

No. 30203-2-III

Siddoway, A.C.J. (concurring) — I write separately because I believe there is technical merit to Walter van Heemstede Obelt’s complaint that his failure to produce a declaration explaining why he possessed no account statements for an AIG account was cited as one basis for the fee award. I join in the result because the record contains sufficient evidence of other delay and obstruction to support the award.

As summarized by the majority opinion, Susan van Heemstede Obelt argued to the court that her husband had provided a vague “interrogatory” response with respect to any statements for an AIG account, stating, “Do not have any AIG. Have nothing to give.”<sup>1</sup> Report of Proceedings at 55. Yet the record on appeal does not include any interrogatories that were directed to Mr. van Heemstede Obelt relating to AIG statements or, for that matter, his response that was quoted in the hearing. Ms. van Heemstede Obelt does not provide a record citation for either in her brief. Her motion to compel discovery in the trial court identified and attached only requests for production for account statements, not interrogatories inquiring about the account. Clerk’s Papers (CP) at 200-01, 207-11.

If Ms. van Heemstede Obelt served only a request for production, then a timely,

signed response from Mr. van Heemstede Obelt that he had no responsive account statements could have been an adequate response under CR 34. *See, e.g.,* Mem. Decision and Order Den. Pl.’s Req. for Recons., *Jimena v. UBS AG Bank*, No. CV-F-07-367 OWW/SKO, 2010 WL 4008137, at \*8 (E.D. Cal. October 12, 2010) (denying a motion to compel under parallel federal rule despite requesting party’s insistence that responding party surely had documents, with the court noting that there was no evidence the responding party had documents, and a responding party “cannot produce documents that it does not have”). If Ms. van Heemstede Obelt had questions about why her husband had no AIG account statements, then interrogatories, a deposition, or examination at trial would have been means to obtain information.

In moving to compel production, Ms. van Heemstede Obelt could also have asked for a court order requiring her husband to state that he had conducted a diligent search to locate AIG account statements and had located none—assuming, for this purpose, that he provided no such statement with an original response. *See, e.g.,* Order Granting in Part and Den. in Part Pl.’s Mot. to Compel Disc. Resps., *Wagner v. Fishing Co. of Alaska, Inc.*, No. C06-1634RSL, 2008 WL 2813333, \*3 (W.D. Wash. July 18, 2008) (ordering such a statement in response to motion to compel production under parallel rules). But Ms. van Heemstede Obelt cites no authority, nor have I found any, that authorizes the trial court to compel compliance with a party’s request for production by framing its own

interrogatory asking for an explanation of nonproduction, and ordering that it be answered. CR 34(a) defines the scope of a request for documents permitted by the rule and limits it to a request to produce the document and permit inspection and copying.

To be fair to an opposing party and spare trial courts the burden of unnecessary supervision of discovery, a party should serve the appropriate discovery before asking the court to intervene. Particularly given the doubtful authority for some of the trial court's oral directions at the discovery hearing, Mr. van Heemstede Obelt was entitled, in my view, to rely on the court's signed order, requiring only that he provide "AIG statements." CP at 414.

That being said, while Mr. van Heemstede Obelt may be technically correct that he did not violate CR 34 by failing to explain why he had no AIG statements in his possession, custody, or control, he does not occupy the high ground on even this discovery issue. He has failed to provide us with a record on appeal that demonstrates that he ever responded to his wife's request for production or that he moved for a protective order.

Most importantly, the trial court identified more than enough instances of Mr. van Heemstede Obelt's intransigence on other matters to support its fee award. His failure to provide the declaration as to the AIG account was relatively inconsequential. For that reason, I join in affirming the judgment below.

No. 30203-2-III – concurrence  
*In re Marriage of van Heemstede Obelt*

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Siddoway, A.C.J.