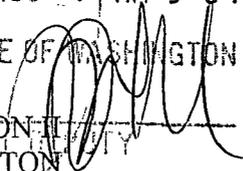


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STATE OF WASHINGTON

BY   
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

SANDRA RAMIREZ

*Respondent*

v.

TOMAS RAMIREZ PENALAZZA

*Appellant*

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RESPONDENT'S RESPONSE BRIEF

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ORIGINAL

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## I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

### Issues Pertaining to Assignments of Error

1. Was the trial court's division of property fair and equitable, and thus soundly within the discretion of the court?
2. Are Appellant's repeated claims that the award of liquid assets to Sandra severely eliminates the working capital of RRI and that the court was aware of this alleged result substantiated by the record?
3. Did the award of maintenance to Sandra rest soundly within the discretion of the court?
4. Was the court's denial of Appellant's motions to amend findings on judgment, new trial, reconsideration and amendment to final judgment pursuant to CR 52(b) & CR 59(a)(4) & (9) soundly within the discretion of the court?
5. Should Sandra be awarded attorney fees and costs for defending this appeal?

## II. STATEMENT OF THE CASE

### A. Substantive Facts Relevant to Appeal

1. Tomas and Sandra Ramirez<sup>1</sup> were married on March 23, 1981 and separated on March 16, 2014. CP 24. The parties were married for 33 years. CP 27.
2. The parties accumulated several assets and two debts during the marriage. CP 24-26.

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<sup>1</sup> The parties' actual names are used pursuant to RAP 10.4(e). First names are used to avoid confusion. No disrespect is intended.

3. Tomas was 53 years old and in average health at trial. CP 27.
4. Tomas presented no evidence or testimony regarding his living expenses. Tomas neither marked nor offered into evidence his financial declaration. CP 354-366.
5. The only debt distributed to Tomas in the decree is the mortgage on Galaxie Dr., CP 37, with a balance owing of \$125,786.32. CP 26.
6. Tomas operates the parties' business, RRI, a C-Corporation, and has done so since its incorporation in 1989. CP 27.
7. Tomas' average annual income for 2011-2013 is \$380,029, which equates to an average monthly income of \$31,669 for 2011-2013. CP 27.
8. Tomas offered no evidence or testimony regarding his 2014 or 2015 income. CP 354-366. Tomas has historically received a W-2 from RRI. Ex. 84.
9. Sandra had the RRI corporate tax return for 2013 fiscal year ending September 30, 2014 admitted into evidence. Ex. 116. The return showed \$162,931 paid out to Tomas for as officer compensation and cash distributions to shareholders (Tomas is the only one) of \$127,900, totaling \$290,831 in income for the year. EX. 116.

10. RRI had total cash of \$1,201,584.87 on deposit in various accounts on or about March 16, 2014, the date of the parties' separation. Ex. 51, 53, 55, 168, 169.
11. By the end of March 2014, Tomas had withdrawn a total of \$667,213.46<sup>2</sup> from the business accounts. CP 25. A total of \$639,972.33 remained on deposit in the RRI accounts after the withdrawals were taken. Ex. 51, 53, 55, 168, 169.
12. Jeffery Robertson, RRI's accountant, told Tomas to transfer the money to another bank account. CP 396.
13. Tomas withdraw the money in the form of cashier's checks made out to either himself or RRI, CP 296, which were subsequently deposited into an attorney trust account. CP 224-226. The \$667,213.46 in dividends Tomas removed from the business have never been returned or loaned back to the business for its use. CP 25, 36, 224-226.
14. On May 29, 2014, Tomas withdrew an additional \$65,027.28 from Wells Fargo business account ending in 0211. Ex. 54.

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<sup>2</sup> The gross amount withdrawn was \$667,423.33 from which \$209.87 was deducted by the bank for fees and penalties assessed, leaving a net dividend of \$667,213.46, which was the value adopted by the court by stipulation of the parties. Additional money was withdrawn from the parties' personal accounts.

15. RRI statements for December 2014 and January 2015<sup>3</sup> collectively show RRI had total cash on deposit in the amount of \$584,169.49<sup>4</sup>. Ex. 51, 164-167. This does not include the \$65,027.28 withdrawal Tomas took on May 29, 2014 that remains unaccounted for, which would increase the total cash on deposit to \$649,196.77.
16. Sandra was 51 years old and in average health at trial. CP 27
17. Early in the marriage Sandra worked odd jobs outside the home and cared for their three eldest children, all now adults. CP 27.
18. Sandra earned an AA in medical office assistant studies from Centralia College in the early 90s. CP 27.
19. Upon graduation, she worked part-time at Centralia Providence Hospital eventually earning \$15.00 per hour at her top pay. CP 27.
20. The fourth child, Tulsa, was born December 13, 2001. CP 27.
21. About two years after Tulsa was born, the parties decided it would be best if she stayed home full-time to raise Tulsa. CP

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<sup>3</sup> These are the most recent statements Sandra had from RRI at the time of trial. She presented them in rebuttal because Tomas, after stipulating to the value of RRI, got on the stand and attempted to allege RRI was failing.

<sup>4</sup> RRI had a Key Bank Business COD ending xxxx-0352 in the amount of \$15,045.93 as of March 2014. Ex. 51. This amount included in the total cash on deposit, at the 2014 value because Sandra was not provided with a more recent statement in discovery.

27. RRI was quite successful so her income was not needed.  
CP 27.
22. Due to the success of the business the parties did not anticipate Sandra would need to work ever again. CP 27. As such, she has not worked outside of the home since approximately 2003 and has not obtained any further training or education. CP 27.
23. The court found Sandra cannot maintain her lifestyle or become self-supporting without assistance from Tomas. CP 27.
24. The court determined Sandra has an ongoing need for spousal maintenance for 11 years and Tomas has the ability to pay spousal maintenance for 11 years as he is being awardee the parties' business, which has historically afforded the parties a very high standard of living for the community in which they live. CP 27.
25. Sandra was awarded maintenance in the amount of \$10,000 per month for no less than 5 years and no more than 11 years. CP 38. A review of the maintenance is scheduled for hearing on the fifth anniversary of the order. CP 38.
26. Sandra received net assets of \$1,540,696.94. CP 24-26, 35-36; Appendix A.

27. Tomas received net assets of \$1,577,646.58 after the RRI value reduction of \$667,213.46. CP 24-26, 36-37; Appendix A.

B. Procedural Facts Relevant to Case

1. Findings of Fact and Conclusions of Law and a Decree of Dissolution were entered on July 22, 2015. CP 23-44
2. Tomas filed a post-trial Motion to Amend Findings on Judgment, New Trial, Reconsideration and Amendment to Final Judgment pursuant to CR 52(b)/CR 59(a)(4) & (9) (on August 3, 2015. 74-76.
3. The trial court heard argument on the post-trial motion on September 15, 2015. VRP 30-80.
4. The order denying the post-trial motions was entered on November 11, 2105. CP 180-182.
5. Tomas filed his Notice of Appeal on December 10, 2015. CP 183-209.

III. ARGUMENT

A. The trial court's division of property was fair and equitable, and thus soundly within the discretion of the court.

1. Washington law affords the trial court wide discretion in distributing property in a marital dissolution action.

Washington law states, in pertinent part:

In a proceeding for dissolution of the marriage the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors including, but not limited to:

- (1) The nature and extent of the community property;
- (2) The nature and extent of the separate property;
- (3) The duration of the marriage; and
- (4) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to a spouse with whom the children reside the majority of the time.

RCW 26.09.080. In addition, “[t]he parties’ relative health, age, education, and employability are considered in property divisions and the ultimate concern is the economic condition of the parties upon the dissolution decree.” *In re the Marriage of Crosetto*, 82 Wn. App. 545, 556, 918 P.2d 954 (Div. II, 1996), citing *In re Marriage of Matthews*, 70 Wn. App. 116, 121, 853 P.2d 462, review denied, 122 Wn.2d 1021, 863 P.2d 1353 (1993). “The trial court may also consider maintenance when making a property distribution.” *Crosetto*, 82 Wn. App. at 557.

“Wide discretion and latitude rests with the trial court in making the determination that a particular division of property meets the ‘just and equitable’ standard found in RCW 26.09.080.” *Davis v. Davis*, 13 Wn. App. 812, 813, 537 P.2d 1048 (1975) (citations omitted). “An equitable

division of property does not require mathematical precision, but rather fairness, based upon a consideration of all the circumstances of the marriage, both past and present, and an evaluation of the future needs of parties.” *Crosetto*, 82 Wn. App. at 556, citing *In re Marriage of Rink*, 18 Wn. App. 549, 553, 571 P.2d 210 (1977) (other citations omitted). “A trial court’s division of marital property will not be reversed absent a showing of manifest abuse of discretion.” *Crosetto*, at 556. “A trial court abuses its discretion when its decision is manifestly unreasonable, or based on untenable grounds, or exercised for untenable reasons.” *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006). If reasonable persons can honestly differ on the question of whether a trial court’s disposition of property and liabilities is just and equitable, the appellate court will hold that the trial court did not abuse its discretion. *See Rehak v. Rehak*, 1 Wn. App. 963, 965, 465 P.2d 687 (1970).

Findings to which no assignment of error is taken are considered verities on appeal. *Davis v. Dept. of Labor & Industries*, 94 Wn.2d 119, 615 P.2d 1279 (1980); *McCleary v. State*, 173 Wn.2d 477, 514, 269 P.3d 227 (2012) (other citations omitted). Tomas has not assigned error to any of the findings of fact adopted by the trial court, thus they are all verities.

A review of trial court’s findings indicate the court considered all relevant factors and circumstances of the parties raised at trial in arriving

at a fair and equitable award of property. The court adopted the parties' agreed property values and debt balances as of the time of trial. Ex. 155; CP 24-26. The parties agree all property was community in nature, which the court concluded. CP 24-26. The court made specific findings as to the length of the marriage, each party's age, relative health, and employability, the wife's education, and the success of the business run by and ultimately awarded to Tomas. CP 27. Attached as *Appendix A* is a chart showing the final distribution of assets and debts by value and the resulting net value of each party's award based on the Findings of Fact and Conclusions of Law and Decree of Dissolution. CP 24-26, 35-37. The total net value of all property awarded to Sandra is \$1,540,696.94, which equates to 49.4% of total net assets.<sup>2</sup> CP 24-26, 35-36; *Appendix A*. The total net value of all property awarded to Tomas is \$1,577,646.58, which equates to 50.6% of total net assets. CP 24-26, 36-37; *Appendix A*. At presentation, Sandra asked the court to address a (cash) offset in her favor to equalize the net award to each party. 7/22/2015 VRP, 16. In response, Tomas' attorney stated, "...I would ask the Court to affirm what you – what your decision about division of assets was. I think you made that decision, and *I think it's inappropriate to come back and ask you to change it or add more to one side or the other.*" 07/22/2015 VRP, 19 (Emphasis added). Mr. Ramirez was clearly satisfied with the

distribution, opposed changes or either party receiving more, a stark contrast to his position on appeal.

2. There is no merit to Tomas' repeated claims that the award of liquid assets to Sandra severely eliminates the working capital of RRI and that the court was aware of this alleged result.

Tomas asserts the award of nearly all of the liquid assets to Sandra was unfair. He claims the award of liquid assets to Sandra severely eliminated the operating capital of RRI, limited its ability to operate, and left him without the financial ability to pay allegedly substantial continuing financial burdens placed upon him, and that the court was fully aware of the same. However, Tomas offers no legal authority for his position and fails to cite to any evidence before the court at trial that even remotely substantiate his claims.

“The trial court was obligated to decide the case on the evidence submitted to it.” *Jet Boats, Inc., v. Puget Sound National Bank*, 44 Wn. App. 32, 42, 721 P.2d 18 (1986); *Biehn v. Lyon*, 29 Wn.2d 750, 758, 189 P.2d 482 (Wash. 1948). No evidence was presented to the trial court to support Tomas' thematic contention, on which he hangs his appeal. Tomas, Jeffrey Robertson (RRI's CPA) and Rikki Ortiz (Jeffrey Robertson's assistant) each testified during trial, and each could have provided testimony and other evidence regarding RRI's working capital, operational needs, and how or why awarding the RRI dividends to Sandra

would have any impact on RRI whatsoever. Yet, they did not. Additionally, despite having only six (6) documents related to RRI marked for identification, Tomas did not offer them into evidence or present any other evidence on the topic. CP 362-366.

3. RRI's liquid assets remained consistent providing RRI with ample working capital to maintain operations at historic levels.

On or about March 16, 2014, RRI had liquid assets on deposit in the amount of \$1,201,584.87. Ex. 51, 53, 55, 168, 169. Between March 16 and March 31, 2014, Tomas withdrew \$667,213.46<sup>5</sup> from the business accounts, leaving \$639,972.33 on deposit. Ex 51, 53, 55, 63, 64, 66, 168, 169; CP 25. The \$667,213.46 was never turned back to RRI and ultimately ended up in trust pending trial<sup>6</sup>. CP 25, 36, 224-226, 296. On May 29, 2014, Tomas withdrew an additional \$65,027.28 from Wells Fargo business account ending in 0211. Ex. 54. This money remains unaccounted for.

Thereafter, RRI continued to successfully operate as evidenced by the December 2014 and January 2015 statements<sup>7</sup>, which collectively

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<sup>5</sup> \$667,423.33 was the gross amount taken from which \$209.87 was retained by the bank as fees and penalties, leaving a net dividend of \$667,213.46, which was the value adopted by the court by stipulation of the parties. Ex. 155.

<sup>6</sup> Tomas had also removed nearly \$200,000 from the parties' personal accounts which ended up in trust as well, bringing the total trust balance well over \$800,000. CP 225.

show RRI had liquid assets on deposit in the amount of \$584,169.49<sup>8</sup>. Ex. 164-167. These liquid assets plus the \$65,027.28 Tomas withdrew on May 29, 2014, which Tomas has not alleged he spent, brings RRI's liquid assets to \$649,196.77 as of January 2015; \$9224.44 more than was on deposit at the end of March 2014. Clearly, the \$667,213.46 was not necessary to the operations of RRI at RRI continued to maintain a consistent level of liquidity after Tomas withdrew the money. It is also clear the added burden of temporary child support and maintenance on Tomas did not impact RRI's liquidity. He was able to cover his own living expenses (whatever they are), pay Sandra temporary support and maintenance of \$11,500 per month and still maintain a consistent level of RRI liquidity.

4. Tomas reliance on pretrial filings is improper as they were not offered into evidence at trial.

Tomas asserts the court knew through pretrial proceedings the damaging effect the alleged depletion of working capital was having on the ability of RRI to operate. He cites to the declaration of RRI accountant, Jeffrey Robertson, filed with the court on November 12, 2014.

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<sup>7</sup> These are the most recent statements Sandra had from RRI at the time of trial. CP 86. She presented them in rebuttal because Tomas, after stipulating to the value of RRI, got on the stand and attempted to allege RRI was failing. CP 86.

<sup>8</sup> RRI had a Key Bank Business COD ending xxx-0352 in the amount of \$15,045.93 as of March 2014. Ex. 51. This amount included in the total cash on deposit, at the 2014 value because Sandra was not provided with a more recent statement in discovery.

*App. Brief*, at 9; CP 230-247. The record shows no offer of the declaration into evidence, no foundation laid, and no opportunity for Sandra to object to its admission. The declaration is thus new evidence governed by RAP 9.11. All six conditions of RAP 9.11 must be met before the court will grant the extraordinary relief of accepting new evidence on appeal. *State v. Fuentes*, 179 Wn.2d 808, 827, 318 P.3d 257 (2014). No such request or showing has been made. This Court should not consider the declaration on review.

5. Each party received substantial liquid assets of the marital estate and RRI.

Tomas statement that Sandra received virtually all liquid assets of the community and RRI is in error. He was awarded all ownership in RRI, including the liquid assets totaling over \$600,000 as of January 2015, as well as nearly \$50,000 in personal accounts. CP 36-37; *Appendix A*. Sandra received the \$667,213.46 in RRI dividends and \$139,509.79 in personal accounts. CP 36-37; *Appendix A*.

Tomas offered no RRI information at trial let alone evidence of its liquid assets at the time of trial in June 2015. Had more recent bank statements, profit and loss statements and other evidence shown a decrease in RRI liquid assets or substantiated a claim (which was never raised at trial) that RRI could no longer operate with liquid assets and working

capital of approximately \$600,000, as it had from March 2014 through June 2015, this evidence could and should have been offered to the court at trial. The fact that no such evidence was offered is a clear indication that the potential evidence did not fit Tomas' narrative that the business was suffering.

6. The court did consider the amount by which the fair market value of RRI would be reduced in awarding the RRI dividends to Sandra.

Tomas claims, for the first time on appeal, the division of assets by the Court did not include consideration of the amount by which removal of \$667,213.46 from RRI's balance sheet reduced the value of that company. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). As such the court should decline consideration of this issue.

Alternatively, the assertion is clearly contradicted by the record. The pure mathematics of the final distribution show the court contemplated and effectively ordered a reduction in RRI's FMV upon awarding the dividends to Sandra. *Appendix A*. The net values awarded to each party as reflected in *Appendix A* were (1) relied on and affirmed by both parties the court at presentation, VRP 16-19; and (2) set forth in Sandra's response to Tomas' post-trial motions without objection or exception, CP 84.

7. The outcome of the dividend award was not unforeseen.

Tomas' assertion that he could not have known the implication of the division is without merit. The trial court said it best, "It seems to me to be blatantly obvious going into the trial that [the money in trust] was going to be a source of division of asset." VRP 42. The court asked:

[H]ow can you say that the decision of the court took six hundred and some thousand dollars away from [RRI] when the testimony was that Mr. Ramirez himself removed that money from the company bank accounts, and gave the cashier's checks to his accountant?

...

The question is, how are you going to account for it and how are you going to deal with it?

VRP 35-36. Further, the proposed distribution of RRI and the dividends was addressed in Sandra's trial brief along with the mathematics of the resulting FMVs. CP 296-97, 323. The fact that Tomas chose not to present evidence at trial regarding what he thought the impact of such a division would have on RRI does not make it unforeseen.

8. There is no tax implication to RRI in the court awarded the RRI dividends to Sandra.

Tomas claims, also for the first time on appeal, the court not only removed \$667,213.46 from the value of [RRI] but added a significant tax obligation to that company which would accompany transfer of those funds to Sandra as a dividend. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a).

As the trial court stated:

[Tomas'] own witness was testifying about the tax consequences and how that money had to be regarded, which was either salary or dividends. I don't understand how [Tomas] can now in essence repudiate the testimony that was given by your witness at trial. having gone along with it and not made the argument at the time that the Court was considering the property division."

VRP 68. In truth, there is no tax obligation to RRI by deeming the \$667,213.46 dividends. Tomas called Keith Meyers, CPA to testify about this very issue. (Tomas failed to mention Keith Meyers' testimony in his Opening Brief or provide the VRP of Mr. Meyers' testimony at trial, thus leaving Sandra with the task of supplementing the record.) Mr. Meyers confirmed there would be no tax paid by RRI on the payment of dividends to part of the marital community that owns it or on the transfer of said dividends between the parties pursuant to divorce. 06/15/2015 VRP, 13. Mr. Meyers testimony put to rest Tomas' claims as to tax liability before they were ever made, making his claim deceitful and frivolous considering he concealed Mr. Meyers' testimony from this Court.

It should be noted Mr. Meyers recommended the \$667,213.46 be considered a dividend. He indicated, "It's the easiest way to get the money out of the corporation," 06/15/2015 VRP 15, and confirmed taking the withdrawals as a qualified dividend it the least detrimental tax implication in this situation. 06/15/2015 VRP 17-18. Mr. Meyers also

testified the only person than can obtain a dividend in the eyes of the IRS is the shareholder and it was his understanding Mr. Ramirez is the only shareholder. 06/15/2015 VRP 20.

9. There is no basis to set aside a stipulation of values.

Tomas spends several pages addressing why the value stipulation, Ex. 155, should have been set aside, however, he fails to point out to this Court the fact that he never asked the court to set aside the stipulation either at trial or on reconsideration. Therefore, this is a new issue that this Court may, and should, refuse to hear. RAP 2.5(a).

B. The award of maintenance to Sandra rested soundly within the discretion of the court.

The court has broad discretion in awarding spousal maintenance in a marital dissolution action. “The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors...” RCW 26.09.090(1). Relevant factors include but are not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find

employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

RCW 26.09.090(1). The only limitation on the amount and duration of maintenance in a dissolution of marriage action is that the award must be just. *See Marriage of Wright*, 179 Wn. App. 257, 319 P.3d 45, *reconsideration denied, review denied* 180 Wn.2d 1019, 327 P.3d 54 (2013). As suggested by Judge Robert Windsor, in a long-term marriage (25 years or more), the court should look forward to try to place the spouses in an economic position where the parties can be expected to be in roughly equal financial position for the rest of their lives. Windsor, *Guidelines for the Exercise of Judicial Discretion in Marriage Dissolutions*, WASH ST. B. NEWS, Jan. 1982, at 14,16.

While Tomas takes issue with whether there are sufficient facts to support Sandra's need for maintenance, he devotes no portion of his

Opening Brief to the issue. The trial court not only considered each of the listed factors, but also made substantial findings of fact with respect to each of the statutory factors and others the court deemed relevant. CP 27. The findings are verities. Sandra's financial declaration indicated her monthly need as \$13,703.57 per month. Ex. 145. Tomas did not dispute the contents of Sandra's financial declaration at trial.

On the other hand, Tomas did not offer a financial declaration for the court's consideration. CP 354-366. In fact, he did not offer any financial information at trial; no pay stubs, no W-2s, no bank statements, no debt information, nothing. CP 354-366. As previously stated, the trial court is obligated to decide the case on the evidence submitted to it. *Jet Boats, Inc., v. Puget Sound National Bank*, 44 Wn. App. at 42; *Biehn*, 29 Wn.2d at 758. Tomas chose not to offer any evidence regarding his income and expenses leaving the court with the information it had before it at trial to make its determination. The findings indicate Tomas earned an average monthly income of \$31,669 for 2011-2013. CP 27. As addressed in detail above, Tomas was left with a viable business, which the court found historically afforded the parties a very high standard of living for the community in which they live. CP 27. Tomas left the marriage with one debt – the mortgage on the Galaxie Dr. home. He asserts no other financial obligations.

There can be no doubt the court acted within its discretion in awarding maintenance in the amount of \$10,000 for no less than 5 years and no more than 11 years with a review after 5 years. CP 38. All of the evidence and the court's findings substantiate Sandra's need for maintenance, Tomas' ability to pay maintenance, and the court's ultimate award of maintenance. CP 27.

C. The court properly denied of Appellant's motions to amend findings on judgment, new trial, reconsideration and amendment to final judgment pursuant to CR 52(b) & CR 59(a)(4) & (9).

Tomas claims the court erred in denying his post-trial motions for amendment of findings on judgment, new trial, reconsideration and amendment to final judgment pursuant to CR 52(b)/CR 59(a)(4),(9). At the outset, it should be noted Tomas makes no reference to CR 52 or CR 59(a)(4) in his Opening Brief. His only assertion is that substantial justice has not been done thus warranting reconsideration pursuant to CR 59(a)(9). *App. Brief*, 16. As such, Sandra will respond only to his CR 59(a)(9) claim as all other post-trial claims appear to have been abandoned.

Tomas' theory as to why substantial justice has not been done is completely different on appeal than he asserted in the trial court. Before the trial court, Tomas stated:

CR59(a)(9): Respondent Tomas Ramirez asserts that substantial justice was not done in this case because he was prevented by the court from presenting evidence through his business accountant of the current financial status of [RRI], the operating capital needs of that company, and the net result which would occur when all of the money when all of the money [sic] held in trust on behalf of Sandra Ramirez was awarded to her by way of a final judgment.

CP 76. Nowhere in his Opening Brief does Tomas assert Mr. Robertson was not allowed to testify as a lay or expert witness and he been allowed to so testify the court would have concluded that the property division was not fair and equitable. As such, the issue of whether substantial justice has been done as determined by the trial court has not been appealed to this Court and with good reason; the record expressly contradicts Tomas' position on the issue. CP 96, 377.

Tomas now claims for the first time on appeal that substantial justice has not been done because:

1. The court had full knowledge that the award of clearly all liquid assets of RRI to Sandra would limit the ability of RRI to continue operations; and
2. He conclusively demonstrated that the division of marital property and the imposition of substantial spousal maintenance placed him in a position of bankruptcy.

*App. Brief*, 1. At no time did Tomas make either of these assertions in his motion for reconsideration. The trial court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). In this case,

the court should refuse to review these claims. “The grant or denial of a CR 59 motion is reviewed for abuse of discretion with the caveat that alleged errors of law are viewed de novo.” *Worden v. Smith*, 178 Wn. App. 309, 322-333, 14 P.3d 1125 (2013); *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). As the trial court has never had the opportunity to address or rule on these new issues, there is no way to determine whether the court abused its discretion, rendering review on appeal mute.

Alternatively, this court should affirm the trial court’s denial of the motion for reconsideration. “[O]n a motion for reconsideration based on CR 59(a)(5)-(9), the court must base its decision on the evidence it already heard at trial.” *Jet Boats, Inc.*, at 42. Therefore, all additional information Tomas sought to have the court consider relative to his CR 59(a)(9) motion was not properly before the court and should not have been considered even if Tomas had raised these issues in the trial court. Nor, should the additional information be considered on review as it is new evidence governed by RAP 9.11, with which Tomas has not attempted to comply. The evidence that should be excluded includes: CP 45-60: a Declaration of Tomas Ramirez with attachments filed August 3, 2015; CP 61-73: Declaration of Jeffrey Robertson with attachments filed August 3, 2015; CP 107-177: Supplemental Declaration of Jeffrey Robertson filed

September 15, 2015; CP 230-247: Declaration of Jeffrey Robertson filed November 12, 2014; and CP 248-256: Federal Bankruptcy Petition Filing of Tomas Ramirez filed November 12, 2015.

Sandra has addressed the record before the trial court as it related to the court having full knowledge that the award of clearly all liquid assets of RRI to Sandra would limit the ability of RRI to continue operations. The court was soundly within its discretion in making the award of property as it did. It is clear that justice had been done and the court did not abuse its discretion in making the award based on the evidence presented at trial.

As for the issue of bankruptcy, this issue was never before the trial court. Since reconsideration pursuant to CR 59(a)(9) must be based on the evidence the trial court heard at trial and the issue of bankruptcy was never raised at trial, the court would have no other option that to deny a request for reconsideration on the ground that substantial justice had not been done. In the event this Court considers the bankruptcy petition, CP 248-256, then Sandra moves this court to admit new evidence pursuant to RAP 2.5, and specifically the *Complaint to Deny the Chapter 7 Discharge* filed by the U.S. Trustee on July 11, 2016 in the United States Bankruptcy Court. Western District of Washington, Case No. 15-45224-PBS, attached as *Appendix B*.

D. The trial court's comments related to Tomas' ongoing contempt.

The comments Tomas attributes to the trial court were made on September 15, 2015, two months after the court issued its ruling on the dissolution of marriage. VRP 71. The comments were made in relation to the contempt review hearing held at the same time as presentation and were more a commentary on Tomas' ongoing contemptuous behavior than anything else. In any event, Tomas cites no authority to support his inference that the court's comment was in some way evidence of bias.

IV. ATTORNEY FEES

"The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this [marital dissolution] chapter . . ." RCW 26.09.140. Upon any appeal, the appellate court may, in its discretion, order a party to pay for the cost to the other party of maintaining the appeal and attorneys' fees in addition to statutory costs. RCW 26.09.140. An award of attorney fees under this section "rests with the sound discretion of the trial court, which must balance the needs of the spouse requesting them with the ability of the other spouse to pay." *Kruger v. Kruger*, 37 Wn. App. 329, 333, 679 P.2d 961 (1984).

“A trial court may also “consider whether additional legal fees were caused by one party's intransigence and award attorney fees on that basis.” *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992) *citing Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969). Awards of attorney fees based upon the intransigence of one party have been granted when the party engaged in “foot-dragging” and “obstruction,” when a party filed repeated motions which were unnecessary; or, simply, when one party made the trial unduly difficult and increased legal costs by his or her actions. *See Eide v. Eide*, 1 Wn. App. 440, 445, 462 P.2d 562 (1969); *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224, *review denied*, 104 Wn.2d 1020 (1985); *In re Marriage of Morrow*, 53 Wn. App. 579, 770 P.2d 197 (1989). “When intransigence is established, the financial resources of the spouse seeking the award are irrelevant.” *Greenlee*, at 708, *citing In re Marriage of Morrow*, 53 Wn. App. 579, 590, 770 P.2d 197 (1989).

In the present case, Sandra has the need for assistance and Tomas has the ability to pay. Sandra has a monthly need of \$13,703.57 per month. She is supposed to receive \$10,000 per month in maintenance, CP 38, and \$1,232.29 per month in child support, CP 9, for total monthly income of \$11,232.29. This leaves her with a monthly deficit of \$2471.28, which substantiates her need for attorney fees and costs. Even

after payment of maintenance and child support Tomas has \$20,436.71 in average gross income per month, CP 27, and one small mortgage, CP 37. Tomas has far superior income and the ability to pay attorney fees and costs pursuant to RCW 26.09.140.

More importantly, the filing of this appeal is simply part of Tomas' ongoing intransigence as summarized during the hearing on reconsideration. VRP 57-68; 71-73. An award of fees and costs in Sandra's favor is warranted and requested.

#### V. CONCLUSION

The trial court's division of property, award of maintenance and denial of reconsideration were soundly within the discretion of the court. Tomas improperly raises several issues for the first time on appeal and attempts to reply on new evidence which he has not properly sought to have this Court consider. Tomas offers no authority for most of his claims and only rarely cites to the record. Tomas presented no evidence at trial that the award would severely eliminate the operating capital of RRI. Tomas presented no evidence at trial to support his contention that the division left him without the financial ability to pay his financial obligations.

The trial court's decisions should be affirmed and attorney fees and costs should be awarded in Sandra's favor pursuant to RCW 26.09.140 and the theory of intransigence.

Respectfully submitted this 29<sup>th</sup> day of July 2016.



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Sydney Guenther, WSBA#45958 for  
Jennifer B. Johnson  
JBJ LAW GROUP  
Attorney for Respondent  
WSBA #28227

# APPENDIX A

**Marriage of Ramirez  
Asset and Debt Chart**

| Property Description                                | FMV             | Debt Owed       | Net Value       | Sandra          | Tomas           |
|---|-----------------|-----------------|-----------------|-----------------|-----------------|
| <b>REAL ESTATE</b>                                  |                 |                 |                 |                 |                 |
| 139 Noble Heights Drive, Chehalis                   | \$ 530,000.00   | \$ -            | \$ 530,000.00   | \$ -            | \$ 530,000.00   |
| 605 Bengal Court, Centralia                         | \$ 195,000.00   | \$ -            | \$ 195,000.00   | \$ 195,000.00   | \$ -            |
| 152 Galaxie Road, Chehalis (Payment = \$947.41/mo)  | \$ 170,000.00   | \$ (125,786.32) | \$ 44,213.68    | \$ -            | \$ 44,213.68    |
| 410 Denny Way, Centralia                            | \$ 80,000.00    | \$ -            | \$ 80,000.00    | \$ 80,000.00    | \$ -            |
| 0 Frogner Road, Adna (14.80 acres)                  | \$ 92,000.00    | \$ -            | \$ 92,000.00    | \$ 92,000.00    | \$ -            |
| 138 Via Solaro, Rancho Mirage                       | \$ 360,000.00   | \$ -            | \$ 360,000.00   | \$ 360,000.00   | \$ -            |
| <b>VEHICLES and RECREATIONAL EQUIPMENT</b>          |                 |                 |                 |                 |                 |
| 2013 Lincoln MKX                                    | \$ 28,400.00    | \$ (21,426.31)  | \$ 6,973.69     | \$ 6,973.69     | \$ -            |
| <b>BANK ACCOUNTS</b>                                |                 |                 |                 |                 |                 |
| Wells Fargo Trust Account (monies removed by Tomas) |                 |                 |                 |                 |                 |
| Balance 05/27/2015 minus business portion*          | \$ 131,577.54   | \$ -            | \$ 131,577.54   | \$ 131,577.54   | \$ -            |
| Wells Fargo Tomas Checking ending 0192              | \$ 29,420.08    | \$ -            | \$ 29,420.08    | \$ -            | \$ 29,420.08    |
| Wells Fargo Tomas Savings ending 4624**             | \$ 10,024.85    | \$ -            | \$ 10,024.85    | \$ -            | \$ 10,024.85    |
| Wells Fargo Joint Checking ending 5947              | \$ 2,457.53     | \$ -            | \$ 2,457.53     | \$ 2,457.53     | \$ -            |
| Wells Fargo Joint Savings ending 9155               | \$ 3,000.99     | \$ -            | \$ 3,000.99     | \$ 3,000.99     | \$ -            |
| Wells Fargo CTO Forestry Savings ending 3068        | \$ 10,001.43    | \$ -            | \$ 10,001.43    | \$ -            | \$ 10,001.43    |
| <b>BUSINESS</b>                                     |                 |                 |                 |                 |                 |
| Ramirez Reforestation, Inc.*                        | \$ 1,890,000.00 | \$ -            | \$ 1,619,500.00 | \$ 667,213.46   | \$ 952,286.54   |
| <b>OTHER</b>  |                 |                 |                 |                 |                 |
| 2009 Federal income tax refund                      | \$ 2,473.73     |                 | \$ 2,473.73     | \$ 2,473.73     | \$ -            |
| Registered 17 Hands Quarter Horse                   | \$ 1,700.00     | \$ -            | \$ 1,700.00     | \$ -            | \$ 1,700.00     |
| Airline Miles                                       |                 |                 |                 | x               | x               |
| <b>TOTALS</b>                                       | \$ 3,531,882.42 | \$ (147,212.63) | \$ 3,118,343.52 | \$ 1,540,696.94 | \$ 1,577,646.58 |

\*The sum of the two amounts awarded to Sandra is the balance in trust.

**APPENDIX B**

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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON

In re  
TOMAS RAMIREZ,  
  
Debtor.  
  
UNITED STATES TRUSTEE,  
  
Plaintiff,  
  
v.  
TOMAS RAMIREZ,  
  
Defendant.

Case No. 15-45224-PBS  
Adv. Case No.  
COMPLAINT TO DENY THE  
CHAPTER 7 DISCHARGE

The United States Trustee asserts claims against Tomas Ramirez (“Defendant”) for the denial of his discharge under § 727 of the Bankruptcy Code, as follows:

**I. PARTIES**

1. Plaintiff is the Acting United States Trustee for Region 18, Gail Brehm Geiger, which includes the Western District of Washington. The United States Trustee has standing to bring this action under 11 U.S.C. §§ 307 and 727(c)(1).

COMPLAINT TO DENY DISCHARGE - 1

Office of the United States Trustee  
700 Stewart Street  
Suite 5103  
Seattle, WA 98101-1271  
206-553-2000, 206-553-2566 (fax)

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2. Defendant is the debtor in the chapter 7 bankruptcy case proceeding as Case No. 15-45224-PBS (the "Bankruptcy Case").

## II. JURISDICTION AND VENUE

3. This is an adversary proceeding to deny Defendant's discharge, brought pursuant to 11 U.S.C. § 727 (a)(4).

4. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334.

5. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(J).

6. Venue is proper pursuant to 28 U.S.C. § 1409(a).

## III. FACTUAL ALLEGATIONS

### A. Factual Background Prior to Bankruptcy Case Filing

7. Defendant is the sole owner of a reforestation firm called Ramirez Reforestation, Inc. ("RRI").

8. Defendant has operated RRI since the 1980s.

9. RRI has generated millions of dollars in revenue and the business has supported Defendant and his family for years.

10. In March 2014, Defendant's former spouse, Sandra Ramirez, filed for divorce from Defendant. The Ramirezes divorce case proceeded in Lewis County Superior Court as Case No. 14-3-00123-3 (the "Divorce Case").

11. The Divorce Case was contentious. The Ramirezes disputed the value and appropriate division of marital assets and spousal support.

12. During the Divorce Case, Defendant claimed that the parties' real property located at 139 Noble Heights Drive in Chehalis, Washington (the "Noble Heights Property") was contaminated.

13. In or around August of 2014, Defendant engaged a professional firm, Expert Chemical Analysis ("ECA") to test a grass sample from the Noble Heights Property for contamination.

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14. ECA issued a report to Defendant dated August 21, 2014.

15. The report indicates that the sample contained Bixin, a yellow “carotenoid pigment,” mineral oil, and castor oil. The words “nontoxic” appeared after each of these substances on the report, and the report further states “[w]e did not find any obvious toxic compounds associated with the grass sample.”

16. Defendant reported alleged contamination at the Noble Heights Property to the county or other local authorities, who did not take or order any remediation or clean-up action at the property.

17. In advance of the June 2015 trial in the Divorce Case, Defendant obtained a professional valuation for RRI, which placed its value at \$1.3 million.

18. On June 2, 2015, Defendant and Mrs. Ramirez, through counsel, stipulated to values of certain of their assets, including:

a. That the Noble Heights Property was worth \$530,000 as of November 19, 2014, which is the appraised value of the property according to an appraisal of the same date prepared by Scott Lee Hamilton, Hamilton Appraisals, LLC; and

b. That RRI was worth \$1,619,500 as of March 16, 2014.

19. Trial was held in the Divorce Case on or around June 2, 2015.

20. At trial, Mrs. Ramirez called an expert witness to testify regarding the alleged contamination at the Noble Heights Property.

21. On information and belief, the expert witness called by Mrs. Ramirez testified that the property was not contaminated.

22. The Superior Court entered a Decree of Dissolution in the Divorce Case on July 22, 2015.

23. Under the Decree of Dissolution, Defendant was awarded, among other things, the Noble Heights Property, a second real property located at 152 Galaxie Road in Chehalis, Washington, and 100% ownership of RRI.

1  
2 24. Defendant was also awarded the following personal property items, as described and  
3 attributed values in Exhibit A to the Decree of Dissolution:

| Item                                       | Value  |
|--|--------|
| Samsung TV                                 | \$250  |
| Pioneer TV                                 | \$250  |
| Leather Couch & Loveseat in living room    | \$250  |
| Custom made chair in living room           | \$250  |
| Dining table w/ 6 side chairs & arm chairs | \$500  |
| Entertainment center                       | \$250  |
| Queen bed with headboard                   | \$250  |
| Office furniture                           | \$500  |
| Apple Computer (laptop)                    | \$250  |
| Apple Computer (desktop)                   | \$500  |
| Surround sound system in rec room          | \$250  |
| Pampered Chef Cookware                     | \$500  |
| Diamond ring                               | \$500  |
| Diamond ring                               | \$1000 |
| Diamond ring                               | \$300  |
| Diamond ring                               | \$300  |
| Watch                                      | \$250  |
| Watch                                      | \$250  |
| Riding lawn tractor w/ attachments         | \$500  |
| Gas powered weed eater                     | \$250  |
| Pressure washer                            | \$250  |
| Air compressor                             | \$250  |
| BBQ  | \$250  |
| Power hand tools                           | \$1000 |
| Rifle                                      | \$250  |
| Rifle                                      | \$250  |
| Saddle                                     | \$1000 |
| Saddle                                     | \$250  |
| Saddle (from Mexico)                       | \$250  |

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20 25. The total value of the personal property awarded to Defendant on Exhibit A to the Decree  
of Dissolution was \$11,100.

21 26. Mrs. Ramirez was awarded, among other things, approximately \$855,000.

22  
23 27. Defendant had withdrawn these funds as cashier's checks from personal and RRI  
24 business bank accounts shortly after Mrs. Ramirez filed for divorce. The cashier's checks were  
25 held without being cashed until fall of 2014.

26 28. In October 2014, the Superior Court ordered Defendant to account for the funds.

1 Defendant filed a "Fund Accounting" in the Divorce Case on or around October 10, 2014, in  
2 which he stated that, in September and October of 2014, the funds were deposited into Wells  
3 Fargo Bank accounts established in the names of Defendant and Sandra Ramirez by Defendant's  
4 counsel in the Divorce Case, Dana Williams.

5 29. On information and belief, the Superior Court ordered that a particular account or  
6 accounts be opened for deposit of the funds pending trial, and ultimately awarded the funds to  
7 Mrs. Ramirez.

8 30. In the Decree of Dissolution, the Superior Court ordered Defendant to claim a total of  
9 \$667,213.46 in dividends from RRI on his tax return.

10 31. In summer 2015, Defendant hired a professional environmental testing firm, Airtech  
11 NW, to test the Noble Heights Property for contamination. Airtech NW issued an Analytical  
12 Report containing its findings on or around July 31, 2015. A copy of that report was filed in the  
13 Bankruptcy Case at Dkt. # 69-1.

14 32. According to Defendant, the Airtech NW report shows that the Noble Heights Property is  
15 contaminated.

16 **B. Bankruptcy Case Background**

17 33. Defendant filed a bankruptcy petition under chapter 7 of the Bankruptcy Code on  
18 November 11, 2015 ("Petition Date").

19 34. Defendant is represented by attorney Brian Budsberg in the Bankruptcy Case.

20 35. On December 4, 2015, Defendant, or someone acting on his behalf, filed his bankruptcy  
21 schedules (the "Schedules," and each a "Schedule") and his Statement of Financial Affairs (the  
22 "SoFA"), which appear on the docket in the Bankruptcy Case as Dkt. # 19.

23 36. On December 4, 2015, Defendant, or someone acting on his behalf, filed an Official  
24 Form 122A-1, Chapter 7 Statement of Your Current Monthly Income (the "Form 122A-1") and  
25 an Official Form 122A-2, Chapter 7 Means Test Calculation, which appear on the docket in the  
26

1 Bankruptcy Case as Dkt. # 20.

2 37. Defendant reviewed and signed the Form 122A-1 and Form 122A-2 before they were  
3 filed.

4 38. On December 14, 2015, Defendant appeared at his section 341 meeting of creditors and  
5 was examined under oath by the chapter 7 trustee, Mark Waldron.

6 39. On February 25, 2016, the Bankruptcy Court entered an order pursuant to Fed. R. Bankr.  
7 P. 2004 permitting the United States Trustee to issue subpoenas to Defendant.

8 40. On March 18, 2016, the United States Trustee served a subpoena directing Defendant to  
9 produce documents, including, but not being limited to:

- 10
- 11 a. Statements for all accounts of Defendant or an entity he controlled from two  
12 years prior to the Petition Date to the present, November 2013 through March  
13 2016 (the "Requested Period");
  - 14 b. Copies of all checks from the responsive accounts that were payable to  
15 Defendant, an entity he controlled, a family member or other relative, or to  
16 cash, or that were written in any amount of \$5,000 or more;
  - 17 c. Copies of any cashier's checks obtained by Defendant or an entity he  
18 controlled during the Requested Period;
  - 19 d. Documents pertaining to Defendant's court-ordered domestic support  
20 obligations and orders directing him or an entity he controls to make payment  
21 to any person.

22 41. The deadline to produce documents pursuant to the subpoena was March 28, 2016.

23 42. Defendant did not produce documents until on or around May 1, 2016, the approximate  
24 date that Defendant's hard copy documents were shipped to the United States Trustee.

25 43. On May 16, 2016, Defendant, or someone acting on his behalf, filed an amended  
26 Statement of Financial Affairs (the "First Amended SoFA"), which appears on the docket in the  
27 Bankruptcy Case as Dkt. # 71.

28 44. On May 18, 2016, Defendant, or someone acting on his behalf, filed amended schedules  
29 (the "First Amended Schedules") and a second amended Statement of Financial Affairs ("Second  
30 Amended SoFA"), which appear on the docket in the Bankruptcy Case as Dkt. # 74.

COMPLAINT TO DENY DISCHARGE - 6

Office of the United States Trustee  
700 Stewart Street  
Suite 5103  
Seattle, WA 98101-1271  
206-553-2000, 206-553-2566 (fax)

1 45. On June 28, 2016, Defendant, or someone acting on his behalf, filed amended schedules  
2 (the "Second Amended Schedules) and a third amended Statement of Financial Affairs (the  
3 "Third Amended SoFA," and together with the First and Second Amended SoFAs, the  
4 "Amended SoFAs"), which appear on the docket in the Bankruptcy Case as Dkt. # 82.

5 46. Defendant reviewed and signed a Declaration About an Individual Debtor's Schedules,  
6 which was filed with his Schedules. He also reviewed and signed his SoFA.

7 47. Defendant reviewed and signed an Amendment Cover Sheet for each of the amended  
8 versions of his Schedules and SoFA filed in the Bankruptcy Case.

9 48. On June 3, 2016, counsel to the United States Trustee emailed Defendant's counsel, Mr.  
10 Budsberg, a list of documents that were requested but not produced by Defendant, including  
11 some or all of the account statements requested for 18 identified bank or other financial  
12 accounts, and copies of checks and cashier's checks, the production of which was incomplete.

13 49. On June 6, 2016, counsel for the United States Trustee sent an email to Rene Kaiel, a  
14 paralegal in Mr. Budsberg's, further specifying which documents had still not been produced.

15 50. On June 20, 2016, Ms. Kaiel produced additional documents on behalf of Defendant  
16 through seven emails.

17 51. In an eighth email that day, Ms. Kaiel listed documents that had not yet been produced,  
18 including certain statements for twelve bank accounts and copies of checks.

19 52. That same day, counsel for the United States Trustee responded to Ms. Kaiel via email to  
20 further clarify that most of the requested checks and cashier's checks had still not been produced.

21 53. The United States Trustee examined Defendant under oath on June 29, 2016 (the "Rule  
22 2004 Exam"), at the offices of the chapter 7 trustee, Orlandini & Waldron, in Tacoma,  
23 Washington.

24 54. At the Rule 2004 Exam, Defendant confirmed that he reviewed and signed his Schedules  
25 and SoFA, and that they were accurate.  
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**C. Facts Relevant to the United States Trustee's Claims**

**i. The Noble Heights Property**

55. Defendant lived in the Noble Heights residence from the time of its construction in approximately 2001, until moving out in 2014.

56. Defendant testified at his 341 meeting and at the Rule 2004 Exam that he believes the Noble Heights Property is contaminated. At the Rule 2004 Exam, Defendant testified that the property became contaminated in spring or summer of 2014.

57. Defendant testified that he vacated the property in 2014 due to a variety of health symptoms that he attributed to the contamination

58. Defendant has never been diagnosed with a health problem attributable to the alleged contamination.

59. In the Rule 2004 Exam, Defendant denied knowing how the property became contaminated, denied contaminating the property, and denied directing anyone else to contaminate the property.

60. Defendant states in the Schedules and Amended Schedules that the Noble Heights Property is contaminated. Defendant scheduled the value of the property as "Unknown" in his Schedules and Amended Schedules at Schedule A/B, and states that he "does not believe the property is valued anywhere near the tax assessed value" of \$386,600.

61. Just six months prior to filing his Schedules, Defendant stipulated in the Divorce Case that the Noble Heights Property was worth \$530,000. The value date was as of November 19, 2014.

62. According to Defendant, as of November 19, 2014, the property was already contaminated.

63. In the SoFA, Defendant stated at question 24 that he had been notified by a governmental unit that he may be potentially liable under or in violation of an environmental law, due to

1 "Reports of significant amounts of toxic chemicals" at the Noble Heights Property.

2 64. Defendant repeats that response and statement at question 24 in each of the three  
3 Amended SoFAs.

4 65. At the Rule 2004 Exam, Defendant testified that no government unit has ever notified  
5 him that he is liable under or is in violation of an environmental law related to the Noble Heights  
6 Property.

7 66. According to the report obtained by Defendant in August 2014, the property was not  
8 contaminated.

9 67. According to Mrs. Ramirez's expert who testified at trial in June 2015, the property was  
10 not contaminated.

11 68. On information and belief, the Noble Heights Property is not subject to any secured  
12 claims.

13 69. On information and belief, Defendant has purposefully undervalued the property on his  
14 Schedules, has stated that the property is contaminated in the Schedules, Amended Schedules,  
15 SoFA, and each Amended SoFA, and has testified that the property is contaminated to  
16 discourage the chapter 7 trustee from liquidating that asset.

17 **ii. Ramirez Reforestation, Inc.**

18 70. Defendant scheduled the value of his 100% ownership interest in RRI as \$0.00 in his  
19 Schedules and Amended Schedules.

20 71. In 2015, less than a year before the Petition Date, the professional business valuation  
21 obtained by Defendant found that RRI was worth \$1.3 million.

22 72. Six months before filing his Schedules, Defendant stipulated in the Divorce Case that  
23 RRI was worth over \$1.6 million.

24 73. At the Rule 2004 Exam, Defendant testified that the 2015 business valuation of \$1.3  
25 million was based on the assumption that the \$855,000 he had withdrawn from the company  
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1 would be returned to it, but instead those funds were awarded to Mrs. Ramirez.

2 74. If Defendant accurately testified regarding this assumption in the business valuation, on  
3 information and belief, the business value would be reduced to reflect the loss of the \$855,000,  
4 but it would not be \$0.

5 75. Financial account statements that Defendant produced for RRI show that, for the latest  
6 statement period prior to the Petition Date, RRI had in excess of \$200,000 in liquid assets.

7 76. On information and belief, as of the Petition Date, RRI was paying the expenses of its  
8 operating overhead as they came due and had no secured or other ongoing debt obligations.

9 77. If RRI had no other assets and ceased operating on the Petition Date, its value would still  
10 be greater than \$0.

11 78. On information and belief, Defendant has purposefully undervalued RRI on his  
12 Schedules and Amended Schedules to discourage the chapter 7 trustee from liquidating that  
13 asset.

14 **iii. Unscheduled or Under-Valued Personal Property Assets**

15 79. In the Divorce Case, Defendant was awarded personal property listed on Exhibit A to the  
16 Divorce Decree, which is listed above.

17 80. Defendant failed to disclose some of these assets in his Schedules or Amended  
18 Schedules, including firearms, the BBQ, and air compressor.

19 81. On information and belief, Defendant also failed to disclose a safe in his Schedules or  
20 Amended Schedules.

21 82. Defendant's Schedule A/B includes household goods and furnishings valued at \$2,500 in  
22 the Schedules and Amended Schedules.

23 83. The Amended Schedules state that this value includes the "Riding Mower &  
24 Electronics."

25 84. According to the Divorce Decree, Defendant was awarded household goods valued at  
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1 \$6,000 (including the BBQ, various yard maintenance equipment, and tools).

2 85. Defendants Schedule A/B includes jewelry valued at \$1,500 in the Schedules and  
3 Amended Schedules.

4 86. According to the Divorce Decree, Defendant was awarded four diamond rings and two  
5 watches having a combined value of \$6,000.

6 87. Defendant's Schedule A/B includes "Horse and tack" valued at \$1,800 in the Schedules  
7 and the Amended Schedules.

8 88. Defendant stipulated on or around June 2, 2015, that the horse was worth \$1,700, and  
9 according to Exhibit A to the Divorce Decree, he was awarded three saddles having a combined  
10 value of \$1,500.

11 89. The scheduled values for household goods and furnishings, jewelry, and the horse and  
12 tack either fail to include all of the personal property Defendant owns, including all of the  
13 property awarded to him in the Divorce Case, or the values are artificially low as compared to  
14 the stipulated value or the values ascribed by the Superior Court in the Divorce Decree.

15 **iv. Failure to Disclose Storage Unit**

16 90. Defendant testified at the Rule 2004 Exam that some of the property that he was awarded  
17 in Exhibit A to the Decree of Dissolution is being stored at a rented storage unit.

18 91. Official Form 107 specifically asks debtors to disclose, at question 22, whether they have  
19 stored property in a storage unit or place other than his or her home within the year before filing  
20 for bankruptcy.

21 92. Defendant did not disclose having a storage unit on the SoFA or the Amended SoFAS.

22 93. Defendant's undisclosed storage unit may contain additional, unscheduled property.

23 **v. Failure to Accurately Disclose 2014 and 2015 Income on the SoFA**

24 94. On the SoFA at question 4, Defendant represented that he received:

25 a. \$100,000 in wages in calendar 2015, as of the Petition Date; and  
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b. \$162,763 in wages in calendar 2014.

95. On the SoFA at question 5, Defendant represented that he received no other income from any source for 2015 or the two previous calendar years.

96. The First Amended SoFA is consistent with the SoFA regarding income disclosure at questions 4 and 5, except that Defendant revised his 2015 wage income to \$106,250.

97. The Second and Third Amended SoFAs do not include any further changes to Defendant's responses to questions 4 and 5.

98. Official Form 107, Statement of Financial Affairs for Individuals Filing for Bankruptcy, at question 5, requires debtors to disclose "Gross Income from each source."

99. Defendant testified at the Rule 2004 Exam that the only income he actually received that was or could be used and spent by him during that year was his wage income from RRI.

100. Defendant's 2014 federal income tax return includes the following income:

- a. \$162,763 in "Wages, salaries, tips, etc.";
- b. \$162,045 in dividend income; and
- c. \$35,680 in rental income from real estate.

101. Defendant's 2015 federal income tax return includes the following income:

- a. \$106,250 in "Wages, salaries, tips, etc."; and
- b. \$905,383 in dividends.

102. The dividends Defendant received from RRI and as rental income, according to his tax returns for 2014 and 2015 are inconsistent with his income disclosures in the SoFA and amended SoFAs. He disclosed no dividend income and no rental income on his SoFA or amended SoFAs.

103. Defendant testified that the dividend income shown on his 2014 tax return was not actually received by him during that calendar year; rather, according to Defendant, after the Superior Court ordered him to claim specific dividends on his taxes, Defendant claimed the dividends as ordered, but divided the dividends claimed between his 2014 tax return (which was

1 prepared in November of 2015) and his 2015 tax return on the advice of his tax preparer.

2 104. Defendant's testimony leaves over \$400,000 in dividends shown on his tax returns  
3 unaccounted for, and fails to account for the \$35,680 in net rental income shown on his 2014 tax  
4 return.

5 105. The Superior Court ordered Defendant to claim a total of \$667,213.46 in dividends (from  
6 RRI) on his 2014 tax return. However, the sum total of dividends actually claimed on  
7 Defendant's 2014 and 2015 tax returns is \$1,067,428, a difference of \$400,214.54.

8 106. Defendant did not produce all bank statements subpoenaed by the United States Trustee.

9 107. However, the statements Defendant produced for his bank accounts show that:

10 a. During calendar 2014, Defendant received a total of at least \$245,953 in  
11 deposits and wire transfers into his bank accounts;

12 b. During calendar 2015, Defendant received a total of at least \$277,218 in  
13 deposits and wire transfers into his bank accounts.

14 108. The funds Defendant actually received into his bank accounts are inconsistent with the  
15 2014 and 2015 annual income that he disclosed on the SoFA and amended SoFAs.

16 109. The income claimed on Defendant's tax returns for 2014 and 2015 is also inconsistent  
17 with the deposits into his bank accounts.

18 110. Based on the bank statements that Defendant produced, the United States Trustee cannot  
19 determine the sources of all deposits to Defendant's bank accounts or otherwise reconcile his  
20 deposits with the income amounts disclosed on the SoFA, Amended SoFAs, or with the income  
21 stated on his tax returns.

22 111. Defendant signed the SoFA and the amended SoFAs under penalty of perjury.

23 112. Defendant's testimony at the Rule 2004 Exam was under oath.

24 **vi. Failure to Accurately Disclose Monthly Income on the Form 122A-1**

25 113. According to Defendant's Form 122A-1, Defendant's average income was calculated  
26 based on his having received: \$12,500 in May 2015, \$12,500 in June 2015, \$18,750 in July

1 2015, \$12,500 in August 2015, and \$0 each month for September and October 2015.

2 114. Defendant's six-month average monthly income shown on the Form 122A-1 is \$9,375.

3 115. During the six months preceding his bankruptcy case, his bank statements show deposits  
4 of: \$4,613 in May 2015, \$13,780 in June 2015, \$14,810 in July 2015, \$17,667 in August 2015,  
5 \$28,717 in September 2015, and \$14,115 in October 2015.

6 116. Defendant testified at the 2004 Exam that his only source of income in 2015 was his  
7 wage income from RRI, which is the only source of income disclosed on the SoFA and  
8 Amended SoFAs.

9 117. Defendant's deposits for the six months preceding the Petition Date total \$93,702, for a  
10 six-month monthly average of \$15,617.

11 118. Assuming that Defendant pays payroll taxes on his wage income, his total deposits would  
12 be net income, not gross income that a debtor must disclose on his or her Form 122A-1.

13 119. The funds Defendant actually received into his bank accounts for the six months prior to  
14 his bankruptcy filing, and his testimony at the Rule 2004 Exam that his only income was wage  
15 income from RRI, are inconsistent with the monthly income shown on his Form 122A-1.

16 120. Defendant's testimony at the Rule 2004 Exam was under oath.

17 121. Defendant signed the Form 122A-1 under penalty of perjury.

18 122. Defendant failed to disclose or account for dividends, draws, or other business income  
19 from RRI, during the six months prior to Defendant's bankruptcy on his Form 122A-1.

20 **IV. CLAIMS FOR RELIEF**

21 **FIRST CLAIM FOR RELIEF**

22 **11 U.S.C. § 727(a)(3)**

23 123. Paragraphs 1 through 122 are incorporated here.

24 124. Defendant has concealed, destroyed, mutilated, falsified, or failed to keep or preserve any  
25 recorded information from which his financial condition or business transactions might be  
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ascertained, including but not being limited to: financial account statements, checks, and cashier's checks for Defendant's and RRI's accounts, from which Defendant's income for 2014 and 2015 can be determined.

**SECOND CLAIM FOR RELIEF**

**11 U.S.C. § 727(a)(4)**

125. Paragraphs 1 through 124 are incorporated here.

126. Defendant reviewed and signed his Schedules, Amended Schedules, SoFA, Amended SoFAs, and Form 122A-1.

127. In these documents, or in other documents that Defendant signed and filed in connection with his Bankruptcy Case, Defendant knowingly and fraudulently made one or more false oaths in connection with his case, including but not being limited to:

- a. Purposefully understating the value of his assets, and specifically the Noble Heights Property and the value of his 100% interest in RRI;
- b. Falsely stating that the Noble Heights Property was contaminated to discourage the chapter 7 trustee from liquidating it;
- c. Failing to disclose all dividends, draws, or other business income from RRI, for calendar years 2014 and 2015;
- d. Failing to account for rental income for calendar 2014, on the SoFA or the amended SoFAs.
- e. Failing to disclose all of his income for the six months preceding his filing the Bankruptcy Case;
- f. Failing to disclose assets on Schedule A/B or purposefully understating the value of scheduled personal property, including but not being limited to jewelry, firearms, a safe, and valuable saddles; and
- g. Failing to disclose on the SoFA or Amended SoFAs that he has a storage unit.

128. Defendant testified at the meeting of creditors and the Rule 2004 Exam under oath.

129. Defendant knowingly and fraudulently made a false oath or account in his case by falsely testifying at the meeting of creditors or the Rule 2004 Exam, or both, regarding some or all of

1 the matters listed above.

2 **THIRD CLAIM FOR RELIEF**

3 **11 U.S.C. § 727(a)(5)**

4 130. Paragraphs 1 through 129 are incorporated here.

5 131. Defendant has failed to explain satisfactorily, any loss or deficiency of assets to meet his  
6 liabilities, including but not being limited to: property that he was awarded in the Divorce  
7 Decree but that was not included in his Schedules and dividend and rental income included on  
8 his tax return that was not included in his SoFA or Amended SoFAs.

9 **V. PRAYER FOR RELIEF**

10 WHEREFORE, the United States Trustee prays for relief as follows:

- 11 A. That the Court enter a judgment denying the Defendant's discharge under 11 U.S.C. §  
12 727(a)(3), (a)(4), and (a)(5); and  
13 B. Granting such other and further relief as the Court deems just and equitable.

14 DATED: July 11, 2016.

15  
16 Respectfully Submitted,

17 GAIL BREHM GEIGER  
18 Acting United States Trustee for Region 18

19 /s/ Hilary Bramwell Mohr  
20 Hilary Bramwell Mohr, WSBA #40005  
21 Attorney for the United States Trustee  
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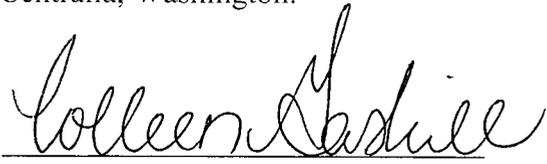
In re the Marriage of: )  
SANDRA MARIE RAMIREZ, )  
Respondent, )  
vs. )  
TOMAS RAMIREZ PENALOZA, )  
Appellant. )

DECLARATION OF  
SERVICE

I, Colleen Gaskill, Office Manager at JBJ LAW GROUP, am over the age of 18, not a party to the above-entitled action, and hereby declare under penalty of perjury under the laws of the state of Washington that on July 29, 2016, I caused a true and correct copy of the **Respondent's Response Brief** to be mailed to Court of Appeals, Division II of the State of Washington, at 950 Broadway Ste 300, Tacoma, WA 98402-4454 Attorney for Appellant, Dana L. Williams, at 1611 North National Avenue, Chehalis, WA 98532, and emailed to Real Party in Interest, Mark Waldron, Chapter 7 Bankruptcy Trustee, at Mark@orlandini-waldron.com, Trustee@orlandini-waldron.com; and Teresa@orlandini-waldron.com, which is Mr. Waldron's preferred and agreed method of service.

//

Signed this 29<sup>th</sup> day of July, 2016, at Centralia, Washington.

A handwritten signature in cursive script, reading "Colleen Gaskill". The signature is written in black ink and is positioned above a horizontal line.

Colleen Gaskill, Office Manager  
JBJ LAW GROUP