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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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No. III-290051

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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CARLOS DIAZ AND ROSALINDA DIAZ, Respondents,

v.

THE WASHINGTON STATE MIGRANT COUNCIL, Appellant

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**REPLY BRIEF OF APPELLANT WASHINGTON STATE  
MIGRANT COUNCIL**

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## I. INTRODUCTION TO REPLY

The issues on appeal are discovery-related: (1) the trial court's order compelling discovery about the immigration status of non-party Board members who volunteer for appellant Washington State Migrant Council, a non-profit corporation, and (2) the court's decision to sanction the Council for not fully providing this discovery after some Board members invoked personal Fifth Amendment privileges. Rather than focus on the legal analysis relevant to these orders, as he did before the trial court, Carlos Diaz attempts to transform this lawsuit into something that it is not: a case about immigration issues, rather than about the misconduct and mismanagement that led to his discharge as the Council's CEO.<sup>1</sup>

Although Diaz admitted in deposition that, throughout his years as the Council's CEO, there was no citizenship or immigration status requirement for Board members, and the organization never screened for immigration status,<sup>2</sup> he now indulges in alarmist rhetoric designed to appeal to societal prejudices and incite controversy, cynically exploiting what our Supreme Court has recognized is a highly charged and politically sensitive topic.<sup>3</sup> He pretends that federal criminal law enforcement and immigration legal compliance will be jeopardized if he is not allowed to

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<sup>1</sup> In December 2007, the Council's Board unanimously voted to discharge Diaz, citing poor performance, gross mismanagement and misconduct. CP at 621:18-22, 695-696.

<sup>2</sup> CP at 1230:23-1231:15.

<sup>3</sup> *Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 672 (2010).

obtain and use evidence regarding each Board member's immigration status in a suit claiming money damages for alleged wrongful discharge. His accusations are unproven, speculative, and entirely irrelevant.

The true issues before this Court involve several discovery orders. The Council seeks reversal of the trial court's order compelling discovery of Board members' citizenship and immigration status, which is wholly unrelated to the Council's Head Start mission, and which admittedly was not even collected or maintained by the Council. Also erroneous are the trial court's later orders sanctioning the Council for not fully providing this discovery, both because it should not have even been compelled in the first place, and because the Council should not be sanctioned for non-parties' lawful personal decisions to invoke individual Fifth Amendment privileges. Finally the trial court compounded its errors by: (1) ordering an overly broad "adverse inference" instruction that will improperly comment on the evidence; (2) summarily ordering the Migrant Council to pay terms without notice or an opportunity to be heard; and (3) limiting the arguments the Council could pursue in its pending summary judgment.

This Court should reverse all of the rulings under appeal. Further, for the guidance of the trial court and parties upon remand, this Court should make it clear that Diaz may not use immigration status either to intimidate non-party witnesses or to incite jurors to act on "passionate

responses [to immigration issues] that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation."<sup>4</sup>

## II. ARGUMENT IN REPLY

### A. Diaz Does Not Contest or Refute Key Facts and Propositions Supporting this Appeal.

Diaz either admits or fails to refute several key facts and propositions supporting the Council's appeal. In particular:

- Board members are volunteers who receive a stipend, not wages.<sup>5</sup>
- No provision of the federal Head Start Act required that Board members be legal immigrants or U.S. citizens.<sup>6</sup>
- Neither the Washington Non-profit Corporation Act nor the Council's by-laws establish any immigration or citizenship qualifications requirements for Board members.<sup>7</sup>
- Neither the Council nor its Board members had any duty to

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<sup>4</sup> *Salas*, 168 Wn.2d at 672.

<sup>5</sup> CP 1569-1570 ¶¶ 3-5 (the volunteer Board received small stipends per meeting, not wages; stipends over \$600 a year are reported on IRS Forms 1099 used for non-wage income using *either* the payee's social security number or tax i.d. number.). *See generally* <http://www.irs.gov/pub/irs-pdf/i1099msc.pdf>. *Accord* Respondents' Brief on Discretionary Review ("Response") at 6 (acknowledging the payment of stipends). *But cf.* Response at 29 (mischaracterizing members' stipends as being reported to the IRS "as if board members were employees," contrary to the record and authority cited here).

<sup>6</sup> CP at 634:18-635:5, 643:2-21 (Diaz's testimony admitting that "citizenship" is not discussed in the Act); RP 5/26/09 at 31:2-6 (Diaz's counsel stating "Mr. Diaz cannot point to a specific provision that says no illegal alien shall serve on the Head Start Migrant Council Board.").

<sup>7</sup> *See* Chapter 24.03 RCW; CP at 632:23-633:15 (Diaz's testimony).

complete Employment Eligibility Verification forms I-9.<sup>8</sup>

- The Council does not maintain any corporate records related to a Board member's citizenship or immigration status.<sup>9</sup>
- The Board members whose immigration status Diaz questions took their fiduciary responsibilities as seriously as any other member; none engaged in any conduct that violated their fiduciary duties.<sup>10</sup>
- Like any other witness, the Board members who were deposed each had the individual right to assert a personal Fifth Amendment privilege about his or her immigration status, and the five Board members who invoked the Fifth Amendment properly did so.<sup>11</sup>
- All six Board members whom Diaz deposed, including the five who asserted Fifth Amendment rights, answered all the questions Diaz's counsel asked about immigration-related conversations.<sup>12</sup>
- The Council requested responsive information and documents from all eight members of the decision making Board but only four

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<sup>8</sup> CP 1569-1570 ¶ 3. The "I-9" form must be completed by *employers* to verify an *employee's* right to work in the United States. See 8 C.F.R. § 274a.2(a)(2).

<sup>9</sup> CP 1570 ¶ 6 (declaration of CFO Luana Lumley).

<sup>10</sup> CP at 636:6-24 (Diaz's testimony).

<sup>11</sup> In moving to compel, Diaz expressly stated "the board members are free to assert the fifth amendment [*sic*] to the United States Constitution." CP at 1594:24-25. The trial court also acknowledged that the Board members had the "right" to this privilege – although the trial court said this was "not without consequences." RP 10/30/09 at 29:12-14; RP 11/18/09 at 18:3-8, 21:17-22; RP 11/18/09 at 18:3-8, 21:17-22:5.

<sup>12</sup> CP at 1287:2-25 (R. Mendoza); CP at 1297:18-1298:10 (M. Sanchez); CP at 1303:15-1304:17, 1314:21-1317:16 (I. Mendoza); CP at 1327:18-24, 1330:12-1331:21, 1332:7-1333:19 (A. Garcia); CP at 1346:6-1347:11 (P. Contreras); CP at 1357:25-1359:9 (J. Avalos). See also CP at 1162 ¶ 4, 1196-1204 ¶¶ 8-15.

of them agreed to provide this personal data. The Council fully produced the responsive information and documents it obtained.<sup>13</sup>

- While Agustin Garcia asserted the Fifth Amendment during his deposition, he was not even on the Board when it discharged Diaz, and thus he was not a decision maker regarding the termination.<sup>14</sup>
- Jaime Avalos, a decision making Board member who invoked the Fifth Amendment and declined to provide the discovery requested, was no longer on the Board at the time of Diaz's discovery.<sup>15</sup>

**B. Diaz Relies on Erroneous “Factual” Assertions and Blatant Speculation.**

RAP 10.3(b) and 10.3(a)(5) required Diaz to provide a citation to the record for each factual statement in his brief. He regularly failed to comply, showing that his factual assertions are speculative and unreliable.

**Abraham Gonzalez:** Diaz claims that Gonzalez – a decision making Board member *who affirmatively provided discovery reflecting his U.S. citizenship* – is an “illegal alien[.]”<sup>16</sup> This is an outrageous example of how Diaz's excessive advocacy strays far from the facts.

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<sup>13</sup> CP at 1388-89 ¶ 10 (former member Y. Salgado), 1157-58 ¶¶ 9-10 (C. Correa), 1774-75 ¶¶ 9-10, 12 (A. Gonzalez and R. Mendoza).

<sup>14</sup> CP at 1334:17-18, 1396 (listing members present for the termination vote). Although Garcia was not on the Board when it voted to discharge Diaz, Diaz asked him questions regarding his immigration status at deposition and the trial court included Garcia in the contempt order. CP at 251:24-252:1, 11, 18.

<sup>15</sup> CP at 1355:17-19 (Avalos testimony discussing his resignation).

<sup>16</sup> Response at 21. CP at 1774-75 ¶¶ 9, 12. CP 251-52. Gonzalez was not even named in the trial court's contempt order. CP 251-52.

**Speculation about Immigration Status and Crimes:** Diaz builds his alarmist arguments on the unproven assumption that some of the Board members were illegal aliens. However, he offers no evidence than any Board member or the Council has ever been accused of, much less convicted of, any immigration crime. Fundamental precepts of criminal law preclude Diaz from relying on the fact of a Board member invoking the Fifth Amendment to “prove” the criminal violations he asserts.<sup>17</sup> And Diaz ignores his own admission that the actual immigration status of individual Board members is not a fact placed in issue.<sup>18</sup> The Court should decline Diaz’s numerous invitations to assume criminal conduct.

**Personal Counsel:** The Court should ignore Diaz’s speculation about who paid for Board members’ personal immigration counsel.<sup>19</sup>

**Diaz’s Ability to Explore Board Members’ States of Mind:** The Council agreed Diaz could ask about discussions of immigration status.<sup>20</sup> Despite Diaz’s *post-hoc* rationalizations, his counsel did in fact have ample opportunity to examine Board members about their states of mind.<sup>21</sup>

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<sup>17</sup> *Griffin v. California*, 380 U.S. 609, 613-15 (1965) (defendant’s assertion of Fifth Amendment privilege cannot be used as evidence of guilt).

<sup>18</sup> Diaz stated that “*he need not prove that any of the Migrant Council board members were illegal aliens.*” CP at 1651:5-7 (emphasis added).

<sup>19</sup> Response at 30. The existence of personal immigration counsel merely underscores the lack of any relationship between immigration status and the Council’s business. It otherwise is irrelevant. Moreover, contrary to what Diaz implies, personal counsel must provide independent advice to his clients regardless of funding source. *See* RPC 1.8(f).

<sup>20</sup> CP at 1587:7-16; RP 9/8/09 at 4:12-18.

<sup>21</sup> *See* Response at 14, 19-20.

The Board members who declined to reveal their personal immigration status still answered deposition questions about whether they told Diaz they were lawfully in the U.S., as well as his counsel's follow-up questions about their answers.<sup>22</sup> Board members testified Diaz told them their discussions of this subject would be confidential, not that Diaz threatened to report them to authorities, as he alleges.<sup>23</sup> Similarly, Board members denied Diaz's assertion that he asked them to resign.<sup>24</sup> With these witnesses denying assumptions imbedded in Diaz's desired further questions, there simply was nothing more to explore in their depositions as to whether any of them had a "mental state[]" of "possible fear or anger" in relation to the erroneous factual predicates of questions they denied.<sup>25</sup> Further, contrary to what Diaz implies, the Council gave a full response to his Interrogatory No. 17 about immigration-related conversations.<sup>26</sup>

**C. Diaz's Alarmist Rhetoric and Accusations of Illegal Immigration Status Ignore the Relevant Discovery Issues.**

The principal issues on this discretionary review are whether the

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<sup>22</sup> CP at 1203 ¶ 15, 1357:22-1359:6 (J. Avalos), 1201 ¶ 15, 1345:20-1348:15 (P. Contreras), 1199 ¶ 13, 1314:21-1317:12 (I. Mendoza), 1198 ¶ 12, 1297:10-1304:17 (M. Sanchez) (content of testimony was redacted due to the trial court's protective order).

<sup>23</sup> CP at 1302:6-1304:8 (M. Sanchez), 1346:16-17 (P. Contreras).

<sup>24</sup> CP at 1355:25-1356:1, 1359:6-9 (J. Avalos), 1348:12-15 (P. Contreras), 1316:17-18 (I. Mendoza), 1298:7-8 (M. Sanchez). Garcia testified Diaz responded supportively to the newspaper article raising questions about his legal status, offering money, legal aid and help moving. CP at 1331:15-25.

<sup>25</sup> See Response at 14, 19-20.

<sup>26</sup> See Response at 13 (quoting this interrogatory); *cf.* CP at 1157-58 ¶ 9, 1774 ¶¶ 9-10, 12 (discussing final supplementation). Interrogatory No. 17 was not included in the Contempt Order. CP at 251-52.

trial court erred in its rulings on the Migrant Council's motion for a protective order regarding immigration-related discovery, Diaz's motion to compel that same discovery, and Diaz's motion for contempt and discovery sanctions. This in turn poses issues about what legal standard the trial court should have used in ruling on the parties' discovery motions; whether the discovery at issue was in the Council's possession, custody or control; whether certain Board members' valid invocations of their personal Fifth Amendment rights supported sanctions against the Council, despite its extensive efforts to obtain the discovery at issue; and, if any sanctions were appropriate, whether the ones imposed by the trial court were proper and consistent with due process.

Instead of focusing on the applicable legal standards relevant to these issues, Diaz tries to defend the trial court's orders with sweeping over-generalizations and outrageous, unsupported accusations of federal crimes ranging from harboring illegal aliens to committing criminal perjury before the federal government.<sup>27</sup> This Court should recognize Diaz's irrelevant discussion as the unworthy name-calling and improper grandstanding that it is, and should decline to rely on it. Diaz's appellate arguments plainly illustrate the improper tactics he wants to use in the trial court to incite passion and prejudice in the minds of the jurors.

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<sup>27</sup> Response at 21-26.

Diaz utterly fails to meet the Council's argument that the trial court did not apply the proper legal standard in ruling on the parties' competing discovery motions.<sup>28</sup> However, immigration issues regularly arise in this state,<sup>29</sup> and this Court should provide guidance to the trial court here, as well as to other trial judges who must grapple with how to address requests for discovery of this sensitive subject matter.

The trial court should have found that the low potential probative value of the personal immigration-related information sought by Diaz was substantially outweighed by the extreme risk of unfair prejudice from such sensitive, highly political and emotionally charged information. Even if this information were of some marginal relevance to the determination of this action, any scant relevance was greatly outweighed by the risk of embarrassment, damage, and prejudice to the individual, non-party, target Board members, and by its *in terrorem* effect on the assertion of legal rights.<sup>30</sup> Real and significant individual harm, such as oppression, embarrassment and chilling of the exercise of constitutional rights, can result from forced disclosure of a person's actual immigration status,

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<sup>28</sup> Opening Brief of Appellant Washington State Migrant Council at 24-25, 30 (discussing *Rivera v. NIBCO, Inc.*, 364 F.3d 1057 (9th Cir. 2004) and *Snedigar v. Hoddersen*, 114 Wn.2d 153, 158 (1990). The Council opposed Diaz's *in terrorem* discovery partly by seeking a protective order against immigration status discovery. CP at 24-33, 1581-1589.

<sup>29</sup> *E.g.*, *Salas*, 168 Wn.2d at 672 (evidentiary context).

<sup>30</sup> *Rivera*, 364 F.3d at 1064. *See also State v. Suarez-Bravo*, 72 Wn. App. 359, 367 (1994) (reversing conviction due to a "substantial likelihood that the jury's verdict was affected by the State's examination regarding Suarez-Bravo's residence, job and ethnic heritage").

regardless of what the person's immigration status actually is.<sup>31</sup> Moreover, "a person's legal status has no bearing on that person's propensity for dishonesty,"<sup>32</sup> so it would be error to find the Board members' legal statuses relevant to their credibility, as Diaz urges. Last, immigration-related discovery has no relevance to whether Board members are fiscally responsible, despite the trial court's erroneous comments otherwise.<sup>33</sup>

The trial court failed to properly weigh the relevant factors. Instead, it cited erroneous conclusions not even argued by Diaz: that the "public" has a "right to know" Board members' immigration statuses and that Board members put themselves in "jeopardy" by volunteering for the Board.<sup>34</sup> This Court should correct these errors and should preclude Diaz from continuing to use immigration-related prejudice for tactical gain.

**D. Diaz Dismisses Personal Constitutional Rights and Confuses Personal Matters with Corporate Duties.**

Diaz fails to effectively counter the Migrant Council's argument that the trial court erred when it denied the Council's motion for a

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<sup>31</sup> *State v. Avendano-Lopez*, 79 Wn. App. 706, 719 (1995) (recognizing that questions regarding parties' nationality and immigration status are highly prejudicial and "are...designed to appeal to the trier of fact's passion and prejudice").

<sup>32</sup> *Holis v. Saraphino's Inc.*, 2010 U.S. Dist. LEXIS 131189 at \*6 (E.D. Wis. 2010).

<sup>33</sup> See RP 9/8/09 at 33:20-23 (The trial court asked "if this entity is handling what appears to be millions of dollars of government funding, doesn't the public have a right to know who's on the board and what their status is?"). See also CP at 1646:12-18 (Diaz's argument – contrary to his deposition admissions (CP at 634:18-635:5, 643:2-21) that "one cannot safeguard federal funds and legally and fiscally oversee United States government programs without being a citizen").

<sup>34</sup> RP 9/8/09 at 33:20-23, 35:11-13, 36:4-7, 40:9-23.

protective order in the first instance. He offers only wishful thinking and speculation about the Council's supposed ability to force current or former board members to divulge personal information protected by a constitutional right. His *argument* falsely implies that the Board members are Migrant Council employees when the *facts* clearly show they are not. Similarly, his *argument* pretends that immigration status is integral to the Council's business or to Board members' duties when *it is undisputed* that neither the Head Start Act nor the Council's by-laws have any citizenship or immigration status requirements.<sup>35</sup>

Diaz has never satisfied his burden to show the Migrant Council's actual control or legal right to obtain the discovery he sought about Board members' personal immigration statuses.<sup>36</sup> True, a corporate officer must furnish discovery about corporate matters that is available to the corporation through reasonable efforts but, as the Council has consistently maintained, this rule does not extend to personal information or documents the corporate officer acquired outside the scope of her official duties.<sup>37</sup> Rather than recognize this common sense limitation, Diaz now

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<sup>35</sup> CP at 632:23-633:15, 634:18-635:5, 643:2-21 (Diaz's testimony); RP 5/26/09 at 31:2-6 (Counsel for Diaz admitted "Mr. Diaz cannot point to a specific provision that says no illegal alien shall serve on the Head Start Migrant Council Board.").

<sup>36</sup> *United States v. Int'l Union of Petroleum & Indus. Workers ("IUPIW")*, 870 F.2d 1450, 1452 (9th Cir. 1989).

<sup>37</sup> See *Gerling Int'l Ins.Co. v. Comm'r* 839 F.2d 131, 138 (3d Cir. 1988) (Contempt order against corporation was error without finding that president had a duty to supply

absurdly asserts that Migrant Council is “responsible for the conduct of its board members,”<sup>38</sup> apparently even in their purely personal capacities.

Diaz’s overly broad and paternalistic assertion has no basis in either logic or in law. He cites *Trethewey v. Green River Gorge*, but this case merely reiterates the unremarkable and “well settled” rule that “the power to do particular acts and the general authority to manage the corporate affairs is vested in the trustees or directors, and their acts are binding only when done as a board and at a legal meeting.”<sup>39</sup> Diaz then leaps to the conclusion that this “warrant[s]” the Council being punished by a negative inference when its directors assert a personal Fifth Amendment privilege.<sup>40</sup> His logic ignores well-established rules of vicarious liability. If his argument were correct, then corporations would be automatically liable for any and all actions by its directors or even its employees within their personal lives – wholly contrary to the settled law of agency and of *respondeat superior*.<sup>41</sup> Under well-established law, **an**

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information concerning personal holdings.). *See also United States v. White*, 322 U.S. 694, 698-700 (1944) (The Fifth Amendment privilege is a personal one that may be asserted only by the person as to personal papers, not as to an organization’s official records that the person holds in his or her official capacity.). *Cf. RCL Northwest, Inc. v. Colorado Resources, Inc.*, 72 Wn. App. 265, 267, 271-72 (1993) (affirming default against corporation in derivative action where president refused inspection of corporate books).

<sup>38</sup> Response at 38.

<sup>39</sup> 17 Wn.2d 697, 727 (Wash. 1943).

<sup>40</sup> Response at 38.

<sup>41</sup> The well-known doctrine of *respondeat superior* holds that an employer is liable for the negligent acts of its employees if, and only if, these acts were within the scope or

*agent's actions are the actions of the corporation only when the agents act within the scope of their actual or apparent authority.*<sup>42</sup>

Further ignoring agency principles and extending his specious logic, Diaz tries to dismiss the distinction between official Council business and the personal lives of its individual Board members as a mere “legal fiction.” One again, Diaz’s argument defies common sense. Each Board member plainly has his or her own personal life, and – just as plainly – the Council has an “institutional identity” that is separate and apart from the identities of its individual Board members.

Courts apply these common sense distinctions in subpoena cases, to determine whether the nature of the material sought is corporate (unprotected by a Fifth Amendment privilege) or is personal and subject to the privilege. In deciding this, the relevant inquiry is whether the material sought is held by the individual in his or her capacity as a representative of the corporation.<sup>43</sup> “It must be fair to say that the records demanded are the records of the organization rather than those of the individual[.]”<sup>44</sup>

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course of...employment. *Rahman v. State*, 170 Wn.2d 810, 815 (2011).

<sup>42</sup> *Mauch v. Kissling*, 56 Wn. App. 312, 316 (1989).

<sup>43</sup> See *Bellis v. United States*, 417 U.S. 85, 88 (U.S. 1974) (holding that a former partner could not invoke the Fifth Amendment privilege to avoid producing business records because the partnership had an institutional identity independent of its individual partners and the records were held by the partner in a representative capacity).

<sup>44</sup> *Bellis*, 417 U.S. at 93. See also *United States v. White*, 322 U.S. 694, 701 (1944) (holding that a labor union president could not invoke his self-incrimination privilege and refuse to produce union records and recognizing distinction between the official union records and union members’ personal records); *United States v. B & D Vending, Inc.*, 398

Because Diaz cannot show the Board members invoked their Fifth Amendment rights regarding corporate records or business information, he substitutes a bootstrap argument, urging that once he raised immigration issues against the Council, those issues became part of the corporation's official business.<sup>45</sup> However, Diaz cannot turn personal information into corporate information simply by wishing it were so. The Board members had no duty to provide the Council with personal information that was in no way related to their official responsibilities as Council directors.

Finally, Diaz ignores the Council's point that the alleged "control" for which he stretches is not even arguable as to former Board members.<sup>46</sup> Contrary what Diaz suggests,<sup>47</sup> the Board could not order former Board members to produce immigration-related discovery.<sup>48</sup> Yet, as Diaz invited, the trial court also drew no distinction between former or current Board members, even though it is abundantly clear that former Board members could in no way be acting as Council representatives when they refused to

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F.3d 728, 734 (6th Cir. 2004) (stating that "key question is whether the records are those of a 'collective entity' which are held by an individual in a representative capacity").

<sup>45</sup> Response at 34.

<sup>46</sup> The former Board members among those targeted by Diaz's discovery were Avalos, Salgado and Garcia. The Council mistakenly stated at page 9 of its opening brief that "four of the Board members who voted to terminate Diaz were not (and still are not) active members at the time of Diaz's discovery requests"; this statement should have cited two members, as Garcia was no longer on the Board on December 15, 2007.

<sup>47</sup> Response at 20.

<sup>48</sup> Diaz's speculation that the Board could have adopted a resolution to order members to waive Fifth Amendment rights again ignores the distinction between their personal lives and official responsibilities.

disclose their personal immigration or citizenship statuses.<sup>49</sup>

**E. Diaz Ignores the Trial Court's Error in Failing to Make any Finding About the Council's Justifiable Excuse.**

The trial court's sanctions were improper.<sup>50</sup> The Council was more than "substantially justified" in not producing all target Board members' personal immigration information, and it took "all the reasonable steps" it could take to comply.<sup>51</sup> A party has *not* "willfully" violated a court order if it has a justifiable excuse.<sup>52</sup>

Diaz ignores this rule, merely persisting in unfounded assertions that the Council could have forced Board members to provide personal immigration or citizenship information.<sup>53</sup> Thus, he continues to wholly ignore, that in imposing discovery sanctions, the trial court was *required*

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<sup>49</sup> See *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 181 (2d Cir. 1999) (an ex-employee may invoke the Fifth Amendment even as to corporate records because "once the agency relationship terminates, the former employee is no longer an agent of the corporation and is not a custodian of the corporate records," and "[w]hen such an individual produces records in his possession he cannot be acting in anything other than his personal capacity"); *In re Grand Jury Proceedings*, 71 F.3d 723 (9th Cir. 1995) (deciding that "the collective entity rule does not apply to a former employee of a collective entity who is no longer acting on behalf of the collective entity"); *United States v. McLaughlin*, 126 F.3d 130, 133 n.2 (3d Cir. 1997) ("It could, of course, be that a person served with a subpoena is not authorized to produce corporate documents, in which case he is not acting as corporate custodian and all bets are off").

<sup>50</sup> See *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494 (1997) (stating that when a trial judge chooses one of the harsher remedies allowed by CR 37(b), its reasons "should, typically, be clearly stated on the record so that meaningful review can be had on appeal," which was not done here); *Snedigar*, 114 Wn.2d at 170 (reversing default order for discovery violations where there was no showing of willfulness or prejudice, similar to the proceedings here).

<sup>51</sup> *Magana v. Hyundai Motor Am.*, 167 Wn.2d 570, 584 (2009).

<sup>52</sup> *Magana*, 167 Wn.2d at 584; *Snedigar*, 114 Wn.2d at 168.

<sup>53</sup> Response at 20.

to make findings about whether the Council acted “willfully” or “without reasonable justification.”<sup>54</sup>

Diaz’s continued omission of the proper legal standard from his appellate brief is especially glaring given that, in granting discretionary review, this Court’s Commissioner found the trial court committed obvious or probable error because “the Migrant Council’s justification that Board members had asserted their Fifth Amendment rights was a “justification [that] appears to be reasonable and thus not ‘willful.’”<sup>55</sup> Diaz still makes no effort to show that the Council acted willfully or without justification when it provided all the information it could in response to the subject discovery requests. No such showing was made below, even though it was essential to a proper sanctions ruling. Thus, the trial court’s decision to sanction the Council must be reversed.

**F. The Trial Court’s Jury Instruction and Decision to Limit the Migrant Council’s Summary Judgment Arguments Went Far Beyond the Scope of the Discovery Dispute.**

In reviewing the trial court’s sanctions ruling, this Court must determine whether the sanctions were “appropriate to advancing the purposes of discovery and were “proportional to the discovery violation

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<sup>54</sup> *Burnet*, 131 Wn.2d at 494 (stating that when a trial judge chooses one of the harsher remedies allowed by CR 37(b), its reasons “should, typically, be clearly stated on the record so that meaningful review can be had on appeal”); *Snedigar*, 114 Wn.2d at 170.

<sup>55</sup> Commissioner’s Ruling Dated June 24, 2010 at 2.

and the circumstances of the case.”<sup>56</sup> Diaz again ignores the controlling legal standard. His appellate brief’s very limited legal discussion of the trial court’s challenged adverse inference instruction simply explains the inapplicable general proposition that adverse inferences may be used in civil cases when a party asserts a Fifth Amendment privilege. The Council acknowledges the U.S. Supreme Court’s ruling that “the Fifth Amendment does not forbid adverse inferences against *parties* to civil actions when *they* refuse to testify in response to probative evidence offered against them[.]”<sup>57</sup> However, this ruling has no application here: Diaz did not make the target Board members personal “parties” to his suit.

Moreover, it is well-settled that the Fifth Amendment privilege against compelled self-incrimination operates differently in civil and criminal proceedings.<sup>58</sup> Here, the relevant issue is the effect of a non-party asserting a Fifth Amendment privilege in *civil* litigation. Inaptly, however, Diaz cites an annotation expressly limited to *criminal* cases.<sup>59</sup> And, even if the application of adverse inferences in criminal cases has any

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<sup>56</sup> *Burnet*, 131 Wn.2d at 496-97.

<sup>57</sup> *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (emphasis added).

<sup>58</sup> *Griffin*, 380 U.S. at 615 (explaining that the Fifth Amendment “forbids either comment by the prosecution on the accused’s silence or instructions by the court that such silence is evidence of guilt”).

<sup>59</sup> Response at 36 (citing “Inferences Arising from Refusal of Witness other than Accused to Answer Questions on the Ground that the Answer would Tend to Incriminate,” 24 A.L.R.2d 895 (1952)). This article specifies its narrow and inapplicable scope: “before the question discussed here arises in a given case the following facts must be present: (1) There must be a criminal prosecution against a person other than the witness[.]” See LEXSEE 24 A.L.R. 2D 895 at \*1. No such prosecution exists here.

significance here, Diaz misses the difference between adverse inferences imposed against a *party* who asserts a Fifth Amendment privilege and the danger of prejudice to a party from imposing an adverse inference where a *non-party* asserts this privilege. This crucial distinction is discussed (to Diaz's detriment) in the very annotation he cites. As explained there:

“[W]hen a witness, other than the accused, declines to answer a question on the ground that his answer would tend to incriminate him, *that refusal alone cannot be made the basis of any inference by the jury, either favorable to the prosecution or favorable to the [criminal] defendant.*<sup>[60]</sup>

The underlying reasoning is that, “in declining to answer a question on the ground that the answer would tend to incriminate him, the witness is exercising a constitutional right *personal* to himself, the exercise of which should neither help or harm a third person.”<sup>61</sup> This underscores what the Council has said all along: it is unjust to punish the Council for valid exercises of individual Fifth Amendment rights by *non-party* Board members about entirely *personal* matters.<sup>62</sup>

Diaz fails to apply the correct legal analysis, primarily relying on inapposite cases discussing adverse inferences where a *party*, typically the

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<sup>60</sup> LEXSEE 24 A.L.R 2D 895 at \*2 (emphasis added).

<sup>61</sup> LEXSEE 24 A.L.R 2D 895 at \*2 (emphasis added).

<sup>62</sup> *Cf. Billeci v. United States*, 184 F.2d 394, 398 (D.C. Cir. 1950) (trial court made a legal error in concluding “that a jury has a right to infer that if the witness had answered the question, the answer would be unfavorable to the defendant...I think a jury has a right to draw an unfavorable inference from that...I am going to let them [the prosecutors] argue it; but I am not going to say anything in my charge to the jury one way or another.”).

plaintiff, asserts Fifth Amendment privilege. However, this case raises the different issue of whether an adverse inference against a *defendant* is proper when a *non-party* invokes the Fifth Amendment. The effect of a party's assertion of this privilege simply is not at issue here. The Council has not asserted Fifth Amendment privilege, and the non-party Board members lawfully invoked their *personal* Fifth Amendment rights.<sup>63</sup>

Diaz also inaptly relies on a host of defunct civil cases involving adultery or criminal actions by a divorcing spouse, where courts dismissed a divorcing *plaintiff's* claim after he or she invoked the Fifth Amendment in response to questions from the defendant spouse.<sup>64</sup> The rationale for allowing sanctions in these cases (which pre-date modern no-fault divorce) stems from the equitable principle that a plaintiff should not be permitted to withhold discovery that might relieve her defendant spouse of liability yet still be permitted to prosecute her claim.<sup>65</sup> As one court stated: "the plaintiff who invokes this privilege should not be permitted to prevail and, in effect, 'eat his cake and have it too.'"<sup>66</sup> This policy does not apply

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<sup>63</sup> RP 11/18/09 at 18:3-8, 21:24-22:2 (trial court recognizing the witnesses' right to invoke privilege).

<sup>64</sup> See Response at 37-38 (cases discussed in text and footnote).

<sup>65</sup> See, e.g., *Christenson v. Christenson*, 281 Minn. 507, 162 N.W.2d 194, 202 (Minn. 1968); *Levine v. Bornstein*, 13 Misc. 2d 161, 174 N.Y.S.2d 574, 578 (N.Y. 1948) (using similar rationale to affirm dismissal of complaint where defendant debtor moved to strike the complaint of plaintiff assignee of creditor's judgment because assignee asserted privilege).

<sup>66</sup> LEXSEE 4 A.L.R.3d 545 at \*2 (2008). See also *Lyons v. Johnson*, 415 F.2d 540 (9th Cir. 1969) (dismissing a plaintiff's civil rights action because she refused to cooperate

here, where Diaz is trying to win damages by forcing non-parties to assert Fifth Amendment privileges about irrelevant personal information.

Diaz cites a few civil cases involving whether a non-party's invocation of the Fifth Amendment was admissible against a party at trial.<sup>67</sup> None involved an adverse inference as a discovery sanction. Two of them involved an inference *against* the plaintiff, and thus are further distinguishable for the reasons just discussed.<sup>68</sup> These cases reject a sweeping rule that an adverse inference based upon a third party's Fifth Amendment assertion is always proper, and they did not approve a broad adverse inference analogous to that ordered here.<sup>69</sup> Finally, these cases teach that two crucial factors in making such a decision are (1) the current existence of an employment relationship between the non-party invoking the Fifth Amendment and the party against whom an inference is sought and (2) a subject matter relationship between the employee's work and the question that triggered privilege.<sup>70</sup>

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with discovery by invoking the Fifth Amendment); *Sparks v. Sparks*, 768 S.W.2d 563, 567 (Mo. Ct. App. 1989) (internal quotation omitted) (stating "[i]t is not unfair to preclude one who invokes the assistance of the courts from recovery when he refuses to produce evidence peculiarly within his knowledge pertinent to his right to recover").

<sup>67</sup> See Response at 38-39 & n.12 (citing *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997), *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983), *FDIC v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969 (5th Cir. 1995), and *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 352 (D. Mass. 1993)).

<sup>68</sup> *Brink's*, 717 F.2d at 708; *LiButti*, 107 F.3d at 124.

<sup>69</sup> *Brink's*, 717 F.2d at 708; *LiButti*, 107 F.3d at 124; *FDIC*, 45 F.3d at 978; *Data General*, 825 F. Supp. at 352.

<sup>70</sup> See *Brink's*, 717 F.2d at 710 (holding that *employees' privilege claim was a vicarious*

Diaz persists in improperly citing an Arkansas case as supporting sanctions when a party invokes the Fifth Amendment.<sup>71</sup> The *Bomar* case actually held that due process does not permit a non-party's valid invocation of the Fifth Amendment to support a discovery sanction against a party organization.<sup>72</sup> Thus, *Bomar* supports the Council's position. It is unjust to punish the Council for lawful assertions of personal constitutional rights by some of its Board members. It also is contrary to Fifth Amendment protections to use these lawful assertions to coerce Board members into waiving personal constitutional rights by punitive sanctions. Even Diaz's divorce cases recognize a distinction when a defendant invokes the Fifth Amendment: "It is something else...to require one who is in court involuntarily to elect between his constitutional

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*admission by employer where the question triggering this claim related to the employees' work*); *FDIC*, 45 F.3d at 977 (in a suit over a plaintiff bank's losses after its chief lending officer was accused of taking bribes, proper to admit Fifth Amendment assertions by non-party witnesses; jury *could not draw an adverse inference without first finding collusion between the bribed employee and the witness, and jury could not find liability based solely on an adverse inference finding*); *Data General*, 825 F. Supp. at 352-53 (employee's assertion of privilege against employer admitted where there was evidence that employer shared in "rewards of employee's wrongdoing"). *Accord LiButti*, 107 F.3d at 113 (allowing an adverse inference against a plaintiff daughter where the IRS levied on a horse she said was hers after the IRS sought to collect delinquent taxes from her father, who invoked privilege about who owned the horse because *she and her father shared an interest in collusively insulating the horse from the IRS's levy*). Cf. *Kontos v. Kontos*, 968 F. Supp. 400, 407 (S.D. Ind. 1997) (third party's refusal to testify not admissible against defendant sister because it was not a vicarious statement, "unlike a claim of privilege by a current or former employee"); *Veranda Beach Club Ltd. P'ship v. West. Sur. Co.*, 936 F.2d 1364, 1374 (1st Cir. 1991) (excluding evidence of privilege against corporation because "an individual's invocation of a personal privilege against self-incrimination cannot, without more, be held against his corporate employer").

<sup>71</sup> Response at 35 (citing *Bomar v. Moser*, 251 S.W.3d 234, 240 (Ark. 2007)).

<sup>72</sup> *Bomar*, 251 S.W.3d at 240 (Ark. 2007).

privilege and the automatic entry of a judgment against him.”<sup>73</sup>

In sum, Diaz provides no authority supporting either the content or effect of the trial court’s adverse inference instruction. The trial court here took the unprecedented and impermissible step of ordering that the jury could infer the entire Board’s motive for discharging Diaz on December 15, 2007 based on personal decisions to exercise constitutional rights made several years later by only half of the decision making Board.<sup>74</sup>

**G. Diaz Pretends that the Council had an Opportunity to Respond to his Request for Terms when It Did Not.**

Diaz disingenuously tries to defend the trial court’s erroneous decision to impose \$1,500 in terms by conveniently ignoring a crucial, undeniable fact: The only time Diaz ever sought terms was in his motion seeking *reconsideration* of the trial court’s decision to moderate its original contempt ruling by imposing lesser sanctions than default.<sup>75</sup> Under Local Civil Rule 59, the Council *could not* respond to Diaz’s reconsideration motion without leave from the trial court.<sup>76</sup> At no time before the presentment hearing did the trial court ask the Council to respond to Diaz’s request for terms. Instead, at the presentment hearing,

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<sup>73</sup> *Sparks*, 768 S.W.2d at 567. Here, of course, the privilege was invoked by non-parties.

<sup>74</sup> *Cf. Billeci*, 184 F.2d at 399 (holding that the trial court erred by allowing the prosecution to argue an unfavorable inference from a non-party’s assertion of privilege; because such “an inference, without more support, would be no more than speculation.”).

<sup>75</sup> CP at 456.

<sup>76</sup> Benton/Franklin County Local Rule 59(1) provides that motions for reconsideration are submitted without oral argument unless the Court orders otherwise; the trial judge may deny the motion or call for a written response. The trial court did not ask for a response.

the trial court simply expressed a desire to avoid further hearings and summarily awarded Diaz \$1,500 in fees, setting a deadline for payment.<sup>77</sup>

Diaz claims that CR 37 “demands” that the trial court award terms here.<sup>78</sup> Once again, his overblown argument is simply wrong. A trial court may not impose terms under CR 37(b)(2) if the conduct at issue “was substantially justified or...other circumstances make an award [of terms]...unjust.” Here, the trial court’s summary imposition of fees not only violated the Council’s due process rights by depriving the Council of any opportunity to be heard on this subject, but it also erroneously imposed a further sanction when the Council’s conduct was “substantially justified” because of non-parties’ valid exercises of their personal Fifth Amendment rights. This Court should reverse the trial court’s procedurally and substantively improper imposition of this additional sanction, and order Diaz to immediately repay the Council for the \$1,500 in terms.

**H. Diaz Misrepresents the Substance of Trial Court’s Improper Limitation on the Council’s Arguments About its Overriding Justification for Diaz’s Discharge.**

Diaz erroneously implies that the trial court ruled the Council is prohibited from arguing it had an “overriding justification” for discharging him, even at trial. The trial court only ordered that the Council cannot

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<sup>77</sup> RP 4/6/10 at 19:22-22:6 (trial court stating “I’ll allow \$1500 for these attorneys fees and we’ll get on with it); 23:6-10 (similar).

<sup>78</sup> Response at 40.

argue the “overriding justification” element at summary judgment.<sup>79</sup> It certainly did not order that the parties could not litigate this issue at trial.

Diaz’s misrepresentation does not cure the trial court’s error. The trial court’s “pre-decision” of the Council’s summary judgment motion due to the discovery dispute improperly prevents the Council from attacking the sufficiency of Diaz’s *prima facie* case through established summary judgment procedures. This violated CR 56, and is not supported by CR 37. Diaz relies upon CR 37 as the authority for striking a summary judgment argument,<sup>80</sup> yet the trial court appeared to properly recognize that it would be error to rely on CR 37(b)(2)(B) to limit summary judgment arguments as a discovery sanction (particularly where the trial court, through a different judge, had already entered a final order imposing its contempt remedy after substantial briefing and five hearings).<sup>81</sup> Yet the court failed to identify any authority for this ruling. It merely opined it would “unfair” to allow the argument because it viewed the subject of the discovery as linked to the issue of overriding justification.<sup>82</sup>

It was error to link the overriding justification element of the

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<sup>79</sup> CP at 153:24-28; RP 4/19/10 at 13:13-17. This ruling was made in response to Diaz’s motion to strike the Council’s summary judgment motion. CP at 454-55.

<sup>80</sup> Response at 39-40.

<sup>81</sup> RP 4/19/10 at 13:13-17.

<sup>82</sup> RP 4/19/10 at 14:12.

wrongful discharge claim to this discovery dispute.<sup>83</sup> This element focuses on “whether the employer had an overriding reason for terminating the employee *despite* the employee’s public policy linked conduct.”<sup>84</sup> Board members’ immigration status is simply irrelevant to whether the Council *nonetheless* had an overriding justification to discharge Diaz for misconduct, poor performance, and mismanagement. This Court should reverse, ordering full litigation of all summary judgment issues.

### III. CONCLUSION

This Court should reverse the trial court’s orders compelling immigration-related discovery and imposing sanctions. Instead, the trial court should have granted the Council’s protective order preventing discovery of actual immigration status. Thus, Diaz should be precluded from using immigration status for tactical gain and *in terrorem* effect.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of April 2011.

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Council

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<sup>83</sup> See RP 3/29/10 at 19:4-14 (court stating “I think it could be patently unfair to allow the defendant to move for summary judgment on the bases of those last four elements because of the discovery violation that Judge Matheson found, number one...”).

<sup>84</sup> *Gardner v. Loomis Armored, Inc.*, 128 Wn.2d 931, 947 (1996).

**DECLARATION OF SERVICE**

The undersigned declares under the penalty of perjury, under the laws of the State of Washington, that on April 12, 2011, I caused a copy of the Reply Brief of Appellant Washington State Migrant Council to be sent via electronic mail on April 12, 2011, as well as sent via Federal Express overnight courier to be personally hand delivered on April 13, 2011, to:

George Fearing  
Leavy, Schultz, Davis & Fearing, P.S.  
2415 West Falls Avenue  
Kennewick, WA 99336-3068

Signed this 12<sup>th</sup> day of April, 2011, at Seattle, Washington.

  
Catharine M. Morisset