial court determined that settlement to be reasonable, dismissed the Pollocks' claims, extinguished Dr. Klicpera's contribution/indemnity claims against Fisons pursuant to RCW 4.22.060 and reserved determination of what claims remained for trial. The trial court then ordered the lawsuit recaptioned, essentially as Dr. James Klicpera, plaintiff v. Fisons Corporation, defendant.

After a month-long jury trial, the court instructed the jury on Dr. Klicpera's claims which were based on the Consumer Protection Act, RCW 19.86, the Product Liability Act, RCW 7.72, and common law fraud. The jury was also instructed on WSPIE's fraud claim seeking to recover the $500,000 paid in settlement to the Pollocks. The trial court ruled that WSPIE could not maintain a Consumer Protection Act cause of action against the drug company.

On a special verdict form, the jury concluded that Dr. Klicpera was entitled to recover against the drug company under his Consumer Protection Act claim and under his product liability claim, but not under the fraud claim. The jury awarded Dr. Klicpera $150,000 for loss of professional consultations, $1,085,000 for injury to professional reputation, and $2,137,500 for physical and mental pain and suffering. The jury further found Dr. Klicpera to be 3.3 percent contributorily negligent. The jury found that WSPIE was not entitled to recover under its fraud claim against the drug company the $500,000 settlement paid to the Pollocks.

***310** The trial court denied the drug company's motion for judgment n.o.v. and for a new trial. On a motion for reduction of the jury award, the trial court reduced the amount awarded for loss of professional consultations from $150,000 to $2,250 but refused to reduce the awards for loss of reputation and for pain and suffering. The trial court also denied WSPIE's motion for judgment n.o.v. or a new trial based on the dismissal of WSPIE's Consumer Protection Act claim.

The trial court awarded $449,568.18 to Dr. Klicpera as attorneys' fees under the Consumer Protection Act finding that 50 percent of the attorneys' time in the lawsuit****1060** was attributable to the Consumer Protection Act cause of action. The court denied Dr. Klicpera's request for further attorneys' fees based upon a theory of equitable indemnification.

Pursuant to the injunctive relief section of the Consumer Protection Act, the court ordered the drug company to send the June 30, 1981 letter regarding the dangers of theophylline poisoning to the Washington State Medical Association.

The drug company sought direct review by this court and we accepted review. Dr. Klicpera and his insurer (WSPIE) cross appeal from the trial court's refusal to award discovery sanctions for the alleged discovery violations. WSPIE also appeals the trial court's dismissal of its Consumer Protection Act claim against the drug company.

The parties' 63 assignments of error raise 9 principal issues.

ISSUES

ISSUE ONE. Under the Consumer Protection Act, RCW 19.86, does a physician whose reputation is injured because the physician misprescribed a medication have standing to sue a drug company which engaged in unfair or deceptive trade practices?

ISSUE TWO. Does a physician who prescribes a drug which injures a patient have a cause of action to recover from a drug company for the physician's own mental pain and suffering, and attendant physical pain, under the product liability act (RCW 7.72), based on the company's failure to warn?

***311** ISSUE THREE. If the facts of this case fail to support a product liability claim, should this physician be allowed to bring a common law negligence cause of action based on the drug company's failure to warn about the risks of the drug?

ISSUE FOUR. Did the trial court err in refusing to allow the physician's insurer's Consumer Protection Act claim to go to the jury?

ISSUE FIVE. Did the trial court err in excluding the testimony of the drug company's sales representative based upon Rule of Evidence 406?

ISSUE SIX. Were the physician's state law claims

preempted by federal law?

ISSUE SEVEN. Should the trial court have granted a new trial or reduced the jury award based on the argument that the damages awarded were excessive?

ISSUE EIGHT. Did the trial court err in calculating the amount of attorneys' fees awarded for the Consumer Protection Act claim?

ISSUE NINE. Did the trial court err in refusing to sanction the drug company and its attorneys for discovery abuse?

DECISION

The general question in this case is whether damages may be awarded to a prescribing physician who is allegedly injured by a drug company's failure to give proper warning of the dangers of a drug which the physician prescribes to a patient and, if so, under what legal theory or theories and for what kind of damages.

ISSUE ONE.

[1] CONCLUSION. Under the Consumer Protection Act (RCW 19.86), a physician whose reputation is injured has standing to sue a drug company which engaged in an unfair or deceptive trade practice by failing to warn the physician of the dangers of its drug about which it had knowledge.

The Washington Consumer Protection Act (CPA), RCW 19.86.020, provides:

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

***312** RCW 19.86.090 creates a private right of action by providing:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020... may bring a civil action ... to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the ****1061** costs of the suit, including a reasonable attorney's fee ...

(Italics ours.)

[2] The elements of a private CPA claim are: (1) an unfair or deceptive act or practice; (2) which occurs in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the plaintiff in his or her business or property; and (5) which injury is causally linked to the unfair or deceptive act.[FN1]

FN1. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 780, 719 P.2d 531 (1986); *Mason v. Mortgage Am., Inc.*, 114 Wash.2d 842, 852, 792 P.2d 142 (1990).

The drug company argues that Dr. Klicpera did not have standing to bring a CPA claim and relies upon *Bowe v. Eaton*, 17 Wash.App. 840, 846, 565 P.2d 826 (1977) for the proposition that the CPA only applies to unfair acts where there is a consumer transaction involving the sale of goods and services. Although *Bowe* does so provide, its holding has been eroded by later cases. In *Salois v. Mutual of Omaha Ins. Co.*, 90 Wash.2d 355, 359, 581 P.2d 1349 (1978), we held that the CPA includes sales but encompasses "more than just sales". In *Escalante v. Sentry Ins. Co.*, 49 Wash.App. 375, 387, 743 P.2d 832 (1987), *review denied*, 109 Wash.2d 1025 (1988), the court held that a passenger in an auto accident had standing to bring a CPA claim against an insurance company based upon the insurer's bad faith handling of a claim even though the injured party was not a party to the insurance contract, did not pay premiums and had no consumer relationship with the company.

The leading CPA case of *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash.2d 778, 719 P.2d 531 (1986) does not include a requirement that a CPA claimant be a direct consumer or user of goods or in a direct ***313** contractual relationship with the defendant. Although the consumer protection statutes of some states require that the injured person be the same person who purchased goods or services, there is no language in the Washington act which requires that a CPA plaintiff be the consumer of goods or services.[FN2]

FN2. RCW 19.86.090; Note, *New York Creates a Private Right of Action to Combat*

Consumer Fraud: Caveat Venditor, 48 Brooklyn L.Rev. 509, 528 (1981-1982). *See Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 733 P.2d 208 (1987); *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash.2d 148, 167, 795 P.2d 1143 (1990).

[3] Additionally, in examining the nature of the relationship between a drug manufacturer, a prescribing physician and a patient, it is the physician who compares different products, selects the particular drug for the ultimate consumer and uses it as a tool of his or her professional trade. Under the learned intermediary doctrine, a drug company fulfills its duty by giving warnings regarding prescription drugs to the physician rather than to the patient.[FN3] This unique relationship results in the physician being comparable to the ordinary consumer in other settings. Some cases have concluded that it is the physician who stands in the shoes of the "ordinary consumer" of the drug.[FN4] Because of this unique relationship, the drug company targets its marketing efforts toward the physician, not toward the patient. The physician, therefore, is a logical person to be the "private attorney general" [FN5] under RCW 19.86.090. We therefore conclude that Dr. Klicpera did have standing to bring a CPA claim, and that the trial court did not err in submitting this claim to the jury.

FN3. *Terhune v. A.H. Robins Co.*, 90 Wash.2d 9, 13, 577 P.2d 975 (1978).

FN4. *Phelps v. Sherwood Med. Indus.*, 836 F.2d 296, 302 (7th Cir.1987); *Carmichael v. Reitz*, 17 Cal.App.3d 958, 989, 95 Cal.Rptr. 381, 401 (1971).

FN5. *Anhold v. Daniels*, 94 Wash.2d 40, 45, 614 P.2d 184 (1980); *Hangman Ridge*, 105 Wash.2d at 778, 788, 719 P.2d 531.

At trial, the jury was properly instructed on the *Hangman Ridge* elements of a CPA cause of action. The jury found that ***314** the drug company engaged in unfair or deceptive acts or practices. This determination is not challenged.

The drug company repeatedly stipulated to both the public interest element and to the trade or commerce requirement.

****1062** With regard to the causation element of the CPA, a causal link must exist between the deceptive act and the injury suffered.[FN6] Here, the jury was properly instructed that it had to find "[t]hat Fisons Corporation's unfair or deceptive act or practice was a proximate cause of the injury to plaintiff Dr. Klicpera's business or property," [FN7] and it so found.

FN6. *Schmidt v. Cornerstone Investments*, 115 Wash.2d at 167, 795 P.2d 1143; *Hangman Ridge*, 105 Wash.2d at 793, 719 P.2d 531.

FN7. Instruction 10, Clerk's Papers, at 125.

[4] The drug company argues that the trial court erred in failing to dismiss the physician's claims on the basis that there was insufficient evidence of proximate cause because only the physician testified how he would have acted differently if he had been adequately warned. This argument addresses factual proximate cause rather than legal proximate cause, and the existence of factual causation is generally a question for the jury.[FN8]

FN8. *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 753-56, 818 P.2d 1337 (1991); *Baughn v. Honda Motor Co.*, 107 Wash.2d 127, 142, 727 P.2d 655 (1986); *Anderson v. Dreis & Krump Mfg. Corp.* 48 Wash.App. 432, 441, 739 P.2d 1177,*review denied*, 109 Wash.2d 1006 (1987).

[5] In the present case the physician, in answer to a question regarding what he would have done if he had known of the information in the 1981 letter or in the 1985 memo, replied:

With that information I would have not used that drug on Jennifer Pollock. And if Dr. Redding [the asthma specialist] had wanted that drug used, I would have let him prescribe and monitor it.

Report of Proceedings, at 1968. This is similar to the evidence in *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 753-56, 818 P.2d 1337 (1991), which we found was sufficient evidence to support a finding of probable cause. The parents of

the injured child in *Ayers* testified ***315** that if they had known of the risks of the product, they would have treated it more carefully. We concluded there that whether cause in fact existed was a jury question.

There is also corroborative testimony which supports the cause-in-fact element. Dr. Dorsey testified that had Dr. Klicpera known of the syndrome (reduced clearance of the drug during viral infections) he was certain Dr. Klicpera would have conducted the laboratory testing differently. Another physician, Dr. Koran, testified essentially that if proper warnings regarding viral infections had been given and followed, Jennifer Pollock would not have suffered seizures. Another doctor, Dr. Redding, also testified that if proper warning had been given, and followed, that Jennifer's seizures would not in all probability have occurred.

The drug company also argues that since there was evidence that the physician had been warned from other sources that further warning would not have made a difference. The jury heard extensive evidence on this issue. While it is generally true that a drug manufacturer's failure to warn a prescribing physician cannot be the proximate cause of the patient's injury if the physician was already aware of the risk involved in the use of the drug, [FN9] that is not the evidence in this case. There was testimony from Dr. Klicpera from which a jury could conclude that although he had some knowledge of a correlation between viral infections and reduced clearance of theophylline, he did not know the alteration in clearance could be as dramatic or as rapid as the undisclosed Fisons memos and letter indicated.

FN9. 3 *American Law of Products Liability* § 32:61 (3d ed. 1993).

One of the key disputed facts addressed throughout the trial is what Dr. Klicpera knew, or should have known, about theophylline from sources aside from the drug company's warning. The extent of the physician's knowledge was a jury question,[FN10] and the jury heard all of the evidence.****1063** We conclude that there was sufficient evidence to justify the proximate cause issue being submitted to the jury.

FN10. *See Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 818 P.2d 1337 (1991); *Baughn v. Honda Motor Co.*, 107 Wash.2d 127, 727 P.2d 655 (1986).

***316** [6] With regard to the injury element, we have held that damage to business reputation and loss of goodwill are compensable damages under the CPA.[FN11] The trial court's instructions properly allowed the jury to consider damage to professional reputation in regard to the CPA cause of action.

FN11. *Nordstrom*, 107 Wash.2d at 740-41, 733 P.2d 208; *see also Mason v. Mortgage Am. Inc.*, 114 Wash.2d at 854, 792 P.2d 142; *Rasor v. Retail Credit Co.*, 87 Wash.2d 516, 530, 554 P.2d 1041 (1976) (holding that injury to reputation was included in the Fair Credit Reporting Act statutory term "actual damages").

The drug company argues that the trial court erred because it allowed Dr. Klicpera to recover for "litigation related" damages. To the extent the drug company is arguing that direct "litigation related" damages were awarded, that is not supported by the record. The trial court ruled that Dr. Klicpera's "so-called litigation expense", including time loss due to attendance at deposition, preparation for trial, and at trial was *not* recoverable under any of the legal theories advanced.[FN12] No error was assigned to this ruling. No recovery was allowed to Dr. Klicpera based on any settlement made with the Pollocks or any loss of the physician's time during litigation.

FN12. Report of Proceedings, at 3925-26.

[7] The drug company also argues that Dr. Klicpera was suing based solely on his having been sued for malpractice by the Pollocks and that because he was determined to be 3.3 percent negligent [FN13] he would have been sued anyway, hence his cause of action should have been barred. This argument ignores the fact that the doctor's recovery was based upon an ***317** independent claim under the Consumer Protection Act. The claim brought by the physician was an independent action; it was not an indemnity claim based on the Pollocks' lawsuit. The Pollocks' malpractice lawsuit was not even a prerequisite of the doctor's claims against the drug company. As the Oregon Supreme Court pointed out in *Oksenholt v. Lederle Labs.*, 294 Or. 213, 217, 656 P.2d 293, 296 (1982), even if the patient had not sued the physician who prescribed the dangerous drug, knowledge of a

physician's misprescription among patients and other physicians could harm the physician's reputation and cause economic loss.

> FN13. Apparently, for tactical reasons, each side argued counter to what would be expected on the issue of reduction of Consumer Protection Act damages based upon contributory negligence. Dr. Klicpera's attorney asked the court to reduce both the Consumer Protection Act and the product liability act awards by the 3.3 percent attributable to the doctor's contributory negligence, because one of the doctor's attorneys had previously made such a representation to the court. Report of Proceedings, at 4131-32. Fisons, however, asked the court *not* to reduce the Consumer Protection Act award based on contributory negligence. Report of Proceedings, at 4206, 4163. The trial court reduced damages awarded under the product liability act claim but not those awarded under the Consumer Protection Act. Report of Proceedings, at 4207. Whether contributory negligence should reduce a Consumer Protection Act award is not raised as an issue on appeal.

Accordingly, we conclude that the jury's determination that Dr. Klicpera was 3.3 percent contributorily negligent does not bar his Consumer Protection Act cause of action which was based on the drug company's unfair or deceptive acts or practices.

In summary, given the liberal construction that is mandated by the CPA, [FN14] and the fact that the act does not require that the person injured be the actual consumer of goods or services, we perceive no legal justification to foreclosing a CPA action under the circumstances here presented.

> FN14. RCW 19.86.920.

[8] The remaining question on this issue is whether damages for pain and suffering may be awarded under the CPA.[FN15] The damages which are recoverable under **1064 the CPA are injuries to plaintiff's "business or property".[FN16] We have not previously decided whether personal injuries are recoverable under a CPA claim.[FN17] In *Stevens v. Hyde Athletic Indus., Inc.*, 54 Wash.App. 366, 369, 773 P.2d 871 (1989), the court looked to federal law as directed in RCW 19.86.920 and quoted *318*Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979), which considered the phrase "injured in his business or property". As *Reiter* explained,

> FN15. Although such damages were apparently awarded at trial under the product liability act (PLA) cause of action rather than the CPA cause of action, it is necessary for us to address this issue because of our subsequent conclusions regarding the PLA issue.
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> FN16. RCW 19.86.090.
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> FN17. *See Schmidt v. Cornerstone Invs., Inc.*, 115 Wash.2d 148, 168, 795 P.2d 1143 (1990) (declining to decide if emotional damages are available under the CPA).

The phrase "business or property" also retains restrictive significance. It would, for example, exclude personal injuries suffered.

The *Stevens* court, 54 Wash.App. at 370, 773 P.2d 871, concluded that had our Legislature intended to include actions for personal injury within the coverage of the CPA, it would have used a less restrictive phrase than injured in his or her "business or property".[FN18] We agree. Personal injuries are not compensable damages under the CPA. *See also Keyes v. Bollinger*, 31 Wash.App. 286, 295, 640 P.2d 1077 (1982), where it is noted that if a plaintiff suffers injury other than to "business or property", the injury is not compensable under the act. In fact, in this case, Dr. Klicpera's attorney conceded to the trial court that mental (and consequential physical) pain and suffering damages were not compensable under the Consumer Protection Act.

> FN18. *See, e. g., Moore v. Eli Lilly & Co.*, 626 F.Supp. 365, 367 (D.Mass.1986); *Hamman v. United States*, 267 F.Supp. 420, 432 (D.Mont.1967).

We therefore conclude that the damages the jury awarded for loss of reputation are compensable under the Consumer Protection Act claim, so long as the

damages are supported by the evidence. However, the damages awarded for the physician's mental "pain and suffering" (and its objective physical manifestations) are not compensable under the CPA.

As the trial court and the litigants correctly recognized, such pain and suffering damages would only be compensable if a product liability action is cognizable under the facts of this case. This then brings us to the issue of whether the product liability cause of action was properly submitted to the jury.

ISSUE TWO.

[9] CONCLUSION. We conclude that a physician who prescribes a drug which injures a patient does not have a cause of ***319** action to recover from the drug company for his or her own emotional pain and suffering [FN19] under the product liability act (RCW 7.72).

> FN19. Although the doctor testified he had developed stomach problems and taken antacid medication as a result of the stress of the lawsuit, the evidence regarding his pain and suffering were essentially relating to mental and emotional pain and suffering regarding his patient's injuries and the ensuing litigation.

The manufacturer's liability section of the product liability act, RCW 7.72.030(1), provides as follows:

A product manufacturer is subject to liability to a claimant if the claimant's harm was proximately caused by the negligence of the manufacturer in that the product was not reasonably safe as designed or not reasonably safe because adequate warnings or instructions were not provided.

In this case we are faced with the unusual situation of a plaintiff (who is not a relative of the injured party) seeking to recover pain and suffering damages as a result of the physical injury suffered by another. Because the Consumer Protection Act (which is a viable cause of action under these facts) does not allow this type of damages, we must determine whether under the facts presented the Legislature intended to allow such damages under the product liability act (PLA) (RCW Ch. 7.72).

Although the drug company asks us to disallow a products liability cause of action because the physician is not a proper ****1065** "claimant" under the meaning of the PLA, or because these attenuated damages are not the proximate cause of the breach, we choose to resolve this case on narrower grounds. We perceive the most precise inquiry here to be whether these pain and suffering damages are the type of "harm" contemplated as recoverable by the Legislature under the PLA.

The PLA, RCW 7.72.010(6) defines "harm" as follows:

"Harm" includes any damages *recognized by the courts of this state:* PROVIDED, That the term "harm" does not include direct or consequential economic loss ...

(Italics ours.)

Although most of the definitional section of the Washington PLA was based upon the Model Uniform Product Liability***320** Act,[FN20] the Senate Report [FN21] explains that the Select Committee on Tort and Product Liability Reform chose not to use the definition of "harm" contained in the uniform act and instead adopted a definition allowing for the continued development of the concept through case law. We must, therefore, look to Washington law to define "harm" for purposes of the PLA.[FN22]

> FN20. Model Uniform Product Liability Act (UPLA), 44 Fed.Reg. 62,713 (1979); *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 763, 818 P.2d 1337 (1991).
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> FN21. Senate Select Comm. on Tort & Product Liability Reform, *Final Report* 32 (Jan. 1981); *see also* Senate Journal, 47th Legislature (1981), at 630.
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> FN22. Talmadge, *Washington's Product Liability Act,* 5 U. Puget Sound L.Rev. 1, 10 (1981-1982).

In this case, the product (the drug) harmed the child which in turn caused emotional distress to the prescribing physician for which he seeks to recover

mental, and claimed physical, pain and suffering damages. We find no directly applicable product liability case law in this state. In prior Washington cases brought under the PLA, the "harm" involved has been for injury caused directly *by the product* to the person or the property of the claimant.[FN23] In this case, however, we are asked to extend recovery for a kind of harm that we do not perceive as having been contemplated by Washington law, that is, emotional distress suffered by a physician as a result of injury to his patient. We can find guidance in the cases wherein damages for emotional harm are available to a plaintiff based upon injuries to a third person. Generally, in cases where emotional distress is not a consequence of physical injury, or caused by intentional conduct, Washington courts have been cautious about extending a right to recovery, especially when the distress is the consequence of an injury suffered by a third person.[FN24] If the law ***321** were otherwise, liability would potentially be endless. Emotional damages caused by a plaintiff witnessing, or learning of, a third person's physical injuries are only compensable in Washington under very limited circumstances. For example, in Gain v. Carroll Mill Co., 114 Wash.2d 254, 787 P.2d 553 (1990), which involved a negligent infliction of emotional distress action, mental distress damages were held *not* to be compensable even to close family members, when they were not present at the scene of a fatal accident.[FN25] If we were to allow emotional distress damages to be awarded to physicians as a result of injuries sustained by their patients, we would be substantially extending our prior law regarding when a plaintiff could recover emotional distress damages caused by the physical injuries of a third person. We decline to do so.

FN23. *See, e.g.,* Avers v. Johnson & Johnson Baby Prods. Co., 117 Wash.2d at 763, 818 P.2d 1337; *Touchet Vly. Grain Growers, Inc. v. Opp & Seibold Gen. Constr. Co.*, 119 Wash.2d 334, 831 P.2d 724 (1992); *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 840 P.2d 860 (1992).

FN24. *E.g.,* Gain v. Carroll Mill Co., 114 Wash.2d 254, 260, 787 P.2d 553 (1990).

FN25. *See also* Hunsley v. Giard, 87 Wash.2d 424, 553 P.2d 1096 (1976); *Schurk v. Christensen*, 80 Wash.2d 652, 497 P.2d 937 (1972).

Our cases which involve intentional torts do not provide a basis to award damages for pain and suffering here. In those cases, emotional distress damages can be awarded as a component of total damages.****1066** [FN26] The level of fault involved in a PLA claim, however, may be considerably less than that in an intentional tort claim. In a product liability claim, liability can be predicated on negligence or even on strict liability.[FN27] Therefore, our intentional tort cases do not provide a state law basis for concluding that the physician's claimed harm here is compensable under the PLA.

FN26. *See, e.g.,* Nord v. Shoreline Sav. Ass'n, 116 Wash.2d 477, 805 P.2d 800 (1991).

FN27. *Falk v. Keene Corp.*, 113 Wash.2d 645, 782 P.2d 974 (1989).

Two cases in other jurisdictions have allowed professionals to recover their own damages when their patients were injured by a product. However, only pecuniary damages were recovered; emotional pain and suffering were either not sought or were disallowed. In Oksenholt v. Lederle Labs., 294 Or. 213, 656 P.2d 293 (1982), a doctor who prescribed a drug which caused injury to his patient was allowed to recover lost earning capacity and lost income caused by harm to the ***322** physician's reputation. In Kennedy v. McKesson Co., 58 N.Y.2d 500, 504, 507, 462 N.Y.S.2d 421, 423, 425, 448 N.E.2d 1332, 1334, 1336 (1983), a dentist who accidentally killed his patient due to defective equipment was allowed to recover pecuniary damages, but not damages for emotional injury which were a consequential result of the breach.

The product liability act was designed to address a liability insurance crisis which the Legislature felt threatened the availability of socially beneficial products and services.[FN28] We would not be furthering the intent of the Legislature if we extended liability so far that drug manufacturers would be chilled in marketing products and developing new ones. In the present case, a Consumer Protection Act claim was proved and substantial damages *were* awarded to the physician. We have upheld that. A physician may thus be able to recover pecuniary damages (damages

to reputation); however, the physician's emotional pain and suffering are not recoverable under either the Consumer Protection Act or the product liability act.

FN28. *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wash.2d 847, 850, 774 P.2d 1199, 779 P.2d 697 (1989); RCW 7.72.010 Preamble; *Falk v. Keene Corp.* 113 Wash.2d 645, 649, 782 P.2d 974 (1989); Talmadge, *Washington's Product Liability Act*,5 U. Puget Sound L.Rev. 1 (1981-1982).

Because we conclude that the facts of this case do not support a cause of action under the PLA for the doctor's pain and suffering damages, we need not address the drug company's other arguments as to why the PLA should not apply.

ISSUE THREE.

[10] CONCLUSION. The Washington product liability act (RCW 7.72), created a single cause of action for product-related harms, and supplants previously existing common law remedies, including common law actions for negligence.

Dr. Klicpera argues that if a product liability claim under the PLA is disallowed by this court, we should then allow a negligence claim based upon the drug company's failure to warn of its product's dangers. We decline to do so. After the enactment of the PLA, such a claim is not viable in a products case.

***323** As we explained in *Washington Water Power Co. v. Graybar Elec. Co.*, 112 Wash.2d 847, 850-55, 860, 774 P.2d 1199, 779 P.2d 697 (1989), the PLA preempts traditional common law remedies for product-related harms. A claim previously based on negligence is within the definition of a product liability claim.[FN29] Since this present cause of action is predicated upon a failure to warn by a product manufacturer, any negligence cause of action therefor is now preempted by the PLA. Therefore, this product liability claim cannot be maintained on a common law negligence theory.[FN30]

FN29. *Graybar*, 112 Wash.2d at 853, 774 P.2d 1199; RCW 7.72.010(4).

FN30. *See* Talmadge, *Washington's Product Liability Act*,5 U. Puget Sound L.Rev. 1, 8 n. 39 (1981-1982).

The PLA does allow claimants to bring a Consumer Protection Act claim since that ****1067** cause of action has been specifically exempted from the preemptive effect of the product liability act.[FN31]

FN31. RCW 7.72.010(4); Talmadge, *Washington's Product Liability Act*,5 U. Puget Sound L.Rev. 1, 10 (1981-1982); *Graybar*, 112 Wash.2d at 850, 774 P.2d 1199.

ISSUE FOUR.

[11] CONCLUSION. The trial court did not err in declining to allow WSPIE's Consumer Protection Act claim to be submitted to the jury.

Dr. Klicpera's insurer, WSPIE, argues that the $500,000 it paid to the Pollocks in settlement of the malpractice claim should have been recoverable from the drug company under the Consumer Protection Act. The trial court did allow WSPIE's fraud cause of action against the drug company to go to the jury. However, the jury found in favor of the defendant drug company on this issue. The trial court declined to allow WSPIE's Consumer Protection Act claim to be submitted to the jury. We agree.

Such an action is simply an indirect attempt to obtain contribution from the drug company. WSPIE, on behalf of Dr. Klicpera, paid $500,000 in settlement of the Pollocks' claim for malpractice. A hearing determined that settlement to be reasonable. Thereafter, Fisons settled with the Pollocks ***324** and that settlement was also determined to be reasonable. Hence, as a matter of law each party's potential contribution rights available under RCW 4.22.040 were extinguished.[FN32]

FN32. *Kirk v. Moe*, 114 Wash.2d 550, 556, 789 P.2d 84 (1990) (a settling defendant is released from all liability, including contribution).

RCW 4.22.060(2) provides in pertinent part:

A release ... entered into by a claimant and a person liable discharges that person from all liability for contribution, ...

After the drug company settled with the Pollocks, the court held a reasonableness hearing and ordered that "Dr. Klicpera's contribution/indemnity claims against Fisons are extinguished pursuant to RCW 4.22.060." WSPIE was acting on behalf of its insured and hence could have been subrogated to the rights of its insured. However, once Fisons settled, Dr. Klicpera's contribution rights for reimbursement for amounts paid to the Pollocks were extinguished. To allow the insurance company to bring a consumer protection action against Fisons for what is in reality contribution or indemnity would be to allow an "end-run" around the tort reform act (RCW 4.22).

As Senator Talmadge, Chairman of the Senate Select Committee on Tort and Product Liability Reform, explained,

the Act provides that where a party enters into a settlement agreement with the claimant, if the settlement agreement is a reasonable one, all liability on the part of that defendant for contribution and for claims by the claimant is discharged. The senate select committee felt that the process of settlement of lawsuits must be encouraged. The ability of a party entering into a settlement with the claimant to be discharged from all claims, including contribution, was essential to fulfill the policy of encouraging settlement.

Talmadge, *Washington Product Liability Act,*5 U.Puget Sound L.Rev. 1, 18-19 (1981-1982).

Therefore, neither the doctor, nor the doctor's insurer, is entitled to recover settlement amounts paid to the Pollocks after their contribution/indemnity rights were extinguished.

The trial court did not err when it disallowed WSPIE's Consumer Protection Act claim.

***325** ISSUE FIVE.

[12] CONCLUSION. We hold that the trial court did not err in excluding the testimony of the drug company's sales representative based upon Rule of Evidence 406.

The drug company sought to introduce testimony from its sales representative, Kevin Cobley, that it was his habit to discuss the dangers of theophylline and ****1068** a particular study which included information about the risks of theophylline when he visited physicians, and, therefore, he must have discussed those risks with Dr. Klicpera. Mr. Cobley did not have any specific memory of talking with Dr. Klicpera about the study. He testified, however, that his usual "habit" was to discuss the subject, and this testimony was sought to be introduced pursuant to ER 406.

ER 406 provides:

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Although the rule does not define "habit", the advisory committee note to Fed.R.Evid. 406 quotes Professor McCormick's description of habitual behavior as "consisting of semi-automatic, almost involuntary and invariabl[y] specific responses to fairly specific stimuli." [FN33] The comments to our ER 406 state that evidence offered under the rule could, of course, still be excluded if the court determines that the conduct sought to be shown did not reach the level of habit or routine.[FN34]

FN33. Comment, ER 406; 5 K. Tegland, Wash.Prac., *Evidence* 459 (3d ed. 1989).

FN34. 5 K. Tegland, at 459.

Mr. Cobley told the trial court that his presentation to physicians "would go virtually the same way with every physician". In response to that court's question whether he could testify that he did discuss these things with Dr. Klicpera, Mr. Cobley responded "I would say its highly unlikely that I did not".

***326** Although Mr. Cobley's business notes of November 8, 1984 indicated Dr. Klicpera was "Impressed with Furukawa study ...",[FN35] Mr. Cobley also stated that there was merely "some reference" in that

study to viral illness and problems with theophylline toxicity.[FN36] After a discussion with thecourt, Mr. Cobley admitted he did not have a copy of the study to give Dr. Klicpera on the date that he noted the physician was "impressed" with it.[FN37] The trial court concluded that Mr. Cobley's behavior did not rise to the level of a habit.

FN35. Report of Proceedings, at 3363.

FN36. Report of Proceedings, at 3366.

FN37. Report of Proceedings, at 3374-78.

As with most evidentiary questions, determination of admissibility of habit evidence is within the trial court's discretion.[FN38] Since habit is "semi-automatic, almost involuntary and invariabl[y] specific responses to fairly specific stimuli", we conclude the trial court did not abuse its discretion in holding that Mr. Cobley's conduct did not reach the level of habit and was thus inadmissible.[FN39]

FN38. *Norris v. State,* 46 Wash.App. 822, 733 P.2d 231 (1987); *Maehren v. Seattle,* 92 Wash.2d 480, 599 P.2d 1255 (1979), *cert. denied,* 452 U.S. 938, 101 S.Ct. 3079, 69 L.Ed.2d 951 (1981).

FN39. *Compare Meyers v. Meyers,* 5 Wash.App. 829, 491 P.2d 253 (notary's business practice, which she said never varied, was admissible as habit evidence), *aff'd,* 81 Wash.2d 533, 503 P.2d 59, 59 A.L.R.3d 1318 (1972)*with Meder v. Everest & Jennings, Inc.,* 637 F.2d 1182 (8th Cir.1981) (on issue of whether police officer's notes were based upon the statements of accident victim, the fact the officer normally spoke to the victims first did not rise to the level of habit under Fed.R.Evid. 406).

ISSUE SIX.

[13] CONCLUSION. We hold that the plaintiffs' state law claims were not impliedly preempted by the Federal Food and Drug Administration (FDA) guidelines.

The drug company argues that the doctor's state law remedies are preempted by the Federal Food and Drug Administration's issuance of uniform class labeling guidelines for theophylline. We disagree.

[14] Federal preemption of state law may occur if Congress passes a statute that expressly preempts state law, if ***327** Congress preempts state law by occupation of the entire field of regulation or if the state law conflicts with federal law due to impossibility****1069** of compliance with state and federal law or when state law acts as an obstacle to the accomplishment of the federal purpose.[FN40]

FN40. *See, e.g., Wisconsin Pub. Intervenor v. Mortier,* 501 U.S. 597, ---- - ----, 111 S.Ct. 2476, 2481-82, 115 L.Ed.2d 532 (1991).

There is no allegation here of express preemption,[FN41] or of any intent to occupy the field. Rather, the drug company argues that preemption should be implied because the state law stands as an obstacle to the accomplishment of the full purposes of the FDA guidelines.

FN41. We recognize that there are cases decided under FDA regulation where the federal law does preempt state tort law. *See Berger v. Personal Prods., Inc.,* 115 Wash.2d 267, 797 P.2d 1148 (1990), *cert. denied,* 499 U.S. 961, 111 S.Ct. 1584, 113 L.Ed.2d 649 (1991). However, those cases involve the *express* preemptive power of 21 U.S.C. § 360k which applies only when State law claims involve "medical devices" and not prescription drugs. *Spychala v. G.D. Searle & Co.,* 705 F.Supp. 1024, 1029 (D.N.J.1988).

[15][16] As we recently reiterated, there is a strong presumption against finding preemption in an ambiguous case and the burden of proof is on the party claiming preemption.[FN42] The presumption against preemption is even stronger with state regulation regarding matters of health and safety.[FN43] State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.[FN44] The defendants here have presented no statutory language or history which supports a conclusion that Congress intended to preempt state law on the subject of pharmaceutical manufacturers' liability under state law. In

fact, case law and scholarly comment indicates that the FDA regulations do not have a preemptive effect on state laws.

FN42. *Inlandboatmen's Union v. Department of Transp.*, 119 Wash.2d 697, 702, 836 P.2d 823 (1992).

FN43. *Abbot v. American Cyanamid Co.*, 844 F.2d 1108, 1112 (4th Cir.1988), *cert. denied*, 488 U.S. 908, 109 S.Ct. 260, 102 L.Ed.2d 248 (1988); *Inlandboatmen's*, 119 Wash.2d at 705, 836 P.2d 823.

FN44. *Mortier*, 501 U.S. at ----, 111 S.Ct. at 2482.

***328** One recent text summarizes the law on this issue:

Effect of compliance with FDA regulations

The Food and Drug Administration (FDA) has promulgated numerous regulations governing the labels and warnings required for drugs. Evidence of compliance with FDA regulations does not necessarily relieve a drug manufacturer of liability for failure to furnish an adequate warning of possible side effects, because the FDA regulations merely set minimum requirements, and does not relieve the manufacturer of the duty to warn of possible side effects or dangers of which it has actual or constructive knowledge as an expert in its field; that is, adherence to government standards does not absolve a drug manufacturer of liability to which it would otherwise be subject.

(Footnotes omitted.) 6 *American Law of Products Liability* § 89:9, at 17 (3d ed. 1987). This conclusion is in accord with the weight of authority.[FN45]

FN45. *See, e.g., Spychala v. G.D. Searle & Co.*, 705 F.Supp. 1024 (D.N.J.1988) (FDA regulation of prescription drugs may establish minimum standards for design and warnings, but compliance does not necessarily absolve a manufacturer of tort liability). *Accord, Mahr v. G.D. Searle & Co.*, 72 Ill.App.3d 540, 28 Ill.Dec. 624, 390 N.E.2d 1214 (1979); *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801 (Tex.1978) (fact that a package insert for a prescription drug has been approved by the FDA does not relieve a drug manufacturer of its obligation to communicate an adequate warning where insert did not adequately warn of potential dangers which were known to officials of manufacturer before inadequacy was known to the FDA); *Abbot v. American Cyanamid Co.*, 844 F.2d at 1112 (preemption does not necessarily follow from federal regulation of prescription drugs); *see Tarallo v. Searle Pharmaceutical, Inc.*, 704 F.Supp. 653, 660 (D.S.C.1988); *Graham v. Wyeth Labs.*, 666 F.Supp. 1483, 1491 (D.Kan.1987) (FDA certification is evidence, but not conclusive evidence of a drug manufacturer's reasonableness. Before a court can conclude federal regulations-which traditionally set minimum standards-have preempted the ability of states to protect their citizens through the judicial process, there should be a clear congressional intent), *vacated in part on other grounds*, 851 F.2d 321 (10th Cir.1988); Comment, *Pharmaceutical Product Liability*, 42 Am.Univ.L.Rev. 199 (1992).

****1070** As the Oregon Supreme Court has pointed out:

A party, commenting to the FDA on its proposed rules, criticized the proposed regulations, arguing that they acted to insulate a manufacturer from liability. The agency responded:

"It is not the intent of FDA to influence civil tort liability of the manufacturer or of the physician...."

44 Fed.Reg. 37,437 (1979).

Oksenholt v. Lederle Labs., 294 Or. 213, 220, 656 P.2d 293, 298 (1982).

***329** [17] The Federal Food, Drug and Cosmetic Act does not create any private right of action.[FN46] Hence, if FDA regulations preempt all state law, arguably no cause of action would exist for a violation of the manufacturer's duty to warn physicians of dangers of prescription drugs.[FN47]

FN46. *See, e.g., Raye v. Medtronic Corp.*, 696 F.Supp. 1273, 1274 (D.Minn.1988) and cases cited therein.

FN47. *See Abbot*, 844 F.2d at 1112 (the presumption against preemption is even stronger against preemption of state remedies, like tort recoveries, when no federal remedy exists).

Given the strong presumption against Federal preemption of state laws regarding health and safety issues,[FN48] it is clear that the federal FDA regulations do not have a preemptive effect on state law.

FN48. *Tarallo*, 704 F.Supp. at 658; *Inlandboatmen's*, 119 Wash.2d at 705, 836 P.2d 823.

ISSUE SEVEN.

[18] CONCLUSION. The trial court did not err in refusing to grant a new trial or to reduce the damage award because of the amount of damages awarded by the jury.

The standards for an appellate court overturning a jury's damage award are well settled in Washington.[FN49] In our recent decision in *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 268-69, 840 P.2d 860 (1992), the principles which govern review by an appellate court of a verdict claimed to be excessive as set forth in *Bingaman v. Grays Harbor Comm'ty Hosp.*, 103 Wash.2d 831, 835-37, 699 P.2d 1230 (1985) were reiterated:

FN49. RCW 4.76.030; CR 59(a)(5), (7).

The determination of the amount of damages, particularly in actions of this nature, is primarily and peculiarly within the province of the jury, under proper instructions, and the courts should be and are reluctant to interfere with the conclusion of a jury when fairly made.

... Because of the favored position of the trial court, it is accorded room for the exercise of its sound discretion in such situations. The trial court sees and hears the witnesses, jurors, parties, counsel and bystanders; it can evaluate at first hand such things as candor, sincerity, demeanor, intelligence and any surrounding incidents. The appellate court, ***330** on the other hand, is tied to the written record and partly for that reason rarely exercises this power.

An appellate court will not disturb an award of damages made by a jury unless it is outside the range of substantial evidence in the record, or shocks the conscience of the court, or appears to have been arrived at as the result of passion or prejudice.

...

Before passion or prejudice can justify reduction of a jury verdict, it must be of such manifest clarity as to make it unmistakable....

(Footnotes omitted.) *Washburn*, 120 Wash.2d at 268-69, 840 P.2d 860 (quoting *Bingaman*).

[19][20] The appellate court does not engage in exactly the same review as the trial court because deference and weight are also given to the trial court's discretion in denying a new trial on a claim of excessive damages. The verdict is strengthened by denial of a new trial by the trial court.[FN50] While either the trial court or an appellate court has the power to reduce an award or order a new trial based on excessive damages,****1071** [FN51]"appellate review is most narrow and restrained" and the appellate court "rarely exercises this power".[FN52]

FN50. *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 271, 840 P.2d 860 (1992).

FN51. *Malstrom v. Kalland*, 62 Wash.2d 732, 738-39, 384 P.2d 613 (1963).

FN52. *Washburn*, 120 Wash.2d at 269, 840 P.2d 860 (quoting *Bingaman*, 103 Wash.2d at 835, 699 P.2d 1230).

The drug company relies upon *Himango v. Prime Time Broadcasting, Inc.*, 37 Wash.App. 259, 680 P.2d 432,*review denied*, 102 Wash.2d 1004 (1984) in which the Court of Appeals concluded that the jury's belief that the plaintiff's reputation had suffered had to have been based on speculation. However, in *Himango*, the appellate court was deciding if the trial court properly reduced the jury's verdict and not, as

here, whether the appellate court should reduce a verdict despite the trial court's refusal to do so.

Bearing the very restrictive appellate review standard in mind, our inquiry is whether the award is outside the range of substantial evidence in the record, shocks the conscience of the court or clearly appears to have been arrived at as a result of passion or prejudice.

***331** The rule in Washington on the question of sufficiency of the evidence to prove damages is that: " '[t]he fact of loss must be established with sufficient certainty to provide a reasonable basis for estimating that loss.' " [FN53] The drug company asks this court to make comparisons between this case and damage awards in other cases. In *Washburn,* we emphatically disallowed such comparisons; [FN54] the focus, rather, must be on the particular injuries in this case.

> FN53. *Haner v. Quincy Farm Chems., Inc.,* 97 Wash.2d 753, 757, 649 P.2d 828 (1982) (quoting *Wilson v. Brand S Corp.,* 27 Wash.App. 743, 747, 621 P.2d 748 (1980)). *See also Lewis River Golf, Inc. v. O.M. Scott & Sons,* 120 Wash.2d 712, 717, 845 P.2d 987 (1993) (doctrine that damages must be proved with reasonable certainty is concerned more with the fact of damage than the extent or amount of damages).
>
> FN54. *Washburn,* 120 Wash.2d at 266-68, 840 P.2d 860.

The evidence the jury heard regarding reputation damage was Dr. Klicpera's own opinion as to such loss and a statement by the trial court that there had been newspaper accounts reporting Dr. Klicpera's alleged medical malpractice. Dr. Klicpera essentially testified that he thought there was certainly a loss to his reputation in the community, and that other physicians had been ignoring him and that he no longer enjoyed his practice and had taken steps to find administrative work.

Pursuant to the drug company's request, the trial court initially ruled that the newspaper articles regarding Dr. Klicpera's incompetence were inadmissible. However, after expressing concern that Dr. Klicpera's reputation damages would not be provable without reference to the press articles, the court subsequently read the following statement to the jury:

Before this trial started, the press disseminated the fact in the community that Dr. Klicpera had been sued for medical malpractice on behalf of Jennifer Pollock and her parents. This information was supplied to the press by the attorneys representing the Pollocks.

This statement resulted from the fact that there was a front page article in the physician's hometown newspaper which indicated that Dr. Klicpera knew enough about the ***332** drug to use it safely but failed to apply that knowledge, and an article on the front page of the Seattle Post-Intelligencer with a statement from the drug company's representative saying the settlement was made with the Pollocks on the possibility that the company could become a deep pocket in a jury award based on the physician's negligence and that the child's injuries were the result of mistreatment by the physician who overdosed the child. According to unrefuted representations made to the trial court, articles also were published in Spokane, Chicago and Los Angeles.

Damages for loss of professional reputation are not the type of damages which can be proved with mathematical certainty and are usually best left as a question of fact for the jury. Given the narrow standard of ****1072** review and the deference accorded to both the jury's discretion, and the trial court's refusal to overturn the award, we conclude that the admitted evidence was sufficient to sustain the jury's award for damages to Dr. Klicpera's reputation.

[21] There was, however, one portion of damages which was awarded under the Consumer Protection Act which must be disallowed. The jury awarded $150,000 for income loss due to lost consultations; the trial court reduced that award to $2,250. The problem with this award is that it conflicts with the trial court's conclusion that damages based upon income lost due to time spent for trial were not recoverable. There is no challenge to this conclusion.

The physician testified that because of his unavailability due to this trial, he missed some consultations he otherwise would have done; these consultations were all foregone because of time spent in or preparing for trial. The trial court had disallowed damages based upon income lost due to time spent for the law-

suit. The trial court recognized that "all of the losses of consultation ... were because he was unavailable" due to trial matters. However, the trial court later reduced the consultation award from $150,000 to $2,250. In light of the trial court's unchallenged conclusion that damages for time lost due to trial preparation were not recoverable, we conclude *333 there was no evidence to support an award for loss of consultations.

[22] The drug company also argues that the award was based upon obvious passion or prejudice. It bases this partly on certain portions of the plaintiffs' attorneys' closing argument. They argue that the court order, stating that alleged litigation fraud and alleged discovery violations should not be presented to the jury, was violated in closing argument. However, the court order, while disallowing reference to discovery disputes, allowed evidence regarding whether certain documents were known to plaintiffs prior to settlement and whether experts had access to the discovery documents when opinions were expressed. While the timing of witnesses' knowledge may have implied "litigation fraud" or discovery violations, such testimony (introduced without objection) and argument referring to it were not in violation of the trial court's order.

In closing argument, the physician's attorney drew a comparison between the number of theophylline side effects reported in a Group Health study (which had been described to the jury during trial) to the number of people who would be shot per 10,000 people if a terrorist were to shoot a given number of times inside Husky Stadium. The drug company now argues that this analogy was so misleading that this court should overturn the jury's decision because it was based on passion or prejudice. This argument, however, was generally based upon the statistics in the study and upon numbers testified to by Fisons' own expert. Most importantly, there was no contemporaneous objection to this analogy. Any perceived inaccuracies in the analogy drawn by plaintiffs' counsel could have been drawn to the attention of the trial court which could have made a curative instruction if necessary.

[23] Even when portions of closing argument are improper or inaccurate, failure to make contemporaneous objections usually waives any error unless the argument was so flagrant and prejudicial as not to be subject to a curative *334 instruction.[FN55] This is especially true when the trial court instructs the jury that arguments are not evidence and that argument not supported by evidence is to be disregarded.[FN56] In this case, the jury was so instructed and with regard to the debatably improper arguments no contemporaneous objections were made.

FN55. *Rasor v. Retail Credit Co.*, 87 Wash.2d 516, 532, 554 P.2d 1041 (1976); *Nelson v. Martinson*, 52 Wash.2d 684, 689, 328 P.2d 703 (1958).

FN56. *E.g.*, *Jones v. Hogan*, 56 Wash.2d 23, 31-32, 351 P.2d 153 (1960).

[24] In order to overturn a jury's verdict based on passion or prejudice, it must be of such manifest clarity as to make it **1073 unmistakable.[FN57] We do not find such evidence here and decline to disturb the jury's award of damages for loss of reputation.

FN57. *James v. Robeck*, 79 Wash.2d 864, 870, 490 P.2d 878 (1971); *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 269, 840 P.2d 860 (1992).

Since we have concluded that the physician's claims of pain and suffering are not compensable, we do not address the issue of sufficiency of the evidence to support the jury's pain and suffering award of $2,137,500.

ISSUE EIGHT.

CONCLUSION. The trial court did not abuse its discretion in its calculation of the attorneys' fees awarded pursuant to the Consumer Protection Act.

The drug company argues that the trial court erred in (1) calculating the attorneys' fees based upon an "enhanced hourly rate" and (2) by using a 1.5 multiplier of the lodestar based upon quality and contingency.

[25] Attorneys' fees available to a successful Consumer Protection Act plaintiff under RCW 19.86.090 are calculated as follows: (1) establishing a "lodestar" fee by multiplying a reasonable hourly rate by the number of hours reasonably expended on theories

necessary to establish the elements of a Consumer Protection Act cause of action; and (2) adjusting that lodestar up or down based upon the contingent nature of success (risk) and, in exceptional circumstances, based also on the quality of work performed.[FN58] The burden of justifying*335 any deviation from the lodestar rests on the party proposing such an alteration.[FN59]

FN58. *Bowers v. Transamerican Title Ins. Co.*, 100 Wash.2d 581, 593-99, 675 P.2d 193 (1983); *Travis v. Washington Horse Breeders Ass'n*, 111 Wash.2d 396, 409, 759 P.2d 418 (1988); *see also Scott Fetzer Co. v. Weeks*, 114 Wash.2d 109, 786 P.2d 265 (1990).

FN59. *Bowers*, 100 Wash.2d at 598, 675 P.2d 193 (quoting *Copeland v. Marshall*, 641 F.2d 880, 892 (D.C.Cir.1980)).

[26] Attorneys seeking fees must provide reasonable documentation of work performed to calculate the number of hours and when attorneys have "an established rate for billing clients", that rate will likely be considered as reasonable.[FN60]

FN60. *Bowers*, 100 Wash.2d at 597, 675 P.2d 193.

A trial court's fee award will not be overturned absent an abuse of discretion.[FN61] Whether attorneys' fees are reasonable is a factual inquiry depending on the circumstances of a given case and the trial court is accorded broad discretion in fixing the amount of attorneys' fees.[FN62]

FN61. *Travis*, 111 Wash.2d at 410, 759 P.2d 418; *Bowers*, 100 Wash.2d at 595, 675 P.2d 193.

FN62. *Schmidt v. Cornerstone Invs., Inc.*, 115 Wash.2d 148, 169, 795 P.2d 1143 (1990).

[27] In this case, the trial court established the hourly fee by averaging the reduced rate charged by the attorneys in medical malpractice defense cases with the hourly rate charged in their other practice. There is no convincing showing that the trial court abused its discretion in arriving at the hourly fee in this manner. That hourly fee was multiplied by 50 percent of the hours expended during the entire case, the amount the trial court decided was attributable to theories necessary to prove the Consumer Protection Act claim. We find no abuse of discretion in this conclusion and decline to disturb the trial court's calculation of the "lodestar" fee.

[28] The trial court then multiplied the lodestar amount by 1.5 based upon the fact that part of the fees were contingent upon success, and on the quality of the work performed by plaintiffs' attorneys in a difficult case.

[29] Quality can be a valid enhancer when the representation is unusually good, taking into account the level of skill normally expected of an attorney commanding the hourly rate used to compute the "lodestar".[FN63] A multiplier for "quality" is seldom sanctioned by this court because quality of a *336 lawyer's work is usually reflected**1074 in the establishment of the lawyer's hourly rate.[FN64] However, in this case exceptional quality was not the only factor which caused the trial court to enhance the lodestar.

FN63. *Bowers*, 100 Wash.2d at 599, 675 P.2d 193.

FN64. *Travis*, 111 Wash.2d at 411, 759 P.2d 418; Washington State Bar Ass'n, *Consumer Protection, Antitrust and Unfair Business Practices Law Developments* 185 (2d ed. 1988) (hereinafter *Consumer Protection*).

This case was tried partially on a guaranteed fee arrangement and the remainder on a contingency agreement. Whether the difficult and novel nature of this case combined with what the court found to be high quality work and partial contingency supports the use of a 1.5 multiplier is a close question. The trial court found that the likelihood of success was low because Dr. Klicpera's attorneys did not initially have access to what turned out to be the determinative "smoking gun" documents. The 50 percent premium which reflects the partially contingent nature of the representation together with the unusually high quality of work performed in this novel case does not appear to us from the record to be an abuse of the trial court's discretion. This being a close question,

we defer to the trial court's discretion and sustain its calculation of attorneys' fees.

[30] Attorneys' fees on appeal are recoverable under the Consumer Protection Act.[FN65] Because of the factfinding required to support such fees, remand to the trial court for determination of reasonable fees on appeal is appropriate in this case.[FN66]

FN65. *Bowers*, 100 Wash.2d at 602, 675 P.2d 193.

FN66. *Consumer Protection*, at 177-78; RAP 18.1(i).

ISSUE NINE.

[31] CONCLUSION. The trial court applied an erroneous legal standard when ruling on the motion for sanctions for discovery abuse and erred when it refused to sanction the drug company and/or its attorneys for violation of CR 26(g).

The doctor and his insurer, Washington State Physicians Insurance and Exchange Association (hereinafter referred to ***337** collectively as "the doctor"), asked the trial court to sanction the drug company and its lawyers for discovery abuse. This request was based on the fact that at least two documents crucial to the doctor's defense as well as to the injured child's case were not discovered until March of 1990-more than 1 year after the doctor had settled with the child, nearly 4 years after the complaint was filed and approximately 1 month before the scheduled trial date. The two documents, dubbed the "smoking guns" by the doctor, show that the drug company knew about, and in fact had warned selected physicians about, the dangers of theophylline toxicity in children with viral infections at least as early as June 1981, 4 years before Jennifer Pollock was injured.

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.

A motion for sanctions based on discovery abuse was heard first by a special discovery master on March 28, 1990, before the child's case was settled. The special master ruled that he could not find "on the basis of this record that there was an *intentional* withholding of this document." (Italics ours.) Clerk's Papers, at 9693. The special master then turned to what he determined was the more relevant issue, additional and full discovery of other theophylline-related documents in the drug company's possession. The special master ordered the drug company's attorneys to turn over any immediately available documents concerning theophylline to attorneys for the child and the doctor by noon the next day and to review the remainder of the drug company's files and produce other relevant documents at the end of 2 weeks. The next day, the second "smoking gun", a 1985 internal memorandum describing theophylline toxicity in children, was delivered along with about 10,000 other documents.

Although other documents were relevant to the case, the two smoking gun ****1075** documents were the most important. The first, a letter, dated June 30, 1981, discussed an article that ***338** contained a study confirming reports "of life threatening theophylline toxicity when pediatric asthmatics ... contract viral infections." Exhibit 3. The second, an interoffice memorandum, dated July 10, 1985, talks of an "epidemic" of theophylline toxicity and of "a dramatic increase in reports of serious toxicity to theophylline." Exhibit 7.

Both documents contradicted the position taken by the drug company in the litigation, namely, that it did not know that theophylline based medications were potentially dangerous when given to children with viral infections.

After the 1985 memorandum was discovered and still prior to trial, the special master's denial of the sanctions motion was appealed and affirmed, without specific findings, by a judge of the Superior Court (Judge Knight), who essentially deferred to the special master.

The motion for sanctions was renewed and heard by another judge of the Superior Court, the trial judge (Judge French), at the close of trial. The trial court declined to impose sanctions, deferring to the earlier decisions of the special master and Judge Knight. The doctor then appealed the denial of his sanctions motion directly to this court.

The standard of review to be applied to sanctions decisions under CR 11 and CR 26(g) has not yet been specifically articulated by this court.[FN67]

FN67. *See* *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 218, 829 P.2d 1099 (1992) (reviewing the imposition of sanctions under CR 11 but declining, in that case, to establish a standard of review).

The doctor urges us to review the sanctions decision *de novo.* However, decisions either denying or granting sanctions, under CR 11 or for discovery abuse, are generally reviewed for abuse of discretion.[FN68] We hold that the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard.

FN68. *See, e.g.*, *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 2461, 110 L.Ed.2d 359 (1990) (appeal from the imposition of Fed.R.Civ.P. 11, which is substantially similar to Washington's CR 11); *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642, 96 S.Ct. 2778, 2780, 49 L.Ed.2d 747 (1976) (abuse of discretion standard applied in reviewing the imposition of sanctions for discovery abuse); *Snedigar v. Hoddersen*, 114 Wash.2d 153, 169, 786 P.2d 781 (1990) (sanctions imposed for failure to comply with discovery order would be reviewed for abuse of discretion). Furthermore, each of the three divisions of this state's Court of Appeals has determined that the abuse of discretion standard should be applied when reviewing sanctions imposed for violation of CR 11. *See, e.g.*, *In re Guardianship of Lasky*, 54 Wash.App. 841, 852, 776 P.2d 695 (1989) (Division One); *Lee v. Columbian, Inc.*, 64 Wash.App. 534, 539, 826 P.2d 217 (1991) (Division Two); *Cooper v. Viking Ventures*, 53 Wash.App. 739, 742, 770 P.2d 659 (1989) (Division Three).

***339** The abuse of discretion standard again recognizes that deference is owed to the judicial actor who is " 'better positioned than another to decide the issue in question.' " *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403, 110 S.Ct. 2447, 2459, 110 L.Ed.2d 359 (1990) (quoting *Miller v. Fenton*, 474 U.S. 104, 114, 106 S.Ct. 445, 451, 88 L.Ed.2d 405 (1985)). Further, the sanction rules are "designed to confer wide latitude and discretion upon the trial judge to determine what sanctions are proper in a given case and to 'reduce the reluctance of courts to impose sanctions'.... If a review de novo was the proper standard of review, it could thwart these purposes; it could also have a chilling effect on the trial court's willingness to impose ... sanctions." *Cooper v. Viking Ventures*, 53 Wash.App. 739, 742-43, 770 P.2d 659 (1989) (quoting Fed.R.Civ.P. 11 advisory committee note, 97 F.R.D. 198 (1983)).

[32] A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds.[FN69] A trial court would necessarily abuse its discretion ****1076** if it based its ruling on an erroneous view of the law.[FN70]

FN69. *Holbrook v. Weyerhaeuser Co.*, 118 Wash.2d 306, 315, 822 P.2d 271 (1992); *Watson v. Maier*, 64 Wash.App. 889, 896, 827 P.2d 311,*review denied*, 120 Wash.2d 1015, 844 P.2d 436 (1992).

FN70. *See* *Cooter & Gell*, 496 U.S. at 405, 110 S.Ct. at 2460-61.

[33][34] The doctor asked that sanctions be awarded pursuant to CR 11, CR 26(g), CR 37(d), or the inherent power of the court. CR 11 sanctions are not appropriate where, as ***340** here, other court rules more properly apply.[FN71] Similarly, the sanctions provisions of CR 37 do not apply where, as here, the more specific sanction rule better fits the situation. Furthermore, the inherent power of the court should not be resorted to where rules adequately address the problem.[FN72] Because CR 26(g), the discovery sanctions rule, was adopted to specifically address the type of conduct involved here, it, rather than CR 11, CR 37 or the inherent power of the court, is applicable in the present case.

FN71. *Bryant v. Joseph Tree*, 119 Wash.2d at 223, 829 P.2d 1099; *Clipse v. State*, 61 Wash.App. 94, 97, 808 P.2d 777 (1991) (noting that the discovery sanction rule, CR 26(g), rather than CR 11, governs discovery disclosures).

FN72. Where conduct occurring during the

> course of litigation can be adequately sanctioned under court rules, a court should ordinarily rely on the rules rather than the inherent power of the court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, ----, 111 S.Ct. 2123, 2136, 115 L.Ed.2d 27 (1991).

CR 26(g) was added to our civil rules in 1985; it provides as follows:

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

***341** CR 26(g) has not yet been interpreted by this court. The rule parallels Fed.R.Civ.P. 26(g) (Rule 26(g)) and, like its federal counterpart and like CR 11, CR 26(g) is aimed at reducing delaying tactics, procedural harassment and mounting legal costs.[FN73] Such practices "tend to impose unjustified burdens on other parties, frustrate those who seek to vindicate their rights in the courts, obstruct the judicial process, and bring the civil justice system into disrepute." Schwarzer, *Sanctions Under the New Federal Rule 11-A Closer Look*, 104 F.R.D. 181, 182 (1985) (hereinafter Schwarzer).

> FN73. *Cf.* 3A L. Orland & K. Tegland, Wash.Prac., *Rules Practice* 215 (4th ed. 1992) (discussing CR 11).

Because it is essentially identical to Rule 26(g), this court may look to federal court decisions interpreting that rule for guidance in construing CR 26(g).[FN74] In turn, federal courts analyzing the Rule 26 sanctions provision look to interpretations of ****1077** Fed.R.Civ.P. 11.[FN75] The federal advisory committee notes describe the discovery process and problems that led to the enactment of Rule 26(g) as follows:

> FN74. *See Bryant v. Joseph Tree*, 119 Wash.2d at 218-19, 829 P.2d 1099; *Miller v. Badgley*, 51 Wash.App. 285, 300, 753 P.2d 530,*review denied*, 111 Wash.2d 1007 (1988).
>
> FN75. *Apex Oil Co. v. Belcher Co. of New York, Inc.*, 855 F.2d 1009, 1015 (2d Cir.1988); *Insurance Benefit Adm'rs, Inc. v. Martin*, 871 F.2d 1354, 1360 (7th Cir.1989).

> Excessive discovery and evasion or resistance to reasonable discovery requests pose significant problems....
>
> The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation." *Hickman v. Taylor*, 329 U.S. 495 [67 S.Ct. 385, 91 L.Ed. 451] (1947). Thus the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses. All of this results in excessively costly and time-consuming activities that are disproportionate to the nature of the case, the amount involved, or the issues or values at stake....

***342** ...Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner

that is consistent with the spirit and purposes of Rules 26 through 37. In addition, *Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions....* The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests....

Concern about discovery abuse has led to widespread recognition that there is a need for more aggressive judicial control and supervision. Sanctions to deter discovery abuse would be more effective if they were diligently applied "not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent." *...Thus the premise of Rule 26(g) is that imposing sanctions on attorneys who fail to meet the rule's standards will significantly reduce abuse by imposing disadvantages therefor.*

(Citations omitted. Italics ours.) *Amendments to the Federal Rules of Civil Procedure,* Advisory Committee Note, 97 F.R.D. 166, 216-19 (1983).

The concept that a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials is reflected in decisions of our Court of Appeals. In *Gammon v. Clark Equip. Co.,* 38 Wash.App. 274, 686 P.2d 1102 (1984), *aff'd,* 104 Wash.2d 613, 707 P.2d 685 (1985), the Court of Appeals held that a new trial should have been ordered because of discovery abuse by the defendant. Then Court of Appeals Judge Barbara Durham wrote for the court:

The Supreme Court has noted that the aim of the liberal federal discovery rules is to "make a trial less a game of blindman's b[l]uff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." The availability of liberal discovery means that civil trials

no longer need be carried on in the dark. The way is now clear ... for the parties to obtain the fullest possible knowledge of the issues and facts before trial.

This system obviously cannot succeed without the full cooperation of the parties. Accordingly, the drafters wisely included a provision authorizing the trial court to impose sanctions for unjustified or unexplained resistance to discovery.

(Citations omitted.) *Gammon,* 38 Wash.App. at 280, 686 P.2d 1102.

***343** It was after *Gammon* that this court adopted CR 26(g) in order to provide a deterrent to discovery abuses as well as an impetus for candor and reason in the discovery phase of litigation.

It is with these purposes in mind, that we now articulate the standard to be applied by trial courts which are asked to impose sanctions for discovery abuse.

****1078** On its face, Rule 26(g) requires an attorney signing a discovery response to certify that the attorney has read the response and that after a reasonable inquiry believes it is (1) consistent with the discovery rules and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose such as to harass or cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had, the amount in controversy, and the importance of the issues at stake in the litigation.

[35] Whether an attorney has made a reasonable inquiry is to be judged by an objective standard.[FN76] Subjective belief or good faith alone no longer shields an attorney from sanctions under the rules.[FN77]

FN76. *Bryant v. Joseph Tree, Inc.,* 119 Wash.2d 210, 220, 829 P.2d 1099 (1992); *Rhinehart v. Seattle Times, Inc.,* 59 Wash.App. 332, 341, 798 P.2d 1155 (1990).

FN77. *Miller v. Badgley,* 51 Wash.App. at 299-300, 753 P.2d 530. A proposed amendment to CR 11 would insert an intent requirement. 120 Wash.2d xxix (Proposed Rules of Court, Jan. 6, 1993). No similar amendment to CR 26(g) is currently pending.

[36] In determining whether an attorney has complied with the rule, the court should consider all of the surrounding circumstances, the importance of the evidence to its proponent, and the ability of the opposing party to formulate a response or to comply with the

request.[FN78]

FN78. *Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir.1992). *See also Bryant v. Joseph Tree*, 119 Wash.2d at 220-21, 829 P.2d 1099; G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* 484-91 (1989).

***344** The responses must be consistent with the letter, spirit and purpose of the rules. To be consistent with CR 33, an interrogatory must be "answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer." CR 33(a) (part). A response to a request for production "shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified." CR 34(b) (part).

[37] In applying the rules to the facts of the present case, the trial court should have asked whether the attorneys' certifications to the responses to the interrogatories and requests for production were made after reasonable inquiry *and* (1) were consistent with the rules, (2) were not interposed for any improper purpose and (3) were not unreasonable or unduly burdensome or expensive. The trial court did not have the benefit of our decision to guide it and it did not apply this standard in this case.

Instead, the trial court considered the opinions of attorneys and others as to whether sanctions should be imposed. This was error. Legal opinions on the ultimate *legal* issue before the court are not properly considered under the guise of expert testimony.[FN79] It is the responsibility of the court deciding a sanction motion to interpret and apply the law.

FN79. ER 702; Comment, ER 704; 5A K. Tegland, Wash.Prac., *Evidence* § 309, at 479 (3d ed. 1989); *Orion Corp. v. State*, 103 Wash.2d 441, 461, 693 P.2d 1369 (1985); *Hiskey v. Seattle*, 44 Wash.App. 110, 113, 720 P.2d 867,*review denied*, 107 Wash.2d 1001 (1986).

The trial court then denied sanctions, in part because: (1) The evidence did not support a finding that the drug company *intentionally* misfiled documents to avoid discovery; (2) neither the doctor nor the child had formally moved for a definition of "product" and neither had moved to compel production of documents or answers before requesting sanctions; (3) the conduct of the drug company and its counsel ***345** was consistent with the customary and accepted litigation practices of the bar of Snohomish County and of this state; and (4) the doctor failed to meet his burden of proving that the "evidence of discovery abuse is so ****1079** clear that reasonable minds could not differ on the appropriateness of sanctions." [FN80]

FN80. Report of Proceedings, at 4523.

[38][39] The trial court erred in concluding as it did. As stated above, intent need not be shown before sanctions are mandated. A motion to compel compliance with the rules is not a prerequisite to a sanctions motion. Conduct is to be measured against the spirit and purpose of the rules, not against the standard of practice of the local bar. Furthermore, the burden placed on the doctor by the trial court in this regard was greater than that mandated under the rule.

Additionally, we agree with the doctor's claim that many of the findings of fact entered by the trial court are, instead, erroneous conclusions of law or are not supported by the evidence. For example, the trial court implicitly found in finding of fact 7, and then again in finding of fact 14b, that the "product scope" had been defined by the plaintiffs early in the litigation. The record does not support this finding. In finding of fact 14c the trial court stated that the doctor had been put on notice by the drug company's discovery responses that production of documents "would be limited to responsive documents from Somophyllin Oral Liquid *files*". (Italics ours.) [FN81] There is no evidence in the record to support this finding and while findings of fact which are supported by substantial evidence will not be disturbed on appeal, unsupported findings cannot stand.[FN82]

FN81. Clerk's Papers, at 7653.

FN82. *See Bering v. Share*, 106 Wash.2d 212, 220, 721 P.2d 918 (1986), *cert. dismissed*, 479 U.S. 1050, 107 S.Ct. 940, 93 L.Ed.2d 990 (1987).

[40] A remand for a determination as to whether

sanctions are warranted would be appropriate but is not necessary.[FN83] Where, as here, the trial judge has applied the wrong ***346** legal standard to evidence consisting entirely of written documents and argument of counsel, an appellate court mayindependently review the evidence to determine whether a violation of the certification rule occurred.[FN84] If a violation is found, as it is here, then sanctions are mandated,[FN85] but in fairness to the attorneys and parties, a remand is required for a hearing on the appropriate sanctions required and against whom they should be imposed.

FN83. *Bryant v. Joseph Tree,* 119 Wash.2d at 222, 829 P.2d 1099.

FN84. *Bryant v. Joseph Tree,* 119 Wash.2d at 222, 829 P.2d 1099.

FN85. *Clipse v. State,* 61 Wash.App. 94, 99, 808 P.2d 777 (1991).

We now measure the conduct of the drug company and its attorneys against the standard set forth in the rule.

[41] The drug company was persistent in its resistance to discovery requests.[FN86] Fair and reasoned resistance to discovery is not sanctionable. Rather it is the misleading****1080** nature of the drug company's responses that is contrary to the purposes of discovery [FN87] and which is most damaging to the fairness of the litigation process.

FN86. For example, the drug company's response to the following interrogatory propounded by the doctor demonstrates the resistance to comply with discovery. Although we do not condone this kind of answer, this answer, *alone,* would not warrant sanctions as it does raise some legitimate objections. The doctor's simple request, and the answer thereto, are as follows:

> *INTERROGATORY NO. 2:* Can Theophylline cause brain damage in humans?
>
> *ANSWER: See* general objections [set forth in two pages] attached hereto as Exhibit A and incorporated herein by reference. This interrogatory calls for an expert opinion beyond the scope of Civil Rule 26(b)(4), and is, in any event, premature. Furthermore, this interrogatory appears to call for an opinion based on medical knowledge after January 18, 1986, whereas the relevant time frame is on or before January 18, 1986. In addition, this interrogatory is not reasonably calculated to lead to discovery of admissible evidence under CR 26(b)(1). This interrogatory is also vague, ambiguous and overbroad. For example, the term "cause" is vague and ambiguous in that it does not specify whether it includes indirect, as opposed to direct, causes. The term "brain damage" is similarly vague and ambiguous and is overbroad as to time and scope. For example, it is unclear whether the term "brain" includes the entire central nervous system; it is further unclear whether the term "brain damage" includes temporary as well as permanent changes.
>
> Clerk's Papers, at 4209-10.

FN87. *See, e.g., Jerome v. Pardis,* 240 Mont. 187, 783 P.2d 919 (1989) (holding responses to discovery that attempt to mislead by concealing information which is material to the other party's case are not consistent with the rules and the "spirit of discovery").

***347** The specific instances alleged to be sanctionable in this case involve misleading or "non" responses to a number of requests which the doctor claims should have produced the smoking gun documents themselves or a way to discover the information they contained. The two smoking gun documents reportedly were contained in files which related to Intal, a cromolyn sodium product, which was manufactured by Fisons and which competed with Somophyllin. The manager of medical communications had a thorough collection of articles, materials and other documents relating to the dangers of theophylline and used the information from those materials to market Intal, as an alternative to Somophyllin Oral Liquid. The drug company avoided production of these theophylline-related materials, and avoided identifying the manager of medical communications as a person with information about the dangers of

theophylline, by giving evasive or misleading responses to interrogatories and requests for production.

The following is but a sampling of the discovery between the parties.

The first discovery documents directed to the drug company were prepared by the child's attorney and were dated September 26, 1986. The interrogatories contained a short definition section stating in part:

The term "the product" as used hereinafter in these interrogatories shall mean the product which is claimed to have caused injury or damage to JENNIFER MARIE POLLOCK as alleged in pleadings filed on her behalf, namely, to wit: "Somophyllin" oral liquid.

Clerk's Papers, at 4103.

These first interrogatories requested information about "the product" which is manufactured by the drug company, Fisons, as well as about theophylline, a drug entity which is the primary ingredient of the drug company's product Somophyllin Oral Liquid. The interrogatory regarding theophylline was answered by the drug company, as were the interrogatories about "the product".

***348** Somophyllin and its primary ingredient, theophylline, were not distinguished in discussions between the attorneys or in drug company literature. The printed package insert for Somophyllin Oral Liquid (Exhibit 93) and marketing brochures refer to the names Somophyllin and theophylline interchangeably. One marketing brochure states:

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

Theophylline

The *one* name to remember ...

Somophyllin.

Exhibit 111.

The drug company's responses to discovery requests contained the following general objection:

Requests Regarding Fisons Products Other Than Somophyllin Oral Liquid. Fisons objects to all discovery requests regarding Fisons products other than Somophyllin Oral Liquid as overly broad, unduly burdensome, harassing, and not reasonably calculated to lead to the discovery of admissible evidence.

See, e.g., Clerk's Papers, at 7399.

Theophylline is not a Fisons "product". Furthermore, because theophylline is the primary ingredient in Somophyllin Oral Liquid, any document focusing on theophylline would, necessarily, be one *regarding* Somophyllin Oral Liquid.

****1081** In November 1986 the doctor served his first requests for production on the drug company. Four requests were made. Three asked for documents concerning Somophyllin. Request 3 stated:

3. Produce genuine copies of any letters sent by your company to physicians concerning theophylline toxicity in children.

The drug company's response was:

Such letters, *if any,* regarding Somophyllin Oral Liquid will be produced at a reasonable time and place convenient to Fisons and its counsel of record.

Clerk's Papers, at 8458.

***349** Had the request, as written, been complied

with, the first smoking gun letter (exhibit 3) would have been disclosed early in the litigation. That June 30, 1981 letter concerned theophylline toxicity in children; it was sent by the drug company to physicians.

The child's first requests for production, and the responses thereto, included the following:

REQUEST FOR PRODUCTION NO. 12: All documents pertaining to any warning letters including "Dear Doctor letters" or warning correspondence to the medical professions regarding the use of the drug Somophyllin Oral Liquid.

RESPONSE: Fisons objects to this request as overbroad in time and scope for the reasons identified in response to request number 2, hereby incorporated by reference. *Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this request* at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

REQUEST FOR PRODUCTION NO. 13: All documents of any clinical investigators who at any time stated or recommended to the defendant that the use of the drug Somophyllin Oral Liquid might prove dangerous.

RESPONSE: Fisons objects to this request as overbroad in time and scope for the reasons identified in response to request number 2 hereby incorporated by reference. Fisons further objects to this request as calling for materials not within Fisons' possession, custody or control. Fisons further objects to this request to the extent it calls for expert disclosures beyond the scope of CR 26(b)(4) or which maybe protected by the work-product and/or attorney-client privilege. *Without waiver of these objections and subject to these limitations, Fisons will produce documents responsive to this interrogatory* at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

(Italics ours.) Clerk's Papers, at 6329-30.

The doctor further requested:

Request for Production No. 4: Please produce copies of any and all seminar materials, regardless of their source, in Fisons' possession on or before January 16, 1986 regarding asthma, bronchopulmonary dysplasia, theophylline and/or allergy.

Response: Fisons objects to this discovery request as overbroad, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence *to the extent it seeks seminar materials regarding subjects other than theophylline.* Without waiving these objections, Fisons answers as follows:

***350** *Fisons has no documents regarding theophylline* and otherwise responsive to this discovery request.

(Some italics ours.) Clerk's Papers, at 3868.

These requests, and others of a similar tenor, should have led to the production of the smoking gun documents.

When the child or the doctor attempted to see information from the files of other products, the drug company objected. For example:

Request for Production No. 1: All documents contained in all files from the regulating department, marketing department, drug surveillance department, pharmaceutical development department, product manager department and the medical departments regarding all cromolyn [Intal] products of Fisons Corporation.****1082** Regarding this request for production all documents should include from inception of file to the present.

Answer: Defendant Fisons objects to this discovery request as not reasonably calculated to lead to the discovery of admissible evidence, as overbroad in time, and as incredibly burdensome and harassing. This discovery request encompasses approximately *eighty-five* percent of *all* documents in the subject files and departments-millions of pages of documents. *Neither cromolyn (which should be referred to as cromolyn sodium), nor any cromolyn product, nor the properties or efficacy of cromolyn is at issue in this litigation.* Furthermore, Fisons objects to this discovery request as calling for the production of extremely sensitive trade secret and proprietary material.

(Some italics ours.) Clerk's Papers, at 4124.

To requests asking for correspondence, memoranda, articles and other documents "concerning", "regarding" or "covering" Somophyllin Oral Liquid, the drug company generally objected to the requests and then stated

Without waiver of these objects and subject to these limitations, Fisons will produce documents responsive to this request at plaintiffs' expense at a mutually agreeable time at Fisons' headquarters.

See, e.g., Clerk's Papers, at 7240-55.

In support of the drug company's motion for a protective order, the drug company's in-house counsel and its Seattle ***351** lawyer filed similar affidavits. Seattle counsel's affidavit declares:

Plaintiffs allege that Fisons failed to provide adequate warnings of possible dangers associated with the use of Somophyllin Oral Liquid, a theophylline-based prescription medication distributed by Fisons.... [Plaintiffs'] discovery requests are extremely broad in scope. Many of these discovery requests are not reasonably related to plaintiffs' failure-to-warn allegations against Fisons.

Following receipt of plaintiffs' First Request for Production, I traveled to Fisons in Bedford, Massachusetts in order to ascertain firsthand the scope and extent of documents responsive to plaintiffs' request for production. At that time I confirmed that to produce all of the documents responsive to plaintiffs' catch-all requests would be extremely burdensome and oppressive to Fisons. Between one and two million pages of documents, most of which have no colorable relevance to the issues in this action, would have to be located, assembled, and made available for review or copying. The time, expense, and intrusion upon the day-to-day business activities of Fisons would be immense.

While at Fisons I identified those documents reasonably related to the claims asserted by plaintiffs in this litigation and arranged to have them copied and forwarded to Seattle for production to plaintiffs.

Clerk's Papers, at 6301-02.

The affidavit goes on to say that the drug company had "agreed to make available those documents reasonably related to plaintiffs' allegations against Fisons." Clerk's Papers, at 6302.

In its memorandum to the court in support of the motion for a protective order, the attorney for the drug company outlined the documents contained in the regulatory file on Somophyllin Oral Liquid. That file purportedly contained complete information regarding the drug including: Summaries of adverse reactions associated with the use of the medication that had been reported to Fisons; all promotional or advertising material disseminated by Fisons *with regard to the medication;* the complete product file for Somophyllin Oral Liquid, which contained records of communications ***352** with the Food and Drug Administration, internal memoranda, and miscellaneous medical literature regarding theophylline. The memorandum goes on to tell the court

In short, Fisons' Regulatory File for Somophyllin Oral Liquid contains all or nearly all documents in Fisons' possession****1083** that are reasonably related to plaintiffs' failure-to-warn allegations.

Clerk's Papers, at 6277. A footnote to this comment states "Fisons has also agreed to make available to plaintiffs an index of periodicals maintained in Fisons' internal library as well as certain other documents." Clerk's Papers, at 6277 n. 3.

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 do not specifically object to the production of documents that discuss the dangers of theophylline, but which are not within the Somophyllin Oral Liquid files. They state that there is no relevant information within the cromolyn sodium product files.

It appears clear that no conceivable discovery request could have been made by the doctor that would have uncovered the relevant documents, given the above and other responses of the drug company. The objections did not specify that certain documents were not

being produced. Instead the general objections were followed by a promise to produce requested documents. These responses did not comply with either the spirit or letter of the discovery rules and thus were signed in violation of the certification requirement.

The drug company does not claim that its inquiry into the records did not uncover the smoking gun documents. Instead, the drug company attempts to justify its responses by arguing as follows: (1) The plaintiffs themselves limited the scope of discovery to documents contained in Somophyllin Oral Liquid *files.* (2) The smoking gun documents were not intended to relate to Somophyllin Oral Liquid, but rather were intended to promote another product of the drug company.***353** (3) The drug company produced all of the documents it agreed to produce or was ordered to produce. (4) The drug company's failure to produce the smoking gun documents resulted from the plaintiffs' failure to specifically ask for those documents or from their failure to move to compel production of those documents. (5) Discovery is an adversarial process and good lawyering required the responses made in this case.

If the discovery rules are to be effective, then the drug company's arguments must be rejected.

First, neither the child nor the doctor limited the scope of discovery in this case. Attorneys for the child, the doctor and the drug company repeatedly referred to both theophylline and Somophyllin Oral Liquid. There was no clear indication from the drug company that it was limiting all discovery *regarding* Somophyllin Oral Liquid to material from that product's file. Nor was there any indication from the drug company that it had information about theophylline, which is not a Fisons' "product", or information *regarding* Somophyllin Oral Liquid that it was not producing because the information was in another product's file. The doctor was justified in relying on the statements made by the drug company's attorneys that all relevant documents had been produced and he cannot be determined to have impliedly, albeit unknowingly, acquiesced in limiting the scope of discoverable information.

Second, the drug company argues that the smoking gun documents and other documents relating to theophylline were not documents *regarding* Somophyllin Oral Liquid because they were intended to market another product. No matter what its initial purpose, and regardless of where it had been filed, under the facts of this case, a document that warned of the serious dangers of the primary ingredient of Somophyllin Oral Liquid is a document *regarding* Somophyllin Oral Liquid.

Third, the discovery rules do not require the drug company to produce only what it agreed to produce or what it was ordered to produce. The rules are clear that a party ***354** must *fully* answer all interrogatories and all requests for production, unless a ****1084** specific and clear objection is made.[FN88] If the drug company did not agree with the scope of production or did not want to respond, then it was required to move for a protective order. In this case, the documents requested were relevant. The drug company did not have the option of determining what it would produce or answer, once discovery requests were made.[FN89]

FN88. CR 33(a); CR 34(b).

FN89. *Gammon v. Clark Equip. Co.*, 38 Wash.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 v. Cessna Aircraft Co.*, 39 Wash.App. 828, 836, 696 P.2d 28 (defendant and its 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 Wash.2d 1040 (1985).

Fourth, the drug company further attempts to justify its failure to produce the smoking guns by saying that the requests were not specific enough. Having read the record herein, we cannot perceive of *any* request that could have been made to this drug company that would have produced the smoking gun documents. Unless the doctor had been somehow specifically able to request the June 30, 1981, "dear doctor" letter, it is unlikely that the letter would have been discovered. Indeed the drug company claims the letter was not an official "dear doctor" letter and therefore

was not required to be produced.

Fifth, the drug company's attorneys claim they were just doing their job, that is, they were vigorously representing their client. The conflict here is between the attorney's duty to represent the client's interest and the attorney's duty as an officer of the court to use, but not abuse the judicial process.

[V]igorous advocacy is not contingent on lawyers being free to pursue litigation tactics that they cannot justify as legitimate. The lawyer's duty to place his client's interests ahead of all others presupposes that the lawyer will live with the rules that ***355** govern the system. Unlike the polemicist haranguing the public from his soapbox in the park, the lawyer enjoys the privilege of a professional license that entitles him to entry into the justice system to represent his client, and in doing so, to pursue his profession and earn his living. He is subject to the correlative obligation to comply with the rules and to conduct himself in a manner consistent with the proper functioning of that system.

Schwarzer, *Sanctions Under the New Federal Rule 11-A Closer Look*, 104 F.R.D. 181, 184 (1985).

Like CR 11, CR 26(g) makes the imposition of sanctions mandatory, if a violation of the rule is found.[FN90] Sanctions are warranted in this case. What the sanctions should be and against whom they should be imposed is a question that cannot be fairly answered without further factual inquiry, and that is the trial court's function. While we recognize that the issue of imposition of sanctions upon attorneys is a difficult and disagreeable task for a trial judge, it is a necessary one if our system is to remain accessible and responsible.

> FN90. *Cascade Brigade v. Economic Dev. Bd.*, 61 Wash.App. 615, 619, 811 P.2d 697 (1991) (interpreting CR 11); *Amendments to the Federal Rules of Civil Procedure*, 97 F.R.D. 220 (1983).

Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense.
Schwarzer, 104 F.R.D. at 205.

In making its determination, the trial court should use its discretion to fashion "appropriate" sanctions. The rule provides that sanctions may be imposed upon the signing attorney, the party on whose behalf the response is made, or both.[FN91]

> FN91. CR 26(g).

[42][43][44][45] In determining what sanctions are appropriate, the trial court is given wide latitude.[FN92] However certain principles guide the trial court's consideration of ****1085** sanctions. First, the least severe sanction that will be adequate to serve the ***356** purpose of the particular sanction should be imposed.[FN93] The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong.[FN94] The wrongdoer's lack of intent to violate the rules and the other party's failure to mitigate may be considered by the trial court in fashioning sanctions.[FN95]

> FN92. *In re Guardianship of Lasky*, 54 Wash.App. 841, 855, 776 P.2d 695 (1989).
>
> FN93. *Bryant v. Joseph Tree, Inc.*, 119 Wash.2d 210, 225, 829 P.2d 1099 (1992); *In re Guardianship of Lasky*, 54 Wash.App. at 855, 776 P.2d 695.
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> FN94. *Gammon v. Clark Equip. Co.*, 38 Wash.App. at 282, 686 P.2d 1102 (sanction award of $2,500 was disapproved for being "cheap at twice the price in the context of a $4.5 million wrongful death case").
>
> FN95. Schwarzer, at 200.

The purposes of sanctions orders are to deter, to punish, to compensate and to educate.[FN96] Where compensation to litigants is appropriate, then sanctions should include a compensation award. However, we caution that the sanctions rules are not "fee shifting" rules.[FN97] Furthermore, requests for sanctions should not turn into satellite litigation or become a "cottage industry" for lawyers. To avoid the appeal of sanctions motions as a profession or profitable specialty of law, we encourage trial courts to consider requiring that monetary sanctions awards be paid to a particular court fund or to court-related funds.[FN98] In

the present case, sanctions need to be severe enough to deter these attorneys and others from participating in this kind of conduct in the future.

FN96. *Miller v. Badgley*, 51 Wash.App. 285, 303, 753 P.2d 530,*review denied*, 111 Wash.2d 1007 (1988).

FN97. *Bryant v. Joseph Tree*, 119 Wash.2d at 228, 829 P.2d 1099 (Andersen, J., concurring in part, dissenting in part).

FN98. *See, e.g., J.M. Cleminshaw Co. v. Norwich*, 93 F.R.D. 338, 354 (D.Conn.1981).

The trial court's denial of sanctions is reversed and the case is remanded for a determination of appropriate sanctions.

In sum, we hold as follows: Dr. Klicpera did have standing to bring a Consumer Protection Act claim and damages for ***357** injury to his reputation are compensable damages under the Consumer Protection Act. However, the physician cannot, under the facts herein, recover damages for his own emotional pain and suffering under the Washington product liability act. Dr. Klicpera cannot maintain a common law negligence cause of action based upon a claim of failure to warn of a product's dangers as such claims were subsumed in the Washington product liability act. We also conclude that the trial court correctly declined to allow the Consumer Protection Act claim of Washington State Physicians Insurance Exchange & Association to go to the jury and did not err in excluding the "habit" testimony of the drug company's sales representative proffered under ER 406. The physician's claims under the laws of this state were not preempted by federal law. We also decline to overturn or reduce the jury's award of damages to the physician for loss of reputation and conclude that the trial court did not abuse its discretion in calculating the amount of attorneys' fees recoverable under the Consumer Protection Act. Finally, we hold that the trial court erred in failing to find that sanctions for discovery abuse were warranted in this case and, in that regard, remand the case to the trial court for imposition of adequate sanctions.

Affirmed in part; reversed in part; and remanded to the trial court for imposition of sanctions.

DOLLIVER, SMITH and GUY, JJ., concur.BRACHTENBACH, Justice (concurring in part/dissenting in part).

I fully concur with the majority except on issue 2. I strongly disagree with the reasoning and result on issue 2 and respectfully dissent.

The issue is whether a drug manufacturer is liable to a physician for damages for his physical and mental injuries when the ****1086** drug manufacturer proximately caused those damages because it failed to warn the physician of known risks in the use of its drug.

Plaintiff was the pediatrician treating a 2-year-old child. He prescribed a drug manufactured and distributed by defendant.***358** The jury found, and it is not here challenged, that defendant failed to adequately warn of the risks in use of its drug. The child suffered permanent brain damage.

The jury found that the resulting publicity and malpractice action against plaintiff, Dr. James A. Klicpera, damaged his professional reputation. The majority affirms that part of the special verdict.

But Dr. Klicpera contends that he suffered more than loss of or damage to his professional reputation. He personally suffered emotional damages with accompanying physical illness; that evidence will be discussed hereafter. It is for these personal damages that Dr. Klicpera sought damages under the product liability act (PLA), RCW 7.72. The jury was properly instructed as to the law of the PLA and was properly instructed as to the type of damages recoverable. The jury made its award; the trial court refused to overturn the jury verdict.

Yet the majority sets aside the jury verdict and reverses the trial court, as a matter of law. It is essential to understand that the majority reverses the jury and the trial court on a theory of its own, a theory never raised, briefed or argued by the defendant.

This dissent will first make an abbreviated review of the product liability act as it relates to this cause of action; second, I will examine the majority, and third, provide a more detailed analysis of the PLA, particularly showing that the legislative history, not exam-

ined by the majority, supports this verdict. Because I would affirm the verdict, it is necessary to examine defendant's challenges to sufficiency of proof of proximate cause and its challenges to the amount of the verdict.

The PLA contains a number of definitions which are critical to understanding it and its application, but the following are the essential considerations supporting the plaintiff's verdict. The PLA expressly recognizes a product liability claim of the very type brought here, *i.e.,* failure to discharge a duty to warn or instruct, whether negligent or innocent. RCW 7.72.010(4). Liability is imposed specifically if adequate ***359** warnings or instructions were not provided. RCW 7.72.030(1). The jury was instructed correctly on this phase of the law; defendant does not challenge the correctness of the PLA instructions.[FN1] The jury held for plaintiff on this point, so it is an established fact that the defendant is liable.

> FN1. Defendant assigns error to certain instructions, but only as a precaution to comply with RAP 10.3(g). Defendant makes no argument that the contents of the instructions are incorrect. Brief of Appellant, at 2.

The PLA also defines who is a "claimant", *i.e.,* who is a proper person to make a product liability claim. The definition is remarkably broad: " 'Claimant' includes *any person* or entity that suffers *harm.* A claim may be asserted under this chapter even though the claimant did not buy the product from, or enter into any contractual relationship with, the product seller." RCW 7.72.010(5). Defendant argues that plaintiff doctor did not have standing to sue under the PLA, *i.e.,* defendant contends, *as a matter of law,* plaintiff was not a *claimant* as defined in the PLA. This issue was not submitted to the jury. Unless plaintiff is not a proper claimant, as a matter of law, defendant is foreclosed on this issue. *The majority never addresses this issue.*

As noted, a claimant is *any* person that suffers *harm.* The term "harm" is also strikingly broad in definition: " 'Harm' includes *any* damages recognized by the courts of this state...." (Italics mine.) RCW 7.72.010(6). The definition goes on to exclude economic loss under the Uniform Commercial Code, RCW Title 62A.

The majority rests its decision against the verdict solely on the basis that plaintiff's****1087** damages are not the *type of harm* recoverable under the above definition. Majority, at 1065. Thus, the majority necessarily holds that the physical and emotional suffering of plaintiff are not within "any damages recognized by the courts of this state". RCW 7.72.010(6).

Defendant never raises, briefs nor argues that the damages suffered by plaintiff are not within the statutory definition of "harm". Yet this is the exclusive focus and foundation of the majority's holding. Defendant's opening brief, from the table ***360** of contents to the conclusion, raises *only* the issue of standing, *i.e.,* whether plaintiff was a proper "claimant". Opening Brief of Appellant, at i, 3, 24, 28, 30-31, 33, 82. Defendant's reply brief continues to raise only that single issue, not mentioning the majority's theory. Reply Brief of Appellant, at 5-7.

In a nutshell, defendant's only challenge is to *WHO* can be a plaintiff under the PLA; the majority's singular inquiry is *WHAT* can be recovered, describing that as "the most precise inquiry". I suggest it is the wrong question, but even if it were the issue, the majority's conclusion is contrary to Washington law and legislative history of the PLA.

The majority seems to find only two perceived policy grounds to justify its reversal. First, if recovery were allowed, "liability would potentially be endless". Majority, at 1065. This merely echoes the unsupported supposition asserted by Justice Dore in *Gain v. Carroll Mill Co.,* 114 Wash.2d 254, 260, 787 P.2d 553 (1990). My answer to this dire warning of "opening the floodgates of litigation" remains the same as expressed before: "I prefer to continue with a faith in trial courts and juries to dispense appropriate justice, rather than create an unjust artificial rule based on some unsupported fear." *Gain,* at 265, 787 P.2d 553 (Brachtenbach, J., concurring in result only; dissenting).

The second policy ground asserted by the majority is its statement: "We would not be furthering the intent of the Legislature if we extended liability so far that drug manufacturers would be chilled in marketing products and developing new ones." Majority, at 1066. The opinion reveals no authority for this significant insight into the pharmaceutical industry. Not even the source of the majority's speculation is dis-

closed.

This speculative ground lends no support to the majority's conclusion. In stark contrast, the Oregon Supreme Court has rendered a reasoned and rational decision rejecting the foundation upon which the majority places such emphasis. The facts are remarkably similar, except the doctor sought only economic damages. In ***361***Oksenholt v. Lederle Labs.*, 294 Or. 213, 656 P.2d 293 (1982), the court held that a prescribing physician had a cause of action against the drug manufacturer for failure to warn as required by federal regulations, 21 C.F.R. § *et seq.* (1993). The defendant argued, as does this defendant, that its duty to warn runs to the patient; that such is its exclusive duty, and thus no liability is owed to the doctor when it is the patient who suffers direct injury from the product.

Oksenholt makes this telling and persuasive statement:

Affording such a remedy for injury to a physician that results from a prescription drug manufacturer's failure to supply adequate information will encourage drug manufacturers to supply that information and thus further the regulatory objective.

Oksenholt at 220, 656 P.2d 293. When one evaluates the validity of the majority's supposition that recovery would "chill" drug manufacturers in marketing products and even in developing new ones, it must be remembered that this case did not involve the scientific complexities of some new drug. All this defendant had to do to escape liability was give the plaintiff and other doctors a fair warning of the literally lethal potential consequences of its widely used drug. Defendant knew those facts; its marketing strategy, the bottom dollar line, led to liability. Hiding the truth is what "chilled" its drug and left the plaintiff's child patient permanently brain damaged.

****1088** I turn to other reasons advanced by the majority. It correctly notes that there is no directly applicable Washington product liability case on the issue presented, whether the issue be who is a proper claimant or are these type of damages "harm" within the statute. However, the majority errs in asserting that in our prior product liability cases under the PLA, "the 'harm' involved has been for injury caused directly *by the product* to the person or the property of the claimant." (Footnote omitted.) Majority, at 21. It cites *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 763, 818 P.2d 1337 (1991); *Washburn v. Beatt Equip. Co.*, 120 Wash.2d 246, 840 P.2d 860 (1992). The majority's statement is not accurate and the cited cases lendit no support, but ***362** rather support the dissent. In *Ayers,* there was a $500,000 recovery by the parents of the child who had been injured directly by the product. In *Washburn,* there was a $2 million recovery by the wife of the person injured by the product. Neither the parents nor the wife suffered injuries caused directly by the product. They were persons whose emotional injuries alone were linked to the person who was injured by the product, just as plaintiff doctor claims injuries linked to the person who was injured by the product.

Next, the majority relies by analogy on *Gain v. Carroll Mill Co., supra.* It too provides no support for the majority. The sole holding in *Gain* is that the mental distress of family members who were not present when their son and brother were killed is not *foreseeable as a matter of law.* *Gain,* 114 Wash.2d at 261, 787 P.2d 553. The holding in *Gain* is entirely irrelevant here; foreseeability is not an issue. We recently so held: "foreseeability is not an element of a failure to warn claim arising under subsection (b)" of RCW 7.72.030(1). *Ayers,* 117 Wash.2d at 765, 818 P.2d 1337.

I can discern no other rationale in the majority other than that discussed and rejected above. Because the majority repeatedly emphasizes what it perceives to be legislative intent in enacting the PLA, we should examine evidence of legislative intent.

First, we should consider the only theory raised by the defendant, the one never considered by the majority, *i.e.,* that the plaintiff doctor lacked standing because he is not a "claimant" as defined by the PLA. To read the plain language of the statute answers the question. RCW 7.72.010(5) could hardly be stated more broadly: "Claimant. 'Claimant' means a person or entity asserting a product liability claim ... 'Claimant' *includes any person* or entity *that suffers harm.*"

Up to this point in the statutory definition of claimant, there is nothing which suggests the limitation created by the majority. However, the Legislature

went further and enlarged the scope of the definition by providing: "A claim may be asserted under this chapter even though the claimant did ***363** not buy the product from, or enter into any contractual relationship with, the product seller." RCW 7.72.010(5).

The legislative history rejects the restrictive reading rendered by the majority. The report of the Senate select committee clearly illustrates the intent that the definition of "claimant" was intended to be broad and sweeping. That report states: "Claimant. Recovery may be had under this act by *any person* or entity *which suffers harm, including those not in privity with the product seller, bystanders as well as product users.*" (Italics mine.) Senate Journal, 47th Legislature (1981), at 630.

It is critical to note what relationship with the product the claimant *does not* have to establish. The claimant need not have bought the product from the product seller. The claimant need have no privity with the product seller. By the Legislature's own declaration of intent, claimants may include *bystanders* with no connection to the product. Note that the Legislature declared that "claimant" *includes* all these potential plaintiffs, and not that it is restricted to those classes.

Within these very wide boundaries, is a physician who prescribes a drug without proper warning of its dangers (an established fact in this case) a claimant? We know from *Ayers v. Johnson & Johnson* ****1089** *Baby Prods. Co., supra,* and *Washburn v. Beatt Equip. Co., supra,* that parents and spouses are claimants, even if not bystanders. Yet the Legislature went so far as to mention specifically bystanders. Nowhere is there a suggestion that there must be some familial relationship.

If mere bystanders are included, what relationship does the prescribing physician occupy? The duty to warn about the drug ran to the plaintiff doctor. The jury was so instructed in an instruction which defendant does not challenge. Instruction 17. The Oregon court in *Oksenholt v. Lederle Labs., supra,* clearly understood this:

By law, a prescription drug manufacturer cannot sell its products to the consumer without the physician's approval. The ***364** patient must rely on the physician to sift through the relevant literature, to match a medicine's indications and contraindications with the patient's ailment and to prescribe the appropriate drug. The [federal] regulations presume this three-way relationship and were designed to aid the physician. We hold that physicians are in the class protected by the [federal] regulations.

Oksenholt, 294 Or. at 219-20, 656 P.2d 293.

The telling point is made entirely clear in *Carmichael v. Reitz,* 17 Cal.App.3d 958, 989, 95 Cal.Rptr. 381 (1971). The court, in considering the necessity of a warning from the drug manufacturer to the physician, stated: "Because of the foregoing law [relating to warnings to the physician], *it is the prescribing doctor who in reality stands in the shoes of 'the ordinary consumer.'*" (Italics mine.) The court went on to hold it was proper to instruct that the drug had to be dangerous to an extent beyond that which could be contemplated by the physician. In this case, the jury was so instructed in this language: "you shall consider whether the product was unsafe to an extent beyond that which would be contemplated by an ordinary physician user." Instruction 17.

If we start with the definition of the statute that a "claimant" includes *any* person who suffers harm, and add the fact that the statute does not require the claimant to be in privity or even be a buyer, and then add the clear legislative history that "even bystanders" are included, what is there which would exclude the plaintiff-prescribing physician? We must eliminate any question of foreseeability. There is no requirement of any special relationship, such as a family member. The statute is perfectly clear that it includes all of the above categories, but does not limit the definition to those described.

Instead of a mere bystander, Dr. Klicpera was an essential participant in the distribution and ultimate sale of defendant's product. By law, without his participation, defendant could not have sold its product. I suggest the California court was exactly correct in stating "it is the prescribing doctor who in reality stands in the shoes of 'the ordinary consumer.' " *Carmichael,* at 989, 95 Cal.Rptr. 381.

***365** I would hold that plaintiff was a proper claimant to bring this PLA action, thereby rejecting the only challenge mounted by the defendant and never answered by the majority.

Because the majority chose to create an entirely separate issue from that raised by defendant, it is necessary to answer that issue. The majority states the issue which it alone creates as follows: "We perceive the most precise inquiry here to be whether these pain and suffering damages are the type of 'harm' contemplated as recoverable by the Legislature under the PLA." Majority, at 20.

The statute provides the definition of "harm" to be: " 'Harm' includes any damages recognized by the courts of this state." RCW 7.72.010(6). It is absolutely clear that the Legislature was referring *only* to the type of damages recoverable, not to the person who was the claimant because the same statute contains a proviso that "the term 'harm' does not include direct or consequential economic loss under Title 62A RCW."

The majority *never denies that emotional distress with accompanying pain and suffering* are types of damages recognized by the Washington courts. That is all the ****1090** statute requires. Indeed, the majority cannot deny that recovery for mental distress has long been recognized as a proper element of damages in this state. Recovery was permitted for mental distress as early as 1918 in *Redick v. Peterson*, 99 Wash. 368, 169 P. 804 (1918). There has been a long debate in the cases about the necessity of physical harm as a condition of recovering for emotional distress, but that issue is not raised here and there were physical injuries. The physical impact requirement was abandoned 17 years ago, but our courts have not experienced the endless litigation and fraudulent claims, then predicted, as the majority now predicts endless liability. *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096 (1976).

The majority correctly notes that the Legislature chose not to use the definition of "harm" contained in the Model Uniform Product Liability Act (UPLA), 44 Fed.Reg. 62,713, 62,717 (1979). However, the majority fails to explore the ***366** difference between the UPLA and the definition enacted in RCW 7.72. The definition of "harm" in the model act is much more restrictive and might justify the result of the majority, but the Legislature intentionally and knowingly *rejected* that restrictive definition which might support the majority. The UPLA included four definitions of "harm", including:

(3) mental anguish or emotional harm attendant to such personal physical injuries, illness or death; and (4) mental anguish or emotional harm caused by the claimant's being placed in direct personal physical danger and manifested by a substantial objective symptom....

44 Fed.Reg. 62,717 § 102(F) (1979).

Under said section 102(F)(3) of the UPLA, recovery here would be dependent upon physical injuries or illness. As discussed hereafter, the evidence may well support recovery under such definition, depending upon its interpretation, but it is not an issue raised by the defendant or the majority. Clearly, under subsection (F)(4), quoted above, Dr. Klicpera would be denied recovery because he was not placed in direct personal damage.

It is obvious that the UPLA proposed a much more restrictive definition of "harm". It is highly significant and relevant here that the definitions in RCW 7.72"are taken substantially from the Uniform Product Liability Act". Senate Journal, 47th Legislature (1981), at 629. But when it came to defining "harm", the Legislature rejected the more restrictive definition in the UPLA. Intent to allow a much broader *type* of damage recovery is apparent. The select committee report states: "(6) Harm. The Select Committee has chosen *not* to utilize the definition of 'harm' contained in the UPLA, and *instead* has adopted a *broad definition* allowing for the *continued development* of the concept through case law." (Italics mine.) Senate Journal, 47th Legislature (1981), at 630.

I suggest that this legislative declaration of intent destroys the majority's claim that its restrictive vision of legislative intent furthers legislative intent. The question is not what the majority wants to accomplish, but rather what the Legislature***367** put in writing about its intent. First, it rejected the narrow definition of the UPLA. Second, it *instead* adopted a *broad definition* which allowed for *continued development* of the concept of recoverable damages. There is nothing in the past several decades of this court's opinions which could lead the Legislature to believe that a broad definition and continued development of the concept would mean a more restrictive recovery. Quite the contrary.

In short, there is nothing in the majority opinion

which convincingly demonstrates that the *type of damages* in the PLA verdict in this case does not constitute damages "recognized by the courts of this state". That is exactly what the majority has to show to justify its conclusion and result because that is the precise requirement of RCW 7.72.010(6).

The jury instruction given on damages is exactly the standard instruction one would expect under our existing law. It included the following as an element the jury could consider if it found for the plaintiff: "the pain and suffering, both physical and mental,**1091 experienced and reasonably certain to be experienced in the future." Instruction 29. While the majority holds, as a matter of law, a verdict pursuant to this instruction was error, not even the defendant claims it to be an erroneous statement of the type of damages recoverable under the statutory definition of "harm".

Because plaintiff has standing under the PLA and I believe the majority is incorrect in using an analysis of "harm" to reverse, it is necessary to consider two arguments which are raised by defendant.

First, defendant argues there was insufficient evidence of proximate cause. Defendant takes the improbable position that: "As a matter of law, a plaintiff's testimony that he would have acted differently if there had been a stronger warning is insufficient to establish proximate case." Opening Brief of Appellant, at 44. On its face that contention is without merit and the cases cited do not support it, despite defendant's assertions as to what those cases hold. At best, *368 its description of the holdings of cited cases is incomplete, if not outright misleading.

There is no question but that Dr. Klicpera testified that he would not have treated the child patient with the drug had he been properly warned of its dangers, and that, since learning of those dangers, he has stopped prescribing the drug. Verbatim Report of Proceedings, at 1968, 1081. This testimony alone was sufficient evidence of proximate cause to go to the jury and to support the verdict.

In support of the statement quoted above, defendant cites *Baughn v. Honda Motor Co.*, 107 Wash.2d 127, 144, 727 P.2d 655 (1986), which does not hold what defendant represents. What *Baughn* did hold, correctly, is that whether warnings were adequate or not, failure to warn was not a cause in fact because the purchaser already knew of the dangers in the vehicle and had warned the injured child of the very danger for which they contended a warning was needed. Defendant's representation of the holding in *Greiner v. Volkswagenwerk Aktiengesellschaft*, 429 F.Supp. 495 (E.D.Pa.1977) is equally misleading. Defendant states: "The court held that the plaintiff's bare allegation that she would not have bought the car if there had been a stronger warning was insufficient as a matter of law." Opening Brief of Appellant, at 45. In fact, the plaintiff was not the buyer of the automobile and did not testify that she would not have bought it if warned. The holding was that the jury could not speculate what she would have said had she been asked.

This dissent need not be extended by an examination of each case cited by defendant because none holds what defendant claims. Counsel responsible for writing this portion of the brief should consult RPC 3.3-Candor Toward the Tribunal.

In *Ayers v. Johnson & Johnson Baby Prods. Co.*, 117 Wash.2d 747, 754-55, 818 P.2d 1337 (1991), we rejected a similar claim about speculation of the effect of a warning and proximate cause. We stated that to overturn a verdict on such basis: "This court must be prepared to conclude that no reasonable person could infer, as did the jury, that a warning would have altered the [plaintiffs'] behavior." *Ayers*, at 755, 818 P.2d 1337. *369 The evidence in *Ayers* did not permit such a conclusion and without question the positive testimony of Dr. Klicpera, cited above, was sufficient and does not permit such a conclusion.

Finally, defendant attacks the PLA verdict as (1) not supported by substantial evidence, or (2) such that it should shock the conscience of the court, or (3) the result of passion and prejudice. Defendant claims all three grounds exist.

As to the sufficiency of the evidence, defendant describes it as minimal. While the plaintiff was not verbose on the subject, he testified that he developed at least a gastritis or an ulcer for which he was being treated by a gastroenterologist. He described severe abdominal pain. He had never had those difficulties before. He positively related those problems to the stress arising from the litigation. He had loved his pediatric work because he liked taking care of kids. Now he does not enjoy **1092 it as much and con-

sidered going into administration.

The doctor testified to a changed relationship with his family. He described himself as hard to live with, spending less time with his children, and a lot less time with his wife. He summed it up as "We don't get along as well as I guess as we used to." His wife testified that he had become uncommunicative. He was on a prescribed medication for his stomach difficulties which caused him to awaken a lot at night. There was substantial evidence before the jury.

The majority has reviewed thoroughly and ably the standards which govern appellate review of the amount of a jury verdict. Majority, at 1070-1071. I need not repeat them, but they lead to the conclusion that we should not disturb the jury verdict.

Comment, however, is appropriate on defendant's claim that the amount should shock the conscience of the court. In its 2-page argument, defendant's only argument is a comparison of this verdict with other cases. As the majority notes: "In *Washburn,* we emphatically disallowed such comparisons...." (Footnote omitted.) Majority, at 1071. Thus, we give no consideration to defendant's argument on this point.

***370** The third challenge is that the verdict was the result of passion and prejudice by the jury. Again, I need not repeat the applicable standards of review fully set out by the majority. Majority, at 1072. Because defendant makes the same arguments about both of the verdicts, that is, the verdict under the Consumer Protection Act and the verdict under the PLA, the majority's rejection of those arguments under the CPA are equally applicable to the PLA verdict. Therefore, the PLA verdict was not the result of passion and prejudice for those same reasons.

However, I must note an egregious lack of candor in defendant's argument regarding passion and prejudice. The defendant states: "The trial court, in ruling on the JNOV/new trial motion, stated that the size of the jury's award did 'startle' his conscience." Verbatim Report of Proceedings, at 4366. Because of the deference we give the trial court on this question and because a verdict is strengthened by denial of a new trial by the trial court, the above quotation could be highly significant. *Washburn v. Beatt Equip. Co.,* 120 Wash.2d 246, 271, 840 P.2d 860 (1992).

When one goes to the record and reads the *entire* statement of the trial court, it is obvious that the defendant's statement, quoted above, is at best misleading and more accurately a plain attempt to misrepresent the ruling and to mislead this court. This is what the trial court said: "I'm not able to say that the verdict shocked the conscience of the Court. I will say that it-I blinked and it did startle my conscience. But I can't really say that it shocked my conscience or it was a result of passion or prejudice." Verbatim Report of Proceedings, at 4366.

In conclusion, I agree with the majority on every issue, and its disposition of those issues, except as to issue 2 on which I would affirm.

JOHNSON and UTTER, JJ., concur.
Wash.,1993.
Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp.
122 Wash.2d 299, 858 P.2d 1054, 62 USLW 2190, Prod.Liab.Rep. (CCH) P 13,675

END OF DOCUMENT

Exhibit C

Only the Westlaw citation is currently available.
United States District Court, S.D. California.
QUALCOMM INCORPORATED, Plaintiff,
v.
BROADCOM CORPORATION, Defendant.
and Related Counterclaims.
No. 05cv1958-B (BLM).

Jan. 7, 2008.

Brian A. Foster, John Allcock, Kathryn Bridget Riley, Randall Evan Kay, DLA Piper US, Christopher James Beal, William S. Boggs, DLA Piper RudnickGray Cary, Roger Wayne Martin, Qualcomm Incorporated, Timothy Scott Blackford, Dla Piper US LLP, San Diego, CA, Geoffrey M. Howard, Bingham McCutchen, San Francisco, CA, for Plaintiff.
Alicia Hunt, Juliana Maria Mirabilio, Will L. Crossley, Wilmer Cutler Pickering Hale and Dorr, Washington, DC, Allen C. Nunnally, Donald R. Steinberg, John J. Regan, Kate Saxton, Louis W. Tompros, Stephen M. Muller, Vinita Ferrera, Wayne L. Stoner, William F. Lee, Wilmer Cutler Pickering Hale and Dorr, Boston, MA, Gregory C. Schodde, Jean Dudek Kuelper, Lawrence M. Jarvis, McAndrews Held and Malloy, Richard J. Prendergast, Richard J. Prendergast Ltd, Chicago, IL, James Sullivan McNeill, Robert S. Brewer, Jr., McKenna Long and Aldridge, San Diego, CA, Maria K. Vento, Mark D. Selwyn, Wilmer Cutler Pickering Hale and Dorr, Palo Alto, CA, Merri A. Baldwin, Chapman Popik & White LLP, San Francisco, CA, for Defendant.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SANCTIONS AND SANCTIONING QUALCOMM, INCORPORATED AND INDIVIDUAL LAWYERS

BARBARA L. MAJOR, United States Magistrate Judge.
*1 At the conclusion of trial, counsel for Broadcom Corporation ("Broadcom") made an oral motion for sanctions after Qualcomm Incorporated ("Qualcomm") witness Viji Raveendran testified about emails that were not produced to Broadcom during discovery. Doc. No. 489. The trial judge, United States District Court Judge Rudi M. Brewster, referred the motion to this Court pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(b) of the United States District Court for the Southern District of California. Doc. No. 494. On May 29, 2007, Broadcom filed a written motion requesting that the Court sanction Qualcomm for its failure to produce tens of thousands of documents that Broadcom had requested in discovery. Doc. No. 540. Qualcomm timely opposed, and Broadcom filed a reply. Doc. Nos. 568, 578, 581.This Court heard oral argument on Broadcom's motion on July 26, 2007.

After hearing oral argument and reviewing Judge Brewster's Order on Remedy for Finding of Waiver ("Waiver Order") and Order Granting Broadcom Corporation's Motion for Exceptional Case Finding and for an Award of Attorney's Fees (35 U.S.C. § 285) ("Exceptional Case Order"), this Court issued an Order to Show Cause Why Sanctions Should Not be Imposed against Qualcomm's retained attorneys ("OSC"). Doc. No. 599. Specifically, this Court ordered James R. Batchelder, Adam A. Bier, Craig H. Casebeer, David E. Kleinfeld, Kevin K. Leung, Christian E. Mammen, Lee Patch, Kyle Robertson, Victoria Q. Smith, Barry J. Tucker, Jaideep Venkatesan, Bradley A. Waugh, Stanley Young, Roy V. Zemlicka, and any and all other attorneys who signed discovery responses, signed pleadings and pretrial motions, and/or appeared at trial on behalf of Qualcomm to appear and show cause why sanctions should not be imposed for their failure to comply with this Court's orders. *Id.*

On October 3, 2007, nineteen attorneys filed declarations and briefs responsive to the OSC. Doc. Nos. 670, 673-74, 676-80; 682, 685-87, 689-91, 693-700.Qualcomm filed a brief and four declarations. Doc. Nos. 675, 681, 683-84, 692.The attorneys filed objections to Qualcomm's brief on October 5, 2007 [Doc. No. 704], and both Broadcom and Qualcomm filed responsive briefs on October 9, 2007 [Doc. Nos. 705-06]. This Court heard extensive oral argument on the sanctions issue on October 12, 2007. Doc. No. 709 (October 12, 2007 Hearing Transcript).

Having considered all of the written and oral

arguments presented and supporting documents submitted, and for the reasons set forth more fully below, the Court **GRANTS IN PART** and **DENIES IN PART** Broadcom's motion for sanctions against Qualcomm, **REFERS TO THE STATE BAR OF CALIFORNIA** six attorneys, and **SANCTIONS** Qualcomm and six of its retained lawyers. Doc. Nos. 489, 540, 599, 614.

BACKGROUND

A. *The Patent Infringement Case*

Qualcomm initiated this patent infringement action on October 14, 2005, alleging Broadcom's infringement of Qualcomm patent numbers 5, 452, 104 (the "'104 patent' ") and 5, 576, 767 (the "'767 patent' ") based on its manufacture, sale, and offers to sell H.264-compliant products. Compl. ¶¶ 7-16. Qualcomm sought injunctive relief, compensatory damages, attorneys' fees and costs. *Id.* at 3. On December 8, 2006, Broadcom filed a First Amended Answer and Counterclaims in which it alleged (1) a counterclaim that the '104 patent is unenforceable due to inequitable conduct, and (2) an affirmative defense that both patents are unenforceable due to waiver. Doc. No. 370. Broadcom's waiver defense was predicated on Qualcomm's participation in the Joint Video Team ("JVT") in 2002 and early 2003. Doc. No. 540-2 at 3. The JVT is the standards-setting body that created the H.264 standard, which was released in May 2003 and governs video coding. Waiver Order at 5-9.

B. *Evidence of Qualcomm's Participation in the JVT*

*2 Over the course of discovery, Broadcom sought information concerning Qualcomm's participation in and communications with the JVT through a variety of discovery devices. For example, as early as January 23, 2006, Broadcom served its First Set of Requests for the Production of Documents and Things (Nos.1-88), in which it requested:

[a]ll documents given to or received from a standards setting body or group that concern any standard relating to the processing of digital video signals that pertains in any way to any Qualcomm Patent, including without limitation communications, proposals, presentations, agreements, commitments, or contracts to or from such bodies.... [and]

[a]ll documents concerning any Qualcomm membership, participation, interaction, and/or involvement in setting any standard relating to the processing of digital video signals that pertains in any way to any Qualcomm Patent. This request also covers all proposed or potential standards, whether or not actually adopted.

Decl. of Kate Saxton Supp. Broadcom's Mot. for Sanctions [Doc. No. 540] ("Saxton Decl."), Ex. BB-2 (Request for Production Nos. 49 & 50). On July 14, 2006, Broadcom served its Second Set of Requests for Production of Documents and Things (Nos.89-115), calling for production of:
[a]ll documents referring to or evidencing any participation by Qualcomm in the proceedings of the JVT, the ISO, the IEC, and/or the ITU-T; and

[a]ll documents constituting, referring to, or evidencing any disclosure by any party to the JVT, the ISO, the IEC, and/or the ITU-T of any Qualcomm Patent and/or any Related Qualcomm Patent.

Id., Exs. D & DD (Request for Production Nos. 93-94). Broadcom also requested similar information via interrogatories and multiple Rule 30(b)(6) deposition notices. *See id.*, Ex. EE (Broadcom Interrogatory Nos. 19-20); Saxton Suppl. Decl., Ex. K (Broadcom Interrogatory No. 13); Broadcom's Mem. Supp. Mot. for Sanctions [Doc. No. 540] ("Def.'s Mem.") at 4 n. 4 (sample excerpt from Broadcom deposition notice directed to the Qualcomm witness knowledgeable about "attendance or participation by any Qualcomm principal, employee, or representative at any H.264 standards committee meetings").

On their face, Qualcomm's written discovery responses did not appear unusual. In response to Broadcom's request for JVT documents, Qualcomm, in a discovery response signed by attorney Kevin Leung, stated "Qualcomm will produce non-privileged relevant and responsive documents describing QUALCOMM's participation in the JVT, if any, which can be located after a reasonable search."Doc. No. 543-3, Ex. X (Qualcomm's Response to Broadcom's Request for Production No. 93); Decl. of Kevin Leung at 5-6, Ex. 3. Similarly, Qualcomm committed to producing "responsive non-privileged documents that were given to or received

from standards-setting body responsible for the ISO/IEC MPEG-4 Part 10 standard, and which concern any Qualcomm participation in setting the ISO/IEC MPEG-4 Part 10 standard."[FN1]Leung Decl. at 6; Decl. of Christian Mammen at 7-8. When asked for "the facts and circumstances of any and all communications between Qualcomm and any standards setting body relating to video technology, including ... the JVT ...," Qualcomm responded that it first attended a JVT meeting in December 2003 and that it first submitted a JVT proposal in January 2006. Decl. of Stanley Young at 14 and Ex. 6 (Response to Interrogatory No. 19). In response to Interrogatory No. 13, Qualcomm stated that it submitted four proposals to the JVT in 2006 but had no earlier involvement. Leung Decl. at 6-7; Decl. of Kyle S. Robertson at 11 and Ex. 2. This response included the statement that "Qualcomm's investigation concerning this interrogatory is ongoing and Qualcomm reserves the right to supplement its response to this interrogatory as warranted by its investigation."*Id.* Kevin Leung signed both of these interrogatory responses. *See* Robertson Decl., Ex. 2 (Response to Interrogatory No. 13) *and* Young Decl., Ex. 6 (Response to Interrogatory No. 19).

> FN1. The standard adopted by the JVT and at issue in this case is known by two names: H.264 and MPEG-4 Part 10. The MPEG-4 Part 10 nomenclature is used by the ISO/IEC organization but both names refer to the same standard. Leung Decl. at 6; Mammen Decl. at 7. The Court will use the H.264 designation throughout this Order.

*3 Qualcomm's responses to Broadcom's Rule 30(b)(6) deposition notices were more troubling. Initially, Qualcomm designated Christine Irvine as the corporation's most knowledgeable person on the issue of Qualcomm's involvement in the JVT. Leung Decl. at 3-4. Although attorney Leung prepared Irvine for her deposition (*id.*), Qualcomm did not search her computer for any relevant documents or emails or provide her with any information to review (Decl. of Christine Irvine at 2-3; Decl. of Christine Glathe at 3). Irvine testified falsely that Qualcomm had never been involved in the JVT. Leung Decl. at 4. Broadcom impeached Irvine with documents showing that Qualcomm had participated in the JVT in late 2003. *Id.* Qualcomm ultimately agreed to provide another Rule 30(b)(6) witness. *Id.*

Qualcomm designated Scott Ludwin as the new representative to testify about Qualcomm's knowledge of and involvement in the JVT. *Id.*Leung prepared and defended Ludwin at his deposition. *Id.* Qualcomm did not search Ludwin's computer for any relevant documents nor take any other action to prepare him. Decl. of Scott Ludwin at 2-3 (listing all of the preparation he did not do); Glathe Decl. at 3. Ludwin testified falsely that Qualcomm only began participating in the JVT in late 2003, after the H.264 standard had been published. *Id.* In an effort to impeach him (and extract the truth), Broadcom showed Ludwin a December 2002 email reflector list from the Advanced Video Coding ("AVC") Ad Hoc Group that listed the email address viji@qualcomm.com.[FN2] Decl. of Stanley Young at 19-20; Robertson Decl. at 14, Ex. 3; Leung Decl. at 8. Although Ludwin did not recognize the document, Broadcom utilized the document throughout the litigation to argue that Qualcomm had participated in the JVT during the development of the H.264 standard. Young Decl. at 19-20; Robertson Decl. at 14-17; Decl. of Jaideep Venkatesan at 14-15.

> FN2. The document is an "Input Document to JVT" entitled "Ad Hoc Report on AVC Verification Test."Robertson Decl., Ex. 3. The report discusses a meeting set to take place on Awaji Island. *Id.* Annex A to the document is entitled a "list of Ad Hoc Members." *Id.* It includes Raveendran's email address, viji@qualcomm.com, and identifies her as a member of list avc_ce. *Id.* While the document is not an email sent to or from Raveendran, it indicates that a Qualcomm employee was receiving JVT/AVC reports in 2002. This document became critical to Broadcom as it was the only evidence in Broadcom's possession indicating the truth-that Qualcomm had been actively involved in the JVT and the development of the H.264 standard in 2002.

As the case progressed, Qualcomm became increasingly aggressive in its argument that it did not participate in the JVT during the time the JVT was creating the H.264 standard.[FN3]This argument was vital to Qualcomm's success in this litigation because if Qualcomm had participated in the creation of the H.264 standard, it would have been required to

identify its patents that reasonably may be essential to the practice of the H.264 standard, including the '104 and '767 patents, and to license them royalty-free or under non-discriminatory, reasonable terms. Waiver Order at 5-9. Thus, participation in the JVT in 2002 or early 2003 during the creation of the H.264 standard would have prohibited Qualcomm from suing companies, including Broadcom, that utilized the H.264 standard. In a nutshell, the issue of whether Qualcomm participated in the JVT in 2002 and early 2003 became crucial to the instant litigation.

FN3. For example, on September 1, 2006, Qualcomm submitted an expert declaration confirming the absence of any corporate records indicating Qualcomm's participation in the JVT. Saxton Decl., Ex. Z. The declaration was prepared by the Heller Ehrman lawyers and reviewed by numerous Day Casebeer and Qualcomm in-house attorneys. Venkatesan Decl. at 9-12; Robertson Decl. at 9; Young Decl. at 15-16. In November, Qualcomm filed a Motion for Summary Adjudication ("MSA") and supporting reply arguing that the evidence established Qualcomm's non-participation in the JVT during the relevant period. Saxton Decl., Exs. FF & GG. Numerous in-house and outside counsel reviewed the pleadings and attorneys Young, Batchelder and Patch argued the motion. Young Decl. at 18-22; Vekatesan Decl. at 12-15; Robertson Decl. at 10-16; Batchelder Decl. at 14-15; Patch Decl. at 4; Decl. of Barry J. Tucker at 4 (Tucker signed the MSA pleadings); Decl. of David E. Kleinfeld at 4 (Kleifeld signed the reply pleadings). In its reply, Qualcomm dismissed the appearance of Raveendran's email address on the JVT *ad hoc* group email reflector list and denied any suggestion that the email reflector list indicated Raveendran received any JVT-related information or otherwise had any involvement in the JVT *ad hoc* committee. Saxton Decl., Ex. II. On November 19, 2006, Qualcomm filed (1) a Motion in Limine to exclude evidence relating to, among other things, Qualcomm's participation in the JVT, declaring that the "facts demonstrate" Qualcomm "did not participate in JVT deliberations while the H.264 standard was being created" and (2) a Memorandum of Contentions of Fact and Law in which it similarly asserted its lack of involvement in the H.264 standardization process. *Id.*, Exs. HH & KK at 2. Numerous in-house and outside counsel also reviewed these pleadings. Mammen Decl. at 15 (Mammen signed the Memorandum); Decl. of Craig H. Casebeer at 4-5; Decl. of Roy V. Zemlicka at 2, 5-6; Batchelder Decl. at 15; Venkatesan Decl. at 15-16; Robertson Decl. at 16-17; Tucker Decl. at 4 (Tucker signed the motion and related pleadings on behalf of Zemlicka). Qualcomm reiterated these arguments in its Rebuttal Memorandum of Contentions of Fact and Law filed on December 4, 2006 and signed by Mammen. Saxton Decl., Ex. JJ; Mammen Decl. at 15. On January 24, 2007, after the discovery of the Raveendran emails, Qualcomm filed its Motion for Judgment as a Matter of Law ("JMOL") asserting the same lack of participation argument. Decl. of Victoria Q. Smith at 2-5; Casebeer Decl. at 7; Robertson Decl. at 19. Smith signed the JMOL. Smith Decl. at 2.

C. *Trial and Decision Not to Produce avc_ce Emails*

Trial commenced on January 9, 2007, and throughout trial, Qualcomm argued that it had not participated in the JVT in 2002 and early 2003 when the H.264 standard was being created. In his opening statement, Qualcomm's lead attorney, James Batchelder, stated:

*4 Later, in May of '03, the standard is approved and published. And then Qualcomm, in the fall of 2003, it begins to participate not in JVT because it's done. H.264 is approved and published. Qualcomm begins to participate in what are called professional extensions, things that sit on top of the standard, additional improvements.

Waiver Order at 45; Batchelder Decl. at 15.

While preparing Qualcomm witness Viji Raveendran to testify at trial, attorney Adam Bier discovered an August 6, 2002 email to viji@qualcomm.com welcoming her to the avc_ce mailing list. Decl. of Adam Bier at 4, Ex. A. Several days later, on January 14, 2007, Bier and Raveendran searched her laptop

computer using the search term "avc_ce" and discovered 21 separate emails, none of which Qualcomm had produced in discovery. *Id.* at 7. The email chains bore several dates in November 2002 and the authors discussed various issues relating to the H.264 standard. Mammen Decl. at 16-19, Ex. 8. While Raveendran was not a named author or recipient, the emails were sent to all members of two JVT email groups (jvt-experts and avc_ce) and Raveendran maintained them on her computer for more than four years. *Id.* The Qualcomm trial team decided not to produce these newly discovered emails to Broadcom, claiming they were not responsive to Broadcom's discovery requests. Bier Decl. at 7; Mammen Decl. at 18-19; Patch Decl. at 6-7; Batchelder Decl. at 16. The attorneys ignored the fact that the presence of the emails on Raveendran's computer undercut Qualcomm's premier argument that it had not participated in the JVT in 2002. Mammen Decl. at 18-19; Bier Decl. at 7; Patch Decl. at 7. The Qualcomm trial team failed to conduct any investigation to determine whether there were more emails that also had not been produced.

Four days later, during a sidebar discussion, Stanley Young argued against the admission of the December 2002 avc_ce email reflector list, declaring: "Actually, there are no emails-there are no emails ... there's no evidence that any email was actually sent to this list. This is just a list of email ... addresses. There's no evidence of anything being sent."Trial Tr. vol. VII at 91-92; Young Decl. at 25-29. None of the Qualcomm attorneys who were present during the sidebar mentioned the 21 avc_ce emails found on Raveendran's computer a few days earlier. *Id.;* Batchelder Decl. at 16-17; Casebeer Decl. at 6.

During Raveendran's direct testimony on January 24th, attorney Lee Patch pointedly did not ask her any questions that would reveal the fact that she had received the 21 emails from the avc_ce mailing list; instead, he asked whether she had "any knowledge of having ***read"*** any emails from the avc_ce mailing list. Patch Decl. at 8-9; Trial Tr. vol. VIII at 46. But on cross-examination, Broadcom asked the right question and Raveendran was forced to admit that she had received emails from the avc_ce mailing list. Trial Tr. vol. VIII at 53. Immediately following this admission, in response to Broadcom's request for the emails, and despite the fact that he had participated in the decision three days earlier not to produce them, Patch told the Court at sidebar:

***5** [I]t's not clear to me [the emails are] responsive to anything. So that's something that needs to be determined before they would be produced ... I'm talking about whether they were actually requested in discovery.... I'm simply representing that I haven't seen [the emails], and [whether Broadcom requested them] hasn't been determined.

Order at 46; Patch Decl. at 10. Over the lunch recess that same day, Qualcomm's counsel produced the 21 emails they previously had retrieved from Raveendran's email archive. Trial Tr. vol. VIII at 114.

On January 26, 2007, the jury returned unanimous verdicts in favor of Broadcom regarding the non-infringement of the '104 and '767 patents, and in favor of Qualcomm regarding the validity and non-obviousness of the same. Doc. No. 499. The jury also returned a unanimous advisory verdict in favor of Broadcom that the '104 patent is unenforceable due to inequitable conduct and the '104 and ' 767 patents are unenforceable due to waiver. *Id.* at 14.

On March 21, 2007, Judge Brewster found (1) in favor of Qualcomm on Broadcom's inequitable conduct counterclaim regarding the '104 patent, and (2) in favor of Broadcom on Broadcom's waiver defense regarding the '104 and '767 patents. Doc. No. 528. On August 6, 2007, Judge Brewster issued a comprehensive order detailing the appropriate remedy for Qualcomm's waiver. Doc. No. 593. After a thorough overview of the JVT, the JVT's policies and guidelines, and Qualcomm's knowledge of the JVT and evidence of Qualcomm's involvement therein, *see id.* at 5-22, Judge Brewster found:

by clear and convincing evidence that Qualcomm, its employees, and its witnesses actively organized and/or participated in a plan to profit heavily by (1) wrongfully concealing the patents-in-suit while participating in the JVT and then (2) actively hiding this concealment from the Court, the jury, and opposing counsel during the present litigation.

Id. at 22.Judge Brewster further found that Qualcomm's "counsel participated in an organized program of litigation misconduct and concealment throughout discovery, trial, and post-trial before new

counsel took over lead role in the case on April 27, 2007."*Id.* at 32.Based on "the totality of the evidence produced both before and after the jury verdict," and in light of these findings, Judge Brewster concluded that "Qualcomm has waived its rights to enforce the '104 and '767 patents and their continuations, continuations-in-part, divisions, reissues, or any other derivatives of either patent."*Id.* at 53.

Also on August 6, 2007, Judge Brewster granted Broadcom's Motion for an Award of Attorneys' Fees pursuant to 35 U.S.C. § 285. Doc. No. 594. Judge Brewster found clear and convincing evidence that Qualcomm's litigation misconduct, as set forth in his Waiver Order, *see* Doc. No. 593, justified Qualcomm's payment of all "attorneys' fees, court costs, expert witness fees, travel expenses, and any other litigation costs reasonably incurred by Broadcom" in the defense of this case. Doc. No. 594 at 4. On December 11, 2007, Judge Brewster adopted this court's recommendation and ordered Qualcomm to pay Broadcom $9,259,985.09 in attorneys' fees and related costs, as well as post-judgment interest on the final fee award of $8,568,633.24 at 4.91 percent accruing from August 6, 2007. Doc. Nos. 715 & 717.

D. *Qualcomm's Post-Trial Misconduct*

*6 Following trial, Qualcomm continued to dispute the relevancy and responsiveness of the 21 Raveendran emails. Bier Decl., Exs. B-E. Qualcomm also resisted Broadcom's efforts to determine the scope of Qualcomm's discovery violation. *Id.*, Exs. B-F. By letter dated February 16, 2007, Bier told Broadcom "[w]e continue to believe that Qualcomm performed a reasonable search of Qualcomm's documents in response to Broadcom's Requests for Production and that the twenty-one unsolicited emails received by Ms. Raveendran from individuals on the avc_ce reflector are not responsive to any valid discovery obligation or commitment."*Id.*, Ex. C. In response to Broadcom's request that Qualcomm conduct additional searches to determine the scope of Qualcomm's discovery violation, Bier stated in a March 7, 2007 letter, we "believe your negative characterization of Qualcomm's compliance with its discovery obligation to be wholly without merit" but he advised that Qualcomm agreed to search the current and archived emails of five trial witnesses using the requested JVT, avc_ce and H.264 terms. *Id.*, Exs. D & E. Bier explained that Qualcomm has "not yet commenced these searches, and [does] not yet know the volume of results we will obtain."*Id.*, Ex. E. Throughout the remainder of March 2007, Bier repeatedly declined to update Broadcom on Qualcomm's document search. *Id.*, Ex. F.

But, on April 9, 2007, James Batchelder and Louis Lupin, Qualcomm's General Counsel, submitted correspondence to Judge Brewster in which they admitted Qualcomm had thousands of relevant unproduced documents and that their review of these documents "revealed facts that appear to be inconsistent with certain arguments that [counsel] made on Qualcomm's behalf at trial and in the equitable hearing following trial."Saxton Decl., Exs. H & I. Batchelder further apologized "for not having discovered these documents sooner and for asserting positions that [they] would not have taken had [they] known of the existence of these documents."*Id.*, Ex. H.

As of June 29, 2007, Qualcomm had searched the email archives of twenty-one employees and located more than forty-six thousand documents (totaling more than three hundred thousand pages), which had been requested but not produced in discovery. Broadcom's Reply Supp. Mot. for Sanctions at 1 n. 2. Qualcomm continued to produce additional responsive documents throughout the summer. Doc. No. 597 (Qualcomm's August 7, 2007 submission of three additional avc_ce emails it had not produced to Broadcom).

DISCUSSION

As summarized above, and as found by Judge Brewster, there is clear and convincing evidence that Qualcomm intentionally engaged in conduct designed to prevent Broadcom from learning that Qualcomm had participated in the JVT during the time period when the H.264 standard was being developed. To this end, Qualcomm withheld tens of thousands of emails showing that it actively participated in the JVT in 2002 and 2003 and then utilized Broadcom's lack of access to the suppressed evidence to repeatedly and falsely aver that there was "no evidence" that it had participated in the JVT prior to September 2003. Qualcomm's misconduct in hiding the emails and electronic documents prevented Broadcom from correcting the false statements and countering the misleading arguments.

A. *Legal Standard*

*7 The Federal Civil Rules authorize federal courts to impose sanctions on parties and their attorneys who fail to comply with discovery obligations and court orders. Rule 37 authorizes a party to file a motion to compel an opponent to comply with a discovery request or obligation when the opponent fails to do so initially. Fed.R.Civ.P. 37(a). If such a motion is filed, the rule requires the court to award reasonable attorney's fees to the prevailing party unless the court finds the losing party's position was "substantially justified" or other circumstances make such an award unjust. *Id.* Depending upon the circumstances, the court may require the attorney, the client, or both to pay the awarded fees. *Id.* If the court grants a discovery motion and the losing party fails to comply with the order, the court may impose additional sanctions against the party. Fed.R.Civ.P. 37(b). There is no requirement under this rule that the failure be willful or reckless; "sanctions may be imposed even for negligent failures to provide discovery." *Fjelstad v. Am. Honda Motor Co., Inc.*, 762 F.2d 1334, 1343 (9th Cir.1985).

The Federal Rules also provide for sanctions against individual attorneys who are remiss in complying with their discovery obligations:

[e]very discovery request, response or objection made by a party ... shall be signed by at least one attorney [and][t]he signature of the attorney ... constitutes a certification that to the best of the signer's knowledge, information, and belief, ***formed after a reasonable inquiry,*** the request, response, or objection is: consistent with the rules and law, not interposed for an improper purpose, and not unreasonable or unduly burdensome or expensive.

Fed.R.Civ.P. 26(g)(2) (emphasis added)."[W]hat is reasonable is a matter for the court to decide on the totality of the circumstances."Fed.R.Civ.P. 26 Advisory Committee Notes (1983 Amendment). The Committee explained that:
Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37. In addition, Rule 26(g) is designed to curb discovery abuse by explicitly encouraging the imposition of sanctions. This subdivision provides a deterrent to both excessive discovery and evasion by imposing a certification requirement that obliges each attorney to stop and think about the legitimacy of a discovery request, a response thereto, or an objection. The term "response" includes answers to interrogatories and to requests to admit as well as responses to production requests .[¶] If primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse. With this in mind, Rule 26(g), which parallels the amendments to Rule 11, requires an attorney ... to sign each discovery request, response, or objection.

Id. If an attorney makes an incorrect certification without substantial justification, the court must sanction the attorney, party, or both and the sanction may include an award of reasonable attorney's fees. Fed.R.Civ.P. 26(g)(3). If a party, without substantial justification, fails "to amend a prior response to discovery as required by Rule 26(e)(2)," the court may prevent that party from using that evidence at trial or at a hearing and impose other appropriate sanctions, including the payment of attorney's fees.Fed.R.Civ.P. 37(c)(1). As the Supreme Court confirmed, Rule 26(g), like Rule 11, requires that the court impose "an appropriate sanction" on the attorney; in other words, one which is commensurate with the discovery harm. *See*Fed.R.Civ.P. 26(g)(3); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991).

***8** In addition to this rule-based authority, federal courts have the inherent power to sanction litigants to prevent abuse of the judicial process. *See* *Chambers*, 501 U.S. at 44-46. All "federal courts are vested with inherent powers enabling them to manage their cases and courtrooms effectively and to ensure obedience to their orders.... As a function of this power, courts can dismiss cases in their entirety, bar witnesses, award attorney's fees and assess fines." *Aloe Vera of Am., Inc. v. United States*, 376 F.3d 960, 964-65 (9th Cir.2004) (citation omitted). Sanctions are appropriate in response to "willful disobedience of a court order ... or when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons ." *Fink v. Gomez*, 239 F.3d 989, 991 (9th Cir.2001). When a court order is violated, a district court considering the imposition of sanctions must also examine the risk of prejudice to the complying party and the availability of less drastic sanctions. *See*

Commodity Futures Trading Comm'n v. Noble Metals, 67 F.3d 766, 771 (9th Cir.1995).

Regardless of whether sanctions are imposed under the Federal Rules or pursuant to a court's inherent power, the decision to impose sanctions lies within the sound discretion of the court. *See Lasar v. Ford Motor Co.*, 399 F.3d 1101, 1109-14 (9th Cir.2005) (reviewing sanctions imposed under the court's inherent power); *Payne v. Exxon Corp.*, 121 F.3d 503, 510 (9th Cir.1997) (upholding sanctions imposed under the Federal Rules).

B. *Broadcom Did Not File a Motion to Compel Discovery*

As summarized above, Broadcom served interrogatories and requested documents relating to Qualcomm's participation in the JVT. Qualcomm responded that "Qualcomm will produce non-privileged relevant and responsive documents describing QUALCOMM's participation in the JVT, if any, which can be located after a reasonable search."Doc. No. 543-3, Ex. X (Qualcomm's Response to Broadcom's Request for Production No. 93). Qualcomm also committed to producing "responsive non-privileged documents that were given to or received from standards-setting body responsible for the [H.264] standard, and which concern any Qualcomm participation in setting the [H.264] standard."Mammen Decl. at 7-8.

Despite these responses, Qualcomm did not produce over 46,000 responsive documents, many of which directly contradict the non-participation argument that Qualcomm repeatedly made to the court and jury. Because Qualcomm agreed to produce the documents and answered the interrogatories (even though falsely), Broadcom had no reason to file a motion to compel.[FN4]And, because Broadcom did not file a motion to compel, Broadcom's possible remedies are restricted. If Broadcom had filed a motion to compel, it could have obtained sanctions against Qualcomm and its attorneys. Fed.R.Civ.P. 37(a) & (b). Because Broadcom did not file a motion to compel, it may only seek Rule 37 sanctions against Qualcomm. Fed.R.Civ.P. 37(c). Thus, Qualcomm's suppression of documents placed its retained attorneys in a better legal position than they would have been in if Qualcomm had refused to produce the documents and Broadcom had filed a motion to compel.

> FN4. Qualcomm attempts to capitalize on this failure, arguing "Broadcom never raised any concern regarding the scope of documents Qualcomm agreed to produce in response to Request No. 50, and never filed a motion to compel concerning this request. Accordingly, there is no order compelling Qualcomm to respond more fully to it."Mammen Decl. at 9. Qualcomm made the same argument with regard to its other discovery responses. *Id.* at 9-11;*see also* Bier Decl., Ex. C. This argument is indicative of the gamesmanship Qualcomm engaged in throughout this litigation. Why should Broadcom file a motion to compel when Qualcomm agreed to produce the documents? What would the court have compelled: Qualcomm to do what it already said it would do? Should all parties file motions to compel to preserve their rights in case the other side hides documents?

***9** This dilemma highlights another problem with Qualcomm's conduct in this case. The Federal Rules of Civil Procedure require parties to respond to discovery in good faith; the rules do not require or anticipate judicial involvement unless or until an actual dispute is discovered. As the Advisory Committee explained, "[i]f primary responsibility for conducting discovery is to continue to rest with the litigants, they must be obliged to act responsibly and avoid abuse."Fed.R.Civ.P. 26(g) Advisory Committee Notes (1983 Amendment). The Committee's concerns are heightened in this age of electronic discovery when attorneys may not physically touch and read every document within the client's custody and control. For the current "good faith" discovery system to function in the electronic age, attorneys and clients must work together to ensure that both understand how and where electronic documents, records and emails are maintained and to determine how best to locate, review, and produce responsive documents. Attorneys must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search. Producing 1.2 million pages of marginally relevant documents while hiding 46,000 critically important ones does not constitute good faith and does not satisfy either the client's or attorney's discovery

obligations. Similarly, agreeing to produce certain categories of documents and then not producing all of the documents that fit within such a category is unacceptable. Qualcomm's conduct warrants sanctions.

C. *Sanctions*

The Court's review of Qualcomm's declarations, the attorneys' declarations, and Judge Brewster's orders leads this Court to the inevitable conclusion that Qualcomm intentionally withheld tens of thousands of decisive documents from its opponent in an effort to win this case and gain a strategic business advantage over Broadcom. Qualcomm could not have achieved this goal without some type of assistance or deliberate ignorance from its retained attorneys. Accordingly, the Court concludes it must sanction both Qualcomm and some of its retained attorneys.[FN5]

> FN5. The Court is limited in its review and analysis of the debacle that occurred in this litigation because Judge Brewster only referred the discovery violation to this Court. Doc. No. 494 ("Dft's Oral Motion [489] for Sanctions re Production of Documents re Witness Viji Raveendran-made and submitted on 01-24-07-Referred to the Magistrate Judge"). Judge Brewster did not refer any sanction motions relating to false statements made to the trial judge or in pleadings resolved by the trial judge. *Id.* Accordingly, this Court is limited in its review, analysis, and conclusion to discovery violations and applicable discovery rules and remedies. *See*Fed.R.Civ.P. 11(d) (Rule 11 does "not apply to disclosures and discovery requests, responses, objections, and motions").

1. *Misconduct by Qualcomm*

Qualcomm violated its discovery obligations by failing to produce more than 46,000 emails and documents that were requested in discovery and that Qualcomm agreed to produce. *See*Fed.R.Civ.P. 26(g) Advisory Committee Notes (1983 Amendment) ("Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37).Rule 37 dictates that "[a] party that without substantial justification fails to ... amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use" the suppressed evidence in court proceedings.Fed.R.Civ.P. 37(c)(1). The court also may impose other appropriate sanctions, including the imposition of reasonable attorneys' fees. *Id.*

10** Qualcomm has not established "substantial justification" for its failure to produce the documents. In fact, Qualcomm has not presented ***any evidence attempting to explain or justify its failure to produce the documents. Despite the fact that it maintains detailed records showing whose computers were searched and which search terms were used (Glathe Decl. at 3 (identifying the individuals whose computers were not searched for specific types of documents)), Qualcomm has not presented any evidence establishing that it searched for pre-September 2003 JVT, avc_ce, or H.264 records or emails on its computer system or email databases. Qualcomm also has not established that it searched the computers or email databases of the individuals who testified on Qualcomm's behalf at trial or in depositions as Qualcomm's most knowledgeable corporate witnesses; in fact, it indicates that it did not conduct any such search. *Id.;* Irvine Decl. at 2; Ludwin Decl. at 3; Decl. of Viji Raveendran at 1, 4. The fact that Qualcomm did not perform these basic searches at any time before the completion of trial indicates that Qualcomm intentionally withheld the documents. This conclusion is bolstered by the fact that when Qualcomm "discovered" the 21 Raveendran emails, it did not produce them and did not engage in any type of review to determine whether there were additional relevant, responsive, and unproduced documents. Bier Decl. at 7; Mammen Decl. at 16-18; Patch Decl. at 5-7. The conclusion is further supported by the fact that after trial Qualcomm did not conduct an internal investigation to determine if there were additional unproduced documents (Bier Decl., Ex. E (Qualcomm still had not searched as of March 7, 2007)); but, rather, spent its time opposing Broadcom's efforts to force such a search and insisting, without any factual basis, that Qualcomm's search was reasonable. *Id.* at 10-11, Exs. B-F; Patch Decl. at 11-14.

Qualcomm's claim that it inadvertently failed to find and produce these documents also is negated by the

massive volume and direct relevance of the hidden documents. As Judge Brewster noted, it is inexplicable that Qualcomm was able to locate the post-September 2003 JVT documents that either supported, or did not harm, Qualcomm's arguments but were unable to locate the pre-September 2003 JVT documents that hurt its arguments. Waiver Order at 38. Similarly, the inadvertence argument is undercut by Qualcomm's ability to easily locate the suppressed documents using fundamental JVT and avc search terms when forced to do so by Broadcom's threat to return to court. *See* October 12, 2007 Hearing Transcript at 192. Finally, the inadvertence argument also is belied by the number of Qualcomm employees and consultants who received the emails, attended the JVT meetings, and otherwise knew about the information set forth in the undisclosed emails. Waiver Order at 10-12, 21-32. It is inconceivable that Qualcomm was unaware of its involvement in the JVT and of the existence of these documents.

***11** Assuming *arguendo,* that Qualcomm did not know about the suppressed emails, Qualcomm failed to heed several warning signs that should have alerted it to the fact that its document search and production were inadequate. The first significant concern should have been raised in connection with the Rule 30(b)(6) depositions of Christine Irvine and Scott Ludwin. Both individuals testified as the Qualcomm employee most knowledgeable about Qualcomm's involvement in the JVT. But, Qualcomm did not search either person's computer for JVT documents, did not provide either person with relevant JVT documents to review, and did not make any other efforts to ensure each person was in fact knowledgeable about Qualcomm's JVT involvement. Irvine Decl. at 2; Ludwin Decl. at 3; Glathe Decl. at 3. These omissions are especially incriminating because many of the suppressed emails were to or from Irvine. Waiver Order at 10-12, 25-26. If a witness is testifying as an organization's most knowledgeable person on a specific subject, the organization has an obligation to conduct a reasonable investigation and review to ensure that the witness does possess the organization's knowledge.[FN6] Fed.R.Civ.P. 30(b)(6); *In re JDS Uniphase Corp. Sec. Litig.*, 2007 WL 219857, *1 (N.D.Cal.2007) (the corporation "must prepare the designee to the extent matters are reasonably available, whether from documents, past employees, or other sources") (internal citation omitted); 1 *Discovery Proceedings in Federal Court* § 8.6 (3rd ed.2007) ("[a] party responding to a request for a deposition of a corporate representative to testify on behalf of the corporation must make a good-faith endeavor to designate the persons having knowledge of the matters sought by the interrogator and to prepare those persons in order that they can answer fully, completely, and unevasively, the questions posed by the interrogator as to the relevant subject matters"). An adequate investigation should include an analysis of the sufficiency of the document search and, when electronic documents are involved, an analysis of the sufficiency of the search terms and locations. In the instant case, a reasonable inquiry should have included using the JVT, avc and H.264 search terms and searching the computers of Raveendran, Irvine, Ludwin (and other Qualcomm employees identified in the emails discovered on the computers of these witnesses). This minimal inquiry would have revealed the existence of the suppressed documents. Moreover, the fact that Broadcom alleged, and Qualcomm agreed or acquiesced, that Irvine was not sufficiently knowledgeable about Qualcomm's JVT involvement or adequately prepared for her deposition, should also have alerted Qualcomm to the inadequacy of its document search and production.

> FN6. Qualcomm's self-serving statements that "outside counsel selects ... the custodians whose documents should be searched" and the paralegal does not decide "what witnesses to designate to testify on behalf of the company" (Glathe Decl. at 1) does not relieve Qualcomm of its obligations. Qualcomm has not presented any evidence establishing what actions, if any, it took to ensure it designated the correct employee, performed the correct computer searches, and presented the designated employee with sufficient information to testify as the corporation's most knowledgeable person. Qualcomm also has not presented any evidence that outside counsel knew enough about Qualcomm's organization and operation to identify all of the individuals whose computers should be searched and determine the most knowledgeable witness. And, more importantly, Qualcomm is a large corporation with an extensive legal staff; it clearly had the ability to identify the correct

witnesses and determine the correct computers to search and search terms to use. Qualcomm just lacked the desire to do so.

Another ignored warning flag was the December 2002 avc_ce email reflector containing Raveendran's email address. Broadcom utilized this document in several ways to argue that Qualcomm was involved in the JVT prior to September 2003. Patch Decl. at 19-20 (document was shown to Ludwin during his deposition); Leung Decl. at 8; Robertson Decl. at 14 (document attached to Broadcom's opposition to Qualcomm's MSA). Even though this document indicated that in December 2002, a Qualcomm employee was a member of the avc_ce email group, which related to the JVT and the development of the H.264 standard, there is no evidence that its presence triggered a search by Qualcomm for "avc_ce," "JVT," or any other relevant term on Raveendran's computer or any other Qualcomm database. Again, if Qualcomm had performed this search, it would have located the suppressed emails. The fact that Qualcomm chose not to investigate this document supports the conclusion that Qualcomm intentionally withheld the 46,000 emails. This conclusion is reinforced by the fact that, without any investigation, Qualcomm repeatedly tried to discredit the document and Broadcom's reliance on it. Waiver Order at 45; Young Decl. at 25-29.

***12** Qualcomm had the ability to identify its employees and consultants who were involved in the JVT, to access and review their computers, databases and emails, to talk with the involved employees and to refresh their recollections if necessary, to ensure that those testifying about the corporation's knowledge were sufficiently prepared and testified accurately, and to produce in good faith all relevant and requested discovery. *See* Nat'l Assoc. of Radiation Survivors v. Turnage, 115 F.R.D. 543, 557-58 (N.D.Cal.1987) (holding in case where sanctions imposed for withholding of documents that "a reasonable inquiry into the factual basis of its discovery responses as well as the factual basis of subsequent pleadings, papers, and motions based on those responses ... would have required, at a minimum, a reasonable procedure to distribute discovery requests to all employees and agents of the defendant potentially possessing responsive information, and to account for the collection and subsequent production of the information"). Qualcomm chose not to do so and therefore must be sanctioned.

2. Attorneys' Misconduct

The next question is what, if any, role did Qualcomm's retained lawyers play in withholding the documents? The Court envisions four scenarios. First, Qualcomm intentionally hid the documents from its retained lawyers and did so so effectively that the lawyers did not know or suspect that the suppressed documents existed. Second, the retained lawyers failed to discover the intentionally hidden documents or suspect their existence due to their complete ineptitude and disorganization. Third, Qualcomm shared the damaging documents with its retained lawyers (or at least some of them) and the knowledgeable lawyers worked with Qualcomm to hide the documents and all evidence of Qualcomm's early involvement in the JVT. Or, fourth, while Qualcomm did not tell the retained lawyers about the damaging documents and evidence, the lawyers suspected there was additional evidence or information but chose to ignore the evidence and warning signs and accept Qualcomm's incredible assertions regarding the adequacy of the document search and witness investigation.

Given the impressive education and extensive experience of Qualcomm's retained lawyers (see exhibit A [FN7]), the Court rejects the first and second possibilities. It is inconceivable that these talented, well-educated, and experienced lawyers failed to discover through their interactions with Qualcomm any facts or issues that caused (or should have caused) them to question the sufficiency of Qualcomm's document search and production. Qualcomm did not fail to produce a document or two; it withheld over 46,000 critical documents that extinguished Qualcomm's primary argument of non-participation in the JVT. In addition, the suppressed documents did not belong to one employee, or a couple of employees who had since left the company; they belonged to (or were shared with) numerous, current Qualcomm employees, several of whom testified (falsely) at trial and in depositions. Given the volume and importance of the withheld documents, the number of involved Qualcomm employees, and the numerous warning flags, the Court finds it unbelievable that the retained attorneys did not know or suspect that Qualcomm had not conducted an

adequate search for documents.

> FN7. Additional information regarding each attorney's role and involvement in this litigation is set forth in his or her declaration and summarized in Exhibit A to this Order. To address the attorneys' Due Process concerns arising from Qualcomm's self-serving and misleading declarations (Doc. No. 704), the Court will not consider the Qualcomm declarations (Glathe, Raveendran, Irvine and Ludwin) in evaluating the conduct of Qualcomm's retained counsel.

***13** The Court finds no direct evidence establishing option three. Neither party nor the attorneys have presented evidence that Qualcomm told one or more of its retained attorneys about the damaging emails or that an attorney learned about the emails and that the knowledgeable attorney(s) then helped Qualcomm hide the emails. While knowledge may be inferred from the attorneys' conduct, evidence on this issue is limited due to Qualcomm's assertion of the attorney-client privilege.[FN8]

> FN8. Qualcomm asserted the attorney-client privilege and decreed that its retained attorneys could not reveal any communications protected by the privilege. Doc. No. 659; October 12, 2007 Hearing Transcript at 38. Several attorneys complained that the assertion of the privilege prevented them from providing additional information regarding their conduct. *See, e.g.,* Young Decl. at 12; Leung Decl. at 3-5; Robertson Decl. at 14-16. This concern was heightened when Qualcomm submitted its self-serving declarations describing the failings of its retained lawyers. Doc. No. 704. Recognizing that a client has a right to maintain this privilege and that no adverse inference should be made based upon the assertion, the Court accepted Qualcomm's assertion of the privilege and has not drawn any adverse inferences from it. October 12, 2007 Hearing Transcript at 4-5. However, the fact remains that the Court does not have access to all of the information necessary to reach an informed decision regarding the actual knowledge of the attorneys. As a result, the Court concludes for purposes of this Order that there is insufficient evidence establishing option three.

Thus, the Court finds it likely that some variation of option four occurred; that is, one or more of the retained lawyers chose not to look in the correct locations for the correct documents, to accept the unsubstantiated assurances of an important client that its search was sufficient, to ignore the warning signs that the document search and production were inadequate, not to press Qualcomm employees for the truth, and/or to encourage employees to provide the information (or lack of information) that Qualcomm needed to assert its non-participation argument and to succeed in this lawsuit. These choices enabled Qualcomm to withhold hundreds of thousands of pages of relevant discovery and to assert numerous false and misleading arguments to the court and jury. This conduct warrants the imposition of sanctions.[FN9]

> FN9. The applicable discovery rules do not adequately address the attorneys' misconduct in this case. Rule 26(g) only imposes liability upon the attorney who signed the discovery request or response.Fed.R.Civ.P. 26(g). Similarly, Rule 37(a) authorizes sanctions against a party or attorney only if a motion to compel is filed; Rule 37(b) authorizes sanctions against a party or an attorney if the party fails to comply with a discovery order; and, Rule 37(c) only imposes liability upon a party for the party's failure to comply with various discovery obligations. Fed.R.Civ.P. 37. Under a strict interpretation of these rules, the only attorney who would be responsible for the discovery failure is Kevin Leung because he signed the false discovery responses. Doc. No. 543-3, Exs. W, X & Y; Robertson Decl., Ex. 2. However, the Court believes the federal rules impose a duty of good faith and reasonable inquiry on all attorneys involved in litigation who rely on discovery responses executed by another attorney. *See*Fed.R.Civ.P. 26 Advisory Committee Notes (1983 Amendment) (Rule 26(g) imposes an affirmative duty to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes

> of Rules 26 through 37); Fed.R.Civ.P. 11 (by signing, filing, submitting or advocating a pleading, an attorney is certifying that the allegations have factual, evidentiary support). Attorneys may not utilize inadequate or misleading discovery responses to present false and unsupported legal arguments and sanctions are warranted for those who do so. *Id.* The facts of this case also justify the imposition of sanctions against these attorneys pursuant to the Court's inherent power. *See, Fink,* 239 F.3d at 993-94 ("an attorney's reckless misstatements of law and fact, when coupled with an improper purpose ... are sanctionable under a court's inherent power").

a. *Identity of Sanctioned Attorneys*

The Court finds that each of the following attorneys contributed to Qualcomm's monumental discovery violation and is personally responsible: James Batchelder, Adam Bier, Kevin Leung, Christopher Mammen, Lee Patch, and Stanley Young ("Sanctioned Attorneys").

Attorneys Leung, Mammen and Batchelder are responsible for the initial discovery failure because they handled or supervised Qualcomm's discovery responses and production of documents. The Federal Rules impose an affirmative duty upon lawyers to engage in discovery in a responsible manner and to conduct a "reasonable inquiry" to determine whether discovery responses are sufficient and proper. Fed.R.Civ.P. 26(g); Fed.R.Civ.P. 26 Advisory Committee Notes (1983 Amendment). In the instant case, a reasonable inquiry should have included searches using fundamental terms such as JVT, avc_ce or H.264, on the computers belonging to knowledgeable people such as Raveendran, Irvine and Ludwin. As the post-trial investigation confirmed, such a reasonable search would have revealed the suppressed documents. Had Leung, Mammen, Batchelder, or any of the other attorneys insisted on reviewing Qualcomm's records regarding the locations searched and terms utilized, they would have discovered the inadequacy of the search and the suppressed documents.[FN10] Similarly, Leung's difficulties with the Rule 30(b)(6) witnesses, Irvine and Ludwin, should have alerted him (and the supervising or senior attorneys) to the inadequacy of Qualcomm's document production and to the fact that they needed to review whose computers and databases had been searched and for what. Accordingly, the Court finds that the totality of the circumstances establish that Leung, Mammen and Batchelder did not make a reasonable inquiry into Qualcomm's discovery search and production and their conduct contributed to the discovery violation.

> FN10. Leung's attorney represented during the OSC hearing that Leung requested a more thorough document search but that Qualcomm refused to do so. October 12, 2007 Hearing Transcript at 14-15. If Leung was unable to get Qualcomm to conduct the type of search he deemed necessary to verify the adequacy of the document search and production, then he should have obtained the assistance of supervising or senior attorneys. If Mammen and Batchelder were unable to get Qualcomm to conduct a competent and thorough document search, they should have withdrawn from the case or taken other action to ensure production of the evidence. *See* The State Bar of California, Rules of Professional Conduct, Rule 5-220 (a lawyer shall not suppress evidence that the lawyer or the lawyer's client has a legal obligation to reveal); Rule 3-700 (a lawyer shall withdraw from employment if the lawyer knows or should know that continued employment will result in a violation of these rules or the client insists that the lawyer pursue a course of conduct prohibited under these rules). Attorneys' ethical obligations do not permit them to participate in an inadequate document search and then provide misleading and incomplete information to their opponents and false arguments to the court. *Id.;* Rule 5-200 (a lawyer shall not seek to mislead the judge or jury by a false statement of fact or law); *see also, In re Marriage of Gong and Kwong,* 157 Cal.App. 4th 939, 951 (1st Dist.2007) ("[a]n attorney in a civil case is not a hired gun required to carry out every direction given by the client;" he must act like the professional he is).

***14** Attorneys Bier, Mammen and Patch are

responsible for the discovery violation because they also did not perform a reasonable inquiry to determine whether Qualcomm had complied with its discovery obligations. When Bier reviewed the August 6, 2002 email welcoming Raveendran to the avc_ce email group, he knew or should have known that it contradicted Qualcomm's trial arguments and he had an obligation to verify that it had been produced in discovery or to immediately produce it. If Bier, as a junior lawyer, lacked the experience to recognize the significance of the document, then a more senior or knowledgeable attorney should have assisted him. To the extent that Patch was supervising Bier in this endeavor, Patch certainly knew or should have recognized the importance of the document from his involvement in Qualcomm's motion practice and trial strategy sessions.

Similarly, when Bier found the 21 emails on Raveendran's computer that had not been produced in discovery, he took the appropriate action and informed his supervisors, Mammen and Patch. Bier Decl. at 7. Patch discussed the discovery and production issue with Young and Batchelder. Patch Decl. at 6-7. While all of these attorneys assert that there was a plausible argument that Broadcom did not request these documents, only Bier and Mammen actually read the emails. Patch Decl. at 6-7; Batchelder Decl. at 16. Moreover, all of the attorneys missed the critical inquiry: was Qualcomm's document search adequate? If these 21 emails were not discovered during Qualcomm's document search, how many more might exist? The answer, obviously, was tens of thousands. If Bier, Mammen, Patch, Young or Batchelder had conducted a reasonable inquiry after the discovery of the 21 Raveendran emails, they would have discovered the inadequacy of Qualcomm's search and the suppressed documents. And, these experienced attorneys should have realized that the presence on Raveendran's computer of 21 JVT/avc_ce emails from 2002 contradicted Qualcomm's numerous arguments that it had not participated in the JVT during that same time period. This fact, alone, should have prompted the attorneys to immediately produce the emails and to conduct a comprehensive document search.

Finally, attorneys Young, Patch, and Batchelder bear responsibility for the discovery failure because they did not conduct a reasonable inquiry into Qualcomm's discovery production before making specific factual and legal arguments to the court. Young decided that Qualcomm should file a motion for summary adjudication premised on the fact that Qualcomm had not participated in the JVT until after the H.264 standard was adopted in May 2003. Given that non-participation was vital to the motion, Young had a duty to conduct a reasonable inquiry into whether that fact was true. And, again, had Young conducted such a search, he would have discovered the inadequacy of Qualcomm's document search and production and learned that his argument was false. Similarly, Young had a duty to conduct a reasonable inquiry into the accuracy of his statement before affirmatively telling the court that no emails were sent to Raveendran from the avc_ce email group.[FN11] Young also did not conduct a reasonable (or any) inquiry during the following days before he approved the factually incorrect JMOL.[FN12] A reasonable investigation would have prevented the false filing.

> FN11. Patch claims that he told Young about the 21 Raveendran emails, but Young denies it. Under either scenario, however, Young had a duty to conduct a reasonable investigation before making that affirmative statement to the court. Sadly, Young did not conduct any investigation; he merely assumed that others had conducted an adequate investigation.

> FN12. While the Court recognizes that the Day Casebeer attorneys were primarily responsible for discovery in this case, the Heller Ehrman attorneys took on the task of preparing witnesses and briefing regarding the JVT and, thus, were in a position to evaluate during this process whether the underlying discovery upon which they relied was adequate. Young, unlike Venkatesan and Robertson, was the primary liaison with Day Casebeer and also was privy to the evolving theories of the case. As such, he was made aware of some of the red flags such as the discovery of the JVT emails on Raveendran's computer and was in the best position both to understand their significance and to communicate any concerns to the Day Casebeer attorneys or Qualcomm in-house counsel.

***15** Patch was an integral part of the trial team-familiar with Qualcomm's arguments, theories and strategies. He knew on January 14th that 21 avc_ce emails had been discovered on Raveendran's computer. Without reading or reviewing the emails, Patch participated in the decision not to produce them. Several days later, Patch carefully tailored his questions to ensure that Raveendran did not testify about the unproduced emails. And, after Broadcom stumbled into the email testimony, Patch affirmatively misled the Court by claiming that he did not know whether the emails were responsive to Broadcom's discovery requests. This conduct is unacceptable and, considering the totality of the circumstances, it is unrealistic to think that Patch did not know or believe that Qualcomm's document search was inadequate and that Qualcomm possessed numerous, similar and unproduced documents.

Batchelder also is responsible because he was the lead trial attorney and, as such, he was most familiar with Qualcomm's important arguments and witnesses. Batchelder stated in his opening statement that Qualcomm had not participated in the JVT before late 2003. Despite this statement and his complete knowledge of Qualcomm's legal theories, Batchelder did not take any action when he was informed that JVT documents that Qualcomm had not produced in discovery were found on Raveendran's computer. He did not read the emails, ask about their substance, nor inquire as to why they were not located during discovery. And, he stood mute when four days later, Young falsely stated that no emails had been sent to Raveendran from the avc_ce email group. Finally, all of the pleadings containing the lie that Qualcomm had not participated in the JVT in 2002 or early 2003 were sent to Batchelder for review and he approved or ignored all of them.[FN13]The totality of the circumstances, including all of the previously-discussed warning signs, demanded that Batchelder conduct an investigation to verify the adequacy of Qualcomm's document search and production. His failure to do so enabled Qualcomm to withhold the documents.

> FN13. Several declarations state or imply that senior lawyers failed to review or comment on pleadings prepared by junior lawyers and sent to them prior to filing. If this is true, it constitutes additional evidence that the senior lawyers turned a blind eye to Qualcomm's discovery failures.

For all of these reasons, the Court finds that these attorneys did not conduct a reasonable inquiry into the adequacy of Qualcomm's document search and production and, accordingly, they are responsible, along with Qualcomm, for the monumental discovery violation.

b. *Identity of Non-Sanctioned Attorneys*

Based upon the Court's review of the submitted declarations (see Exhibit A), the Court finds that the following attorneys do not bear any individual responsibility for the discovery violation and, on that basis, declines to sanction them: Ruchika Agrawal, Howard Loo, William Nelson, Ryan Scher, Bradley Waugh, David Kleinfeld, Barry Tucker, Heidi Gutierrez, Victoria Smith, Roy Zemlicka, Craig Casebeer, Jaideep Venkatesan, and Kyle Robertson.

The Court declines to sanction attorneys Agrawal, Loo, Nelson, Scher, Waugh and Guiterrez because they did not significantly participate in the preparation or prosecution of the instant case or primarily participated in aspects of the case unrelated to those at issue in this Order and Judge Brewster's Waiver Order and Exceptional Case Order. *See* Exhibit A.

***16** The Court also declines to sanction Heller Ehrman attorneys Kleinfeld and Tucker. These attorneys primarily monitored the instant case for its impact on separate Qualcomm/Broadcom litigation. However, for logistical reasons, both attorneys signed as local counsel pleadings that contained false statements relating to Qulacomm's non-participation in the JVT. Given the facts of this case as set forth above and in the declarations, the limitations provided by the referral, and the totality of the circumstances, the Court finds that it was reasonable for these attorneys to sign the pleadings, relying on the work of other attorneys more actively involved in the litigation.[FN14]

> FN14. The Court is declining to sanction these attorneys for their role in signing and filing false pleadings, but the Court notes that sanctioning local counsel for such conduct is possible and may be imposed in another case under different circumstances.

> Attorneys must remember that they are required to conduct a reasonable inquiry into the accuracy of the pleadings prior to signing, filing or arguing them. Fed.R.Civ.P. 11. While it may be reasonable for attorneys to rely on the work conducted by other attorneys (*Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1364 (9th Cir.1990) (*en banc*) (describing various applications of the "reasonableness" inquiry)), that determination is dependent on the circumstances of each case.

While a closer call, the Court also declines to sanction Day Casebeer attorneys Casebeer, Smith and Zemlicka. Unlike the Sanctioned Attorneys, Casebeer did not begin working on this case until after discovery had closed and he did not learn about the Raveendran emails until after she testified at trial. Thus, he would not have been privy to any of the red flags, which should have alerted the Sanctioned Attorneys to the fact that significant discovery gaps existed and further investigation was necessary.

Smith and Zemlicka prepared and signed pleadings containing false statements about Qualcomm's non-participation in the JVT. While they did more substantive work on the false motions than Kleinfeld and Tucker, all four relied on work conducted by other lawyers who were more involved in the discovery and litigation. In addition, Smith and Zemlicka worked under the direction of Casebeer who told them to rely on and conform the motion to the discussion of facts set forth in Qualcomm's MSA.[FN15] Although the Court questions the reasonableness of the attorneys' decision to rely on the MSA without conducting any independent investigation under the facts of this case, the Court concludes that the totality of the circumstances do not justify sanctioning Zemlicka or Smith. This conclusion is bolstered by the fact that the pleadings were reviewed and approved by attorneys with more litigation experience and more familiarity with this case.

> FN15. The Court notes that Casebeer stated that "[i]t was not then, or now, my practice to independently confirm factual representations that had previously been made to a court by colleagues working on a case, where I had no reason to question the accuracy of such representations."Casebeer Decl. at 5. It is the last phrase that the Court considers critical. As discussed in previous sections, the fault that the Court finds throughout this case was the failure of Qualcomm and many of its attorneys to realize (or take appropriate action based upon the realization) that there ***was*** a reason (actually several reasons) to question the accuracy of the representations and the adequacy of the discovery search and production.

For similar reasons, the Court finds it inappropriate to individually sanction Heller Ehrman attorneys Kyle Robertson and Jaideep Venkatesan. These attorneys, working for Stanley Young, began work on JVT-related issues in August 2006. Robertson, under the supervision of Venkatesan, made significant efforts to confirm the accuracy of the facts upon which he relied in drafting various pleadings, including: (1) reviewing numerous deposition transcripts and discovery responses, (2) circulating drafts of all pleadings he prepared to more senior outside and inside counsel with the expectation that they would inform him of any factual inaccuracies, and (3) upon learning from Broadcom's opposition to the MSA of the December 2002 report listing Raveendran's email address, searching the JVT website for information about the Ad-Hoc Group email list, contacting numerous Day Casebeer and Heller Ehrman attorneys for more information, and finally calling Raveendran at home. The Court again finds it troubling that these attorneys failed to investigate the adequacy of Qualcomm's document search and production before filing the pleadings but, given the totality of the circumstances, the Court declines to sanction Robertson and Venkatesan.

3. *Imposed Sanctions*

*17 As set forth above, the evidence establishes that Qualcomm intentionally withheld tens of thousands of emails and that the Sanctioned Attorneys assisted, either intentionally or by virtue of acting with reckless disregard for their discovery obligations, in this discovery violation. The remaining issue, then, is what are the appropriate sanctions.

a. *Monetary Sanctions Against Qualcomm*

In its sanction motion, Broadcom requested that this Court order Qualcomm to (1) reimburse Broadcom for its attorneys' and experts' fees incurred in litigating this case, to the extent not already awarded pursuant to the Exceptional Case Order, (2) pay a substantial fine to the Court, (3) implement a discovery compliance program to prevent Qualcomm's future litigation misconduct, and (4) identify all false statements and arguments. Doc. No. 540 at 2, 14. Broadcom also requested an opportunity to conduct additional discovery regarding Qualcomm's discovery violations. *Id.* Because Broadcom prevailed at trial and in post-trial hearings, despite the suppressed evidence, and because the case is on appeal, oversight sanctions such as monitoring Qualcomm's discovery efforts, or identifying false testimony and arguments are not appropriate. Monetary sanctions, however, are appropriate.

The suppressed emails directly rebutted Qualcomm's argument that it had not participated in the JVT during the time the H.264 standard was being developed. As such, their absence was critical to Qualcomm's hope and intent of enforcing its patents against Broadcom (as well as presumably all other cellular companies utilizing the H.264 technology in their products). Because Broadcom prevailed at trial and in the post-trial hearings despite the suppressed evidence, it is reasonable to infer that had Qualcomm intended to produce the 46,000 incriminating emails (and thereby acknowledge its early involvement in the JVT and its accompanying need to disclose its intellectual property), the instant case may never have been filed.[FN16]Even if Qualcomm did file this case, the hidden evidence would have dramatically undermined Qualcomm's arguments and likely resulted in an adverse pretrial adjudication, much as it caused the adverse post-trial rulings. *See* Waiver Order; Exceptional Case Order. Accordingly, Qualcomm's failure to produce the massive number of critical documents at issue in this case significantly increased the scope, complexity and length of the litigation and justifies a significant monetary award. *See,*Fed.R.Civ.P. 26(g)(3) & 37(c).

> FN16. Qualcomm argues that while it was aware of the H.264 standard and its application to the instant litigation, it was not aware of the issue that if it had participated in the JVT's development of the H.264 standard, it could not have enforced its H.264 patents until Broadcom raised this issue as an affirmative defense. Mammen Decl. at 11-12. This argument strains credulity as the potential defense screams for consideration prior to filing this suit.

The Court therefore awards Broadcom all of its attorneys' fees and costs incurred in the instant litigation. Because Judge Brewster already has awarded these costs and fees to Broadcom in the Exceptional Case Order and a double recovery would be improper, this Court directs that Qualcomm receive credit toward this penalty for any money it pays to Broadcom to satisfy the exceptional case award. Accordingly, for its monumental and intentional discovery violation, Qualcomm is ordered to pay $8, 568, 633.24 to Broadcom; this figure will be reduced by the amount actually paid by Qualcomm to Broadcom to satisfy the exceptional case award.[FN17]

> FN17. Because the attorneys' fees sanction is so large, the Court declines to fine Qualcomm. If the imposition of an $8.5 million dollar sanction does not change Qualcomm's conduct, the Court doubts that an additional fine would do so.

b. *Referral to the California State Bar*

***18** As set forth above, the Sanctioned Attorneys assisted Qualcomm in committing this incredible discovery violation by intentionally hiding or recklessly ignoring relevant documents, ignoring or rejecting numerous warning signs that Qualcomm's document search was inadequate, and blindly accepting Qualcomm's unsupported assurances that its document search was adequate. The Sanctioned Attorneys then used the lack of evidence to repeatedly and forcefully make false statements and arguments to the court and jury. As such, the Sanctioned Attorneys violated their discovery obligations and also may have violated their ethical duties. *See e.g.,* The State Bar of California, Rules of Professional Conduct, Rule 5-200 (a lawyer shall not seek to mislead the judge or jury by a false statement of fact or law), Rule 5-220 (a lawyer shall not suppress evidence that the lawyer or the lawyer's client has a legal obligation to reveal or to produce). To address the potential ethical violations, the Court refers the Sanctioned Attorneys to The State Bar of

California for an appropriate investigation and possible imposition of sanctions.[FN18] Within ten days of the date of this Order, each of the Sanctioned Attorneys must forward a copy of this Order and Judge Brewster's Waiver Order to the Intake Unit, The State Bar of California, 1149 South Hill Street, Los Angeles, California 90015 for appropriate investigation.

> FN18. Monetary sanctions would be appropriate to address the discovery violations. However, the Court declines to impose monetary sanctions against the Sanctioned Attorneys for several reasons. First, if the imposed sanctions do not convince the attorneys to behave in a more ethical and professional manner in the future, monetary sanctions are unlikely to do so. Second, it is possible that Qualcomm will seek contribution from its retained attorneys after it pays Broadcom's attorneys' fees and costs and, in light of that significant monetary sanction, an additional fine is unlikely to affect counsel's future behavior. Third, the Court acknowledges the limitations on its authority (see sections A and B and footnotes 5 and 9) and, based on those concerns, declines to impose significant monetary sanctions.

c. *Case Review and Enforcement of Discovery Obligations*

The Court also orders Qualcomm and the Sanctioned Attorneys to participate in a comprehensive Case Review and Enforcement of Discovery Obligations ("CREDO") program. This is a collaborative process to identify the failures in the case management and discovery protocol utilized by Qualcomm and its in-house and retained attorneys in this case, to craft alternatives that will prevent such failures in the future, to evaluate and test the alternatives, and ultimately, to create a case management protocol which will serve as a model for the future.

Because they reviewed and approved the false pleadings, the Court designates the following Qualcomm attorneys to participate in this process as Qualcomm's representatives: Alex Rogers, Roger Martin, William Sailer, Byron Yafuso, and Michael Hartogs (the "Named Qualcomm Attorneys").[FN19] Qualcomm employees were integral participants in hiding documents and making false statements to the court and jury. Qualcomm's in-house lawyers were in the unique position of (a) having unlimited access to all Qualcomm employees, as well as the emails and documents maintained, possessed and used by them, (b) knowing or being able to determine all of the computers and databases that were searched and the search terms that were utilized, and (c) having the ability to review all of the pleadings filed on Qualcomm's behalf which did (or should have) alerted them to the fact that either the document search was inadequate or they were knowingly not producing tens of thousands of relevant and requested documents. Accordingly, Qualcomm's in-house lawyers need to be involved in this process.

> FN19. Qualcomm chose not to provide any information to the Court regarding the actions of Qualcomm's counsel or employees so the Court must rely on the retained attorneys' statements that these attorneys were involved in the case. Robertson Decl. at 13, 22; Venkatesan Decl. at 14; Young Decl. at 18, 21, 35. Qualcomm's General Counsel at the time, Lou Lupin, is not included in this list since he has resigned from the company. October 12, 2007 Hearing Transcript at 108, 198.

19** At a minimum, the CREDO protocol must include a ***detailed analysis (1) identifying the factors [FN20] that contributed to the discovery violation (e.g., insufficient communication (including between client and retained counsel, among retained lawyers and law firms, and between junior lawyers conducting discovery and senior lawyers asserting legal arguments); inadequate case management (within Qualcomm, between Qualcomm and the retained lawyers, and by the retained lawyers); inadequate discovery plans (within Qualcomm and between Qualcomm and its retained attorneys); etc.), (2) creating and evaluating proposals, procedures, and processes that will correct the deficiencies identified in subsection (1), (3) developing and finalizing a comprehensive protocol that will prevent future discovery violations (e.g., determining the depth and breadth of case management and discovery plans that should be adopted; identifying by experience or authority the attorney from the retained counsel's office who should interface with the corporate

counsel and on which issues; describing the frequency the attorneys should meet and whether other individuals should participate in the communications; identifying who should participate in the development of the case management and discovery plans; describing and evaluating various methods of resolving conflicts and disputes between the client and retained counsel, especially relating to the adequacy of discovery searches; describing the type, nature, frequency, and participants in case management and discovery meetings; and, suggesting required ethical and discovery training; etc.), (4) applying the protocol that was developed in subsection (3) to other factual situations, such as when the client does not have corporate counsel, when the client has a single in-house lawyer, when the client has a large legal staff, and when there are two law firms representing one client, (5) identifying and evaluating data tracking systems, software, or procedures that corporations could implement to better enable inside and outside counsel to identify potential sources of discoverable documents (e.g. the correct databases, archives, etc.), and (6) any other information or suggestions that will help prevent discovery violations.

> FN20. In the CREDO program, the Court does not seek the identities of individuals who contributed to the discovery failure, nor the content of communications between or among counsel and client so this program does not implicate the attorney-client privilege.

To facilitate development of the CREDO program, the Sanctioned Attorneys and Named Qualcomm Attorneys are required to meet [FN21] at 9:00 a.m. on Tuesday, January 29, 2008, in the chambers of the Honorable Barbara L. Major, United States Magistrate Judge, 940 Front Street, Suite 5140, San Diego, California, 92101. The Court will participate only to the extent necessary to ensure that the participants are complying with the instructions in this Order. The Court will provide whatever time is necessary for the participants to fully and completely examine, analyze and complete the CREDO protocol. At the conclusion of the process, the participating attorneys will submit their proposed protocol to the Court. The Court will review the proposed protocol and, if sufficient, order it filed. The Court will notify the Sanctioned Attorneys and Named Qualcomm Attorneys if the proposed protocol is insufficient so further revisions can be implemented. When completed protocol is submitted, the Sanctioned Attorneys and Named Qualcomm Attorneys shall each file a declaration under penalty of perjury affirming that they personally participated in the entire process that led to the CREDO protocol and specifying the amount of time they spent working on it.

> FN21. While not required to do so, a Broadcom attorney may participate in the process. If Broadcom decides to participate, Qualcomm and the Sanctioned Attorneys must pay the Broadcom attorney's reasonable costs and fees incurred in traveling to and participating in this program.

***20** While no one can undo the misconduct in this case, this process, hopefully, will establish a baseline for other cases. Perhaps it also will establish a turning point in what the Court perceives as a decline in and deterioration of civility, professionalism and ethical conduct in the litigation arena. To the extent it does so, everyone benefits-Broadcom, Qualcomm, and all attorneys who engage in, and judges who preside over, complex litigation. If nothing else, it will provide a road map to assist counsel and corporate clients in complying with their ethical and discovery obligations and conducting the requisite "reasonable inquiry."

CONCLUSION

For the reasons set forth above, the Court **GRANTS IN PART** and **DENIES IN PART** Broadcom's sanction motion and **ORDERS** Qualcomm to pay Broadcom $8,568,633.24. Qualcomm will receive credit toward this sanction for any amount it pays to Broadcom to satisfy the Exceptional Case sanction. The Court also **REFERS to The State Bar of California** for an investigation of possible ethical violations attorneys James R. Batchelder, Adam A. Bier, Kevin K. Leung, Christian E. Mammen, Lee Patch and Stanley Young. The Court **ORDERS** these six attorneys and Qualcomm in-house attorneys Alex Rogers, Roger Martin, William Sailer, Byron Yafuso, and Michael Hartogs to appear 9:00 a.m. on Tuesday, January 29, 2008, in the chambers of the Honorable Barbara L. Major, United States Magistrate Judge,

940 Front Street, Suite 5140, San Diego, California, 92101 to develop the comprehensive Case Review and Enforcement of Discovery Obligations protocol in accordance with this Order.

IT IS SO ORDERED.

Exhibit A[FN22]

FN22. All of the information in this exhibit was obtained from the attorneys' declarations.

Day Casebeer Madrid & Batchelder

James R. Batchelder-Partner and founding member of Day Casebeer, B.A. from Franklin & Marshall College, J.D. from University of California, Los Angeles, School of Law. Qualcomm's lead attorney throughout this case. Delivered Qualcomm's opening and closing arguments and refined Qualcomm's trial strategies and theories. Delegated case preparation and trial issues to other attorneys or teams of attorneys but was available for consultation on discovery and all trial issues. Was told on January 14, 2007 that JVT documents that Qualcomm had not produced in discovery were located on Raveendran's computer, but he did not review them and directed other attorneys to handle the issue. Present for the January 18, 2007 sidebar during which Young stated that there was no evidence that any emails were sent to the viji@qualcomm.com address and he did not correct the statement nor mention the 21 Raveendran emails. Present for the January 24, 2007 sidebar after Raveendran's testimony during which Patch implied that the 21 emails had not been reviewed. Participated in drafting several pleadings that ultimately were determined to contain false statements and arguments, including Qualcomm's Post-Trial Brief Concerning Waiver and Inequitable Conduct. Doc. No. 678.

*21 ***Lee Patch***-Partner, B.S. from Carnegie Mellon University, J .D. from Duquesne University School of Law. Defended Raveendran's deposition. Responsible for defending Qualcomm against Broadcom's inequitable conduct allegations. Supervised Bier in the trial preparation of Viji Raveendran and conducted the direct examination of Raveendran. Learned about the 21 Raveendran emails on January 14, 2007, told Batchelder and Young about the email discovery, and did not review the emails but participated in the decision not to produce them. Did not ask Raveendran about the 21 emails discovered on her laptop or whether she had received any avc_ce emails; asked her whether she had ***read*** any avc_ce emails. In the sidebar immediately after Raveendran admitted she received avc_ce emails, Patch stated that he had not seen the emails and did not know whether they were responsive to Broadcom's discovery requests; he did not tell the court that Qualcomm already had reviewed the emails and decided not to produce them to Broadcom. Participated in drafting and arguing pleadings that contained false and misleading statements regarding Qualcomm's non-participation in the JVT. Doc. No. 676.

Christian E. Mammen-Senior Associate during trial and currently a Partner, B.A. from Trinity University, J.D. from Cornell Law School, D. Phil. in law from Oxford University. Drafted the complaint, handled day-to-day discovery activities, and supervised Leung in additional discovery matters. Prepared memoranda regarding document retention, collection and production. Reviewed the 21 Raveendran emails on January 14, 2007 and made the decision not to produce them. Helped prepare, reviewed, and signed some of the pleadings which contained false statements. Participated in the post-trial correspondence and resistance to Broadcom's requested additional document searches. Doc. No. 682.

Kevin Leung-Associate, B.A. from University of California at Berkeley, J.D. from University of California at Los Angeles. Had primary responsibility for discovery duties, including drafting and signing written discovery responses; supervised by Mammen. Prepared and defended Christine Irvine's personal and Rule 30(b)(6) depositions. Supervised by Mammen and Batchelder in this regard. Discovered shortly before Irvine's deposition 400,000 pages of publicly available JVT documents that a Qualcomm employee had downloaded to Qualcomm's computer system but Broadcom refused to continue the deposition. Irvine testified that Qualcomm had never been involved in the JVT but subsequent review of the publicly available JVT documents established that Qualcomm was involved in the JVT in late 2003. The subsequent review also revealed December 2002 and March 2003 reports of an *ad hoc* group

concerning coding efficiency analysis and testing of H.264 that listed Raveendran's email address. Based upon at least Irvine's false statement, Leung agreed to Broadcom's request for a new Rule 30(b)(6) witness on Qualcomm's involvement in the JVT. Scott Ludwin was the replacement Rule 30(b)(6) witness and Leung defended his deposition. Ludwin testified that Qualcomm had not participated in the JVT prior to late 2003. After Ludwin's deposition, Leung worked with Qualcomm and produced additional documents concerning Qualcomm's involvement in the JVT in and after December 2003. Leung explains that the earlier document were not discovered because the mid-2006 search involved computers belonging to the Multimedia Development and Standardization Group, not the Digital Cinema Group. Doc. No. 680.

*22 ***Adam Bier***-Junior associate, undergraduate degree from University of California, Berkeley, J.D. from the New York University School of Law. Bier did not participate in pre-trial document collection. During trial, he was responsible for the twice-daily disclosures of evidence to be used and witnesses to be called at trial. Patch also asked him to assist in preparing Raveendran to testify at trial. In that regard, he met with Raveendran on several days in January 2007. On or about January 7, 2007, Bier became aware of an August 6, 2002 email received by Raveendran welcoming her to the avc_ce email group. Bier does not recall what, if anything, he did after learning about this document. On January 14, 2007, Bier and Raveendran searched her computer using the search term "avc_ce" and discovered 21 separate emails that had not been produced to Broadcom. Bier brought those emails to the attention of Mammen and Patch. The three attorneys decided not to produce the emails to Broadcom. After Raveendran testified on January 24, 2007, Bier helped produce to Broadcom the 21 emails found on Raveendran's computer. The August 6, 2002 email was not included in this document production. After trial, Bier, under the supervision of Batchelder, Patch and Mammen, corresponded with Broadcom's counsel, arguing that the 21 Raveendran emails were not covered by any Broadcom discovery request and resisting Broadcom's attempts to force Qualcomm to conduct additional searches for JVT documents. In March 2007, Bier advised Broadcom that Qualcomm would conduct limited additional document searches. Doc. No. 686.

Craig Casebeer-Partner and founding member of Day Casebeer, B.A. from Stanford University, J.D. from University of California at Berkeley, Boalt Hall. Joined this litigation shortly before trial and provided assistance and trouble-shooting experience to Batchelder and the rest of Qualcomm's trial team. Supervised the preparation of motions in limine. Directed Zemlicka to use Qualcomm's MSA to draft the motion in limine to exclude evidence relating to Qualcomm's participation in the JVT. Conducted the trial testimony of two witnesses who were not mentioned in Judge Brewster's Waiver Order. Present for the January 18, 2007 sidebar during which Young stated that there was no evidence of emails being sent to the group, including Raveendran. Supervised Smith in the drafting, editing and finalizing of the JMOL, although the waiver portion was prepared by the Heller Ehrman lawyers. Participated in the decision to produce the 21 emails after Raveendran's testimony. Authored the letter to Judge Brewster submitting the Amended JMOL, which corrected the statements determined to be false based upon the Raveendran emails. Participated in drafting Qualcomm's Post-Trial Brief Concerning Waiver and Inequitable Conduct, which contained statements later determined to be false and misleading. Doc. No. 679.

Victoria Q. Smith-Junior associate, B.S. from University of Tulsa, J.D. from University of Michigan. Assisted in the preparation of expert witnesses and other technical witnesses. Helped prepare and signed both of Qualcomm's Motions for Judgment as a Matter of Law. Smith did not draft the portion of the JMOL that concerned waiver. Doc. No. 691.

*23 ***Roy V. Zemlicka***-Junior associate, bachelor's degree from University of California at Santa Cruz, J.D. from Santa Clara University. Performed discrete tasks to assist senior lawyers in pre-trial litigation. Signed two pleadings relating to Qulacomm's Motion in Limine to Exclude Evidence relating to Qualcomm's participation in the JVT. Also helped prepare the motion, although the majority of his work was on an issue that was subsequently moved to another motion in limine and then resolved prior to court argument. Inserted language from Qualcomm's MSA into the Motion in Limine and this language subsequently was determined to be false and

misleading. Zemlicka did not perform any independent factual investigation; he relied on prior Qualcomm pleadings. Doc. No. 694.

Ruchika Agrawal-First year associate, Bachelor's degree from Rutgers University, Master's degree from Stanford University, J .D. from University of Virginia Law School. Attended two chamber's conferences regarding jury instructions. Assisted with discrete tasks during trial, including assisting in the mock cross-examination of Raveendran. Was present in court during Raveendran's testimony and sat with her during break in testimony but did not discuss her testimony or the 21 emails. Doc. No. 677.

William P. Nelson-Associate, J.D. from University of California, Boalt Hall. Had minimal involvement in the instant litigation and none related to Qualcomm's participation in the JVT. Signed Qualcomm's opposition to Broadcom's motion for leave to file an amended answer and counterclaims and argued the motion in court. Doc. No. 689.

Howard T. Loo-Associate, B.A. from Stanford University, J.D. University of California at Berkeley's Boalt Hall. Only billed 11.8 hours to this case but signed a pleading unrelated to the JVT or H.264 standard. Doc. No. 687.

Ryan L. Scher-First year associate, J.D. from Tulane University. Attended two chamber's conferences regarding jury instructions. Also performed discrete tasks related to trial for more senior lawyers. Doc. No. 690.

Bradley A. Waugh-Associate, B.S. from Georgia Institute of Technology, M.S. from Rice University, J.D. from Stanford University. Heavily involved in instant case but vast majority of work related to claim construction, infringement and some invalidity. Waugh also provided technical assistance to lawyers responsible for the JVT issues. Signed several pleadings unrelated to the issues addressed in Judge Brewster's order. Doc. No. 693.

Heller Ehrman LLP

Stanley Young-Firm shareholder, A.B., A.M. from Stanford University, J.D. from Harvard Law School. Became involved with this case in early 2006. Initially only responsible for damages issues. Understood that Day Casebeer was responsible for written discovery and document production. In August 2006, Young agreed to Batchelder's request to have Heller Ehrman assume responsibility for handling JVT issues. Decided to file the MSA arguing that Qualcomm had not participated in the JVT at any time before the H.264 standard was established. Supervised Venkatesan and Robertson in the preparation of expert reports and pleadings relating to JVT issues, including the MSA and reply. Argued the MSA to Judge Brewster on December 5, 2006. Agreed to present the JVT witnesses at trial, although they ultimately were not used at trial. Argued at sidebar on January 18, 2007 to exclude the December 2002 email reflector list containing Raveendran's email address and affirmatively stated that there was no evidence that any emails had been sent to Raveendran's email address. Although Young denies knowing about the 21 Raveendran emails, his statement occurred four days after Patch claims he notified Young of the discovery. Directed Day Casebeer and Heller Ehrman lawyers to prepare an Amended JMOL to correct the false statements regarding Qualcomm's non-participation that had been included in the original JMOL filed on January 24, 2007. Doc. No. 699-4.

24** ***Jaideep Venkatesan-Associate, J.D. from University of California at Los Angeles. At Young's direction, worked on the damages aspect of this case and later on responding to the expert report relating to JVT issues. Venkatesan and Young discussed the JVT discovery and issues with Patch and other Day Casebeer lawyers. Supervised Robertson in preparing Dr. Richardson's expert declaration. Transmitted the draft declaration to Day Casebeer lawyers Patch, Leung and Waugh and Qualcomm in-house lawyers Alex Rogers and Roger Martin for review. Worked with Robertson to prepare Qualcomm's MSA and the related reply. The Reply, which addressed the December 2002 email reflector list including Raveendran's address, was sent to Day Casebeer lawyers Leung, Mammen, Patch and Batchelder and Qualcomm lawyers Rogers, Martin and Byron Yafuso. Also prepared or assisted in preparing and/or reviewing other pleadings ultimately determined to contain false or misleading JVT statements. Doc. No. 699-3.

Kyle S. Robertson-Junior associate, B.A. from

Grinnel College, J.D. from Boalt Hall School of Law at the University of California at Berkeley. In August 2006, Young directed Robertson to become involved in the JVT issues. To become familiar with the subject, Robertson went to the JVT website and learned about its work and intellectual property rights policies. In late August, he attended the deposition of Gary Sullivan, the Chairman of the JVT. It was the first deposition Robertson had attended and he obtained background information and specific questions from Patch. He also reviewed a number of JVT-related depositions taken by other attorneys. Under Venkatesan and Young's supervision, Robertson prepared several pleadings, including the MSA and related Reply, and an expert declaration, all of which were sent to other attorneys for review. In preparing those documents, Robertson relied on depositions taken and discovery prepared by Day Casebeer lawyers. He circulated the MSA pleadings to Qualcomm attorneys Rogers, Martin, Louis Lupin, William Sailer and Michael Hartogs and Day Casebeer attorneys Batchelder, Patch and Mammen. When Robertson received Broadcom's opposition to the MSA, which included the December 2002 email reflector, he searched the JVT website to learn about the AVC *ad hoc* group, discussed it with senior lawyers at Heller Ehrman and Day Casebeer, and contacted Raveendran. Robertson also prepared a portion of the JMOL and post-trial briefs, which later were determined to contain the false and misleading statements regarding Qualcomm's non-participation in the JVT. The documents were transmitted to a number of Day Casebeer and Qualcomm in-house lawyers for review prior to filing. Doc. No. 699-2.

Heidi M. Gutierrez-Firm shareholder, B.S. from United States Naval Academy, J.D. University of San Diego Law School. Had minimal responsibility with the instant case and none related to the JVT or H.264 standard. Doc. No. 670-6

*25 ***David E. Kleinfeld***-Firm shareholder. Not actively involved in this case but monitored instant litigation for developments that might affect other Qualcomm/Broadcom litigation. Signed several pleadings, including Qualcomm's Reply to its MSA, as local counsel. The pleadings were prepared by other lawyers in Northern California but signed by Kleinfeld for logistical reasons. Doc. No. 670-4.

Barry J. Tucker-Firm shareholder, B.A. University of California, Los Angeles, J.D. from University of California, Hastings College of Law. Not actively involved in this case but coordinated instant litigation with other Qualcomm/Broadcom litigation. Signed approximately 15 Qualcomm pleadings, including the MSA and Motion in Limine to Exclude Evidence relating to Qualcomm's participation in the JVT, as local counsel. The documents were prepared by Heller Ehrman or Day Casebeer lawyers located outside of San Diego but signed by Tucker for logistical reasons. Doc. No. 670-5.

S.D.Cal.,2008.
Qualcomm Inc. v. Broadcom Corp.
Slip Copy, 2008 WL 66932 (S.D.Cal.)

END OF DOCUMENT

Exhibit D

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION
RESPONSE TO DATA REQUEST

Response Date: April 18, 2005
Docket No.: UT-042022
Requestor: Complainants
Respondent: T-Netix, Inc.
Prepared by: Arthur A. Butler, 206-623-4711

COMPLAINANTS' DATA REQUEST NO. 2 Please produce all documents that relate to the negotiation, interpretation, implementation, or performance of the contracts between T-Netix and AT&T relating to the provision of inmate telephone services in Washington State.

T-NETIX'S RESPONSE TO DATA REQUEST NO. 2:

T-NETIX objects to this Request on the ground that it seek "all documents" and is therefore overly broad, unduly burdensome, and oppressive. T-NETIX further objects on the ground that this Request regards "services in Washington State," rather than services in Washington Department of Corrections facilities, and therefore seeks documents that are neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. T-NETIX further objects on the ground that many, if not all, responsive documents are in the possession of complainants. Subject to and without waiving all objections stated herein, T-NETIX states that its search for responsive documents is ongoing and all non-privileged, responsive documents will be produced as soon as practicable.

ATER WYNNE LLP
Lawyers
601 Union Street, Suite 5450
Seattle, Washington 98101-2327
(206) 623-4711

Exhibit E

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION
RESPONSES TO SECOND DATA REQUESTS

Docket No.:	UT-042022
Response Date:	November 17, 2008
Requestor:	Complainants
Respondent:	T-Netix, Inc.
Prepared by:	Joseph Ferretti

Complainants' Amended Second Data Request No. 5: Please produce all DOCUMENTS in which T-NETIX uses the phrase "operator service" or "operator services" or "alternate operator services" or "automated operator" to describe any part of the services that it has provided, is providing, or will provide. This request for DOCUMENTS is not limited to T-NETIX INSTITUTIONS.

T-Netix's Response to Amended Second Data Request No. 5:

T-Netix objects to this Request on the ground that the term "T-NETIX INSTITUTION" improperly refers to all Washington Department of Corrections facilities rather than the three institutions identified by Complainants as originating the inmate collect calls at issue in this proceeding. Therefore, the Request is overly broad, unduly burdensome and expensive, oppressive, and not relevant or reasonably calculated to lead to the discovery of admissible evidence. T-Netix further objects to this Request on the ground that is overly broad, unduly burdensome, and expensive. T-Netix cannot be expected to search every document it ever created containing the terms listed in the Request, as the expense for such a search would greatly outweigh any potential benefit to Complainants in this litigation. Therefore, the Request as framed is improper and cannot possibly be responded within any reasonable period of time.

T-Netix's First Supplemental Response to Amended Second Data Request No. 5:

Complainants have now identified a fourth institution as originating the inmate collect calls at issue in this proceeding. As a result, T-Netix withdraws its objection to this Request as to that institution.

Subject to and without waiving any objection stated herein, T-Netix has no additional responsive documents at this time but will produce all responsive documents, if any, that it discovers in its search for documents responsive to other, more narrowly-tailored data requests that may be promulgated by Complainants.

ATER WYNNE LLP
Lawyers
601 Union Street, Suite 1501
Seattle, Washington 98101
(206) 623-4711

Exhibit F

WASHINGTON UTILITIES & TRANSPORTATION COMMISSION
RESPONSES TO SECOND DATA REQUESTS

Docket No.:	UT-042022
Response Date:	November 17, 2008
Requestor:	Complainants
Respondent:	T-Netix, Inc.
Prepared by:	Joseph Ferretti

Complainants' Amended Second Data Request No. 18: With respect to the scripts described at TNXWA 00786-87, did AT&T or T-NETIX, or both, determine the final versions of the text that was actually used in connection with INMATE-INITIATED CALLS from T-NETIX INSTITUTIONS?

T-Netix's Response to Amended Second Data Request No.18:

T-Netix objects to this Request on the ground that the term "T-NETIX INSTITUTION" improperly refers to all Washington Department of Corrections facilities rather than the three institutions identified by Complainants as originating the inmate collect calls at issue in this proceeding. Therefore, the Request is overly broad, unduly burdensome and expensive, oppressive, and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

T-Netix further objects to this Request on the ground that the term "INMATE INITIATED CALLS" improperly refers to calls made from "June 20, 1996 to the present" rather than from June 20, 1996 through December 31, 2000. According to telephone records that Complainants produced in response to T-Netix First Data Request No. 2, the latest month during which complainants received inmate collect calls for which they allege no prerecorded rate information was provided is November 2000. Therefore, the Request is overly broad, unduly burdensome and expensive, oppressive, and not relevant or reasonably calculated to lead to the discovery of admissible evidence.

Subject to and without waiving these objections, T-Netix responds that it lacks sufficient information at this time, years after the events at issue and after a number of intervening corporate and personnel changes, to determine which party, or both, approved the text of the rate quote scripts employed at T-NETIX INSTITUTIONS.

T-Netix's First Supplemental Response to Amended Second Data Request No. 18:

Complainants have now identified a fourth institution as originating the inmate collect calls at issue in this proceeding. As a result, T-Netix withdraws its objection to this Request as to that institution.

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