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Distinguished by [U.S. v. Demmitt](#), 5th Cir.(Tex.), February 1, 2013

57 F.3d 1374

United States Court of Appeals,
Fifth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Doyle Marshall WILLEY, Sr., Defendant–Appellant.

No. 93–2930.

June 27, 1995.

Rehearing Denied Aug. 8, 1995.

Chapter 7 debtor was convicted of bankruptcy fraud, conspiracy to commit bankruptcy fraud, aiding and abetting making of false statement on loan application, aiding and abetting concealment of assets from RTC and FDIC, and aiding and abetting money laundering after trial in the United States District Court for the Southern District of Texas, [Ewing Werlein, Jr.](#), J. Defendant appealed, and the Court of Appeals, [Garwood](#), Circuit Judge, held that: (1) jury could find that Chapter 7 debtor had intent to commit bankruptcy fraud and to conceal assets from RTC and FDIC; (2) jury could find that debtor aided and abetted the making of a false statement on a loan application; (3) jury could find that debtor committed offense of money laundering with respect to five out of six financial transactions involving debtor; (4) evidence was insufficient to find that debtor committed offense of money laundering with respect to check issued to debtor's girlfriend from her brokerage account and deposited by her into one of her personal checking accounts; (5) admission of IRS agent's expert testimony was not abuse of discretion; (6) personal items seized during search of property owned by corporation that was set up by debtor were admissible; (7) debtor was properly sentenced under money laundering sections of federal Sentencing Guidelines; and (8) district court should have made specific factual findings as to two disputed amounts used to calculate total value of funds attributable to crime when it sentenced debtor.

Affirmed in part, reversed in part, vacated in part, and remanded for resentencing.

West Headnotes (23)

[1] Bankruptcy [Evidence and fact questions](#)

Jury could find that Chapter 7 debtor had intent to commit bankruptcy fraud and to conceal assets from RTC and FDIC; despite debtor's sworn statements that no one was holding anything of value in which he had interest, evidence showed that debtor and his company had substantial assets that were being held by various nominees. [18 U.S.C.A. §§ 152, 1032.](#)

[Cases that cite this headnote](#)**[2] Bankruptcy** [Concealment of Property](#)

While under bankruptcy laws, debtor may not be discharged if debtor fraudulently conceals or transfers property within one year of declaring bankruptcy, “doctrine of continuing concealment” can operate to deny debtor discharge even though actual transfer in question occurred more than one year before debtor declared bankruptcy. [Bankr.Code, 11 U.S.C.A. § 727\(a\)\(2\)\(A\).](#)

[3 Cases that cite this headnote](#)**[3] Criminal Law** [Construction of Evidence](#)

In reviewing sufficiency challenge, evidence, whether direct or circumstantial, is reviewed in light most favorable to jury verdict.

[1 Cases that cite this headnote](#)**[4] Criminal Law** [Construction in favor of government, state, or prosecution](#)**Criminal Law** [Inferences or deductions from evidence](#)

In reviewing sufficiency challenge, all credibility determinations and reasonable inferences are to be resolved in favor of verdict.

[3 Cases that cite this headnote](#)

[5] **Criminal Law**

🔑 Reasonable Doubt

Evidence is sufficient if it could lead rational fact finder to conclude that essential elements of crime have been proved beyond reasonable doubt.

[Cases that cite this headnote](#)

[6] **Banks and Banking**

🔑 Prosecutions

Jury could find that Chapter 7 debtor aided and abetted the making of a false statement on a loan application, even though it was not shown that consideration of debtor's colleague as borrower on loan would have resulted in loans-to-one-borrower violation, based on evidence that it was actually debtor who intended to and did in fact make loan payments, and that identity of party to whom bank was making loan would be capable of properly influencing bank's decision to make loan. 18 U.S.C.A. § 1014.

[Cases that cite this headnote](#)

[7] **Currency Regulation**

🔑 Money laundering

Jury could find that Chapter 7 debtor committed offense of money laundering with respect to five out of six financial transactions involving debtor; check issued by debtor's colleague and friend was tied to transfer from debtor's girlfriend, whose funds were all traced back to debtor, two checks constituted transfers from one third party to another of illegal proceeds in partial payment for asset that created appearance of legitimate wealth in debtor, and another transaction was highly unusual and was made so that it would be difficult to trace debtor's involvement. 18 U.S.C.A. § 1956(a)(1)(B)(i).

[2 Cases that cite this headnote](#)

[8] **Currency Regulation**

🔑 Money laundering

While showing of simply spending money in one's own name will generally not support money laundering conviction, using third party, for example, business entity or relative, to purchase goods on one's behalf or from which one will benefit usually constitutes sufficient proof of design to conceal. 18 U.S.C.A. § 1956(a)(1)(B)(i).

[9 Cases that cite this headnote](#)

[9] **Currency Regulation**

🔑 Money laundering

In order to establish design element of money laundering, it is not necessary to prove with regard to any single transaction that defendant removed all trace of his involvement with money or that particular transaction charge is itself highly unusual, although either of these elements might be sufficient to support money laundering conviction. 18 U.S.C.A. § 1956(a)(1)(B)(i).

[4 Cases that cite this headnote](#)

[10] **Currency Regulation**

🔑 Money laundering

In order to establish design element of money laundering, it is not necessary that transaction be examined wholly in isolation if evidence tends to show that it is part of larger scheme that is designed to conceal illegal proceeds. 18 U.S.C.A. § 1956(a)(1)(B)(i).

[17 Cases that cite this headnote](#)

[11] **Currency Regulation**

🔑 Money laundering

Under money laundering statute, design to conceal in prior transaction can be imputed to subsequent one, although inference is weaker than if initial transaction itself were charged. 18 U.S.C.A. § 1956(a)(1)(B)(i).

[5 Cases that cite this headnote](#)

[12] **Currency Regulation**

🔑 Money laundering

Evidence was insufficient to find that Chapter 7 debtor committed offense of money laundering with respect to check issued to debtor's girlfriend from her brokerage account and deposited by her into one of her personal checking accounts, even though money in brokerage account was traced back to debtor. 18 U.S.C.A. § 1956(a)(1)(B)(i).

[Cases that cite this headnote](#)

[13] Criminal Law

🔑 [Miscellaneous matters](#)

Admission of IRS agent's expert testimony regarding whether financial transactions of Chapter 7 debtor concealed true source, nature, ownership, or control of funds, under money laundering statute, was not abuse of discretion. 18 U.S.C.A. § 1956(a)(1)(B)(i); Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7 Cases that cite this headnote](#)

[14] Criminal Law

🔑 [Aid to jury](#)

Criminal Law

🔑 [Admissibility](#)

Decision to admit expert testimony lies within district court's sound discretion and will not be overturned unless manifestly erroneous.

[3 Cases that cite this headnote](#)

[15] Criminal Law

🔑 [Aid to jury](#)

To be admissible, expert's opinion must be helpful to trier of fact. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[5 Cases that cite this headnote](#)

[16] Criminal Law

🔑 [Aid to jury](#)

Evidence rule governing expert opinions allows experts to suggest appropriate inference to be drawn from facts in evidence if expert's specialized knowledge is helpful in

understanding facts. Fed.Rules Evid.Rule 702, 28 U.S.C.A.

[7 Cases that cite this headnote](#)

[17] Searches and Seizures

🔑 [Places, persons, and things within scope of warrant](#)

Personal items seized during search of property owned by corporation that was set up by Chapter 7 debtor-defendant were admissible, even though items were not documentary evidence; warrant allowed seizure of "other fruits, proceeds, evidence, and instrumentalities of delineated violations," and agents had seen copies of debtor's bankruptcy petition and knew that he claimed no assets. U.S.C.A. Const.Amend. 4.

[4 Cases that cite this headnote](#)

[18] Searches and Seizures

🔑 [Particular concrete applications](#)

Chapter 7 debtor had standing to challenge search of property purchased one week before search by corporation that was set up by debtor; on day of search debtor was in process of moving his belongings to property, and thus, debtor had legitimate expectation of privacy in property. U.S.C.A. Const.Amend. 4.

[2 Cases that cite this headnote](#)

[19] Searches and Seizures

🔑 [Objects in plain view; inadvertent discovery](#)

Even if personal items seized during search of property owned by corporation that was set up by Chapter 7 debtor-defendant were outside scope of warrant, seizure would have been appropriate under plain view doctrine. U.S.C.A. Const.Amend. 4.

[3 Cases that cite this headnote](#)

[20] Sentencing and Punishment

🔑 [Money laundering](#)

Chapter 7 debtor was properly sentenced under money laundering sections of federal Sentencing Guidelines, even though debtor claimed that his conduct did not fall within “heartland” of criminal activity statute was meant to punish. U.S.S.G. Ch. 1, Pt. A, intro., 4(b), 18 U.S.C.A.

[1 Cases that cite this headnote](#)

[21] Criminal Law

🔑 [Requisites and sufficiency of judgment or sentence](#)

District court's refusal to grant downward departure under Sentencing Guidelines provides no basis for appeal.

[4 Cases that cite this headnote](#)

[22] Sentencing and Punishment

🔑 [What Guideline Applies; Choice of Guideline](#)

“Heartland” requirement in federal Sentencing Guidelines focuses on type of conduct for which defendant is convicted, not amount of conduct relative to other criminal acts. U.S.S.G. Ch. 1, Pt. A, intro. 4(b), 18 U.S.C.A.

[1 Cases that cite this headnote](#)

[23] Bankruptcy

🔑 [Prosecutions](#)

District court should have made specific factual findings as to two disputed amounts used to calculate total value of funds attributable to crime when it sentenced Chapter 7 debtor, who was convicted of committing bankruptcy fraud. [Fed.Rules Cr.Proc.Rule 32\(c\)\(3\)\(D\), 18 U.S.C.A.](#)

[Cases that cite this headnote](#)

Attorneys and Law Firms

*1377 [Camile F. Gravel](#), Alexandria, LA, [William H. Jeffress, Jr.](#), [Tracey E. George](#), Miller, Cassidy, Larroca & Lewin, Washington, DC, for appellant.

Larry Eastepp, [James L. Turner](#), Ms. [Paula C. Offenhauser](#), Asst. U.S. Attys., Houston, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before [KING](#), [GARWOOD](#) and [BENAVIDES](#), Circuit Judges.

Opinion

[GARWOOD](#), Circuit Judge:

Doyle Marshall Willey (Willey) appeals his convictions on thirty-one counts of bankruptcy fraud, conspiracy to commit bankruptcy fraud, aiding and abetting the making of a false statement on a loan application, aiding and abetting the concealment of assets from the Resolution Trust Corporation (RTC) and the Federal Deposit Insurance Corporation (FDIC), and aiding and abetting money laundering. We affirm in part, reverse in part, vacate the sentence, and remand for resentencing.

Facts and Proceedings Below

In January 1988, Sam Houston National Bank (Sam Houston Bank) of Huntsville, Texas, failed. Willey, a Huntsville real estate and timberland developer, was a director of Sam Houston Bank; Albert Hornaday (Hornaday) was its president from August 1987 until January 1988 and was a life-long friend of Willey's.¹ While investigating the bank's failure, the FBI uncovered potentially fraudulent activity with respect to a piece of property in Sam Houston Bank's real estate owned portfolio (the Richards Road property). This information led investigators to inquire into the activities of Willey, Hornaday, Willey's wife, Kimberly Bacon (Bacon),² and Shadylane Farms, Inc. (Shadylane Farms), a corporation set up by Willey and Bacon and wholly-owned by Bacon. This investigation revealed that Willey, who had declared personal and corporate bankruptcy in 1990 and thereby walked away from approximately \$46 million in unsecured debt, had undertaken, with the assistance of Bacon, Hornaday, and Shadylane Farms, to shield the majority of his and his company's assets from creditors.

In June 1992, federal agents applied for and were granted warrants to search both the home in which Willey and Bacon were then living (the Sunset Lake Road house)

and the Richards Road property, which Shadylane Farms had just purchased from Hornaday and into which Willey and Bacon were then in the process of moving. The voluminous documentary evidence seized during the search revealed a labyrinthine series of financial transactions involving numerous corporate entities with which Willey was associated.³ Although Willey and his company, MWI Land, Inc. (MWI), received significant amounts of money from these various corporations and had access to and/or control over approximately twenty corporate and personal bank accounts, Willey was not listed as an employee in state-mandated reports for any *1378 company other than MWI.⁴ In addition, although Bacon, or Willey and Bacon, were signatories on most of the accounts, none were in Willey's name; most had been opened as "trust" accounts,⁵ with Willey's interest undisclosed, by Bacon in her own name, or in a corporate name.

Based on this information, Willey, Bacon, Hornaday, and Shadylane Farms were charged in a 32-count indictment with bankruptcy fraud, conspiracy to commit bankruptcy fraud, aiding and abetting the making of a false statement on a loan application, aiding and abetting the concealment of assets from the RTC and the FDIC, and aiding and abetting money laundering.⁶ The government contended that, beginning in 1986, Willey funneled money belonging to him and MWI through the corporate and personal accounts that he controlled, but with which he was not conspicuously associated, enabling him to continue to enjoy assets that should have become part of his and MWI's bankruptcy estates. Focusing on two pools of money totalling \$400,000 that had been paid to MWI in July 1986, the government painstakingly traced the money through a convoluted series of transfers from the various nominee and "trustee" accounts that Willey controlled. The evidence showed that, from 1986 to 1992, Willey and Bacon used the money in these accounts to purchase various assets—land, cattle, a fur coat, vehicles, mineral interests, and most importantly, the Richards Road property and improvements thereon. We will not here recount the intricate web of transfers and transactions by which most of these assets were shown to have come into Willey's possession. Because the transactions related to the financing, improvement, and purchase of the Richards Road property were central to many of the charges in this case, however, a somewhat more detailed recounting of them is appropriate.

The Richards Road property was a 61-acre tract of land with a house.⁷ When Sam Houston Bank hired Hornaday in August

1987, it gave him, as part of his compensation package, a lease purchase agreement on the property under which he paid \$200 a month in rent. After Sam Houston Bank failed, the FDIC, in its capacity as receiver, decided to advertise the property for public bids. Two bids were submitted, one from Willey, acting as broker for D.E. Hughes, for \$200,000 and one from Sam Dominey (Dominey) for \$200,100; the appraised market value of the property was \$244,000. The FDIC accepted Dominey's bid, but Hornaday filed an affidavit in the county property records asserting the priority of his purchase option, and Dominey refused to close the purchase with this cloud on the title. Thereafter, Hornaday submitted a bid on April 21, 1988,⁸ in the amount of \$200,100, and the sale was closed May 31, 1988.⁹

*1379 From the time Hornaday purchased the Richards Road property in May 1988 until June 1989, when Shadylane Farms entered into a lease with an option to purchase the property, Willey, through various of his nominee accounts, advanced Hornaday money to pay the mortgage on the property; after June 1989, Shadylane Farms made the payments.¹⁰ Nevertheless, Hornaday continued to live on the property until Shadylane Farms bought it outright in June 1992. In addition, the government introduced substantial evidence that Willey was making improvements on the Richards Road house long before Shadylane Farms actually purchased it in June 1992.¹¹ Payments for these improvements came from various of the accounts to which Willey had access.¹² Willey characterized the payments to Hornaday for the mortgage and improvements on the Richards Road property as loans, but was forced to admit that there were no promissory notes memorializing these alleged loans and that he had not listed the loans on his bankruptcy petition as a debt owed him.

Following ten days of testimony, a jury found Willey guilty on all counts.¹³ The district court sentenced Willey to 60 months' imprisonment on the conspiracy, bankruptcy fraud, and concealment from federal agency counts (counts 1 and 3–24), 24 months' imprisonment on the false statement count (count 2), and 97 months' imprisonment on the money laundering counts (counts 25–31), all sentences to run concurrently. In addition, the district court imposed a 3-year term of supervised release on counts 1 and 3–31, a 1-year term of supervised release on count 2, a fine of \$15,000, and special assessments totalling \$1500.

In his timely appeal, Willey contests the sufficiency of the evidence to support the “conceal or disguise” element of his money laundering convictions under 18 U.S.C. § 1956(a)(1)(B)(i). In this same vein, he claims that the opinion testimony of IRS Special Agent Lana Stone respecting the conceal or disguise element was highly prejudicial and therefore improperly admitted. He further claims that, even if the government's evidence was sufficient to prove money laundering, the district court erred in sentencing him under the Sentencing Guidelines' money laundering provisions because his conduct is not within the “heartland” of criminal behavior that the provisions were meant to address. With respect to the other offenses, he claims that the search of his two homes grossly exceeded the scope of the warrant and that therefore the fruits of the search should have been suppressed. Even if the search was appropriate and the evidence seized was therefore admissible, Willey challenges the sufficiency of the evidence of intent to commit the bankruptcy fraud and transfer and concealment crimes. He claims *1380 that the evidence was likewise insufficient to support his conviction on the false statement count because, he alleges, the statement at issue was neither false, material, nor known to him. Lastly, he argues that the district court erred in failing to resolve a factual dispute regarding the Presentence Report's (PSR) calculation of certain moneys said to have been laundered by him.

Discussion

I. Bankruptcy Fraud and Transfer and Concealment Counts

[1] [2] A person commits the crime of bankruptcy fraud when he “transfer[s] or conceal[s] property (1) knowingly, (2) fraudulently, and (3) in contemplation of a case under title 11 or with intent to defeat the provisions of title 11.” *United States v. West*, 22 F.3d 586, 589 n. 8 (5th Cir.), cert. denied, 513 U.S. 1020, 115 S.Ct. 584, 130 L.Ed.2d 498 (1994); see 18 U.S.C. § 152. Under 18 U.S.C. § 1032, it is a crime to “knowingly conceal[] or endeavor[] to conceal an asset or property from the Federal Deposit Insurance Corporation, acting as conservator or receiver or in the Corporation's corporate capacity with respect to any asset acquired or liability assumed by the Corporation ...” 18 U.S.C. § 1032(1). This section also criminalizes concealing assets from the RTC or any conservator appointed by an enumerated agent of the United States. *Id.* This Court has held that a transfer made with the requisite intent may be prosecuted even though it occurred more than one year before the debtor declared bankruptcy.¹⁴ *West*, 22 F.3d at 590.

[3] [4] [5] Willey contests the sufficiency of the government's evidence with respect to the intent element of both these offenses. In reviewing a sufficiency challenge, the evidence, whether direct or circumstantial, is reviewed in the light most favorable to the jury verdict. *United States v. Nguyen*, 28 F.3d 477, 480 (5th Cir.1994). All credibility determinations and reasonable inferences are to be resolved in favor of the verdict. *Id.* The evidence is sufficient if it could lead a rational factfinder to conclude that the essential elements of the crime have been proved beyond a reasonable doubt. *United States v. Villasenor*, 894 F.2d 1422, 1425 (5th Cir.1990). In making such a determination, “[i]t is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt.” *United States v. Bell*, 678 F.2d 547, 549 (5th Cir.1982) (en banc), *aff'd on other grounds*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983). Willey argues that the government failed to adequately rebut his contention that all the financial arrangements he made were for the benefit of his children, whom he feared would be short-changed in the aftermath of his acrimonious divorce from his first wife. He contends that the government's largely circumstantial case is insufficient to rebut his assertion of innocent intent. We disagree.

The government's theory of this case was that Willey was contemplating bankruptcy in 1986 and thus began to transfer assets out of his name to various individual and corporate nominees and “trustees.” The evidence focused primarily on two checks totalling \$400,000 that MWI received in mid-July 1986. Almost immediately upon receiving these checks, Willey transferred them to an attorney acting as “trustee.” At this same time, Willey filed a motion to obtain a temporary restraining order in connection with his divorce from his first wife.¹⁵ To the motion, he attached an affidavit averring that, unless restrained, his wife would “[i]ncur massive debts as she did when she recently filed suit in this county seeking a divorce from me.” He went on:

*1381 “Because of present economic conditions, I am and have been for some time, in extreme financial difficulty. I have been forced to consider relief through the Federal Bankruptcy Court.”

This affidavit was signed July 21, 1986, the same day Willey transferred the first check to his putative “trustee.” Starting in 1988, Willey's financial fortunes took a decided turn for the worse. He lost more than \$1.2 million in the

collapse of Sam Houston Bank and an additional \$286,242 in the demise of Spindletop Savings. In addition, corporate loans Willey had personally guaranteed began to fall through, and judgments against him started to accumulate. Although Willey testified at trial that he was not considering bankruptcy at that time, he admitted that he was in dire financial straits. A letter found among his personal files, dated March 13, 1989, referred Willey to a San Antonio bankruptcy attorney who the writer claimed was “ ‘the best bankruptcy attorney I have ever visited. Super smart and tough. In addition, he is the alternate trustee for bankruptcy filings, thus no hassle on your plan, etc. Give me a call.’ ”

On July 20, 1989, Willey gave a deposition in connection with the collection of a judgment against him and MWI on a loan guarantee; portions of that deposition were read into the record. In the deposition, Willey averred that he had “shut down all operations” of MWI in mid-1986, that the company was “defunct” and held no assets, and that he had been living on money borrowed from his family. He testified that he owned no real estate other than his home and that his children owned no real estate; he later testified that MWI held no real estate or leasehold interests. He also testified that he did not own a vehicle, that he had borrowed Bacon's car to come to the deposition, and that she did not hold any property that belonged to him. He affirmed that no one else was holding any property on his behalf and that MWI had not transferred any assets to other persons. He testified that he owned no jewelry, except for a \$350 Bulova watch, no weapons, no commodities, securities, or mutual funds, and no equipment. Under the evidence, the jury could find that this testimony was false and then known to be so by Willey.

Willey declared personal bankruptcy under Chapter 7 on August 23, 1990. The total amount of unsecured debt reflected in his petition was in excess of \$26 million, largely as a result of personal guarantees he had signed on corporate loans. On his bankruptcy schedules, Willey declared that no one was holding anything of value in which he had an interest. He listed his Sunset Lake Road home but no other real property or leasehold interests. Willey further declared that he owned personal property (clothing and a watch) with a total value of \$1000, had \$45 cash on hand at the time he filed the bankruptcy petition, and otherwise owned no jewelry, firearms, automobiles, livestock, or farming equipment. MWI's Chapter 7 bankruptcy petition, filed September 25, 1990, showed a similar dearth of assets and listed \$20,942,806.63 in unsecured debt. Accordingly, both bankruptcy trustees filed reports of no distribution in their

respective cases. Willey was discharged on February 6, 1991, and his personal bankruptcy was closed on June 27, 1991; MWI's bankruptcy was closed on December 11, 1990.

The evidence showed that, despite these sworn statements, Willey and MWI had substantial assets that were being held by various nominees, most significantly Bacon, Hornaday, and Shadylane Farms. Each of the bankruptcy fraud and concealment counts was keyed to a specific asset or group of assets; each of these assets was ultimately traced back to Willey or MWI.¹⁶ Although most of these assets were not titled in Willey's or MWI's name, the evidence adequately showed that these were mere nominee arrangements, that Willey or MWI had actually financed the purchases, and that Willey *1382 continued to derive benefit from the assets and used or dealt with them as his own property; those that had not been transferred out of Willey's name, such as various firearms and a \$3750 designer watch, were simply not declared on either bankruptcy petition.

Having reviewed the entire record in this case, we conclude that the government's evidence of culpable intent was more than sufficient to support the jury's verdicts on these counts. At base, Willey's challenge to the sufficiency of the evidence on these charges is that the government's largely circumstantial case is insufficient to rebut his direct testimony that he concealed the money with the intent only to benefit his children. He cites precedent from this Court stating that, “[i]f the ‘evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged,’ this Court must reverse the convictions.” *United States v. Menesses*, 962 F.2d 420, 426 (5th Cir.1992) (citation omitted). This, however, is not the case here. The government's circumstantial case on the bankruptcy fraud and transfer and concealment counts was overwhelming. Willey's only substantial evidence of his professed contrary intent was his own testimony and that of Bacon and another of Willey's nominees, which the jury was free to give whatever weight it chose.¹⁷ The bankruptcy fraud and transfer and concealment convictions are affirmed.

II. Fraudulent Statement Count

[6] Count 2 of the indictment charged Willey with aiding and abetting the making of a false statement on a loan application in violation of 18 U.S.C. § 1014. The evidence supporting this count involves Hornaday's application for a \$250,000 loan from Bedford Savings Association (Bedford

Savings) to fund both the purchase of the Richards Road property and various improvements to the house there. According to the government's allegations, it was actually Willey who intended to and did in fact, through Bacon and later Shadylane Farms, make payments on the Richards Road property. Given this arrangement, the government alleged that Hornaday's statement on the loan application that he would be solely responsible for repayment of the loan was fraudulent. To prove a violation of [section 1014](#), the government was required to show that Hornaday knowingly made a false statement on the application, that Willey authorized or directed Hornaday to do so, and that the statement was material. *United States v. Thompson*, 811 F.2d 841, 844 (5th Cir.1987). Willey contests the sufficiency of the evidence as to all three elements of the offense.

Hornaday's loan application was admitted into evidence. The financial statement attached to the application, dated August 17, 1987, listed total assets of \$1,065,607 and net income of \$102,500; on May 31, 1988, Hornaday affirmed that his financial condition had not changed, even though he had been unemployed since Sam Houston Bank failed in January 1988. Marilyn Crosson (Crosson) of Bedford Savings, who served as a liaison between the president and Bedford Savings borrowers, testified that she dealt with Willey during the loan negotiations; a letter requesting a draw on the loan, written on MWI letterhead and signed by Willey, also was introduced into evidence.

As noted above, the government showed that, after Hornaday secured the loan, Shadylane Farms made the payments on the Richards Road property. In 1989, the year Hornaday purchased the Richards Road property, he and his wife showed a combined wage income of \$37,973.29; they claimed mortgage interest deductions of \$25,996.07. In 1990, the Hornadays reported \$41,301.57 in wage income and \$27,260.75 in mortgage interest. The government's expert testified that, in each instance, the reported wage income would generally be insufficient to *1383 make the mortgage payments and also cover normal living expenses. That same year, Shadylane Farms reported rent payments of \$22,951.60 for a pasture lease; Hornaday, however, reported no rental income for that tax year.

The evidence was sufficient to show that the statement on the loan application was false. Viewing all the evidence in the light most favorable to the verdict, a rational jury could conclude beyond a reasonable doubt that Hornaday would not be solely responsible for repayment of the loan.

Viewed in the light most favorable to the verdict, the circumstantial evidence is also sufficient to establish that Willey directed or authorized Hornaday to make the fraudulent statement. Crosson testified that it was Willey who was her contact during the loan negotiations and who forwarded appropriate records and data to Bedford Savings. Willey and Hornaday were long-time friends, and Willey was the person who directed Hornaday to Bedford Savings, where Willey had borrowed before. Willey's previous association with Bedford Savings, and his having borrowed money there, also support the inference that he knew the loan application contained this averment. In addition, Willey himself admitted that he was familiar with the banking business generally, which was also shown by other evidence. Finally, the evidence amply demonstrated that Willey actually made the mortgage payments on the Richards Road property.

The question remains, however, whether the statement was material. In the context of this statute, "[a] false statement is material if it is shown to be capable of influencing a decision of the institution to which it was made." *United States v. Williams*, 12 F.3d 452, 456 (5th Cir.1994) (footnote omitted). To prove materiality, however, it is not necessary to show that the statement "actually influence[d] a decision[,] provided that it is capable of doing so. Reliance is irrelevant." *Id.* at 456 n. 14. The government argues that the statement was material in that Willey could not get a loan from Bedford Savings himself because he was a previous Bedford Savings borrower and would have exceeded the bank's loans-to-one-borrower limits. However, no evidence was introduced showing what Bedford Savings's loans-to-one-borrower limits were or the amount of Willey's loan indebtedness to Bedford Savings in May 1988. Without this information, it is impossible to say whether Willey's being considered a borrower on this loan would have resulted in a loans-to-one-borrower violation.

Nevertheless, the test is not whether the bank could not or would not have made the loan but for the false statement, but whether the statement was properly "capable of influencing" the bank's decision to grant the loan. Thus, regardless whether a loan to Willey would have breached the bank's loans-to-one-borrower limits, we cannot say that his involvement in the loan would not have been a factor properly "capable of influencing" the decision to make the loan. The evidence showed that Hornaday was likely not capable of making the mortgage payments on the Richards Road property himself and that he was no more than a nominee borrower for Willey. We think that the jury could reasonably infer that Bedford

Savings would properly want to know the party to whom it was making this loan and that the party's identity itself would be capable of properly influencing its decision to make the loan. The fraudulent statement conviction is affirmed.

III. Money Laundering Counts

[7] Counts 25 through 31 charged Willey with aiding and abetting money laundering contrary to 18 U.S.C. § 1956(a)(1)(B)(i). A person violates section 1956(a)(1)(B)(i) if he conducts or attempts to conduct a financial transaction knowing that the property involved is the proceeds of unlawful activity and knowing that the transaction was designed “to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity.” To prove that a defendant aided and abetted money laundering, the government must show that the defendant “associated himself with the unlawful financial manipulations, that he participated in them as something he wished to bring about, and that he sought, by his actions, to make the effort succeed.” *1384 *United States v. Termini*, 992 F.2d 879, 881 (8th Cir.1993). Each money laundering count of the indictment alleged a different specific transaction with a different particular check made out by either Bacon, Hornaday, or ShadyLane Farms, the funds for which the government's evidence adequately showed were the proceeds of Willey's bankruptcy fraud. Willey argues, however, that there is insufficient evidence that the financial transactions charged as money laundering in this case were designed to conceal or disguise their source or origin.

Willey relies principally on the Tenth Circuit's decision in *United States v. Garcia–Emanuel*, 14 F.3d 1469 (10th Cir.1994). In *Garcia–Emanuel*, the defendant was indicted on 17 counts of money laundering in violation of section 1956(a)(1)(B)(i). The defendant and his wife had used the proceeds of the defendant's criminal enterprise to pay their mortgage, buy land, vehicles, and horses, and make various investments. *Id.* at 1472. All the transactions involved payment by cash or personal or cashier's check and were conducted in the defendant's own name or that of his wife or his restaurant. *Id.* A jury found the defendant guilty of all seventeen money laundering counts. The district court, however, granted the defendant's post-verdict motion for judgment of acquittal as to all these counts, reasoning that, because the transactions did not conceal the defendant's identity as the person providing the illegal proceeds, the government had failed to meet its burden of proving that the transaction was one that was designed to conceal. ¹⁸ *Id.* at 1473.

The Tenth Circuit disagreed with the district court's reasoning, but upheld its finding of insufficient evidence of the design requirement as to twelve of the seventeen counts. *Id.* Citing a report of the President's Commission on Organized Crime, the court defined money laundering schemes as those that “ ‘seek to change large amounts of cash ... into an ostensibly legitimate form, such as business profits or loans, *before using those funds for personal benefit....*’ ” *Id.* at 1474 (citations omitted; emphasis in *Garcia–Emanuel*). Thus, the court concluded,

“Merely engaging in a transaction with money whose nature has been concealed through other means is not in itself a crime. In other words, the government must prove that the specific transactions in question were designed, at least in part, to launder money, not that the transactions involved money that was previously laundered through other means. If transactions are engaged in for present personal benefit, and not to create the appearance of legitimate wealth, they do not violate the money laundering statute.” *Id.*

The design requirement separates the crime of money laundering from the innocent act of mere money spending. *Id.* at 1474. In one sense, the acquisition of *any* asset with the proceeds of illegal activity conceals those proceeds by converting them into a different and more legitimate-appearing form. *Id.* But the requirement that the transaction be *designed* to conceal implies that more than this trivial motivation to conceal must be proved. *Id.* The court thus held that substantial proof of a design to conceal was required; behavior that is merely suspicious but does not evince a design to conceal, as well as “the mere accumulation of non-concealing behavior,” is not sufficient to sustain a conviction for money laundering. *Id.* at 1476.

Reviewing the money laundering counts under these standards, the *Garcia–Emanuel* court affirmed the judgment of acquittal as to those counts involving cashier's checks on which the defendant himself was noted as remitter. *Id.* at 1476–78. Likewise, as to those counts involving purchases with cash in which the defendant's name appeared on the contract of sale and those counts involving purchases by personal check in which the defendant's name appeared on the check, the court upheld the judgment of acquittal. *Id.* at 1478. However, as to count 11, which charged the defendant with causing the issuance of a cashier's check, on which *his restaurant* was noted as remitter, to purchase *1385

some land, the court reversed the judgment of acquittal and reinstated the conviction for money laundering:

“The transaction not only creates the false impression that the restaurant was his source of wealth, but it creates documentary evidence in support of that deception that could mislead an investigator. This furthers a launderer’s goal of ‘plac[ing] illicit bulk cash in an economy, [so] it becomes increasingly difficult to uncover their money laundering operation.’ ” *Id.* at 1476–77 (citation omitted; alterations in *Garcia–Emanuel*).

Using a similar rationale, the court found insufficient evidence to support count 14, involving the use of \$15,000 cash as partial payment for a horse, in part because,

“[u]nlike count 11, Defendant did not transfer money to his restaurant, use his restaurant as a remitter, involve his restaurant as a named party in any kind of transaction, or design a paper trail that would lead an investigator to believe that the money for the horse came from some source other than Defendant.”¹⁹ *Id.* at 1477.

[8] The rule that emerges from the Tenth Circuit’s analysis is that, while a showing of simply spending money in one’s own name will generally not support a money laundering conviction, using a third party, for example, a business entity or a relative, to purchase goods on one’s behalf or from which one will benefit usually constitutes sufficient proof of a design to conceal.²⁰ If this were a typical case, the involvement of the third parties would clearly support the money laundering convictions. The difference in the present case is that the scheme was much more complex than that in *Garcia–Emanuel*. The transactions alleged to constitute money laundering here are not the initial transfers to Bacon, Hornaday, and ShadyLane Farms but certain intermediate transactions that the third parties conducted with the money.

Although *Garcia–Emanuel* does state that “the *specific transactions in question* were designed, at least in part, to launder money,” *id.* at 1474 (emphasis added), we do not understand this statement to mean that each transaction must be analyzed in isolation from the alleged scheme in its entirety. *Garcia–Emanuel* itself noted that a design to conceal in a particular transaction may be imputed to a subsequent transaction, although the inference may be weaker than if the concealing transaction itself were charged. *Id.* at 1478. More importantly, the court also noted that other types of evidence, including “depositing illegal profits in the bank account of a legitimate business” and “a series of unusual

financial moves cumulating [sic] in the transaction,” had been found to *1386 support an inference of an intent to conceal. *Id.* at 1476 (footnotes omitted).

Evidence that the defendant commingled illegal proceeds with legitimate business funds has been held to be sufficient to support the design element. *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir.1991) (evidence that defendant “treated the [illegal] funds [commingled] in [legitimate church] accounts as his own,” and that he would often “remove[] himself still further from the funds in the church accounts by using the church secretary to present Development Corporation checks made out to cash,” was sufficient to support finding of design to conceal); *see also Termini*, 992 F.2d at 881 (commingling of illegal gambling proceeds in legitimate corporate bank accounts sufficient to establish a design to conceal).²¹ Moving money through a large number of accounts has, in the light of other evidence, also been found to support the design element of this offense, even when all the accounts to which the defendant transferred the money and from which he withdrew it were in his own name. *United States v. Lovett*, 964 F.2d 1029, 1036 (10th Cir.1992) (“[T]he purchase of the house was directly facilitated by the defendant’s convoluted series of financial transactions, combined with his numerous misleading statements regarding the nature and source of the proceeds.”), *cert. denied*, 506 U.S. 857, 113 S.Ct. 169, 121 L.Ed.2d 117 (1992), and *cert. denied*, 510 U.S. 1002, 114 S.Ct. 576, 126 L.Ed.2d 475 (1993);²² *see also United States v. Beddow*, 957 F.2d 1330, 1335 (6th Cir.1992) (together with evidence tending to show that the defendant used another person as a “front man” to disguise his ownership of gemstones purchased with illegal drug proceeds, “the evidence of [the defendant’s] convoluted financial dealings with his banks and his charter boat business further support a conclusion that he intended to disguise the illegal source of his money”).

[9] [10] These cases demonstrate that in order to establish the design element of money laundering, it is not necessary to prove with regard to any single transaction that the defendant removed all trace of his involvement with the money or that the particular transaction charged is itself highly unusual,²³ although either of these elements might be sufficient to support a money laundering conviction. *See, e.g., United States v. Campbell*, 977 F.2d 854, 858 n. 4 (4th Cir.1992) (evidence was sufficient to establish design to conceal when government demonstrated that the contract for sale of house was altered to reflect a reduction in price of \$60,000 after

purchaser suggested the change and agreed to give the sellers \$60,000 under the table), *cert. denied*, 507 U. S. 938, 113 S.Ct. 1331, 122 L.Ed.2d 716 (1993). That is, it is not necessary that a transaction be examined wholly in isolation if the evidence tends to show that it is part of a larger scheme that is designed to conceal illegal proceeds.²⁴ With these standards in mind, we now turn to the money laundering charges in this case.

[11] Count 25 involved a \$6000 check written by Hornaday on his personal account *1387 at First American Bank in Bryan, Texas. The check was cashed. The source of these funds was two \$9000 checks issued March 14, 1990, from Bacon's brokerage account. Hornaday deposited this money into his account, less \$600 cash, on March 21. As noted above, a design to conceal in a prior transaction can be imputed to a subsequent one, although the inference is weaker than if the initial transaction itself were charged. See *Garcia-Emanuel*, 14 F.3d at 1478. Thus, in count 25, although the specific conduct alleged, the issuance of a check by Hornaday from his personal account, is not in itself concealing, it was tied to a transfer from Bacon; the funds in Bacon's accounts were all traced back to Willey. In the context of this case, a transfer from one third party to another supports a reasonable inference of a design to conceal because it moves the money further away from the defendant than it was before the transfer. Although we note that there is no evidence of what Hornaday did with the money once he cashed the check, there was more than sufficient evidence of the relationship between Willey and Hornaday to support the reasonable inference that Hornaday was acting as a shill for Willey with respect to the Richards Road property. This is sufficient for a reasonable jury to infer that the transaction ultimately inured to Willey's benefit. See *id.* at 1474. The conviction on count 25 is affirmed.

Counts 27 and 28 were keyed to two \$2900 checks issued from a ShadyLane Farms account to Hornaday, one dated November 5, 1990, the other dated December 5, 1990, to pay the mortgage on the Richards Road property. Under a reasonable view of the evidence, this is a classic money laundering transaction; the transfer from one third party to another of illegal proceeds in partial payment for an asset that created the appearance of legitimate wealth in the defendant. A rational jury could infer that such a transaction was designed to conceal Willey's relationship to the proceeds, his involvement in the transaction, and his interest in the property. The convictions on counts 27 and 28 are affirmed.

Count 29 involved the deposit on January 10, 1992, by Bacon into a personal checking account in her name of a \$64,988.41 cashier's check from the Lillie Mae Smith Trust, of which Willey was trustee.²⁵ The check represented payment for the purchase of municipal unit trusts owned by Bacon's brokerage account. The unusualness of this transaction supports a reasonable inference of a design to conceal. In a typical brokerage account transaction, the purchaser pays the broker, and the account holder receives her remuneration through the brokerage account; the brokerage account statement reflects the transaction. In this transaction, however, the check was issued directly to Bacon by the trust as purchaser; the money was not actually passed through the brokerage account and there thus would have been no record at all of the brokerage account ever having sold anything to the Lillie Mae Smith Trust. The transaction thus allowed Willey to get money out of Bacon's brokerage account without creating any record of his involvement in the transaction. We conclude that such a highly unusual financial transaction, especially one that makes it very difficult to trace the defendant's involvement, supports a reasonable inference of a design to conceal. The conviction on count 29 is affirmed.

The item referenced in Count 30 was a cashier's check for \$309,371 that ShadyLane Farms purchased on May 7, 1992. That check, which was intended for the purchase of a tract of land, was redeposited into various bank accounts the next day after the deal fell through.²⁶ Count 31 involved a \$200,000 cashier's check purchased by ShadyLane Farms on June 5, 1992, for the purchase of the Richards Road property. The government's *1388 expert witness traced both these checks back to the \$400,000 MWI originally received in 1986. These two transactions evince a combination of the factors, discussed above, that courts have found probative of a design to conceal: a purchase in a third party's name; a series of convoluted financial maneuvers leading up to the purchase; and the commingling of illegitimate funds in the accounts of an ostensibly legitimate business. The inference is admittedly more tenuous because the transfers that plausibly constitute money laundering are those going into ShadyLane Farms's account prior to the issuance of the cashier's checks. In *Garcia-Emanuel*, however, when the evidence showed only one of the probative factors, the court held that, despite the weaker nature of the evidence, this was sufficient to evince a design to conceal.²⁷ *Id.* at 1478. The convictions on counts 30 and 31 are affirmed.

[12] However, we are constrained to reverse the conviction on count 26. Count 26 involved a \$4500 check issued to

Bacon from her brokerage account and deposited by her into one of her personal checking accounts on October 12, 1990. The money in the brokerage account was traced back to Willey. This was the only evidence, other than the government expert's opinion that the transaction did in fact conceal the source of the proceeds, presented as to this count. In other words, all the government proved was that Bacon had transferred money from one account in her name to another in her name. This clearly is insufficient to support an inference that the particular transaction charged in count 26 was designed to conceal within the meaning of the statute.²⁸ We thus reverse Willey's conviction on count 26.

IV. Admissibility of Expert Testimony

[13] As part of its case against Willey, the government put on Lana Stone (Stone), a special agent for the IRS Criminal Investigation Division, to show that the particular checks specified in counts 25 to 31 represented laundered monies. Stone was asked to describe each transaction, the source of the funds, and then to state whether, in her opinion, the transaction concealed the true source, nature, ownership, or control of the funds. Willey made a timely objection to this last part of Stone's testimony as improper opinion testimony each time it was elicited; he was overruled each time. Willey argues that, even if there is sufficient evidence of a design to conceal, Stone's testimony as to the money laundering charges was *1389 so prejudicial as to require a new trial, not only as to the money laundering charges, but also as to all the charges except count 2.

[14] [15] The decision to admit expert testimony lies within the district court's sound discretion and will not be overturned unless manifestly erroneous. *United States v. Townsend*, 31 F.3d 262, 270 (5th Cir.1994), cert. denied, 513 U.S. 1100, 115 S.Ct. 773, 130 L.Ed.2d 668 (1995). To be admissible, an expert's opinion must be helpful to the trier of fact. Fed.R.Evid. 702. Willey argues that Stone's testimony violated the helpfulness requirement of Rule 702, relying on the Seventh Circuit case of *United States v. Benson*, 941 F.2d 598 (7th Cir.1991), amended, 957 F.2d 301 (7th Cir.1992). In *Benson*, the court held that the testimony of the IRS agent was improperly admitted because the agent testified outside his area of expertise; his testimony therefore violated the helpfulness requirement of Rule 702. *Id.* at 604–05. Willey, however, does not attack Stone's qualifications as an expert; instead, he argues that Stone's opinion testimony was objectionable because Stone's specialized knowledge was not necessary to help the jury understand whether the

transaction was concealing. In other words, Willey argues that Stone was no more qualified than the jury to conclude that the transaction was concealing, and her testimony therefore did no more than tell the jury what conclusion to reach.

[16] An expert may properly offer an opinion “[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Fed.R.Evid. 702. The rule thus allows experts to suggest an appropriate inference to be drawn from the facts in evidence if the expert's specialized knowledge is helpful in understanding the facts. The rule has been interpreted to “permit expert opinion even if the matter is within the competence of the jurors if specialized knowledge will be helpful, as it may be in particular situations.” 1 *McCormick on Evidence* § 13 at 54 (1992) (footnote omitted).

Although we do not recommend the present case as a model for eliciting expert testimony, on balance we tend to believe that the district court did not abuse its discretion by admitting this testimony. Certainly, the admission was most damaging with respect to count 26 because there was no evidence other than Stone's testimony supporting the inference of a design to conceal with respect to that count, but we have reversed the conviction on that count. As to the remaining money laundering counts, we conclude that, even if error occurred, it was undoubtedly harmless. Stone clearly stated the bases for her conclusions, and those conclusions were supported by the overwhelming evidence.²⁹ In these circumstances, we do not think there was a significant risk that Stone's testimony “supplant[ed the] jury's independent exercise of common sense.” *Scott v. Sears, Roebuck & Co.*, 789 F.2d 1052, 1055 (4th Cir.1986).

V. Legality of the Search

[17] [18] On June 11, 1992, state and federal agents, acting pursuant to a search warrant and a civil forfeiture *in rem* warrant, searched Willey's Sunset Lake Road home and the Richards Road property. The search warrant listed the items to be seized *1390 as a variety of documentary evidence as well as “any other fruits, proceeds, evidence, and instrumentalities of the delineated violations.” In executing the search, agents seized not only documentary evidence, but also jewelry, vehicles, cattle, firearms, a big screen television, and other items not specifically described in the warrant. Willey sought to suppress the evidence on Fourth Amendment grounds, but the district court denied the motion.³⁰

Willey argues that the items seized that were not described with particularity in the warrant (e.g., the firearms, jewelry, cattle, etc.) should be suppressed because they were outside the valid scope of the warrant.³¹ “[U]nder the ‘severability’ doctrine, items that are illegally seized during the execution of a valid warrant do not affect the admissibility of evidence legally obtained while executing the warrant.” *United States v. Hamilton*, 931 F.2d 1046, 1053–54 (5th Cir.1991). Nevertheless, Willey argues that a new trial is necessary because the admission of the allegedly illegally seized items was not harmless.

Of course, the severability doctrine assumes that the items in question were in fact illegally seized, that is, that they were outside the valid scope of the warrant. The items at issue in this case, however, fell within the scope of the warrant. The warrant in this case allowed the agents to seize “other fruits, proceeds, evidence, and instrumentalities of the delineated violations.” This language is similar to that contained in the warrant approved of in *Andresen v. Maryland*, 427 U.S. 463, 479–80, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In *Andresen*, the Supreme Court held that, read in context, the language was sufficient to limit the warrant to a search only for fruits of the particular crimes the defendant was alleged to have committed. *Id.* at 479–83, 96 S.Ct. at 2748–49. The fact that some of the evidence seized led to charges against the defendant for a different crime was not relevant because the agents had probable cause to seize the evidence in connection with the offense named in the warrant. *Id.* at 481–85, 96 S.Ct. at 2749–50. That probable cause arose from the agents’ knowledge, not set forth in the warrant, that the defendant had been involved in a number of other fraudulent transactions, as well as the agents’ familiarity with the defendant’s method of operations, did not invalidate the warrant. *Id.* at 483–85, 96 S.Ct. at 2750.

In the present case, the “other fruits” language in the warrant does not even need to be read in context; the sentence itself describes the evidence sought as that relating to the “delineated violations,” which were specifically enumerated in the warrant. Willey nevertheless argues that, because the items were not specified in the warrant, they should be suppressed, implying that, because the items seized were tangible physical property, not the type of documentary evidence specifically referenced in the warrant, they were outside its scope. As a theory, there may be some validity to this argument. “The requirement that warrants shall particularly describe the things to be seized makes general

searches under them impossible and prevents the seizure of one thing under a warrant describing another.’ ” *Stanford v. Texas*, 379 U.S. 476, 485–86, 85 S.Ct. 506, 512, 13 L.Ed.2d 431 (1965) (quoting *1391 *Marron v. United States*, 275 U.S. 192, 195–98, 48 S.Ct. 74, 76, 72 L.Ed. 231 (1927)). When detailed particularization is not practicable, however, “generic language suffices if it particularizes the types of items to be seized.” *United States v. Webster*, 734 F.2d 1048, 1055 (5th Cir.), *cert. denied*, 469 U.S. 1073, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984).

Nevertheless, given the facts of this case, the district court did not err in admitting the “other fruits” that were seized during the search, even though they were not documentary evidence. The affidavit of Agent John Mabry, which was attached to the warrant and incorporated in it by reference, stated that agents had observed Willey arrive at the Richards Road property in a truck and that they had seen cattle on the property, which further investigation revealed to belong to Willey. Agents had seen copies of Willey’s and MWI’s bankruptcy petitions and knew that both had claimed no assets. This, coupled with the nature of the alleged scheme, was sufficient to give the agents probable cause to seize these other items. Willey is simply mistaken in thinking that there was “nothing about his possession of, for example, a television set, or a gold bracelet, or a wallet containing \$204 in cash, to give the agents probable cause to believe they are ‘fruits’ of bankruptcy fraud.” For one thing, the warrant specifically referenced currency. Moreover, the very nature of bankruptcy fraud suggests that the defendant is hiding assets, and money laundering suggests, at least to some extent, the conversion of liquid assets into apparently legitimate tangible property. It is therefore wholly reasonable to suspect that expensive assets in the defendant’s possession may be tied to that scheme, either because they were not disclosed on the bankruptcy petition or because they were purchased with funds wrongfully withheld from creditors.

[19] At all events, assuming *arguendo* that the items complained of were outside the scope of the warrant, their seizure would nevertheless have been appropriate under the plain view doctrine. See *United States v. Hill*, 19 F.3d 984, 989 (5th Cir.) (seizure of items in plain view is appropriate if officer has probable cause to believe that the items are “either contraband or will be useful in establishing that a crime has been committed”), *cert. denied*, 513 U.S. 929, 115 S.Ct. 320, 130 L.Ed.2d 281 (1994). The district court did not err in denying the motion to suppress.

VI. Sentencing

[20] Willey challenges his sentence in two respects. First, he contends that, even if his convictions for money laundering are upheld, his sentence under the money laundering sections of the Sentencing Guidelines should be reversed because his conduct does not fall within the “heartland” of criminal activity the statute was meant to punish. The Sentencing Guidelines contemplate that

“the sentencing courts [will] treat each guideline as carving out a ‘heartland,’ a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where conduct significantly differs from the norm, the court may consider whether a departure is warranted.” U.S.S.G. ch. 1, pt. A, cmt. 4(b).

[21] [22] A district court's refusal to grant a downward departure provides no basis for appeal.³² *United States v. Miro*, 29 F.3d 194, 198 (5th Cir.1994). Moreover, Willey offers no evidentiary support for the argument that his behavior is not typical of money laundering *1392 schemes. His objections to the PSR indicate that he argued before the district court that his conduct did not come within the normal range of conduct contemplated by the money laundering guidelines because the money laundering transactions were only a relatively small fraction of the criminal conduct of which he was convicted. This is not what the “heartland” requirement contemplates, however; rather it focuses on the type of *conduct* for which the defendant is convicted, not the amount of the conduct relative to other criminal acts. *See* U.S.S.G. ch. 1, pt. A, cmt. 4(b) (describing the “heartland” as “a set of typical cases *embodying the conduct that each guideline describes*,” and an “atypical case” as “one to which a particular guideline linguistically applies but *where conduct significantly differs from the norm*”) (emphases added). The district court did not err in applying the money laundering guidelines.

[23] Willey claims that the district court further erred at sentencing in failing to make specific factual findings as to two disputed amounts used to calculate the total value of funds attributable to the crime, as required by *Fed.R.Crim.P. 32(c)(3)(D)*. “[W]here there are disputed facts material to the sentencing decision, the district court must cause the record to reflect its resolution thereof, particularly when the dispute is called to the court's attention.” *United States v. Warters*, 885 F.2d 1266, 1272 (5th Cir.1989). On the other hand, “[the] adoption of the [PSR's] findings indicates

that the court, ‘at least implicitly, weighed the positions of the probation department and the defense and credited the probation department's determination of the facts.’ ” *United States v. Ramirez*, 963 F.2d 693, 706 (5th Cir.), *cert. denied*, 506 U.S. 944, 113 S.Ct. 388, 121 L.Ed.2d 296 (1992) (citation omitted).

The district court in this case specifically adopted the findings of the PSR. The PSR characterized the two disputed amounts as “monies laundered.” Both the disputed amounts were commissions Willey earned approximately a year after he was discharged in bankruptcy that he had directed be paid directly to ShadyLane Farms. At sentencing, the government contended that these amounts were part of Willey's continuing effort to defraud creditors by using ShadyLane Farms to hide assets that really belonged to him and MWI.

In *United States v. Moody*, 923 F.2d 341 (5th Cir.), *cert. denied*, 502 U.S. 821, 112 S.Ct. 80, 116 L.Ed.2d 54 (1991), this Court held that the bankruptcy fraud statute was broad enough to encompass both pre- and post-petition transfers. *Id.* at 346–47. The broad coverage of the statute, however, stems from a concern for minimizing “the level of interference with the administration of the debtor's bankruptcy estate that might arise from unregulated transfers.” 1 *Collier on Bankruptcy* ¶ 7A.02[7][a][v] at 88. Discharge of the debtor at least partially alleviates this concern.³³ In any event, even if it were true that Willey titled these commissions in ShadyLane Farms's name to avoid detection of the earlier bankruptcy fraud, there is nothing to suggest that these commissions were part or proceeds of or attributable to bankruptcy fraud as they were earned after Willey was discharged. Nor, without more substantial proof that Willey agreed with the other defendants at the outset to conceal the bankruptcy fraud, can the government bring these monies within the conspiracy count. *See Grunewald v. United States*, 353 U.S. 391, 404–06, 77 S.Ct. 963, 974, 1 L.Ed.2d 931 (1957) (“But a vital distinction must be made between acts of concealment done in furtherance of the *main* criminal objectives of the conspiracy, and acts of concealment done after these central objectives have been attained, for the purpose *1393 only of covering up after the crime.... In the latter case, as here, the acts of covering up can by themselves indicate nothing more than that the conspirators do not wish to be apprehended—a concomitant, certainly of every crime since Cain attempted to conceal the murder of Abel from the Lord.”).³⁴

The district court therefore could not have properly included these amounts in the calculation of the total funds attributable

to the money laundering crimes. Nor was this error harmless; if these two amounts had not been included, the total amount of funds attributable to those crimes would have been less than \$1,000,000, and the increase in Willey's base offense level would have been only 4, rather than 5. See U.S.S.G. § 2S1.1(b)(2)(E). We must therefore vacate the sentence and remand the case to the district court for resentencing.

AFFIRMED. Willey's sentence is VACATED and the cause REMANDED to the district court for resentencing due to the reversal of count 26 and because of the erroneous inclusion of funds earned post-bankruptcy in the total amount of funds attributable to the money-laundering counts.

AFFIRMED in part; REVERSED in part; VACATED in part and REMANDED for resentencing.

Conclusion

For the foregoing reasons, Willey's conviction on count 26 is REVERSED and his convictions on all other counts are

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Footnotes

- 1 The record is unclear as to when Hornaday assumed the presidency of Sam Houston Bank. Willey testified that Hornaday had been hired as a computer operator with the intention of making him president when the bank's then-current president left. Other witnesses referred to Hornaday simply as Sam Houston Bank's president.
- 2 At the time of this investigation, Bacon was actually Willey's girlfriend and, at some later point, his fiancée. Bacon had originally been hired by Willey as a part-time secretary in 1984; their relationship became intimate some time in 1986 during the break-up of Willey's first marriage. Willey and Bacon were married on June 13, 1992.
- 3 Willey was involved in or affiliated with a large number of small corporations and unincorporated business ventures in east Texas. The evidence showed that Willey was affiliated with the following entities: Dizbo, Inc.; Megachips, Inc.; O.D., Inc.; One Lake Place, Inc.; OKC Limited; MWI Land, Inc.; Marshall Willey Investments; MWI Company; Linscomb Willey Joint Venture; Junction Square Properties; Woodridge Motor Company; Foxhall, Inc.; Texla Holding Company; KLB Company; Mount Pleasant Village; and Shadylane Farms, Inc.
- 4 Records of the Texas Employment Commission (TEC) listing paid employees showed that Willey was not listed as an employee or officer for any of the companies listed in footnote 3 (other than MWI). MWI reported to the TEC from 1986 to 1988, but neither Shadylane Farms nor Texla ever filed an employee report with the TEC. The only listed employee of Foxhall was H.P. Williams. In 1990, MWI received over \$10,000 in deposits from OD, Dizbo, and Foxhall in a single day. In addition, although the only listed employee of Megachips was Andrew Dunn, evidence showed that Megachips filed a 1099 form with its 1990 tax return reporting miscellaneous payments to Willey totalling \$19,985.44; Willey reported that amount as income in his personal return for that year.
- 5 Although Willey set up a number of accounts that he designated as "trust" accounts, none of these was a true trust; Willey had actual control over the funds in the accounts.
- 6 Count 32, the forfeiture count, is not at issue in this appeal.
- 7 The property included improved and fenced pasture land, a pond, various outbuildings, and a barn and stalls. The house had four bedrooms and 4615 square feet of enclosed space.
- 8 On March 18, 1988, Willey had placed money in an escrow account with a local title company for the FDIC auction on the Richards Road property. On April 21, 1988, the title company purchased a cashier's check payable to the FDIC out of the escrow money. The title company was listed as the remitter; the check bore the notation "for Albert B. Hornaday."
- 9 This is the loan that is the subject of count 2, charging Willey with aiding and abetting the making of a false statement on a loan application. This count is discussed in part II of the text, *infra*.
- 10 Shadylane Farms was incorporated in June 1989. Bacon testified that the company was set up to allow her to go into the cattle business.
- 11 James Thompson (Thompson) of Thompson Custom Homes testified that Willey called him in 1988 to do remodeling work on the Richards Road house. Even though Hornaday was living in the house at that time, it was Willey who negotiated for and closed the deal on the improvements, although he did inform Thompson that he was going to pay for the work through an improvement loan Hornaday had received in connection with his purchase of the property. In total, Thompson billed Willey \$32,583.92 for the improvements.

- 12 Payments made on December 22, 1988, and March 7, 1989, to Thompson Custom Homes came from Foxhall. On April 6, 1989, Texla wrote a check on its account to purchase carpet for the Richards Road house; a check written from the same account on April 10, 1989, was paid to Thompson Custom Homes. In August and September 1989, Bacon wrote checks out of one of her personal accounts for a refrigerator, a dinette table and eight chairs, and for resurfacing the driveway at Richards Road; a second check for the resurfacing work came from Shadylane Farms's account. Willey made one payment to Thompson Custom Homes in cash. A \$7000 check to Hood Ornamental for a gate, a January 12, 1989, payment to Thompson Custom Homes, and a payment to A.T. Scott for painting the house were all paid for by Hornaday out of an improvement loan he took out with Bedford Savings Association. The total value of the improvements to the property was \$79,529.09.
- 13 Willey, Bacon, Hornaday, and Shadylane Farms were originally tried together, but Hornaday's case was severed on the sixth day of trial after he became too ill to continue. Bacon, who was also found guilty on all counts, originally filed notices of appeal in her case and on behalf of Shadylane Farms as its president, but withdrew them after having completed her sentence.
- 14 Under the bankruptcy laws, a debtor may not be discharged if he fraudulently conceals or transfers property within one year of declaring bankruptcy. 11 U.S.C. § 727(a)(2)(A). The doctrine of continuing concealment, however, can operate to deny the debtor a discharge even though the actual transfer in question occurred more than one year before the debtor declared bankruptcy. See *In re Olivier*, 819 F.2d 550, 554–555 (5th Cir.1987).
- 15 Willey and his first wife reconciled briefly some time in early 1987, but Willey reinstated divorce proceedings in May 1987 after his wife was arrested for assaulting Bacon. The divorce became final on December 20, 1988.
- 16 Specifically, the assets charged to have been concealed in Willey's personal bankruptcy were the Richards Road property, a 1985 Chevrolet truck, a tractor, a livestock trailer, twelve firearms, twenty-eight head of cattle, jewelry, and a large screen television. Assets alleged to have been concealed in MWI's bankruptcy were \$200,000 in cash (part of the \$400,000 MWI received in July 1, 1986), 61 acres of land in Houston County, Texas, three lots of land located in Walker County, Texas, and mineral rights on land located in Sabine County, Texas.
- 17 Indeed, given that the "Willey Children's Trust" was only a bank account that never had more than \$9000 in it, that a substantial amount of money was transferred from the children's account to Shadylane Farms, and that both Bacon and Willey admitted on cross-examination that none of the arrangements they had made would protect the children's purported interest in the property held in Bacon's and Shadylane Farms's names, the jury had ample evidence to discredit Willey's professed intent to benefit his children.
- 18 The district court held that the defendant was so closely associated with his restaurant that dealings in its name did not conceal the defendant's personal involvement. *Garcia–Emanuel*, 14 F.3d at 1473.
- 19 The court noted that the defendant had made an oral misrepresentation to the seller concerning the source of the cash, representing that it was profits from his restaurant business, but "only after a paper trail had already been created that clearly connected Defendant to the cash." *Garcia–Emanuel*, 14 F.3d at 1477.
- 20 This interpretation also accords with the Tenth Circuit's decision in *United States v. Sanders*, 928 F.2d 940 (10th Cir.), cert. denied, 502 U.S. 845, 112 S.Ct. 142, 116 L.Ed.2d 109 (1991), in which the court overturned the defendant's convictions for money laundering in connection with the purchase of two cars. Although the defendant titled the cars in his wife's and daughter's names, the court found that his conspicuous involvement in the purchase negotiations and subsequent conspicuous use of the cars undercut the argument that the transactions were designed to conceal defendant's association with them. According to the court, "[T]he purpose of the money laundering statute is to reach commercial transactions intended (at least in part) to disguise the relationship of the item purchased with the person providing the proceeds." *Id.* at 946. Thus, the transactions in *Sanders* "differ [ed] from what could be described as a 'typical money laundering transaction' in the Sanderses' failure to use a third party to make the car purchases and thereby conceal the buyers' identities." *Id.* (citation omitted). The Tenth Circuit reiterated this interpretation of *Sanders* in *United States v. Edgmon*, 952 F.2d 1206 (10th Cir.1991), cert. denied, 505 U.S. 1223, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992), in which the court upheld the defendant's conviction for money laundering when the evidence showed that, although the defendant provided the money to finance the transactions, it was his father who negotiated and paid for the assets, which were then used as collateral for a loan that was ultimately remitted to the defendant. *Id.* at 1210–11. Distinguishing *Sanders*, the court stated, "[I]n holding that the defendants in *Sanders* did not violate § 1956, we emphasized that no third parties were involved and no effort was made to conceal the identity of the defendants as the purchasers." *Id.* at 1210 (citation omitted).
- 21 In *Termini*, however, the court reversed the defendant's conviction for aiding and abetting money laundering because the government's evidence was insufficient to show that the defendant, a route driver who merely collected the funds

for the defendants who actually masterminded the illegal gambling scheme, had the requisite intent to aid and abet the illegal scheme. *Termini*, 992 F.2d at 881–82.

22 In *Lovett*, however, the court reversed the defendant's convictions with respect to two counts charging him with money laundering in connection with the purchase of a car and a ring using the illegal proceeds; the court found that as to these two transactions the government had shown no more than mere money spending. *Id.* at 1036–37.

23 Indeed, viewed in isolation, many transactions charged as money laundering could not be classified as “unusual” financial transactions. Those who would launder illegal proceeds frequently use cash, personal checks, or cashier's checks to pay for the assets or make the transfers that are charged as money laundering.

24 We thus reject Willey's implicit argument that there could be no design to conceal because each check charged in the money laundering counts listed its true remitter or clearly indicated the account from which it came. Obviously, with respect to the *immediate* source of the money, this is true, but that is not what the government was seeking to prove. Its argument was that, with respect to each transaction, the *ultimate* source of the funds, i.e., Willey, was concealed.

25 The Lillie Mae Smith Trust was a testamentary trust, set up by an elderly couple, who asked Willey to serve as trustee. Willey had used the same brokerage firm at which Bacon had her account in his capacity as trustee for the Lillie Mae Smith Trust since its inception in 1983. The record does not reveal for whose benefit the trust was established.

26 Although the sale contemplated in count 30 was not consummated, this factor is not relevant to our analysis of the design element. The charged transaction is the purchase of the cashier's check, and the relevant inquiry concerns the defendant's state of mind at the time he purchased the check.

27 In *Garcia–Emanuel*, the charged conduct was the purchase of a horse by the defendant's wife, but in the defendant's own name, with a cashier's check drawn on the defendant and his wife's joint checking account. *Garcia–Emanuel*, 14 F.3d at 1478. The evidence showed that, prior to the issuance of the cashier's check, \$23,000 in currency had been deposited to the account in amounts small enough to avoid triggering the bank's duty to report currency deposits of more than \$10,000. *Id.* The court noted that this attempt to avoid a transaction reporting requirement was prosecutable under 18 U.S.C. § 1956(a)(1)(B)(2), but the government had not proceeded under this more straightforward theory. *Id.* Nevertheless, although “[t]he inference under this theory [that the conduct constituted money laundering in violation of § 1956(a)(1)(B)(i)], that the design to conceal in the first transaction (the purchase of the cashier's check) can be imputed to the second (the purchase of the horse), is considerably weaker,” the court found that “this is evidence of a design to conceal” and reinstated the conviction. *Id.*

28 We recognize that the court in *United States v. Peery*, 977 F.2d 1230 (8th Cir.1992), cert. denied, 507 U.S. 946, 113 S.Ct. 1354, 122 L.Ed.2d 734 (1993), affirmed the defendant's conviction for money laundering when he had merely moved the illegal proceeds through accounts titled in his own name. We find that case distinguishable, however. The *Peery* court seems to have been willing to infer that the design to conceal in the initial transfer to the defendant's personal account of money that rightfully belonged to the defendant's employer carried through to the subsequent transfer between the defendant's own accounts. See *id.* at 1234 & n. 3. Moreover, the evidence in *Peery* showed that, having made the transfers between his personal accounts, the defendant then purchased cashier's checks from the account to make car payments and put a down payment on a house. *Id.* at 1234. The court found that this showed that the defendant “did more than merely transfer funds from one personal account to another personal account.” *Id.* In contrast, the transfer charged here was much more attenuated from the original illegality and so far removed from any subsequent potentially concealing act that we must conclude that this was no more than a transfer between two personal accounts in the same name, a situation that *Peery* itself implicitly recognizes is insufficient to support an inference of a design to conceal. *Id.*

29 The government points out that this Court distinguished *Benson* in *United States v. Moore*, 997 F.2d 55 (5th Cir.1993). The Court noted that the testimony in *Benson* was objectionable, at least in part, because the IRS agent had testified as to the defendant's state of mind, which is prohibited by Rule 704. *Id.* at 58; see *Benson*, 941 F.2d at 604 (“Nothing in the record indicates Cantzler had any particular knowledge of Social Security law, or any other expertise that would give him any special insight into the mind of a person trying to cheat the Social Security Administration.”). The Court went on:

“The more pertinent authority is *United States v. Dotson*, 817 F.2d 1127 (5th Cir.), *aff'd in pertinent part on reh'g*, 821 F.2d 1034 (1987). In *Dotson*, we held that it was permissible for the IRS expert to summarize and analyze the facts indicating willful tax evasion so long as he did not ‘directly embrace the ultimate question of whether [the defendant] did in fact intend to evade income taxes.’ *Id.* at 1132.” *Moore*, 997 F.2d at 58–59 (alteration in *Moore*).

Stone's testimony did not violate the limitation of Rule 704(b). Her testimony was that the transactions “concealed” the source of the funds, *not* that they were “designed to conceal,” which is the ultimate issue in this case.

30 In the district court below and now on appeal, the government contends that Willey does not have standing to contest the search of the Richards Road property because he did not enjoy a legitimate expectation of privacy in the property. This

seems a curious argument for the government to make, given that in every other aspect of the case, the government argues that Willey did have a real and substantial interest in the Richards Road property. The district court did not err in finding that Willey had standing. Shadylane Farms had purchased the property only a week before, and on the day of the search, Willey and Bacon were in the process of moving their belongings from the Sunset Lake Road house to Richards Road. This is more than sufficient to give Willey a legitimate expectation of privacy in the Richards Road property.

31 In the alternative, Willey contends that the agents exhibited a “flagrant disregard” for the scope of the warrant and that therefore all the evidence recovered from the search should be suppressed. This Court has not adopted the flagrant disregard exception to severability. *United States v. Khalid*, No. 93–2345 (5th Cir. Nov. 14, 1994) (unpublished) at 9 n. 10, 41 F.3d 661. In any event, the evidence does not compel the conclusion that there was a flagrant disregard.

32 Willey directs this court to the Second Circuit opinion in *United States v. Skinner*, 946 F.2d 176 (2d Cir.1991), in which the court remanded a sentence imposed for violations of 18 U.S.C. § 1956(a)(1)(A)(i) for reconsideration when the charged conduct, although falling within the proscription of the statute, was so *de minimis* as to be outside the contemplation of the Sentencing Commission in fashioning the money laundering guidelines. *Id.* at 179–80. In subsequent cases, however, the Second Circuit has clarified that *Skinner* represents an exception to the general rule that a refusal to depart downward is not subject to appellate review and only applies “when a sentencing court mistakenly concludes that it lacks the legal authority to grant a downward departure.” *United States v. Piervinanzi*, 23 F.3d 670, 685 (2d Cir.), *cert. denied*, 513 U.S. 900, 115 S.Ct. 259, 130 L.Ed.2d 179, and *cert. denied*, 513 U.S. 904, 115 S.Ct. 267, 130 L.Ed.2d 185 (1994). Willey does not suggest and the record does not reflect that the district court felt itself legally constrained to deny his request for a downward departure.

33 Of course, it is a ground to deny a discharge in the first instance if the debtor is shown to have concealed property, either before or after bankruptcy, with the intent to hinder, delay, or defraud creditors. 11 U.S.C. § 727(a)(2). In addition, a discharge may be revoked if it is proved that the debtor obtained the discharge through fraud and the creditor or trustee did not learn about the fraud until after the discharge had been granted. *Id.* § 727(d)(1). The request for revocation, however, must be made within one year after the date the discharge is granted. *Id.* § 727(e)(1). There is no evidence in the record indicating that such a revocation was either sought or granted in this case.

34 The government argued at sentencing that, in having the commissions paid over to Shadylane Farms rather than himself, Willey avoided significant tax consequences. Willey was not charged with tax evasion or filing false tax returns, however.

 KeyCite Yellow Flag - Negative Treatment

Distinguished by [Too Marker Products, Inc. v. Creation Supply, Inc.](#),
D.Or., September 26, 2014

373 Ill.App.3d 135
Appellate Court of Illinois,
Second District.

Michael G. ZWICKY and Rita L.
Zwicky, Plaintiffs–Appellants,
v.

FREIGHTLINER CUSTOM CHASSIS
CORPORATION, Fleetwood Motor Homes of
Indiana, Inc., and Rand Thompson, Inc., d/
b/a Crystal Valley RV, Defendants–Appellees.

No. 2–05–1177.

|
April 25, 2007.

Synopsis

Background: Motor home buyers brought action against seller and motor home manufacturer, alleging breach of express and implied warranties and seeking revocation of acceptance. The Circuit Court, McHenry County, [Michael J. Sullivan, J.](#), granted defendants summary judgment. Buyers appealed.

Holdings: The Appellate Court, [Gilleran Johnson, J.](#), held that:

[1] defendants were not estopped from using buyers' judicial admissions;

[2] defendants did not waive their right to use admissions;

[3] buyers' failure to respond to the requests for admissions amounted to judicial admissions;

[4] admissions did not prevent buyers from proving any necessary component of breach of warranty claims; and

[5] buyers were not entitled to revoke purchase.

Affirmed in part, reversed in part, and remanded.

West Headnotes (17)

[1] Evidence

🔑 [Judicial admissions in general](#)

Judgment

🔑 [Documentary evidence or official record](#)

Pretrial Procedure

🔑 [Admission by failure to respond](#)

Deemed admissions for failing to respond to request for admissions are considered binding judicial admissions and thus are incontrovertible and may be cited in support of a motion for summary judgment. [Sup.Ct.Rules, Rule 216\(c\)](#).

[2 Cases that cite this headnote](#)

[2] Pretrial Procedure

🔑 [Admission by failure to respond](#)

Any confusion created by defendant's failure to file proof of service of request for admissions was irrelevant to whether plaintiffs' failure to respond to the requests constituted an admission given that plaintiffs conceded that they received the requests for admissions along with other discovery and given the fact that they never responded to the requests. [Sup.Ct.Rules, Rules 12\(b\), 216\(c\)](#).

[1 Cases that cite this headnote](#)

[3] Estoppel

🔑 [When estoppel arises](#)

“Estoppel” arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his injury.

[Cases that cite this headnote](#)

[4] Pretrial Procedure

🔑 [Admission by failure to respond](#)

Defendant's statement that it was still willing to pursue settlement with plaintiffs regardless

of plaintiffs' failure to respond to requests for admissions did not estop the defendant from using the deemed admissions in the case; the statement regarding settlement negotiations did not induce the plaintiffs to forgo responding to the requests for admissions since the settlement negotiations occurred after the plaintiffs' responses were due. [Sup.Ct.Rules, Rule 216\(c\)](#).

[Cases that cite this headnote](#)

[5] **Estoppel**

🔑 Nature and elements of waiver

“Waiver” is the voluntary and intentional relinquishment of a known right inconsistent with an intent to enforce that right.

[Cases that cite this headnote](#)

[6] **Estoppel**

🔑 Presumptions and burden of proof

The party claiming the waiver has the burden of proving a clear, unequivocal, and decisive act by the other party manifesting an intention to waive its rights.

[Cases that cite this headnote](#)

[7] **Pretrial Procedure**

🔑 Admission by failure to respond

Defendant's statements that it was still willing to pursue settlement with plaintiffs regardless of plaintiffs' failure to respond to requests for admissions and that it would try and settle case before engaging in further discovery did not amount to a waiver of its right to use the plaintiffs' deemed admissions in future litigation. [Sup.Ct.Rules, Rule 216\(c\)](#).

[Cases that cite this headnote](#)

[8] **Pretrial Procedure**

🔑 Request; striking request

Pretrial Procedure

🔑 Admission by failure to respond

Defendant's requests for admissions contained only reasonably clear statements of fact, not conclusions of law or other material outside the scope of rule regarding admissions, and thus, the requests were proper and plaintiffs' failure to respond to the requests amounted to judicial admissions. [Sup.Ct.Rules, Rule 216](#).

[1 Cases that cite this headnote](#)

[9] **Antitrust and Trade Regulation**

🔑 Preemption

States

🔑 Trade Regulation; Monopolies

When the Magnuson–Moss Warranty—Federal Trade Commission Improvement Act does not conflict with state law governing the sale of consumer products, state law applies. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, § 101 et seq., [15 U.S.C.A. § 2301 et seq.](#)

[1 Cases that cite this headnote](#)

[10] **Sales**

🔑 Right of action

States

🔑 Particular cases, preemption or supersession

If the written warranty in question is a limited warranty, Illinois law governs the claim rather than the Magnuson–Moss Warranty—Federal Trade Commission Improvement Act. Magnuson–Moss Warranty—Federal Trade Commission Improvement Act, § 101 et seq., [15 U.S.C.A. § 2301 et seq.](#)

[1 Cases that cite this headnote](#)

[11] **Evidence**

🔑 Judicial admissions in general

Motor home buyers' judicial admissions that there were presently no known defects with vehicle and that vehicle had not sustained any diminution in value as a result of any repair procedure did not prevent buyers from proving any necessary component of breach of express warranty claims against seller and manufacturer; despite the admissions, genuine issues of

material fact existed as to whether the limited warranty failed of its essential purpose due to the amount of time or number of attempts necessary to repair defects, whether the exclusion of consequential damages was unconscionable, and whether there was a difference between the value of the motor home as warranted and as actually received at the time of acceptance, all of which precluded summary judgment. S.H.A. 810 ILCS 5/2–719(2, 3); Sup.Ct.Rules, Rule 216.

[1 Cases that cite this headnote](#)

[12] Sales

🔑 Warranty of Quality, Fitness, or Condition

A product breaches the implied warranty of merchantability if it is not fit for the ordinary purposes for which such goods are used.

[1 Cases that cite this headnote](#)

[13] Sales

🔑 Merchantability

On a implied warranty of merchantability with regard to motor vehicles, fitness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects.

[Cases that cite this headnote](#)

[14] Evidence

🔑 Judicial admissions in general

Motor home buyers' judicial admissions that there were presently no known defects with vehicle and that vehicle had not sustained any diminution in value as a result of any repair procedure did not prevent buyers from proving any necessary component of breach of implied warranty claims against seller and manufacturer; genuine issues of material fact existed regarding whether the vehicle was defective on the date of acceptance, precluding summary judgment. S.H.A. 810 ILCS 5/2–714(2); Sup.Ct.Rules, Rule 216.

[Cases that cite this headnote](#)

[15] Sales

🔑 Estoppel or waiver

Where ceasing use of the goods would cause undue hardship to the buyer, continued use may not preclude revocation.

[Cases that cite this headnote](#)

[16] Sales

🔑 Evidence

Buyers bear the burden of proving the existence of some exception to the rule that substantial change bars revocation, and generally of proving that the continued use of goods was reasonable under the circumstances.

[Cases that cite this headnote](#)

[17] Evidence

🔑 Judicial admissions in general

Sales

🔑 Estoppel or waiver

Motor home buyers were not entitled to revoke purchase after judicially admitting that motor home had substantially changed from the time of its initial purchase due to the fact that it had several thousand miles on its odometer in the absence of evidence that the accumulation of miles was reasonable under the circumstances. S.H.A. 810 ILCS 5/2–608(2); Sup.Ct.Rules, Rule 216.

[Cases that cite this headnote](#)

Attorneys and Law Firms

****529** [Rebecca J. Letourneaux](#), [Paul M. DeBlase](#), [Mike K. Kim](#), Consumer Legal Services, P.C., Elmhurst, for Michael G. and Rita L. Zwicky.

[Nancy J. Robinson](#), Nancy J. Robinson Law Office, Chicago, for Freightliner Custom Chassis Corporation.

[Bruce S. Terlep](#), [Christian A. Sullivan](#), Swanson, Martin & Bell, LLP, Lisle, for Fleetwood Motor Homes of Indiana, Inc. and Rand Thompson Inc.

Opinion

Justice [GILLERAN JOHNSON](#) delivered the opinion of the court:

137 ***838** The plaintiffs, Michael and Rita Zwicky, brought claims against the defendants for breach of express and implied warranties and for revocation of acceptance. On October 26, 2005, the trial court granted summary judgment in favor of the defendants on all counts of the plaintiffs' complaint, finding that pursuant to [Supreme Court Rule 216](#) (134 Ill.2d R. 216), the plaintiffs were deemed to have made certain admissions as a result of their failure to answer requests for admissions, and that these admissions prevented them from recovering on their claims as a matter of law. On appeal, the plaintiffs argue: (1) that their failure to answer the requests for admissions should not be treated as admissions; and (2) that even if the requests for admissions are all deemed admitted, summary judgment was improper because the admissions do not preclude them from recovering on their causes of action. For the **839 **530** following reasons, we affirm in part and reverse in part and remand for further proceedings.

I. Background

On August 31, 1999, the plaintiffs Michael and Rita Zwicky purchased from the defendant Rand Thompson, Inc., d/b/a Crystal Valley RV (CVRV), a 1999 Fleetwood Discovery motor home and an extended warranty. In addition to the extended warranty, the motor home came with a limited warranty, as defined by the Magnuson–Moss ***138** Warranty—Federal Trade Commission Improvement Act (the Act) (15 U.S.C. § 2301 *et seq.* (2000)), issued by the defendants Freightliner Custom Chassis Corporation (Freightliner) and Fleetwood Motor Homes of Indiana, Inc. (Fleetwood). Between the date they bought the motor home and September 13, 2001, the Zwickys had the motor home repaired on at least 16 separate occasions. On September 27, 2002, the Zwickys notified CVRV that they wished to revoke their acceptance of the motor home.

In October 2002, the Zwickys filed a complaint against the defendants for breach of express and implied warranties and for revocation of acceptance. On January 3, 2003, Fleetwood mailed to the plaintiffs written discovery, including interrogatories, requests to produce, and requests for admissions. Among the requests for admissions served by

Fleetwood were the following statements, which Fleetwood requested that the plaintiffs either admit or deny pursuant to [Supreme Court Rule 216](#):

- “1. Plaintiffs remain in possession of the subject vehicle.
2. Plaintiffs continue to enjoy the benefits of the use of the vehicle on a regular basis.
3. Plaintiffs continue to use the subject vehicle on a regular basis.

* * *

7. That the terms and conditions of the Fleetwood Motor Homes Limited Warranty, issued by Fleetwood Motor Homes, specifically excludes and limits damages for incidental and consequential damages.

8. That at the time plaintiffs sent written notification of plaintiff's [*sic*] revocation of acceptance, the condition of the subject vehicle had substantially changed from the time of its initial purchase or lease in that the vehicle had several thousand miles on its odometer.

9. There are presently no known defects or nonconformities with the subject vehicle.

10. That the subject vehicle has not sustained any diminution in value as a result of any repair procedure, servicing procedure, or replacement procedure performed by any vehicle dealership or repair facility.

11. That no independent Fleetwood dealership or service facility ever refused to perform repair procedures or replacement procedures on the subject vehicle.”

Fleetwood did not file the proof of service for the requests for admissions, but the plaintiffs do not dispute that they received the requests for admissions in January 2003. The plaintiffs never responded to the requests for admissions. The parties engaged in settlement discussions beginning in June ***139** 2003 but were unable to reach agreement. On October 23, 2003, the plaintiffs filed a motion for extension of time to respond to Fleetwood's requests for admissions. The trial court denied the motion on January 15, 2004. On March 1, 2004, the plaintiffs voluntarily dismissed the original complaint.

On May 21, 2004, utilizing section 13–217 of the Code of Civil Procedure ([***840](#) [**531](#) [735 ILCS 5/13–217 \(West 2004\)](#)), which permits voluntarily dismissed actions to be refiled within one year, the plaintiffs filed a new complaint against the defendants. They filed an amended six-count complaint on December 3, 2004. Counts I (against Freightliner) and II (against Fleetwood) alleged breaches of express warranty pursuant to the Act ([15 U.S.C. § 2301, et seq. \(2000\)](#)). Counts III (against Freightliner), IV (against Fleetwood), and V (against CVRV) alleged breaches of the implied warranty of merchantability pursuant to the Uniform Commercial Code (UCC) ([810 ILCS 5/2–314 \(West 2004\)](#)) and the Act. Count VI (against CVRV) alleged a breach of contract and sought revocation of acceptance pursuant to the UCC ([810 ILCS 5/2–608 \(West 2004\)](#)). On May 4, 2005, the trial court granted CVRV's motion to dismiss count V, which is not at issue on appeal.

On July 15, 2005, Fleetwood and CVRV filed a motion for summary judgment, arguing that the requests for admissions to which the plaintiffs failed to respond in the original action should be deemed admissions applicable in the current action, and that those admissions precluded the plaintiffs from maintaining the claims enumerated in the amended complaint. On August 15, 2005, Freightliner filed a motion to join in the other defendants' motion for summary judgment, essentially adopting their arguments. The summary judgment motion was fully briefed. On October 26, 2005, after a hearing at which all parties presented oral arguments, the trial court granted the motion and entered summary judgment in favor of the defendants on all counts. The plaintiffs filed a timely notice of appeal.

II. Discussion

Rule 216 Admissions

[1] On appeal, the plaintiffs first contend that their failure to respond to the requests for admission served in the original action should not be construed pursuant to [Supreme Court Rule 216\(c\)](#) ([134 Ill.2d R. 216\(c\)](#)) as admissions of the statements contained therein ([Rule 216 admissions](#)). [Rule 216](#) states, in pertinent part:

“(a) **Request for Admission of Fact.** A party may serve on any other party a written request for the admission by the latter of the truth of any specified relevant fact set forth in the request.

* * *

***140 (c) Admission in the Absence of Denial.** Each of the matters of fact * * * of which admission is requested is admitted unless, within 28 days after service thereof, the party to whom the request is directed serves upon the party requesting the admission either (1) a sworn statement denying specifically the matters of which admission is requested or setting forth in detail the reasons why he cannot truthfully admit or deny those matters or (2) written objections on the ground that some or all of the requested admissions are privileged or irrelevant or that the request is otherwise improper in whole or in part. * * *

* * *

(e) **Effect of Admission.** Any admission made by a party pursuant to request under this rule is for the purpose of the pending action and any action commenced pursuant to the authority of section 13–217 of the Code of Civil Procedure [citation] only.” [134 Ill.2d R. 216](#).

Under [Rule 216\(c\)](#), the plaintiffs' failure to respond to the requests for admissions served by Fleetwood operates as an admission of all of the statements contained in the requests. [134 Ill.2d R. 216\(c\)](#); [Robbins ***841 **532 v. Allstate Insurance Co., 362 Ill.App.3d 540, 543, 298 Ill.Dec. 879, 841 N.E.2d 22 \(2005\)](#). Admissions created by the operation of [Rule 216\(c\)](#) are considered binding judicial admissions and thus are incontrovertible and may be cited in support of a motion for summary judgment. [Robbins, 362 Ill.App.3d at 543, 298 Ill.Dec. 879, 841 N.E.2d 22](#).

The plaintiffs do not claim that the fact that they voluntarily dismissed their first action and subsequently refiled it defeats the application of [Rule 216\(c\)](#) to the requests for admissions that were served in the original action. [Rule 216\(e\)](#) specifically provides that any admission made pursuant to [Rule 216](#) binds the party making the admission “for the purpose of the pending action and any action commenced pursuant to the authority of section 13–217 of the Code of Civil Procedure.” [134 Ill.2d R. 216\(e\)](#). Section 13–217 of the Code of Civil Procedure permits the refiled, within one year, of any action voluntarily dismissed ([735 ILCS 5/13–217 \(West 2004\)](#)), and it was the authority by which the plaintiffs filed their current action. Thus, any fact admitted via [Rule 216\(c\)](#) in the original action remains admitted in the refiled action. [134 Ill.2d R. 216\(e\)](#).

[2] Instead, the plaintiffs raise three arguments to support their contention that their failure to respond to the requests for admissions should not result in binding admissions. First, they note that Fleetwood failed to comply with [Supreme Court Rule 12\(b\)](#) (145 Ill.2d R. 12(b)), as it did not file a copy of the proof of service for the requests for admissions. The plaintiffs argue that it is “impossible” for them to say for sure when the requests for admissions were received, because the proof of service was not filed with the clerk's office, and the attorney *141 who had been handling the plaintiffs' case left the firm in August 2003. However, the plaintiffs concede in their opening brief that they received the requests for admissions in January 2003, along with other written discovery served at the same time. Thus, allowing 28 days to respond as provided in [Rule 216\(c\)](#) (134 Ill.2d R. 216(c)), the responses were due no later than February 28, 2003. In light of the fact that the plaintiffs never responded to the requests for admissions at all, any confusion created by Fleetwood's failure to file the proof of service is irrelevant.

[3] [4] Second, the plaintiffs note that during settlement negotiations, Fleetwood's attorneys apparently stated that they would try to settle the case before engaging in any further discovery and that they would not “hammer” the plaintiffs regarding their failure to respond to the requests for admissions but were still willing to pursue settlement. The plaintiffs ask this court to find either that these statements estop the defendants from using the [Rule 216](#) admissions in the current case, or that the statements serve as a waiver of the defendants' right to use the admissions. “Estoppel arises when a party, by his words or conduct, intentionally or through culpable negligence, induces reasonable reliance by another on his representations and thus leads the other, as a result of that reliance, to change his position to his injury.” [Schwinder v. Austin Bank of Chicago](#), 348 Ill.App.3d 461, 472, 284 Ill.Dec. 58, 809 N.E.2d 180 (2004). Here, Fleetwood's statements during settlement negotiations cannot be held to have induced the plaintiffs to forgo responding to the requests for admissions, because the responses to the requests were due by the end of February, but the settlement negotiations in which the statements were made did not begin until June 2003. Thus, the plaintiffs cannot show the detrimental reliance that would be necessary for estoppel to apply.

533 *842 [5] [6] [7] Nor is the waiver doctrine applicable. “Waiver is the voluntary and intentional relinquishment of a known right inconsistent with an intent to enforce that right.” [R & B Kapital Development, LLC v.](#)

[North Shore Community Bank & Trust Co.](#), 358 Ill.App.3d 912, 922, 295 Ill.Dec. 95, 832 N.E.2d 246 (2005). The party claiming the waiver has the burden of proving a clear, unequivocal, and decisive act by the other party manifesting an intention to waive its rights. [In re Nitz](#), 317 Ill.App.3d 119, 130, 250 Ill.Dec. 632, 739 N.E.2d 93 (2000). Neither of the statements allegedly made by Fleetwood's attorneys demonstrates a clear and unequivocal relinquishment of the right to use the [Rule 216](#) admissions in future litigation. The statements show (1) a desire to resolve the litigation, if possible, before engaging in *additional* discovery, but no intent to disregard past discovery; and (2) Fleetwood's willingness to pursue a settlement that would be fair to both parties despite the strategic advantage it had by virtue of the *142 plaintiffs' [Rule 216](#) admissions. Thus, neither estoppel nor waiver applies here.

[8] The plaintiffs' final basis for arguing that the [Rule 216](#) admissions should not be binding against them is that the requests for admissions were not proper in form, *i.e.*, rather than containing statements of specific fact to be admitted or denied, they contained “generic” statements that were not specific to the case at hand and required the plaintiffs to make “inferential leaps” in order to respond. The plaintiffs are correct that [Rule 216](#) permits parties to serve “[r]equest[s] for [a]dmission[s] of [f]act” (emphasis added) (134 Ill.2d R. 216(a)), and requests that contain conclusions of law instead of statements of specific fact will not be deemed to be admissions regardless of the response to such requests. [P.R.S. International, Inc. v. Shred Pax Corp.](#), 184 Ill.2d 224, 239, 234 Ill.Dec. 459, 703 N.E.2d 71 (1998) (requests for admissions of legal conclusions are improper and will not give rise to “admissions” under [Rule 216](#), but requests that are limited to questions of fact are proper, even if they relate to ultimate facts). Here, our review of Fleetwood's requests for admissions reveals that they contain only reasonably clear statements of fact, not conclusions of law or other material outside the scope of [Rule 216](#). Thus, we decline to find that the requests for admissions were not in the proper form to serve as judicial admissions by the plaintiffs.

In sum, we reject all of the plaintiffs' arguments against treating their failure to respond to the requests for admissions as creating judicial admissions, and we hold that the trial court correctly treated the [Rule 216](#) admissions as binding on the plaintiffs. We now turn to the second issue raised on appeal: whether the [Rule 216](#) admissions supported the entry of summary judgment in favor of the defendants.

We review appeals from the entry of summary judgment *de novo*. *Home Insurance Co. v. Cincinnati Insurance Co.*, 213 Ill.2d 307, 315, 290 Ill.Dec. 218, 821 N.E.2d 269 (2004). Summary judgment is appropriate only where no genuine issues of material fact exist and the movant is entitled to judgment as a matter of law. *Fiumetto v. Garrett Enterprises, Inc.*, 321 Ill.App.3d 946, 958, 255 Ill.Dec. 510, 749 N.E.2d 992 (2001). In determining whether the trial court properly granted summary judgment, we must construe the record liberally in favor of the opposing party and strictly against the movant. *Fiumetto*, 321 Ill.App.3d at 958, 255 Ill.Dec. 510, 749 N.E.2d 992. Because it is a drastic means of disposing of litigation, it should be granted only where the movant's right to judgment is clear and free from doubt. ****534 ***843** *Fiumetto*, 321 Ill.App.3d at 958, 255 Ill.Dec. 510, 749 N.E.2d 992.

Breach of Express Warranty

[9] [10] The first cause of action contained in the amended complaint is for breach of express warranty, brought pursuant to the Act (***143** 15 U.S.C. § 2301 *et seq.* (2000)). The Act provides a consumer with a private cause of action against a manufacturer or retailer that fails to comply with the Act or the terms of a written warranty or any implied warranty arising therefrom. 15 U.S.C. § 2310(d) (2000). When the Act does not conflict with state law governing the sale of consumer products, state law applies. *Bartow v. Ford Motor Co.*, 342 Ill.App.3d 480, 484, 276 Ill.Dec. 777, 794 N.E.2d 1027 (2003). If the written warranty in question is a limited warranty, Illinois law governs the claim. *Razor v. Hyundai Motor America*, 222 Ill.2d 75, 85–86, 305 Ill.Dec. 15, 854 N.E.2d 607 (2006) (“the Act does not set out requirements for limited warranties” and so state law applies); *cf. Mydlach v. DaimlerChrysler Corp.*, 364 Ill.App.3d 135, 148–51, 301 Ill.Dec. 164, 846 N.E.2d 126 (2005) (issued before *Razor*; applying the Act to determine when a claim for breach of limited written warranty accrues and in the process holding that section 2310(d) of the Act provides a private cause of action for breach of limited warranty); *Mattuck v. DaimlerChrysler Corp.*, 366 Ill.App.3d 1026, 1035 & n. 3, 304 Ill.Dec. 235, 852 N.E.2d 485 (2006) (issued after *Razor*; acknowledging the supreme court's statement in *Razor*, but declining to “*sua sponte* read that isolated statement to indicate that portions of the Act, such as section 2310(d) in particular, do not apply to limited warranties” and continuing to follow *Mydlach*). In moving for summary judgment on the breach of warranty claims, the defendants argued that

the plaintiffs could not recover under the Act as a matter of law because of the **Rule 216** admissions. Specifically, the defendants contended that two of the plaintiffs' **Rule 216** admissions—that “the subject vehicle has not sustained any diminution in value as a result of any repair procedure, servicing procedure, or replacement procedure performed by any vehicle dealership or repair facility” (Admission number 10) and that “[t]here are presently no known defects or nonconformities with the subject vehicle” (Admission number 9)—precluded the plaintiffs from recovering under the Act. The defendants noted that the written warranty was a limited “repair or replace” warranty, which limits the consumer's remedy to repair or replacement of the defective part, and pointed out that they had performed multiple repairs on the motor home. The defendants argued that the two admissions identified above, taken together with the defendants' repairs of the motor home, amounted to an admission that the plaintiffs had not sustained any damages at all as a result of the claimed defects. The defendants concluded by arguing that, in the absence of damages, the plaintiffs could not recover on either the breach of express warranty or the breach of implied warranty claims. Following the hearing on summary judgment, the trial court implicitly adopted the defendants' arguments, stating (after finding that the plaintiffs were bound by the ***144 Rule 216** admissions): “As far as the substantive issues of the motions for summary judgment, the court finds that the motion is well taken and I will grant the motion.”

Although damages are an essential element of both claims—breach of express warranty and breach of implied warranty of merchantability—different factors are relevant to damages under the two claims, and so we consider them separately. We review the breach of express warranty claims first. When determining the scope of the remedy and the damages available *****844 **535** for the breach of a written warranty, we begin by looking at the terms of the warranty. Here, the motor home came with a written warranty that expressly limited the relief available under it in two respects: it limited the buyer's remedy for defects to repair and replacement of nonconforming parts; and it excluded any recovery for consequential damages (damages caused by the defects).

Under certain circumstances, limitations such as these may be ineffective. If the repair or replacement of the defective parts takes an unreasonable amount of time or number of attempts, then under **section 2–719(2) of the UCC (810 ILCS 5/2–719(2) (West 2004))**, the limited warranty may be

found to have “fail[ed] of its essential purpose” of adequately remedying the defects, and the buyer may be entitled to seek other remedies available under the UCC. *Razor*, 222 Ill.2d at 87, 305 Ill.Dec. 15, 854 N.E.2d 607; *Mattuck*, 366 Ill.App.3d at 1035–36, 304 Ill.Dec. 235, 852 N.E.2d 485. Similarly, under section 2–719(3) of the UCC, the exclusion of consequential damages may not be enforceable if it is unconscionable. *Razor*, 222 Ill.2d at 87, 305 Ill.Dec. 15, 854 N.E.2d 607. Our supreme court recently clarified that these two attacks on warranty limitations must be proved separately and independently. That is, if both types of warranty limitations are contained in a written warranty, a plaintiff must prove both an unreasonable amount of time or number of attempts to repair (to overcome the restriction on repair or replacement as the sole remedy) and that it would be unconscionable to enforce the exclusion of consequential damages (to overcome that exclusion). *Razor*, 222 Ill.2d at 98–99, 305 Ill.Dec. 15, 854 N.E.2d 607. If a plaintiff can successfully attack the limitations in the warranty, he is entitled to seek the damages otherwise available under the UCC: “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.” *Razor*, 222 Ill.2d at 106, 305 Ill.Dec. 15, 854 N.E.2d 607, quoting 810 ILCS 5/2–714(2) (West 2000); *Mattuck*, 366 Ill.App.3d at 1034, 304 Ill.Dec. 235, 852 N.E.2d 485 (same).

[11] Bearing these principles in mind, we turn to an examination of whether the Rule 216 admissions identified by the defendants preclude recovery for breach of the express warranty at issue here as a matter *145 of law. In Admission number 9, the plaintiffs admitted that “[t]here are presently no known defects or nonconformities with the subject vehicle.” Admission number 10, that “the subject vehicle has not sustained any diminution in value as a result of any repair procedure, servicing procedure, or replacement procedure performed by any vehicle dealership or repair facility,” simply means that the defendants did not cause any additional diminution of value to the motor home through their repair procedures.

The defendants urge us to read Admission number 10 more broadly, to include an admission that no damages were caused by their *failure* to repair the vehicle properly or within a reasonable amount of time or number of attempts, but we decline to do so. There is no legal basis for looking beyond the plain and ordinary meaning of the words used in a request for

admission. Here, the defendants requested an admission that the motor home had not suffered any loss of value *as a result* of the repair procedures, not an admission that there were no damages caused by the defendants' alleged *failure* to make timely repairs. The plaintiffs' admission of this statement is limited to the words of the ***845 **536 statement itself, *i.e.*, those damages caused by the repair procedures themselves.

The Rule 216 admissions do not prevent the plaintiffs from proving any necessary component of their claims for damages. Even with these admissions, the plaintiffs can still introduce evidence: (1) that the limited “repair or replace” warranty failed of its essential purpose because the amount of time or number of attempts necessary to repair the defects was unreasonable; (2) that the exclusion of consequential damages would be unconscionable; and (3) regarding the difference between the value of the motor home as warranted and as actually received at the time and place of acceptance. See, *e.g.*, *Pearson v. DaimlerChrysler Corp.*, 349 Ill.App.3d 688, 697–98, 286 Ill.Dec. 173, 813 N.E.2d 230 (2004) (even where the plaintiff conceded that no actionable defects in his motor vehicle remained following the defendant's repair attempts, summary judgment was improper if there were factual questions regarding whether the repairs were made within a reasonable time or number of attempts); *Lara v. Hyundai Motor America*, 331 Ill.App.3d 53, 62, 264 Ill.Dec. 416, 770 N.E.2d 721 (2002) (plaintiff could still seek damages for breach of written limited warranty where the vehicle had been repossessed and therefore could no longer be repaired under the “repair or replace” warranty, if the seller “unreasonably delay[ed] the replacement of the product, refuse[d] to replace it at all, or [was] unsuccessful in correcting the defects” within a reasonable time). Moreover, the admission that “there are presently no known defects” in the motor home does not preclude the plaintiffs from showing that defects existed at the time they received the motor *146 home. August 31, 1999 (the date of acceptance, *i.e.*, the date the plaintiffs received the motor home), is the relevant date for calculating damages under the UCC (810 ILCS 5/2–714(2) (West 2004)), and the admission that the motor home had no defects on a later date (in February 2003, when the plaintiffs failed to respond to the requests for admissions) does not bar the plaintiffs from showing that defects existed when they received the motor home. *Pearson*, 349 Ill.App.3d at 696, 286 Ill.Dec. 173, 813 N.E.2d 230.

Finally, we note that the plaintiffs' failure to allege in their complaint that the exclusion of consequential damages

was unconscionable is not fatal. In *Razor*, the plaintiff likewise had failed to include any allegations regarding unconscionability, but that did not prevent the court from considering the issue. *Razor*, 222 Ill.2d at 104 & n. 4, 305 Ill.Dec. 15, 854 N.E.2d 607. The court then went on to hold that the exclusion was unenforceable where the warranty was preprinted in the vehicle's operating manual without input from the consumer, the warranty was intended to limit the drafter's liability, and there was evidence that the purchaser never saw the warranty until after she signed the sale contract. *Razor*, 222 Ill.2d at 100–01, 305 Ill.Dec. 15, 854 N.E.2d 607. The complaint here suggests that at least some of these facts may exist in the present case, although we make no determination on that issue. We simply hold that despite the Rule 216 admissions, factual issues remain that prevent the entry of summary judgment on the plaintiffs' claims in counts I and II for breach of express warranty.

Breach of Implied Warranty

[12] [13] [14] We next consider the viability of the plaintiffs' claims for breach of implied warranty (counts III and IV of the amended complaint), in light of the Rule 216 admissions. A product breaches the implied warranty of merchantability if it is not “‘fit for the ordinary purposes for which such goods are used.’ [Citation.]” ***537 ***846 *Alvarez v. American Isuzu Motors*, 321 Ill.App.3d 696, 703, 255 Ill.Dec. 236, 749 N.E.2d 16 (2001). With regard to motor vehicles, “‘[f]itness for the ordinary purpose of driving implies that the vehicle should be in a safe condition and substantially free of defects.’ [Citation.]” *Check v. Clifford Chrysler–Plymouth of Buffalo Grove, Inc.*, 342 Ill.App.3d 150, 159, 276 Ill.Dec. 579, 794 N.E.2d 829 (2003). The plaintiffs may recover damages for breach of an implied warranty of merchantability if they can prove that the motor home was defective and that the defects existed when the motor home left the defendants' control. *Alvarez*, 321 Ill.App.3d at 702–03, 255 Ill.Dec. 236, 749 N.E.2d 16. The measure of damages recoverable for the breach of an implied warranty of merchantability is once again “the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, *147 unless special circumstances show proximate damages of a different amount.” 810 ILCS 5/2–714(2) (West 2004). Just as with a claim for breach of express warranty, the legal focus is on the defects in the vehicle as of the date of acceptance, not at the later time when the requests for admissions were served, and thus the Rule 216 admissions

do not negate the damages element (or any other element) of the plaintiffs' claims for breach of implied warranty. We thus reverse the grant of summary judgment on these claims as well.

Revocation of Acceptance

Our final review is of the summary judgment entered for the defendants on count VI, which was labeled as a claim for “revocation of acceptance” against CVRV, which sold the plaintiffs the motor home at issue. The defendants first argue that “revocation of acceptance” is merely a type of remedy available under the UCC for breach of warranty, and that the plaintiffs' right to such revocation must fall when the breach of warranty claims fall. Of course, this argument itself fails due to our reversal of summary judgment on the breach of warranty claims.

However, the defendants also contend that the plaintiffs are barred from revoking their acceptance of the motor home because, in Rule 216 Admission number 8, the plaintiffs admitted “[t]hat at the time plaintiffs sent written notification of plaintiff's [*sic*] revocation of acceptance, the condition of the subject vehicle had substantially changed from the time of its initial purchase or lease in that the vehicle had several thousand miles on its odometer.” Section 2–608 of the UCC provides that “[r]evocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects.” 810 ILCS 5/2–608(2) (West 2004).

[15] If the existence of “substantial change” in the vehicle's condition were the only relevant factor here, the defendants' entitlement to summary judgment would be clear, because the plaintiffs have (by operation of law) admitted that at the time they sought revocation, the condition of the motor home had “substantially changed” in that it had several thousand miles on its odometer. This admission is a judicial admission, and the plaintiffs are barred from offering contrary evidence at trial or at any other point during the course of the case. *Robbins v. Allstate Insurance Co.*, 362 Ill.App.3d 540, 543, 298 Ill.Dec. 879, 841 N.E.2d 22 (2005), citing *In re Yamaguchi*, 118 Ill.2d 417, 424, 113 Ill.Dec. 928, 515 N.E.2d 1235 (1987), and ***847 ***538 *Ellis v. American Family Mutual Insurance Co.*, 322 Ill.App.3d 1006, 1010, 255 Ill.Dec. 902, 750 N.E.2d 1287 (2001). However, as this court has noted, “[e]xceptions exist; thus, the *148

continued use of goods will not, in all circumstances, bar revocation. For example, where ceasing use of the goods would cause undue hardship to the buyer, continued use may not preclude revocation.” *Basselen v. General Motors Corp.*, 341 Ill.App.3d 278, 283, 275 Ill.Dec. 267, 792 N.E.2d 498 (2003). Thus, if the plaintiffs put forth evidence showing that there was some compelling reason for their continued use of the motor home, the fact that there had been such continued use (and therefore the increase in mileage that created the substantial change) would not necessarily bar them from revoking their acceptance of the motor home.

[16] The plaintiffs bear the burden of proving the existence of some exception to the rule that substantial change bars revocation, and generally of proving that the continued use was reasonable under the circumstances. See *Basselen*, 341 Ill.App.3d at 283, 275 Ill.Dec. 267, 792 N.E.2d 498. Accordingly, in order to defeat a motion for summary judgment, the plaintiffs must show the existence of facts that could support judgment in their favor on this issue. “[A]lthough the nonmoving party is not required to prove his case in response to a motion for summary judgment, he must present a factual basis that would arguably entitle him to judgment.” *Land v. Board of Education of the City of Chicago*, 202 Ill.2d 414, 432, 269 Ill.Dec. 452, 781 N.E.2d 249 (2002).

[17] Here, in their motion for summary judgment, the defendants raised the effect of the plaintiffs’ Rule 216 admission regarding substantial change. In response, the plaintiffs provided no affidavits or other evidence suggesting that their continued use of the motor home, and its accumulation of “several thousand miles on the odometer,”

was reasonable under the circumstances. Indeed, the plaintiffs provided the trial court with no information at all on this point, such as: how much mileage was actually on the odometer in February 2003; whether they continued to use the motor home, and if so, for what purposes; and so on. In the absence of any such evidence, the plaintiffs have failed to carry their burden to show that they could prevail at trial on their claim for revocation of acceptance. See *Land*, 202 Ill.2d at 432, 269 Ill.Dec. 452, 781 N.E.2d 249; see also *Basselen*, 341 Ill.App.3d at 284, 275 Ill.Dec. 267, 792 N.E.2d 498 (affirming grant of summary judgment where plaintiffs provided no basis on which a finder of fact could conclude that their continued use of the vehicle was reasonable under the circumstances). We affirm the trial court’s grant of summary judgment in CVRV’s favor on count VI.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the circuit court of McHenry County as to count VI; we reverse the judgment of *149 the circuit court of McHenry County as to counts I, II, III and IV; and we remand for further proceedings consistent with this decision.

Affirmed in part and reversed in part; cause remanded.

HUTCHINSON and BYRNE, JJ., concur.

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Docket No. 1-15-2985

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FIRST DISTRICT**

AMCOR FLEXIBLES, INC.,)	
<i>Petitioner</i>)	
v.)	On Direct Appeal of
)	Orders of the Illinois
)	Commerce Commission
ILLINOIS COMMERCE COMMISSION)	Ill.C.C. Docket No.
AND COMMONWEALTH EDISON Co.)	11-0033
<i>Respondents</i>)	

BRIEF OF THE RESPONDENT
ILLINOIS COMMERCE COMMISSION

Office of General Counsel
Illinois Commerce Commission
160 N. La Salle St.
Suite C-800
Chicago, Illinois 60601
312/793-2877
Fax 312/793-1556
JWEGING@ICC.ILLINOIS.GOV

James E. Weging
Special Assistant Attorney General

Counsel for the Respondent
Illinois Commerce Commission

March 8, 2016

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CERTIFICATE OF COMPLIANCE

I, James E. Weging, Special Assistant Attorney General, counsel for the Respondent, Illinois Commerce Commission, certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, this Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 12078 words.

Dated: March 8, 2016



JAMES E. WEGING

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Certificate of Compliance precedes Points and Authorities

INTRODUCTION

This action is a direct administrative review of the denial of the complaint of Amcor Flexibles, Inc., (“Amcor”) against Commonwealth Edison Co. (“ComEd”) concerning a backbill for unbilled electric delivery service, which AMCOR disputes, and the denial of Amcor’s motion in limine which sought to bar the meter test evidence upon which the backbill is based. This cause was previously remanded to the Commission by Rule 23 Order, *Amcor Flexibles, Inc. v. Illinois Commerce Commission* (“Amcor”), 2015 IL App (1st) 141964-U, ¶¶45-47.

STATEMENT OF FACTS

The parties to the complaint before the Commission herein entered into a Stipulation of Facts and Undisputed Testimony (“Stipulation”). R. Vol. 1, C-00033–81. However, various matters were stipulated to for only limited purposes, *e.g.*, ¶¶17, 18, 19 and 22 of the Stipulation, *Id.*, C-00036–38.

From July 2005 to April 2009, ComEd’s service to Amcor was measured by Meter No. 140384879. The meter was identified in the Stipulation as the “Replaced Meter.” The Replaced Meter was removed because of an expected increased load at the Mundelein Plant of Amcor. The Replaced Meter was replaced before the increased load

was operated. R Vol. 1, C-00034, C-00035, and C-00044.

The "First New Meter" (Meter No. 141521021) operated from April to June 2009, when it was replaced by the "Second New Meter" (Meter No. 141379855). Testing showed that the First New Meter was running accurately. Commission Order of April 2, 2014 ("Order"), p. 10, fn. 4, R. Vol. 5, C-01211 and Vol. 1, C-00035-36 and C-00044.

ComEd submitted that the First New Meter was replaced because of Amcor's complaint about high bills. Amcor did not stipulate to this claim (R. Vol. 1, C-00037), but Amcor (Brief, p.12, 1st Par. and p. 34) admits it questioned the increased usage shown on the bills after the new extension line (an estimated 1000 kW of additional load) began operation, *i.e.*, questioning the bills issued from the readings of the First and, possibly, the Second New Meter. Commission Order on Remand of August 25, 2015 ("Order on Remand"), p. 9, R. Vol. 7, C-01718 and Vol. 1, C-00035, C-00045, and C-00058.

On September 24, 2009, the Replaced Meter was tested by ComEd. The Replaced Meter was properly reading the flowing power. However, ComEd's billing for that power was miscalculated. For billing purposes, the power meter readings were being billed as if only one-third of the actual power was being delivered to Amcor. *Id.*, C-00034, C-00038-41, and C-00073-81.

ComEd informed Amcor of the underbilling by a letter sent

December 8, 2009. Pursuant to Commission rule (83 Ill. Adm. Code 280.100 in Appendix to this Brief,¹ * A-18-A-19), ComEd sought recovery of the unbilled amounts for the period December 2007 through April 2009. When Amcor was threatened with discontinuance of service for nonpayment of its bills, Amcor filed an informal complaint and later a formal complaint with the Commission. *Id.*, C-00036, C-00038, C-00048, and C-00064.

Upon adverse ruling by the Commission and denial of rehearing (R. Vol. 5, C- 01202-28 and Vol. 6, C-01511), Amcor sought administrative review. Upon administrative review, the Illinois Appellate Court reversed the Commission order and remanded for further proceedings. *Amcor Flexibles, Inc. v. Illinois Commerce Commission ("Amcor")*, 2015 IL App (1st) 141964-U, ¶¶45-47, found at R. Vol. 7, C-01593-1616. The Court held that the Commission had failed to consider the merits of Amcor's motion in limine and, as a result, the court was unable to review the propriety of admitting the evidence in the administrative proceeding. *Amcor, supra*, ¶1. Amcor's motion in limine is exclusively a spoliation of evidence claim, aimed at the only evidence that showed that the Replaced Meter was underbilling. *Amcor, supra*, ¶28.

¹ Because of the numerous citations to the Commission's rules, citation to the Separate Appendix to this Brief will be designated "*" hereafter.

Upon remand, the parties stood on their previous pleadings, the Commission issued a proposed order, and the parties filed exceptions and replies to exceptions. On August 25, 2015, the Commission issued its Order on Remand, denying Amcor's motion in limine. R. Vol. 7, C-01710-21. Upon denial of Amcor's application for rehearing, Amcor again sought administrative review. R. Vols. 7-9, C-01630-707, C-01618-29, C-01747-85, C-01846, C-01861-73 and Tr. 1-5 (Remand), hearing of April 14, 2015.

ARGUMENT

I. Scope and Standard of Review

In reviewing an Illinois Commerce Commission ("Commission") decision under the Public Utilities Act ("Act"), 220 ILCS 5, the Commission's order is to be considered *prima facie* reasonable. 220 ILCS 5/10-201(d). In seeking to overturn such an order, the party appealing the Commission's decision has the burden of proof on all issues. *Id.* Judicial review of a Commission order is limited: the Court will reverse the order of the Commission only if the Commission's findings are not supported by substantial evidence based on the record; the Commission acted outside the scope of its statutory authority; the Commission issued findings in violation of the State or Federal Constitution or law; or the proceedings or the manner in which the Commission reached its findings violates the State or Federal

Constitution or laws, to the prejudice of the appellant. 220 ILCS 5/10-201(e)(iv); *Citizens Utility Board v. Illinois Commerce Commission*, 166 Ill. 2d 111, 120–21 (1995); *People ex rel. Madigan v. Illinois Commerce Commission*, 2015 IL 116005, ¶20

In analyzing the Commission’s order, it is firmly established that the Commission is entitled to great deference from the reviewing court because it is an administrative body possessing expertise in the field of public utilities. *Archer-Daniels-Midland Company v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397 (1998); *United Cities Gas Co. v. Illinois Commerce Commission*, 163 Ill. 2d 1, 12 (1994). Thus, the reviewing court must not put itself in the place of the Commission and conduct an independent investigation or substitute its judgment for the Commission’s. *Produce Terminal Company v. Illinois Commerce Commission*, 414 Ill. 528, 589 (1953). As has long been recognized by the Illinois Supreme Court, where the propriety of the means or methods used by the Commissioners in the exercise of clearly conferred power is questioned, all doubts should be resolved in favor of the Commissioners in the interest of the administration of law. *State Public Utilities Commission ex rel. City of Springfield v. Springfield Gas Company*, 291 Ill. 209, 216 (1920).

On questions of fact, the standard of review is deferential. 220 ILCS 5/10-201(d) [prima facie true and correct]; *Citizens Utilities*

Board v. Illinois Commerce Commission, 275 Ill. App. 3d 329, 342 (1st Dist. 1995). The evidence only need be such that a reasoning mind would accept it as sufficient to support a particular conclusion. *Central Illinois Public Service Co. v. Illinois Commerce Commission*, 268 Ill. App. 3d 471, 479 (4th Dist. 1994). The appellants must affirmatively demonstrate that the conclusion opposite to the one reached by the Commission is "clearly evident." *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1st Dist. 1994); *Commonwealth Edison Co. v. Illinois Commerce Commission*, 2013 IL App (2d) 120334, ¶84 [presentation of more witnesses and more pages of testimony does not compel the opposite conclusion]. Merely showing that the evidence presented can support a different conclusion than the one reached by the Commission is not sufficient. *Ameren Illinois Co v. Illinois Commerce Commission*, 2012 IL App (4th) 100962, ¶129.

Similarly, if the reviewing court determines that any claim raises a mixed question of fact and law, the appropriate standard for review is deferential, and the Commission is only to be reversed if the agency decision is clearly erroneous. *Chicago Messenger Service v. Jordan*, 356 Ill. App. 3d 101, 106-107 (1st Dist. 2005); *Murphy v. Board of Review*, 394 Ill. App. 3d 834, 836-837 (1st Dist. 2009).

While the Commission's interpretation of a legal question is not

binding on a reviewing court, where the legislature delegates the administration of a broad statutory standard to an agency's discretion, "courts shall rely upon the agency's interpretation where there is reasonable debate as to the statute's meaning." *Business and Professional People in the Public Interest v. Illinois Commerce Commission*, 171 Ill. App. 3d 948, 957 (1st Dist. 1988); *State of Illinois v. Church*, 164 Ill. 2d 153, 162 (1995). The interpretation of a statute by the agency charged with the administration of the statute is entitled to substantial deference, and such construction should be, and normally is, persuasive. *Milkowski v. Dept. of Labor*, 82 Ill. App. 3d 220, 222 (1st Dist. 1980); *Moncada v. Illinois Commerce Commission*, 212 Ill. App. 3d 1046, 1052-1053 (1st Dist. 1991) [The reason for this deference is that agencies can make informed judgments about the issues based on their experience, and they constitute an informed source for ascertaining the legislative intent].

The same rule of deference adheres to an agency's interpretation of its own rules. *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 537 (1st Dist. 2002). Where the issues in the case involve the Commission's interpretation and application of provisions of the Public Utilities Act, courts will give weight to such administrative interpretations, up to equal weight with judicial construction. *Mississippi River Fuel Corp. v. Illinois Commerce*

Commission, 1 Ill. 2d 509, 514 (1953); *MCI Telecommunications Corp. v. Illinois Commerce Commission*, 168 Ill. App. 3d 1008, 1012 (1st Dist. 1988).

In the instant case, the Petitioner, Amcor, at times raises factual claims but fails to meet its burden concerning substantial evidence. 220 ILCS 5/10-201(d) and (e)(iv)(A). It is well settled that "Appellants must affirmatively demonstrate that the conclusion opposite to the one reached by the Commission is 'clearly evident.'" *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1st Dist. 1994); *Commonwealth Edison Co.*, *supra*, 2013 IL App (2d) 120334, ¶84.

The denial of Amcor's motion in limine, which is a spoliation of evidence claim, is subject to an abuse of discretion standard. *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 122-123 (1998). Amcor agrees that the denial of its motion in limine is subject to an abuse of discretion standard (Brief, p. 13), but then erroneously claims that the denial of its motion in limine is subject to *de novo* review, citing two criminal law cases: *People v. Williams*, 188 Ill. 2d 365, 373-376 (1999) and *People v. Peterson*, 2012 IL App (3d) 100514-B, ¶¶10, 19, and 29.

However, as the Supreme Court explained in *People v. Caffey*, 205 Ill.2d 52, 89-90 (2001), in rejecting a similar claim for *de novo*

review for “legal rulings,” the rule of law exception applies where the trial court’s discretionary ruling is based on a broadly applicable rule rather than the specific circumstances of the case. See *People v. Torres*, 2012 IL 111302, ¶46 [admissibility of evidence is not a question of law]; *People v. Hall*, 195 Ill. 2d 1, 20-21 (2000) [in rejecting *de novo* review of excluded evidence, the exception to the general rule of deference applies in cases that involve questions of statutory interpretation]. In denying Amcor’s spoliation claim, the Commission relied neither on a statute nor a broadly applicable rule and so Amcor’s claim for *de novo* review should be rejected (Order on Remand pp. 7-10, R. Vol. 7, C-01716–19).

Also the denial of Amcor’s novel issue, *i.e.*, the Payment Obligation to ComEd, first raised in Amcor’s original application for rehearing (Amcor Brief, pp. 3 and 42-43; R. Vol. 6, C-01420) is likewise subject to an abuse of discretion standard. 220 ILCS 5/10-101 and 10-113(a). See *General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1077 (1st Dist. 2007) [denial of motion to reopen proofs will not be disturbed absent a clear abuse of that discretion]; see generally *Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140-1142 (4th Dist. 2004) [decision on motions to reconsider and to reopen proofs is subject to abuse of discretion standard; affidavit which did not contain newly discovered evidence could not

lawfully be considered with motion to reconsider and can be rejected on motion to reopen proofs]. As will be shown, the Commission did not abuse its discretion on this matter.

The rest of Amcor's argument involves the Commission's construction of its rules in 83 Ill. Adm. Code 410 (Brief, pp. 13-14). See * A-20-A-37. The primary goal in interpreting a Commission rule to which all others are subordinate is to determine the Commission's intent in the language of the rule. *In Re Donald A.G.*, 221 Ill. 2d 234, 246 (2006). The words and phrases of the rule should not be construed in isolation, but the rule should be reviewed as a whole. *Id.* Despite Amcor's contrary claim, an agency's interpretation of its rules is subject to considerable deference. *Cook County Board of Review v. Property Tax Appeal Board*, 339 Ill. App. 3d 529, 537 (1st Dist. 2002). In contradistinction to Amcor's claim that the Commission merely engaged in a "ministerial task" (Brief, p.14), a reviewing court in administrative review is not empowered to substitute its judgment for the Commission's. *Business and Professional People for Public Interest v. Illinois Commerce Commission*, 146 Ill. 2d 175, 210-211 (1991); *People ex rel. Madigan v. Illinois Commerce Commission*, 2011 IL App (1st) 100654, ¶9 and ¶55.

The Commission Order of April 2, 2014 (R. Vol. 5, C-01202-228), and the Order on Remand of August 25, 2015 (R. Vol. 7, C-

01710-721) are supported by the substantial evidence in the administrative record, are not contrary to law, and are within the Commission's discretion. Therefore, affirmance of the Commission Order and Order on Remand is warranted.

II. The Commission did not abuse its discretion in denying Amcor's motion in limine

Throughout its Brief, Amcor improperly equates the Commission's administrative proceedings with a judicial action in the Circuit Court, both procedurally and substantively. *Contra* Supreme Court Rule 1. The Commission has jurisdiction to establish its own rules of practice and has done so. 83 Ill. Adm. Code 200. See 220 ILCS 5/10-101; *Summers v. Illinois Commerce Commission*, 58 Ill. App. 3d 933, 935-936 (4th Dist. 1978); *Krantz v. Industrial Commission*, 289 Ill. App. 3d 447, 452 (5th Dist. 1997). The Illinois Supreme Court long ago held that complaint proceedings before the Commission are not the same as common law actions for damages. *Central Illinois Public Service Co. v. Illinois Commerce Commission ("CIPS")*, 18 Ill. 2d 506, 507-508 and 511-512 (1960). 220 ILCS 5/10-108 is the successor to Section 64 of the repealed Public Utilities Act, Ill. Rev. Stat., Ch. 111 2/3, ¶168. *CIPS, supra*, 18 Ill. 2d at 512.

The various Illinois cases cited by Amcor concern negligence and strict liability lawsuits over defective products. *Shimanovsky v.*

General Motors Corp., 181 Ill. 2d 112, 116 (1998) [strict liability]; *Kambylis v. Ford Motor Co.*, 338 Ill. App. 3d 788, 789 (1st Dist. 2003) [strict liability]; *American Family Insurance v. Village Pontiac-GMC, Inc.*, 223 Ill. App. 3d 624, 627 (2nd Dist. 1992) [strict liability and negligence]; and *Graves v. Daley*, 172 Ill. App. 3d 35, 36 (3rd Dist. 1988) [strict liability and negligence]. Such cases have no application to the Commission's jurisdiction over complaints, *i.e.*, over acts done or omitted in violation of the Public Utility Act or the orders or rules of the Commission. 220 ILCS 5/10-108. *Moncada v. Illinois Commerce Commission*, 164 Ill. App. 3d 867, 872 (1st Dist. 1987) [the Commission as an administrative agency has no inherent or common law powers], citing *Lyons v. Department of Revenue*, 116 Ill. App. 3d 1072, 1077-8 (1st Dist. 1983) [statutory language of "any court" does not include administrative agencies]. This Court should reject Amcor's attempt to analogize the instant administrative case to judicial actions involving product liability matters.

The Appellate Court remanded this cause for the Commission to expressly rule on Amcor's motion in limine. *Amcor Flexibles Inc. v. Illinois Commerce Commission*, 2015 IL App (1st) 141964-U, ¶¶1 and 45-47. This motion sought to bar the undisputed evidence that showed that the Replaced Meter was misbilling (R. Vol. 1, C-00041 (testimony), C-00073-81 (meter test), and C-00097 (Amcor's

motion)). The claimed basis for such a bar was the destruction of the Replaced Meter before Amcor filed a formal complaint with the Commission, which essentially is a spoliation of evidence claim (*Id.*, C-00086–97).

No other sanction, assuming Amcor's spoliation claim was allowed, was ever suggested in this cause. See *Adams v. Bath & Body Works, Inc.*, 358 Ill. App. 3d 387, 395 (1st Dist. 2005) [dismissal with prejudice, the "death penalty" of sanctions, is a last resort]. Unlike a court, the Commission has no inherent judicial power. *Fountain Water District v. Illinois Commerce Commission*, 291 Ill. App. 3d 696, 703 (5th Dist. 1997). See *City of Waukegan v. Pollution Control Bd.*, 57 Ill. 2d 170, 184 (1974) [an administrative agency can impose monetary penalties only when authorized by the legislature]. The Commission's sanction rule (83 Ill. Adm. Code 200.420, * A-12) is limited to noncompliance with subpoenae or discovery orders, neither of which is present in this cause. 83 Ill. Adm. Code 200.370(b) [ALJ issues such rulings as justice requires], * A-8. Indeed the record is silent on any discovery request by Amcor. See *Graves v. Daley*, 172 Ill. App. 3d 35, 37 (3rd Dist. 1988) [request to produce destroyed furnace made during discovery].

On remand, the Commission applied the six factors, concerning the appropriateness of a discovery sanction, if any, that are listed in

Shimanovsky v. General Motors Corp., 181 Ill. 2d 112, 124 (1998). The Commission found that five of the considerations favored ComEd and only one (timeliness in objecting to evidence) favored Amcor (Order on Remand, pp. 8-10, R. Vol. 7, C-01717-19). Amcor disputes most of the Commission's adverse findings in some manner.

Before addressing the five *Shimanovsky* factors which the Commission found favored ComEd, the Commission responds to certain preliminary matters in Amcor's Brief pp. 14-21.

A. Amcor failed to establish that ComEd had a duty to preserve the Replaced Meter

Amcor argues that ComEd had a duty to preserve the Replaced Meter (Brief, pp. 14-17). There is no general duty to preserve evidence. *Martin v. Keeley & Sons*, 2012 IL 113270, ¶46. Such a duty must arise from some "agreement, contract, statute, special circumstance, or voluntary undertaking" sufficient to justify the imposition of a duty. *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶16. Amcor's duty claim does not arise from the Public Utilities Act, 220 ILCS 5, or from any Commission rule specifically requiring the retention of electric meters, which is the ambit of Section 10-108 of the Act, 220 ILCS 5/10-108, which provides as follows:

"complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of the Act, or any order or rule of the Commission."

No issue related to the retention of the Replaced Meter was raised in Amcor's complaint (R. Vol. 1, C-00001-14). Amcor's complaint merely rested on allegations that ComEd had violated 83 Ill. Adm. Code 410.160 and 410.155 by failing to test the Replaced Meter (R. Vol. 1, C-00003-04 and C-00006-14). Amcor did not allege in its complaint that the Replaced Meter was accurate in its billing, thereby contesting ComEd's evidence. Indeed, some of Amcor's allegations and reliefs were based on ComEd's alleged knowledge of installing a defective meter (*Id.*, C-00010-13). In a complaint before the Commission, the Commission cannot issue an order broader than the complaint. *Alton and Southern Railroad Co. v. Illinois Commerce Commission*, 316 Ill. 625, 630 (1925); *Peoples Gas Light & Coke Co. v. Illinois Commerce Commission*, 221 Ill. App. 3d 1053, 1060 (1st Dist. 1991).

Amcor's intent to seek its own testing of the Replaced Meter is not evident from its complaint or any dispute about discovery in the administrative record, prior to its motion in limine of January 26, 2012 (R. Vol. 1, C-00086-C-00100). 83 Ill. Adm. Code 200.370, * A-8 [ALJ supervises discovery, *inter alia*, upon motion of the party]. Most of the caselaw cited by Amcor expressly stated that there had been a written request, as required by Supreme Court Rules 213 and 214. *See Shimanovsky*, 181 Ill. 2d at 116 [written request]; *Kambylis*, 338

Ill. App. 3d at 790 [written request]; and *Graves* 172 Ill. App. 3d at 37 [request to produce destroyed furnace made during discovery]; *Cf. Lawrence v. Harley-Davidson Motor Co., Inc.*, 1999 WL 637172, *1 [pursuant to discovery for the state lawsuit, alteration was found]. The other cases do not indicate how the absence of the product was discovered. *Cf. American Family Ins. ex rel. Dunn v. Black & Decker (U.S.), Inc.*, 2003 WL 22139788, *2, [Plaintiff should have known that defendant would want to be able to conduct an investigation, citing *American Family Ins. Co. v. Village Pontiac GMC, Inc.*, 223 Ill.App.3d 624, 627 (2nd Dist. 1992)].

Amcor's first "inquiry about the meter" by ComEd's admission (Order on Remand, p. 6, R. Vol. 7, C-01715) was made at the February 17, 2011, hearing, in what was an off-the-record discussion. The ALJ was made first aware that "there may be a motion on admissibility of some evidence" at the October 11, 2011, hearing. The proposed filing of a motion in limine, with no details, was first mentioned at the December 1, 2011, hearing. (R. Vol. 9, Tr. 1-5, 15-16, 20). None of this indicates that Amcor had demanded its own testing of the Replaced Meter, prior to its motion in limine. *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶¶16-17 [something more than possession and control are required, such as a request by the plaintiff to preserve the evidence, before a duty to retain can be established], citing *Martin v.*

Keeley & Sons, 2012 IL 113270, ¶¶45 and 50-51.

Instead Amcor (Brief, pp. 16-17) argues that this duty to retain arises from the Commission's procedural rule, 83 Ill. Adm. Code 200.360(c), * A-7, which generally allows the use of other discovery tools commonly utilized in Illinois civil actions in Commission cases. Amcor thereupon argues that, because a private litigant in a product liability case is allowed its own testing of a piece of equipment, ComEd was under a duty to preserve the Replaced Meter in expectation of both Amcor's formal complaint and a later discovery request for independent testing of the Replaced Meter. ComEd retained the Replaced Meter for 13 months after the meter test (R. Vol. 1, C-00041). Moreover, even in civil suits, the Illinois Supreme Court has found it of no moment—as it pertained to the existence of a duty—that the evidence at issue was destroyed the day after the accident. *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶13 citing *Martin v. Keeley & Sons*, 2012 IL 113270, ¶46.

Amcor's reliance (Brief, p. 16) on 83 Ill. Adm. Code 200.610(b), * A-13, continues to be misplaced. See *Shimanovsky*, 181 Ill. 2d at 123 [a just sanction under Rule 219(c) insures both discovery **and** a trial on the merits]. A sanction for a violation of discovery or other pretrial procedures under Supreme Court Rule 219(c) is neither a rule of evidence nor a rule of privilege within the meaning of 83 Ill. Adm.

Code 200.610(b). See Illinois Rules of Evidence, esp. Article V (Privileges).

The Commission does not have a rule requiring the retention of electric meters; rather the Commission requires the retention of meter tests of electric meters, such as Exhibit I to the stipulation (R. Vol. 1, C-00073-81). 83 Ill. Adm. Code 420.90 and App. A, Sec. 59 (k)-(m) and 83 Ill. Adm. Code 410.20 and 410.110. See * A-38-A-40 and A-25-A-27. Given the costs and policy considerations that a general duty to retain electric meters would have if imposed by the Commission, the Commission remained unconvinced of a general duty to preserve the many electric meters tested every year, in case some customer would, sometime later, seek an additional meter test in discovery during a formal complaint. As the Commission stated:

“...it is not entirely clear that Amcor had a right to perform independent or third party testing on the Replaced Meter. The Commission is a quasi-adjudicatory body and as such not all discovery procedures that are common place in civil litigation are applicable to cases brought before the Commission. While there is no rule that expressly prohibits independent or third party meter testing by customers, there is also no provision in the Commission’s rules that provides for this type of testing. As ComEd noted, the only rule providing for customer requested meter testing is Section 410.190(d) which specifically provides for referee testing after a written application has been filed with the Commission. This testing maybe performed on a meter after

it has been removed.”

Order on Remand, pp. 7-8, R. Vol. 7, C-01716–17).

Because of the Court’s Order (2015 IL App (1st) 141964-U) requiring the Commission to issue findings concerning Amcor’s motion in limine, the Commission’s Order on Remand (R. Vol. 7 C-01716–19) considered and ruled upon the factors suggested by the *Shimanovsky* court (181 Ill. 2d at 124) to determine what, if any, sanction is appropriate because of the destruction of the Replaced Meter. Thus, whether or not ComEd had a duty to preserve the Replaced Meter under the facts herein, the Commission has determined that a sanction is inappropriate.

B. The Commission correctly determined that Amcor failed to establish knowledge on the part of ComEd that future litigation was likely

The Commission requires the filing of an informal complaint before any utility customer, no matter what their class of service, can file a formal complaint. 83 Ill. Adm. Code 200.160, * A-4. Although the Commission has always designated the process as an informal complaint, in fact it is a mediation process conducted by staff in the Commission’s Consumer Services Division.

Amcor argues that ComEd should have known that a formal complaint would be filed (Brief, pp. 17-21). The sole basis for its claim is a single undisputed fact, that its informal complaint was closed as unresolved on October 24, 2010 (R. Vol. 1, C-00034 and C-00038).

The Commission found that “there is insufficient evidence to support the inference that ComEd knew or should have known that future litigation was likely after the informal Complaint was closed.” (Order on Remand, p. 8, R. Vol. 7, C-01717). In its evaluation of Amcor’s claim, the Commission observed that “[a] fair amount of informal Complaints are filed against large public utilities like ComEd and many of these cases are closed after the informal Complaint process without progressing to a formal Complaint.” (*Id.*)

Amcor argues that this explanation of the Commission’s finding that there is insufficient evidence to find ComEd “knew or should have known” constitutes reliance on evidence outside of the record (Brief, pp. 19-21). The Commission, however, is an expert body that draws upon its knowledge and experience and is not required to accept even un rebutted evidence, especially when the Commission knows that the evidence is insufficient. *City of Chicago v. Illinois Commerce Commission*, 15 Ill. 2d 11, 16-17 (1958); *see Archer-Daniels-Midland Co. v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397 (1998) [the Commission is entitled to great deference because of its expertise in the field of public utilities]. Even lay jurors are expected to use their combined wisdom and experience in evaluating claims. Illinois Pattern Jury Instructions-Civil 1.01[4] [“You may use common sense gained from your experiences in life, in evaluating what you see and hear

during trial”]. *People v. Tye*, 141 Ill. 2d 1, 25 (1990) [even a judge as a juror is allowed to consider the evidence presented at trial in the light of his own observations and experience in life].

Further, Amcor seeks the inference that the existence of an unresolved informal complaint puts a utility on notice of the likelihood of the filing of a formal complaint (Brief, p. 21). In rejecting Amcor’s inference, the Commission properly relied on its experience with informal and formal complaints. *Archer-Daniels-Midland Co. v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397 (1998) [the Commission is entitled to great deference because of its expertise in the field of public utilities]; *People ex rel. O’Malley v. Illinois Commerce Commission*, 239 Ill. App. 3d 368, 392 (2nd Dist. 1993) [The ICC is entitled to great deference additionally because their decisions “result from the deliberations of members who are better qualified to interpret evidence supplied by specialists and technicians.”]. The existence of an unresolved informal complaint does not necessarily mean that there a formal complaint will follow. In the absence of any other evidence presented by Amcor, the Commission’s refusal to draw the inference (that ComEd should have known a formal complaint was forthcoming) Amcor wants from the undisputed fact (that its informal complaint was closed as unresolved) does not violate Section 10-103 of the Act, 220 ILCS 5/10-103. *City of Chicago v. Illinois Commerce Commission*, 15

Ill. 2d 11, 16-17 (1958).

Similarly, Amcor's reliance on a claimed fact that ComEd did not renew its shut-off threat after October 24, 2010, is improper. Amcor's claim is beyond the scope of the record. Neither the complaint, nor answer nor stipulation provide any information concerning the post October 24, 2010, actions or lack thereof of any party. Only the final notice of disconnection of September 27, 2010, is in the record. R. Vol. 1, C-00038 and C-00064.

Assuming *arguendo* that there was no renewed threat of shut-off and that Amcor was still refusing to pay the backbill, the Commission accepted ComEd's argument, e.g., R. Vol. 1, C-00154 and Vol. 9, Tr. 60-61. Order on Remand, p.8, R. Vol. 7, C-01717. Amcor's citation to *Eaglin v. Cook County Hospital*, 227 Ill. App. 3d 724 (1st Dist. 1992) is inapposite. Permitting a trier of fact to draw an adverse inference (227 Ill. App. 3d at 728) is not the same as requiring the Commission in this case to draw Amcor's solely argumentative inference.

Finally, the Commission takes all of its informal and formal complaints seriously. The Commission's rules of practice do not discriminate on the right of various classes of utility customers to bring complaints. 83 Ill. Adm. Code 200.40 (defs. of "Complainant" and "Person"), * A-1 & A-3, and 200.170 (formal complaints), * A-5. The

right to bring complaints is broadly granted under the Act. See 220 ILCS 5/10-108. *Cable Television and Communications Assn. v. Illinois Commerce Commission*, 288 Ill. App. 3d 354, 359 (2nd Dist. 1997). The Commission does not have one rule for what Amcor describes on page 20 of its Brief as “nickel and dime” residential electricity consumers and a different rule for well-heeled electricity consumers.

Amcor has not carried its burden of proving that it is clearly evident that ComEd should have known a formal complaint was forthcoming. *Continental Mobile Telephone Co. v. Illinois Commerce Commission, supra*, 269 Ill. App. 3d at 171; *Ameren Illinois Co., supra*, 2012 IL App (4th) 100962, ¶129. The Commission’s conclusion is supported by the record and is reasonable.

C. The Commission properly exercised its discretion in denying Amcor’s motion in limine

Because Amcor’s arguments do not follow the order of the Commission’s findings (Order on Remand, pp. R. Vol. 7, C-01717–19), the Commission will follow the order in Amcor’s Brief.

(1) Prejudicial effect of the proffered evidence

Amcor strenuously argues that its inability to personally test the Replaced Meter prejudiced it (Brief, pp. 21-24). Amcor does not challenge the fact, however, that ComEd’s testing of the Replaced Meter was not in preparation for litigation upon which the Commission relied in finding an absence of prejudice (Order on Remand, p. 9, R.

Vol. 7, C-01718). This fact distinguishes this Commission complaint case from many product liability cases, where the evidence is specifically developed for a potential lawsuit, such as *Shimanovsky, supra*, 181 Ill. 2d at 115-116; *American Family Insurance Co., supra*, 223 Ill. App. 3d at 625-626; and *Graves, supra*, 172 Ill. App. 3d at 37.

The Commission does not have a rule requiring the retention of electric meters; rather the Commission requires the retention of meter tests of electric meters, such as Exhibit I to the stipulation (R. Vol. 1, C-00073-81). 83 Ill. Adm. Code 420.90 and App. A, Sec. 59 (k)-(m) and 83 Ill. Adm. 410.20 and 410.110. See * A-38-A-40 and A-25-A-27. The Commission also has rules on the accuracy of an electric meter when testing is conducted. 83 Ill. Adm. Code 410.150. See * A-30-A-31. The Commission rules show the intention to rely on the meter test results for regulatory purposes. 83 Ill. Adm. Code 410.20. See * A-25. *People ex rel. Madigan v. Illinois Commerce Commission*, 231 Ill. 2d 370, 382-383 (2008); *CBS Outdoor, Inc. v. Ill. Dept. of Transportation*, 2012 IL App (1st) 111387, ¶27 [the court's primary objective in interpreting an agency regulation is to ascertain and give effect to the intent of the regulatory agency]. There would be no point in retaining such records if the records cannot be relied upon. See *People v. Torruella*, 2015 IL App (2d) 141001, ¶ 22-¶30 [the court did not abuse its discretion in admitting accuracy check records of

breathalyzer which met administrative code standards].

The Commission as an expert body has created both the meter test rules and the retention of meter test results. This is unlike the judicial branch of government, which does not have any regulatory interest even in products liability, but only in the resolving of private disputes brought to the Court's attention for resolution. *Compare Safeway Ins. Co. v. Spinak*, 267 Ill. App. 3d 513, 516 (1st Dist.1994) [Access to our courts as a vehicle for resolving private disputes is a fundamental component of our judicial system] *with Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶43 [primary jurisdiction resides in administrative agencies charged with particular regulatory duties when it has a specialized or technical expertise that would help resolve the controversy, or where there is need for uniform administrative standards] and *Peoples Gas Light & Coke Co. v. City of Chicago*, 125 Ill. App. 3d 95, 101 (1st Dist. 1984) [noting the exclusive regulatory jurisdiction over this area in a single regulatory agency (the Illinois Commerce Commission)]. As the Commission found, this is unlike the caselaw concerning product liability relied upon by Amcor. Order on Remand, pp. 8-9, R. Vol. 7, C-01717-18.

Amcor also challenges the Commission's statement that not all discovery procedures common to civil litigation are applicable to

administrative cases before the Commission (Brief, pp. 22-24). In the first place, the Commission statement to which Amcor is objecting is not explicitly referenced as a ground for the Commission's prejudice finding, the subject of Amcor's argument. Order on Remand, *compare* pp. 7-8 *with* pp. 8-9, *Id.*, C-01716-18.

More particularly, Amcor presented no evidence in this cause on how "common in civil actions" testing of tangible things occurs, outside of products liability cases, as the Commission rule provides. 83 Ill. Adm. Code 200.360(c), *A-7. There is no written interrogatory, request, or other discovery tool for meter testing in this administrative record as required by the rule. 83 Ill. Adm. Code 200.360(c), *A-7. *See also* Supreme Court Rule 214 ("written request"); *Shimanovsky, supra*, 181 Ill. 2d at 116 [written request]; *Kambylis, supra*, 338 Ill. App. 3d at 790 [written request]; and *Graves, supra*, 172 Ill. App. 3d at 37 [request to produce destroyed furnace made during discovery]. In the absence of any evidence of Amcor's pursuit of discovery, a sanction would be improper. *Cf. In re Marriage of Daebel*, 404 Ill. App. 3d 473, 487 (2nd Dist. 2010).

Amcor has not shown facial compliance to proceed under 83 Ill. Adm. Code 200.360(c) in this administrative action, the provision upon which Amcor relies. *Cf. Vancura v. Katris*, 238 Ill. 2d 352, 369-370 (2010) [failure to comply with judicial rule of procedure forfeits issue]

and *People v. Fuentes*, 172 Ill. App. 3d 874, 876 (3rd Dist. 1988) [by failing to comply with the requirement that a motion to dismiss be made in writing and in a timely fashion, defendant is deemed to have waived any ground he may have had for his motion].

That discovery practice before the Commission is different than discovery in the circuit court is shown by 83 Ill. Adm. Code 200.340, * A-6. See R. Vol. 9, ALJ statement at first hearing, Tr. p. 5. The Commission's rules of practice favor interrogatories and the exchange of documents. However, the Commission rules provide for sanctions for failure to comply with a subpoena or a discovery order (83 Ill. Adm. Code 200.420, * A-12), neither of which is contained in this administrative record. *Shimanovsky, supra*, 181 Ill. 2d at 121-22 and its progeny are aimed at discovery violations. *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶18, fn 2.

Amcor's failure to request a referee test any time after December 2009, was not part of the Commission's prejudice finding, and these arguments (Amcor Brief, pp. 25-28) will be addressed in the "diligence in seeking discovery" section below.

In sum, the Commission properly exercised its discretion in finding that Amcor was not prejudiced by its inability to independently test the Replaced Meter.

(2) Diligence in seeking discovery

Amcor challenges the relevance of its failure to seek a referee test of the Replaced Meter (Brief, pp. 25-28). Amcor's arguments, which are not supported by any evidence, are entirely based on factual assumptions and on reading 83 Ill Adm. Code 410.190 in isolation. *In Re Donald A.G.*, 221 Ill. 2d at 246 [the rule should be reviewed as a whole]. Amcor failed to meet its burden of proof as complainant. *City of Chicago v. Illinois Commerce Commission*, 15 Ill. 2d 11, 13 (1958) and *Champaign County Telephone Co. v. Illinois Commerce Commission*, 37 Ill. 2d 312, 321-322 (1967).

The Commission found that Amcor had not been diligent in seeking the testing of the Replaced Meter. Order on Remand, p. 9, R. Vol. 7, C-01718. Although the incorrect scaling of the Replaced Meter was identified from the beginning of the dispute, Amcor never sought a referee-test of the Replaced Meter, which it had a right to do under 83 Ill. Adm. Code 410.190. R. Vol. 1, C-00005, C-00046 and C-00062. See * A-34-A-35. The first time that testing the Replaced Meter was raised was in Amcor's January 26, 2012 motion in limine. As noted earlier, there is no written interrogatory, request, or other discovery tool for meter testing as required by the Commission's rule of procedure. 83 Ill. Adm. Code 200.360(c), *A-7. See also Supreme Court Rule 214 ("written request").

In the absence of a request for a referee test, ComEd was never obligated to keep the Replaced Meter *in situ* pursuant to 83 Ill. Adm. Code 410.190. See * A-34-A-35. The implication that Amcor attempts to raise that the Replaced Meter could only be tested *in situ* is erroneous and requires the Court to read 83 Ill. Adm. Code 410.190 in isolation. For example, the Commission rules require an electric utility to “provide working standards and portable standards necessary to make the tests required of the entity by this Part” and “When in use for testing meters, all solid state working and portable standards shall be compared to a reference standard at least once every six months.” 83 Ill. Adm. Code 410.140(a) and (c). See * A-28-A-29. See 83 Ill. Adm. Code 410.10, * A-24, definitions of “portable standards” and “working standards.” There would be no point to having “working standards” as defined if meters are not to be tested in meter shops. Amcor presented no expert evidence that the Replaced Meter could only be tested *in situ*. 220 ILCS 5/10-201(d) [burden on all issues is on the Petitioner]. *Continental Mobile Telephone Co. v. Illinois Commerce Commission*, 269 Ill. App. 3d 161, 171 (1st Dist. 1994); *Ameren Illinois Co v. Illinois Commerce Commission*, 2012 IL App (4th) 100962, ¶129.

Amcor’s construction of 83 Ill. Adm. Code 410 is absurd and should be rejected. *Micro Switch, a Div. of Honeywell, Inc. v. Human*

Rights Comm., 164 Ill. App. 3d 582, 587 (1st Dist. 1987) [An administrative agency has the power to construe its own rules and regulations to avoid absurd or unfair results].

The Commission's finding that Amcor was not diligent in seeking to test the Replaced Meter is supported by Amcor's nonaction in seeking the available referee meter test and the absence of any evidence in the record about the seeking of an additional meter test prior to the motion in limine. Amcor has not carried its burden of proof on the substantial evidence. *Continental Mobile Telephone Co., supra*, 269 Ill. App. 3d at 171 [conclusion opposite to the Commission must be clearly evident]; *Ameren Illinois Co., supra*, 2012 IL App (4th) 100962, ¶129 [merely showing that the evidence presented can support a different conclusion than the one reached by the Commission is not sufficient]. Amcor's absurd construction of 83 Ill. Adm. Code 410.190, * A-34-A-35, should be rejected.

A sanction is proper where the record indicates that the party diligently pursued the hidden evidence in discovery. *In re Marriage of Daebel*, 404 Ill. App. 3d 473, 487 (2nd Dist. 2010). The Commission properly exercised its discretion in finding that Amcor had not pursued meter testing with due diligence.

(3) Prejudicial effect of the proffered evidence

Amcor challenges the Commission's reference to the undisputed

fact that Amcor was pursuing in its complaint a completely independent ground (from additional meter testing) against ComEd (Amcor Brief p. 28). R. Vol. 9, C-01718; see *also* R. Vol. 1, C-00001-14). Amcor in this argument cites neither to precedent nor the record to support its claim. Failure to do so warrants rejection of Amcor's claims. Rule 341(h)(7).

Spoliation claims necessarily are connected to either discovery violations per *Shimanovsky, supra*, and its progeny or an underlying cause of action per *Boyd v. Travelers Insurance Co.*, 166 Ill. 2d 188, 197-198 (1995). Where such a connection is lacking, such as with Amcor's complaint, a sanction for spoliation would be improper. *Cf. Cangemi v. Advocate South Suburban Hospital*, 364 Ill. App. 3d 446, 472 (1st Dist. 2006) [the injury for which a claim of spoliation of evidence seeks redress is necessarily related to the plaintiff's ability to bring an underlying claim].

In any event, whether Amcor's argument is on the facts or for an abuse of discretion, this Commission finding is properly based on the facts and the law.

(4) Unfair surprise to the adverse party

Amcor claims that it was unfairly surprised by the destruction of the Replaced Meter (Brief pp. 28-30). However, in its attack on the facts, Amcor relies exclusively on the time between the filing of the

agreed Stipulation of Facts (December 22, 2011) and the filing of its motion in limine (January 26, 2012). R. Vol. 1, Page 2 of Index. The relevance of the time of bringing a motion in limine after the Stipulation of Facts is not a measure of Amcor's surprise. Amcor has been disputing the backbill since December 2009 (Amcor Brief, p. 17).

On the question of facts, Amcor fails to carry its burden to show that the conclusion opposite the Commission's findings is clearly evident. *Continental Mobile Telephone Co., supra*, 269 Ill. App. 3d at 171. Merely showing that the evidence presented can support a different conclusion than the one reached by the Commission is not sufficient. *Ameren Illinois Co., supra*, 2012 IL App (4th) 100962, ¶129. It is undisputed that Amcor never inquired about the Replaced Meter (prior to February 17, 2011), about ComEd's meter retention practices, about holding the Replaced Meter, or about having a referee test any time after December 2009. Order on Remand, pp. 6 and 8, R. Vol. 1, C-01715 and C-01717). Thus, Amcor can hardly claim unfair surprise upon learning that ComEd had disposed of the Replaced Meter.

On the abuse of discretion issue, Amcor limits itself to a claim that the Commission's reliance on *Shimanovsky, supra*, is misplaced, because its delay was not the 5½ year delay in *Shimanovsky, supra*, 181 Ill. 2d at 125. Even in products liability suits, however, the time between destruction of the product and the request to produce is not

controlling. *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶13, citing *Martin v. Keeley & Sons*, 2012 IL 113270, ¶46.

Unlike a product liability cases, consumer complaints under the Act are not expected to take a similarly long time. 220 ILCS 5/10-108, 6th Par. (1 year unless extended by written agreement of the parties). Moreover, unlike a private litigant, who usually has no ability to seek testing until the bringing of a lawsuit, utility customers have the right to a referee meter test, even in the absence of any proceeding before the Commission. 83 Ill. Adm. Code 410.190(d). See * A-34-A-35. Thus, Amcor did sleep on its right to have a meter test, if Amcor thought that its backbill was not supported by ComEd's meter test, which was later submitted into record evidence. R. Vol. 1, C-00073-81.

The Commission's finding about surprise is neither contrary to the substantial evidence nor an abuse of discretion and should be sustained on administrative review.

(5) Good faith of party offering the evidence

Amcor challenges the Commission's finding that there is no evidence that the destruction of the Replaced Meter was done in bad faith (Brief, pp. 30-31). R. Vol. 7, C-01718-19. For all that appears in this record, this meter was destroyed as a routine matter without interference or influence of the attorneys for ComEd. R. Vol. 1, C-

00041–42. *People v. Stolberg*, 2014 IL App (2d) 130963, ¶¶27-30 [the defendant had to prove that the State acted in bad faith when the evidence was destroyed upon a claim that the evidence was potentially useful]; *H and H Sand and Gravel Haulers Co. v. Coyne Cylinder Co.*, 260 Ill. App. 3d 235, 247-248 (2ND Dist. 1994) [mere destruction of allegedly defective product does not prove bad faith for spoliation claim]; and *Norman-Nunnery v. Madison Area Technical College*, 625 F.3d 422, 428-429 (7th Cir. 2010) [the crucial element in a spoliation claim is not the fact that the documents were destroyed but that they were destroyed for the purpose of hiding adverse information].

The Commission acknowledged that discarding the meter “a day after the informal Complaint was closed may appear suspicious.” *Id.*, C-01718–19. More importantly, however, the Commission found that “there is no evidence in the record that ComEd acted in bad faith when Mr. Rumsey discarded the meter.” *Id.* Amcor’s self-serving claim otherwise does not meet its burden of proof. *Continental Mobile Telephone Co., supra*, 269 Ill. App. 3d at 171 [conclusion opposite to the Commission must be clearly evident] and *Ameren Illinois Co., supra*, 2012 IL App (4th) 100962, ¶129 [Merely showing that the evidence presented can support a different conclusion than the one reached by the Commission is not sufficient].

Amcor again argues that ComEd had a free-floating obligation to

retain the Replaced Meter. Amcor's claim is not based on any statute or Commission rule requiring such retention. The Commission notes that the administrative record is silent about any discovery request by Amcor related to the retention or independent testing of the Replaced Meter, which would perhaps trigger an obligation to preserve the Replaced Meter, prior to its filing of its motion in limine in January 2012, and despite knowing since December 2009 that the backbill was based on misbilling by the Replaced Meter [R. Vol. 1, ¶18, C-00005 and C-00024]. *People v. Stolberg*, 2014 IL App (2d) 130963, ¶10 & ¶30 [even with a prior written discovery request, the mere assertion that the State allowed the victim's body to be cremated, without more, is insufficient to establish bad faith]; *Combs v. Schmidt*, 2015 IL App (2d) 131053, ¶¶16-17 [something more than possession and control are required, such as a request by the plaintiff to preserve the evidence, before a duty to retain can be established], citing *Martin v. Keeley & Sons*, 2012 IL 113270, ¶¶45 and 50-51.

Amcor's reliance on *American Family Insurance Co. v. Village Pontiac GMC, Inc.*, 223 Ill. App. 3d 624 (2d Dist. 1992), is misplaced (Brief, p. 30). The meter test, which is established by Commission rule, and the record of which is required to be retained by Commission rule are not an opinion. See 83 Ill. Adm. Code 410.150, 410.20, 410.110, 420.90 and App. A, Sec. 59 (k)-(m), * A-30-A-31, A-38-A-

40 and A-25-A-27. An expert opinion might be needed to explain or interpret the meter test; however, the parties have stipulated to what the meter test showed on the only evidence of record, the meter test itself (Ex. I of the Stipulation). R. Vol. 1, C-00038-40 and C-00073-81.

In any event, there is no evidence of ComEd's "deliberate, contumacious and unwarranted disregard" of the Commission's authority to justify the barring of the meter test and the undisputed evidence, as required by *Shimanovsky*. *Peal v. Lee*, 403 Ill. App. 3d 197, 206 (1st Dist. 2010); *Palmer v. Minor*, 211 Ill. App. 3d 1083, 1086-1087 (1st Dist. 1991). The Commission's finding that there is no evidence that the destruction of the Replaced Meter was done in bad faith is supported by the evidence and does not represent an abuse of the Commission's discretion.

(6) Nature of the testimony and evidence

Amcor's speculation about the existence of other ComEd evidence that supports ComEd's misbilling claim contradicts its own Brief (Brief pp. 31-32). As Amcor admits (Brief, p. 1), the undisputed testimony and evidence (§36 and Ex. I of the Stipulation, R. Vol. 1, C-00041 and C-00073-C-00081) which it seeks to bar is the only proof that (1) the Replaced Meter was measuring the electricity properly (*i.e.* that there was no meter error within the meaning of the Commission's

rules) and (2) the Replaced Meter was misbilling the properly measured amount of electricity. Order pp. 20-24, R. Vol. 5, C-01221-C-01225. In rejecting Amcor's claim, the Commission noted that the remedy sought "is a drastic sanction that should only be invoked in those cases where the party's actions show 'deliberate, contumacious or unwarranted disregard of the court's authority.'" (Order on Remand, p. 10, 2nd par., R. Vol. 1, C-01719), quoting *Shimanovsky, supra*, 181 Ill. 2d at 123; see *King v. Clay*, 335 Ill. App. 3d 923, 927-928 (1st Dist. 2002) [a court abuses its discretion in barring the only testimony supporting a claim as a discovery sanction in the absence of deliberate, contumacious or unwarranted disregard of the court's authority].

The meter test results of the Replaced Meter (Ex. I of the Stipulation, *supra*) are required to be retained by Commission rule. 83 Ill. Adm. Code 420.90 and App. A, Sec. 59 (k)-(m) and 83 Ill. Adm. Code 410.20 & 410.110, * A-38-A-40 and A-25-A-27 (Order on Remand, p. 9, R. Vol. 7 C-01718). There is no requirement in the Public Utility Act or the Commission rules concerning (a) retention of the meter itself either for a particular time or in anticipation of a potential dispute with the customer or (b) the testing of the meter by the customer. The Commission rules show the intention to rely on the meter test results for regulatory purposes. 83 Ill. Adm. Code 410.20, * A-25. *People ex rel. Madigan v. Illinois Commerce Commission*, 231 Ill.2d 370, 382-

383 (2008); *CBS Outdoor, Inc. v. Ill. Dept. of Transportation*, 2012 IL App (1st) 111387, ¶27 [the court's primary objective in interpreting an agency regulation is to ascertain and give effect to the intent of the regulatory agency]. There would be no point in retaining such records if the records cannot be relied upon as a basis for resolving a billing or metering dispute. *See People v. Torruella*, 2015 IL App (2d) 141001, ¶ 22-¶30 [the court did not abuse its discretion in admitting accuracy check records of breathalyzer which met administrative code standards].

The barring of the undisputed testimony would effectively determine the outcome of this complaint case. *See In Re Marriage of Booher*, 313 Ill. App. 3d 356, 360-361 (4th Dist. 2000) [where the nature of the evidence is on an important issue, a court abuses its discretion when the sanction effectively determines the outcome]. The Commission did not abuse its discretion given the nature of the evidence which was sought to be barred.

(7) Conclusion

Amcor has failed to meet its heavy burden of establishing that the Commission abused its discretion in rejecting the proposed sanction. *See American Service Insurance, v. Miller*, 2014 IL App (5th) 130582, ¶13 [A trial court exceeds its discretion on sanctions only where no reasonable person would take the view adopted by it]. The

barring ComEd's meter test evidence, if granted, is such a severe sanction in the absence of any evidence of deliberate wrongdoing on ComEd's part and would amount to a punitive, unreasonable sanction. *Shimanovsky, supra*, 181 Ill. 2d at 123, 127 and 129.

The Commission's ruling on the facts is supported by the substantial evidence of record, does not represent an abuse of discretion, and should be sustained on administrative review.

III. Amcor's other contentions are without merit

The Commission has an active role as a regulatory body in administering the Act. *Antioch Milling Co. v. Public Service Co. of Northern Illinois*, 4 Ill. 2d. 200, 210 (1954). As part of its supervisory and policy making functions, the Commission has established various rules. 83 Ill. Adm. Code 410 encompasses the correct measurement of electricity by meters. 83 Ill. Adm. Code 280 applies to misbilling by a utility. Rules promulgated by an administrative agency are construed under the same standard as statutes. *Granite City Division of National Steel Co. v. Illinois Pollution Control Board*, 155 Ill. 2d 149, 162, (1993) and *People ex rel. Ryan v. Illinois Commerce Commission*, 298 Ill. App. 3d 483, 486 (2nd Dist. 1998):

The undisputed evidence is that the meter engine of the Replaced Meter properly measured the electricity but, because of an

erroneous scaling factor, the microcontroller miscalculated the billing pulses to be sent to the billing memory. R. Vol. 1, C-00073-81; C-00038-41. Amcor's contention that the billing function is subject to the same rules as the measurement of electricity function could be rejected out-of-hand for lack of support in the evidentiary record. The burden of proof is on Amcor in its complaint case and not the defendant ComEd. *Champaign County Telephone Co. v. Illinois Commerce Commission*, 37 Ill. 2d 312, 321-322 (1967); *City of Chicago v. Illinois Commerce Commission*, 15 Ill. 2d 11, 13 (1958).

Instead, Amcor argues constructions of the Commission rules which are not supported by any evidence and are contrary to the plain language of the rule. Amcor cites 83 Ill. Adm. Code 410.155, which requires a "post-installation inspection under load," and then argues that ComEd failed to perform "post-installation testing" (Brief, pp. 32 and 39). 83 Ill. Adm. Code 410.155 plainly does not require the testing established within 83 Ill. Adm. Code 410.200(h)(1). The Commission correctly rejected Amcor's unsupported argument. See Order, pp. 17-19 (ComEd's response) and p. 26, 3rd Ordering ¶, R. Vol. 5, C-01218-C-01220 and C-01227; ALJ's memo, *Id.*, C-01170 and C-01198. See also * A-32; A-37; *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 479 (1994) [it is improper to depart from the plain language in construing statutes].

Despite Amcor's contentions, the Commission, the author of the rules, has properly applied its rules to the present situation. The Commission's Order of April 2, 2014 should be affirmed as will be explained below in this Brief. R. Vol. 5, C-01202-C-01228.

A. Amcor's evidentiary and statutory arguments lack merit

There is no evidence that the Replaced Meter was inaccurate in measuring load. ¶¶6, 21, 25, and 36 and Ex. I of the Stipulation, R. Vol. 1, C-00034-C-00041 and C-00073-C-00081. ComEd ran the meter tests required under the Commission rules, and the Replaced Meter was accurate within the requirements of the Commission rules. 83 Ill. Adm. Code 410.150 and 410.200. Comm. Order, pp. 20-21, R. Vol. 5, C-01221-C01222. The accuracy test established under the Commission rules is not novel, for these rules have existed in one form or another since at least 1948. See * A-21, A-30-A-31 & A-36-A-37. *City of Chicago v. Illinois Commerce Commission*, 15 Ill. 2d 11, 16 (1958) ["One of the very functions of the Commission is to evaluate the evidence before it. Drawing on its expert knowledge and great experience in these matters..."]; *Moncada v. Illinois Commerce Commission*, 212 Ill. App. 3d 1046, 1052-1053 (1st Dist. 1991) [the reason for this deference is that agencies can make informed judgments about the issues based on their experience, and they constitute an informed source for ascertaining the legislative intent].

Nevertheless, Amcor claims that ComEd failed to comply with initial testing requirements of 83 Ill. Adm. Code 410.160 and 410.200(h)(1). There is no evidence that ComEd neglected to perform the initial test of the Replaced Meter as required by 83 Ill. Adm. Code 410.160. ¶¶6 and 21 of the Stipulation, R. Vol. 1, C-00034 and C-00038. The standard against which the Replaced Meter was measured in 2005 is provided in 83 Ill. Adm. Code 410.150. See * A-30-33.

As to Amcor's argument on page 34 of its Brief that the 2009 testing of the First New Meter indicates disparate treatment, 83 Ill. Adm. Code 410.190(a), requires testing upon customer complaint. The record indicates that Amcor did complain about the bills received when the First New Meter was operating. See Statement of Facts, *infra*; * A-34.

What Amcor really disputes is whether the various Commission rules apply only to the measurement of load. Amcor argues that the billing function of the Replaced Meter should have been measured against the same meter standards that the Commission provides for measuring electric loads. However, there is no expert evidence that the billing function of the Replaced Meter can meaningfully be tested under the standards in the Commission rule. 83 Ill. Adm. Code 410.150(a) (light load, heavy load and power factor test), * A-30. On meter testing, the Commission is the expert body whose evaluation of

the evidence is accorded substantial deference on judicial review. *City of Chicago, supra*, 15 Ill. 2d at 16; *Moncada, supra*, 212 Ill. App. 3d at 1052-1053. Amcor has never even attempted to meet its burden to supply substantial evidence, *i.e.* that the opposite conclusion to the Commission's finding is "clearly evident." 220 ILCS 5/10-201(d) [burden of proof on all issues is upon the appellant]. *Continental Mobile Telephone Co., supra*, 269 Ill. App. 3d at 171; *Commonwealth Edison Co. v. Illinois Commerce Commission*, 2013 IL App (2d) 120334, ¶84.

What remains is Amcor's claim that, as a matter of law, the term, "meter error," in 83 Ill. Adm. Code 410.200 should be read in isolation from the rest of the rule (Brief, pp. 35-42). The Commission rule itself creates the standard, 83 Ill. Adm. Code 410.150, * A-30-A-31, by which meter error as meant by the rule is measured, 83 Ill. Adm. Code 410.200, * A-36-A-37. Not only is Amcor's approach inappropriate, *In Re Donald A.G.*, 221 Ill. 2d 234, 246 (2006); *Abrahamson v. Illinois Department of Professional Regulation*, 153 Ill. 2d 76, 91 (1992), but also the Commission as the expert body concerning 83 Ill. Adm. Code 410 has rejected Amcor's claim. Order, pp. 20-23, R. Vol. 5, C-01221-24. *Milkowski v. Dept. of Labor*, 82 Ill. App. 3d 220, 222 (1st Dist. 1980); *Moncada, supra*, 212 Ill. App. 3d at 1052-1053 [The reason for this deference is that agencies can make informed judgments about

the issues based on their experience, and they constitute an informed source for ascertaining the legislative intent].

On page 36 of its Brief, Amcor relies on Ex. B of the Stipulation, ComEd's first letter to Amcor concerning the misbilling, although Amcor did not stipulate to the accuracy of the contents of Ex. B. R. Vol. 1, C-00036. The stipulation did not include much of the contents of the various communications attached as exhibits. *Id.*, C-00037. Amcor's arguments attempt to interpret factual matters which were not admitted generally into the record and which Amcor voluntarily relinquished its ability to enquire into Ex. B by entering into the Stipulation. *Cf. In Re Avery S.*, 2012 IL App (5th) 100565, ¶19 [the decision to stipulate to evidence is generally a tactical decision]. In any event, Amcor provides no authority on how ComEd's unsworn statements could constitute a binding interpretation, overturning the Commission's interpretation of its own rule. 220 ILCS 5/10-201(d) [the burden on all issues is on the appellant]. *Continental Mobile Telephone Co.*, *supra*, 269 Ill. App. 3d at 171; *Ameren Illinois Co.*, *supra*, 2012 IL App (4th) 100962, ¶129. Indeed, Amcor provides no authority at all in support of its argument. Rule 341(h)(7).

On pages 37-39 of its Brief, Amcor admits that its arguments concerning the underbilling by the Replaced Meter are not supported by any Commission metering rule. Underbilling is controlled by 83 Ill.

Adm. Code 280.100. See also 280.5 “Policy”, * A-17–A-19. The burden of proof is on Amcor in its complaint case. *Champaign County Telephone Co., supra*, 37 Ill. 2d at 321-322; *City of Chicago, supra*, 15 Ill. 2d at 13.

Amcor’s claim that 83 Ill. Adm. Code 410.150 has nothing to do with 83 Ill. Adm. Code 410.200, lacks even facial merit (Brief, pp. 37 and 40). 83 Ill. Adm. Code 410.200(a) and (b) uses the term “average error” which is defined in 410.10, as “the difference between 100% and the average percent registration as defined in Section 410.150(d).” See * A-22, A-31, A-36. Amcor’s interpretation which ignores the language of the rules is meritless. Cf. *In re Marriage of Lonvick*, 2013 IL App (2d) 120865, ¶61.

Amcor purports to rely on *Illinois Insurance Guaranty Fund v. Virginia Surety Company, Inc.*, 2012 IL App (1st) 113758, ¶15 (Brief, p. 38). The case supports the Commission since it holds that, assuming *arguendo* that Amcor’s argument indicates that 83 Ill. Adm. Code 410.150 is ambiguous about whether meter billing functions are included, the rule is to be construed as a whole. *Id.* If 83 Ill. Adm. Code 410.150 is determined by the Court to be ambiguous in its application to billing, the Commission’s interpretation of its own rules is entitled to substantial weight and deference. *Archer-Daniels-Midland Co. v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397

and 400-401 (1998) and *Illinois Consolidated Telephone Co. v. Illinois Commerce Commission*, 95 Ill.2d 142, 152, (1983) [same, for ambiguous statutory language].

It is Amcor's example — that the Commission interpretation of 83 Ill. Adm. Code 410.190 would bar recovery of overbilling by the meter — which is absurd (Brief, pp. 39-40). If ComEd's meter were to show an overbilling for any reason, refund to the customer is required under 220 ILCS 5/9-252.1. It is Amcor who insists on pounding a square peg (misbilling) into a round hole (meter testing under 83 Ill. Adm. Code 410).

Amcor argues that the stipulation does not support that there was a mismatch between the billing software and the information provided by the meter concerning the amount of electricity used (Brief, p. 41). Order, pp. 22-23, R. Vol. 5, C-01223 –C-01224. This is entirely incorrect. *See especially* ¶¶31-33 and 25-28 of the Stipulation, R. Vol. 1 C-00039–C-00040. Amcor's argument does not meet its burden of proof. *Ameren Illinois Co v. Illinois Commerce Commission*, 2012 IL App (4th) 100962, ¶129.

Amcor again argues that a portion of a particular paragraph of the Commission Order on pages 20-21 has no support in the record and, therefore, violates Section 10-103 of the Act, 220 ILCS 5/10-103 (Brief, p.42). Amcor challenges the Commission's reference to how

meters are tested, *i.e.*, comparison of the existing meter to a standard meter, etc.

The Commission is an expert body. *Archer-Daniels-Midland Co. v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397 (1998) [the Commission is entitled to great deference because of its expertise in the field of public utilities]; *People ex rel. O'Malley v. Illinois Commerce Commission*, 239 Ill. App. 3d 368, 392 (2nd Dist. 1993) [The ICC is entitled to great deference additionally because their decisions "result from the deliberations of members who are better qualified to interpret evidence supplied by specialists and technicians."] The Commission created the testing rule, 83 Ill. Adm. Code 410 and knows how an electric meter is tested against a standard meter. 83 Ill. Adm. Code 410.10 Definition: "Reference standards means instruments...", 410.110(a)(6)(F), identification of equipment used to test meter, and 410.140, Testing Facilities and Equipment, with numerous references to the reference standards. See * A-24-A-29. The record reflects that ComEd performed a pre-installation test on July 19, 2005, and a post-removal test on September 24, 2009, facts which have meaning to the Commission (§21, §36 and Ex. I, R. Vol. 1, C-00038, C-00041, and C-00073-C-00081). Thus, the Commission statement in the Order is based on the requirements of 83 Ill. Adm. Code 410 and the Stipulation.

In any event, the Commission does not violate Section 10-103 of the Act, *supra*, when it considers the evidence in light of its own experience which includes general knowledge on how meter tests are conducted. On the contrary, as an administrative body possessing expertise in the field of public utilities, the Commission was entitled to rely on its experience. *Archer-Daniels-Midland Co. v. Illinois Commerce Commission*, 184 Ill. 2d 391, 397 (1998) [the Commission is entitled to great deference because of its expertise in the field of public utilities]; *People ex rel. O'Malley v. Illinois Commerce Commission*, 239 Ill. App. 3d 368, 392 (2nd Dist. 1993) [The ICC is entitled to great deference additionally because their decisions "result from the deliberations of members who are better qualified to interpret evidence supplied by specialists and technicians."]. Thus, Amcor's claims should be rejected.

B. The Commission properly exercised its discretion in denying rehearing on Amcor's belated claim regarding payment to MidAmerican Energy

In its Applications for Rehearing, Amcor raised a new claim that the \$62,190.07 underbilling which is due ComEd should be paid to MidAmerican Energy Co. ("MidAmerican"), rather than to ComEd. R. Vol. 5, C-01203, Order, p.2; Vol. 6, C-01398 and C-01420; Vol. 8, C-01783 and Vol. 8, C-01783. Amcor vaguely cited to the Stipulation (*Id.*, C-01420), inviting the Commission to search the document to

identify support for Amcor's claim. *Contra* 83 Ill. Adm. Code 200.880(b) [issues must be stated specifically, including citation to the document and page], * A-16. The only references to MidAmerican are contained in Exs. B and C to the Stipulation, exhibits to which Amcor did not stipulate as being accurate (*Id.*, C-01427).

Given the limitation agreed to by the parties in considering these attachments to the Stipulation, Amcor improperly attempts to support its arguments by reference to new facts. In order for these "facts" to be properly of record, Amcor needed to provide both an explanation as to why its proposed evidence was not previously adduced and a verification of that evidence. R. Vol. 6, C-01394-1473 and Vol. 8, C-01747-1841. 83 Ill. Adm. Code 200.880(a) and (c), * A-16.

Amcor's reference to Mr. Sula's affidavit does not provide its application for rehearing its missing support. Mr. Sula's affidavit was not submitted with Amcor's application for rehearing, but instead was offered five days later (May 7, 2014) with its Second Motion for Stay. R. Vol. 6, C-01482-84. Mr. Sula's affidavit was filed more than 30 days from the service date of the Commission Order of April 3, 2014. R. Vol. 5, C-01228. *People ex rel. Illinois Highway Transportation Co. v. Biggs*, 402 Ill. 401, 407 (1949) ["The rehearing step is a part of an orderly plan set up by the legislature for judicial review of the

commission's rulings...and neither the commission nor the parties can extend it"].

Given the limited time (20 days) that the Commission has to consider whether to grant an application for rehearing under 220 ILCS 5/10-113(a) and that ComEd has no practical method to respond to a new issue in an application for rehearing, Amcor's novel claim appears to be dilatory in the absence of any explanation excusing Amcor's failure to raise this issue earlier in the proceeding. 83 Ill. Adm. Code 200.880(a)-(c), * A-16. The ALJ's memo to the Commissioners appropriately recognized that Amcor's claim lacked merit. R. Vol. 6, C-01509. Moreover, the record reflects that ComEd does not intend to bill Amcor directly. R. Vol. 6, C-01507-C-01508.

Further, there is a limitation to the scope of complaint cases before the Commission. The Commission cannot issue an order which is broader than the relief sought in the complaint under 220 ILCS 5/10-108 and 10-110. *Peoples Gas Light and Coke Co. v. Illinois Commerce Commission*, 221 Ill. App. 3d 1053, 1060 (1st Dist. 1991) [Commission could not order removal of unpaid charge where complaint did not seek such relief]; *Alton and Southern Railroad v. Illinois Commerce Commission*, 316 Ill. 625, 629-630 (1925) [evidence should be limited to issue made; Commission could not reduce rates for 20 to 30 miles and beyond 30 miles where complaint was limited to rates within 20

miles of relay station]. Amcor's complaint raised no issue concerning ComEd's and MidAmerican's relationship. R. Vol. 1, C-00001-C-00015. The Commission had no authority under 220 ILCS 5/10-108 and 10-110 to consider this issue within the context of Amcor's complaint as filed.

Moreover, the Commission order does not say what Amcor claims. The Commission order does not direct Amcor to pay ComEd. The Commission stated a logical conclusion that, upon denial of Amcor's complaint, Amcor "is responsible for paying the backbill" or "is required to pay the backbill amount." Order, p. 24, 2nd Par., and p. 25, Finding (4); R. Vol. 5, C-01225-26. In contrast, ComEd is directed to accept monthly payments for the backbill. Order, p. 24, 2nd Par., and p. 25 Finding (5), also the 2nd Ordering Paragraph on page 26; *Id.*, C-01225-27. The Commission also refused to get involved in the similarly novel issue concerning late charges. *Id.*

The Commission did not abuse its discretion in denying Amcor's application for rehearing on this novel and heretofore unraised issue. 220 ILCS 5/10-113(a). *See General Motors Acceptance Corp. v. Stoval*, 374 Ill. App. 3d 1064, 1077 (1st Dist. 2007) [denial of motion to reopen proofs will not be disturbed absent a clear abuse of that discretion]; *see generally Stringer v. Packaging Corp. of America*, 351 Ill. App. 3d 1135, 1140-1142 (4th Dist. 2004) [decision on motions to

reconsider and to reopen proofs is subject to abuse of discretion standard; affidavit which did not contain newly discovered evidence could not lawfully be considered with motion to reconsider and can be rejected on motion to reopen proofs].

The Commission did not abuse its discretion in denying rehearing on Amcor's attempt to raise a new issue in its complaint case which did not meet either the Commission's procedural rules or the statutory requirements for rehearing.

CONCLUSION

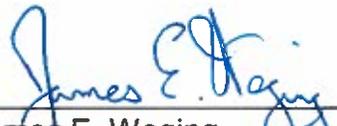
Amcor's Brief seeks relief, in part, which goes beyond administrative review. Amcor's first request for relief (A.) seeks that the Court substitute its judgment for the Commission on the motion in limine which is contrary to administrative review. 220 ILCS 5/10-201(e)(iv) and (v). *People ex rel. Madigan v. Illinois Commerce Commission*, 2011 IL App (1st) 100654, ¶¶9 and ¶55; *Russell v. Board of Education of City of Chicago*, 379 Ill. App. 3d 38, 43 (1st Dist. 2007) ["A reviewing court does not have the authority to modify an administrative agency's decision...the Administrative Review Law empowers a court of review to either affirm or reverse a board decision. No more than that."].

Similarly, Amcor's last request for relief (E.) goes beyond the scope of its complaint as argued above on pages 48-52. *Peoples Gas*

Light and Coke Co. v. Illinois Commerce Commission, 221 Ill. App. 3d 1053, 1060 (1st Dist. 1991); *Alton and Southern Railroad v. Illinois Commerce Commission*, 316 Ill. 625, 629-630 (1925).

In any event, the Commission Order of April 2, 2014, and Order on Rehearing of August 25, 2015, should be sustained on administrative review and, therefore, affirmance of the Commission Orders is warranted.

Respectfully submitted,



James E. Weging
Special Assistant Attorney General
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601-3104
(312) 793-2877
Fax (312) 793-1556
JWEGING@icc.illinois.gov

*Counsel for the Respondent
Illinois Commerce Commission*