FILED
MAR 10 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

No. 290051 - III

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CARLOS AND ROSALINDA DIAZ,
Respondents,

vs.

WASHINGTON STATE MIGRANT COUNCIL,
Petitioner.

BRIEF OF RESPONDENTS

GEORGE FEARING, WSBA # 12970
LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
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Kennewick, WA 99336
(509) 736-1330
Attorneys for Respondents Diaz

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I. INTRODUCTION

Federal law criminalizes the hiring of an illegal alien, providing support to an illegal alien, and otherwise encouraging an illegal alien to remain in the United States. Carlos Diaz, the Executive Director of the Washington State Migrant Council, an entity receiving millions of dollars in federal funds, gained information that numerous members of the Migrant Council Board of Directors are illegal aliens. Carlos Diaz told those board members to resign from the Board of Directors, after which the Board of Directors fired Diaz.

Carlos Diaz sued the Migrant Council for wrongful discharge in violation of public policy, claiming that he was fired for whistleblowing. In its answer to the complaint, the Migrant Council, whose affairs, including this litigation, are controlled by its Board of Directors, denied that it fired Diaz for telling illegal aliens to resign from the board. The Migrant Council even denied that any of its board members were illegal aliens.

Carlos Diaz sought discovery as to the immigration status of the members of the Migrant Council Board of Directors. In response, the

Migrant Council objected to answering interrogatories seeking this information. The superior court entered an order compelling disclosure of the information, but the Migrant Council continued withholding the information. Also, during depositions, board members exercised their fifth amendment privilege to refuse answering questions about their immigration status, thereby precluding Diaz from examining the members as to how their illegal immigration status impacted their decision to fire him, the most critical factual question in the suit. The Migrant Council also hired counsel for the board members to assist them in asserting their fifth amendment rights.

Because Carlos Diaz was refused critical discovery, the superior court entered a default judgment against the Migrant Council. The court later reversed itself by vacating the default judgment, but entered an order reading that the jury would be given an instruction allowing it to infer, based upon the pleading of the fifth amendment, that board members fired Carlos Diaz because of whistleblowing. The superior court also refused to entertain portions of the Migrant Council's summary judgment motion on the issue of whether Diaz was fired for reporting wrongdoing.

The court of appeals improvidently granted discretionary review,

and, in response, the Migrant Council writes a brief that outlines only its tainted version of the facts, quotes legal principles with limited bearing on the discovery dispute, misconstrues decisions, and relies on false assumptions.

II. ISSUES

1. A former Chief Executive Officer of an organization claims he was fired for directing illegal alien members of the organization's Board of Directors to resign because of the jeopardy their status placed upon the organization. Despite a discovery order directing the organization to disclose the information, board members, with the assistance of the organization itself, refused to answer questions related to their immigration status and how their status impacted their decision to fire the Chief Executive Officer. May the superior court, as a discovery sanction, direct an adverse inference that the Chief Executive Officer was fired in retaliation for encouraging illegal alien board members to resign?

2. A former Chief Executive Officer of an organization claims he was fired for directing illegal alien members of the organization's Board of Directors to resign because of the jeopardy their status placed upon the organization. Despite a discovery order directing the organization to

disclose the information, board members, with the assistance of the organization itself, refused to answer questions related to their immigration status and how their status impacted their decision to fire the Chief Executive Officer. May the superior court refuse to entertain those portions of the organization's summary judgment motion that concern the reasons for the firing of the Chief Executive Officer?

3. A former Chief Executive Officer of an organization claims he was fired for directing illegal alien members of the organization's Board of Directors to resign because of the jeopardy their status places upon the organization. Despite a discovery order directing the organization to disclose the information, board members, with the assistance of the organization itself, refused to answer questions related to their immigration status and how their status impacted their decision to fire the Chief Executive Officer. Must the court impose sanctions upon the organization for violating a discovery order?

III. FACTS

Carlos Diaz filed this lawsuit after the Board of Directors of the Washington State Migrant Council fired him, as the Council's Executive Director, in order to prevent the public and authorities from learning that

most of its board members were and are illegal aliens.[1] Diaz claims he was fired in violation of public policy. CP 1761.

Carlos Diaz was the founder and first Executive Director of the Washington State Migrant Council. CP 276. He served as its Executive Director from 1983 to December 2007. CP 276. As Executive Director, he was also the Council's Chief Executive Officer. Diaz took the Migrant Council from a budget of about $3 million per year to $33 million per year. CP 276.

The Washington State Migrant Council is a non-profit corporation that exists to improve the quality of life for migrant, seasonal farm workers and rural poor families by promoting human service opportunities. CP 276. Programs of the Migrant Council include head start, early childhood education, child and adult food care, and migrant and seasonal farm worker vocational rehabilitation. CP 276, 7. The Migrant Council receives much of its funding through grants from the federal government, particularly the federal Head Start program. CP 277.

The governing board of the Migrant Council is its Board of

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[1] The Migrant Council claims Diaz was fired for poor performance, gross management and misconduct. The record belies this allegation. That record not only includes written performance reviews of Diaz by the Board of Directors but the testimony of the former Chairwoman of the Board. CP 289, 90.

Directors. CP 277. As the Executive Director of the Migrant Council, Carlos Diaz reported to the Board of Directors. CP 277. The Board had the sole authority to fire and discipline Diaz. CP 277.

The Migrant Council pays stipends to board members for attending meetings and other board functions. CP 277. After payment of $600 in any single year, the Migrant Council must report stipend income to the Internal Revenue Service. CP 277. The report must contain an identifying number, preferably a Social Security number, for the board member. CP 277.

The Migrant Council also reimburses board members for travel and other expenses. CP 277. On occasion, board members attended conferences in locations such as Washington, D.C., and New York City. CP 277, 8. On occasion, board members perform business out of state. CP 278. On these occasions, the Migrant Council makes travel arrangements for board members and pays their plane fares and hotel and restaurant expenses. CP 278.

On September 23, 2007, Carlos Diaz read an article in the *Yakima Herald-Republic* about Migrant Council Board Chairman Agustin Garcia. CP 278. The article mentioned that Garcia had a Social Security number

the same as the number used by a lady in Spokane. CP 278. The article raised questions about the status of Agustin Garcia in the United States. CP 278.

In late September 2007, after publication of the newspaper article, Agustin Garcia told Carlos Diaz, in a conversation at Diaz' Sunnyside office, that Garcia was an illegal alien. CP 278. Garcia said he purchased a Social Security number and, by bad luck, that number was the number of a person in Spokane. CP 278. Diaz told Garcia he should consider resigning as chairman. Garcia was remorseful and agreed to resign. CP 278.

In late September or early October 2007, the Internal Revenue Service notified the Migrant Council that Social Security numbers of additional board members did not match IRS records. CP 278. Employee Luana Lumley gave Diaz IRS forms for board members to complete. CP 278.

In September 2007, Carlos Diaz spoke with Ted Watters, an attorney in Washington, D.C., specializing in Head Start law. CP 278. Watters advised Diaz: "get them [the illegal aliens] off the board." CP 278.

As the Executive Director, Carlos Diaz attended Migrant Council Board of Directors meetings. CP 279. He provided a report at each meeting. CP 279. About one week before each board meeting, Diaz met with the Board Chairman and others to prepare the board meeting agenda. CP 279.

In October 2007, Carlos Diaz conducted an agenda preparation meeting in his Sunnyside office. CP 279. Present were Board Chairman Agustin Garcia and board members Idelfonzo Mendoza and Jaime Avalos. CP 279. The IRS had previously identified Avalos as having a non-matching Social Security number. CP 279. During the meeting, Avalos confirmed that he was an illegal alien. CP 279. Mendoza also disclosed he was an illegal. CP 279. Garcia and Avalos gave Diaz employer identification numbers to use in place of Social Security numbers. CP 279. Diaz told all three they should consider resigning from the board. CP 279. Diaz mentioned that a new Head Start bill contained changes that would require the board of directors to include an attorney, someone with background in early childhood education, and someone with accounting experience. CP 279. He also mentioned that these new board qualifications could lead the federal government to inquire about the

citizenship of board members. CP 279. All three - Avalos, Mendoza, and Garcia - were regretful. CP 279. Avalos stated he would leave the board when his term expired in November. CP 279. Garcia had previously told Diaz that he would resign as Board Chairman. CP 279. During the October agenda preparation meeting, Diaz, Garcia, Avalos, and Mendoza also discussed the possibility of the Immigration and Custom Enforcement agency's raiding the Migrant Council headquarters during a board meeting, because of press concerning the status of board members. CP 279.

During the October 2007 Migrant Council Board of Directors meeting, board members did not discuss the illegal status of some of its board members. CP 280. Agustin Garcia resigned as the Board Chairman, but not as a board member. CP 280.

For the November 2007 agenda preparation meeting, Carlos Diaz met again at his office with Jaime Avalos, Idelfonzo Mendoza, and Agustin Garcia, where they discussed the illegal status of Avalos, Mendoza and Garcia. CP 280. Avalos reaffirmed that he would resign. Garcia and Mendoza did not mention whether they would resign. CP 280.

Immediately before convening the November 2007 Board of Directors meeting, certain board members discussed their illegal status and the need for employment numbers. CP 280. Member Paula Contreras disclosed to Diaz that she was in the U.S. illegally. CP 280. Diaz told her to consider resigning. CP 280. She said her husband was legal and asked about his taking her place on the board of directors. CP 280. Before the convening of the meeting, Margarita Sanchez also confessed she was an illegal alien. Diaz told her to consider resigning. CP 280.

Board members did not discuss the illegal status of any members during the November meeting. CP 280. Nevertheless, during breaks, other board members encouraged Garcia, Contreras, and Sanchez to stay as members despite their illegal status. CP 280.

During the Executive Office report portion of the November Board of Directors meeting, Diaz mentioned the new law concerning qualifications for board members and warned that the government might inquire as to the citizenship status of members. CP 280, 1. During the presentation, Diaz emphasized to board members the importance of allowing only legal residents on the Board of Directors. CP 281. Diaz warned that, in order to protect the Migrant Council's funding, he, as its

Executive Director, would need to report to the government any board members who possibly were in the county illegally. CP 281. Although Diaz named no names, he once again encouraged illegal members to resign. CP 281.

During the November 2007 Board of Directors meeting, Agustin Garcia resigned from the board. CP 281. At the conclusion of the meeting, Jaime Avalos no longer served on the board, because of the expiration of his term. CP 281.

On several occasions during 2007, Carlos Diaz spoke with Sean Bleck, a Migrant Council attorney in Seattle, on the subject of citizenship of board members. CP 281. Bleck told Diaz that common sense dictated that board members of any federally funded group be U.S. citizens. CP 281. During the November 2007 Migrant Council Board of Directors meeting, and likely during other meetings, Diaz told board members of the counsel received from Sean Bleck. CP 281.

In November and December 2007, Carlos Diaz prepared a plan for transition of board membership. CP 282. He intended to provide the plan to the Board of Directors at its December 15, 2007, meeting. CP 282. The plan called for resignations of all board members who resided in the

United States illegally. CP 282.

From December 12 to 14, Carlos Diaz called Frank Fuentes, Associate Commissioner of Head Start for the United States Department of Health and Human Services. CP 282. Diaz left messages, but Fuentes never returned the calls. CP 282. Diaz planned to mention to Fuentes that the Migrant Council had illegal aliens as board members. CP 282.

On either December 13 or 14, one of Carlos Diaz's assistants received a call from someone, probably new Board Chairman Rudy Mendoza, asking to place on the December board meeting agenda the replacement, on the Board of Directors, of Agustin Garcia by Jaime Avalos. CP 282. This would mean an illegal alien would return to the Board of Directors and Diaz would need to report four, rather than three, illegals to the federal government. CP 282.

Carlos Diaz was fired at the December 15, 2007, Board of Directors meeting. CP 282. Before the firing, he received good, if not excellent, ratings in performance evaluations. CP 282.

The Migrant Council denied that any of its board members are illegal aliens. CP 1677. Therefore, after Carlos Diaz filed this suit, he sent interrogatories to the Migrant Council. The interrogatories asked, in part:

> INTERROGATORY NO. 17: During his employment, did Carlos Diaz speak with any directors, mangers or supervisors about the status, within the United States, of any member or members of the Board of Directors? If so, please indicate: (1) the date of the conversation; (2) with whom the conversation occurred; and (3) what was said during the conversation.
>
> ...
>
> INTERROGATORY NO. 20: For each member of the board of directors, indicate: (1) the nation of his or her citizenship; and (2) whether the member was legally within the United States at the time of Carlos Diaz' termination from employment.

CP 1610, 11. Diaz's requests for production included:

> REQUEST FOR PRODUCTION NO. 8: Documents of citizenship for each member of the Board of Directors at the time of the termination of Carlos Diaz' employment.

CP 1616. The Migrant Council refused to answer both interrogatories and to produce the records. CP 1610, 1, 6. Diaz brought a motion to compel, and, on September 8, 2009, the court entered an order compelling responses to both interrogatories and the production request. CP 1514-7.

After entry of the order to compel, the Migrant Council supplemented its answers to interrogatories 17 and 20 and its response to the request for production by again refusing to provide the information. CP 1083, 4. The Migrant Council also referred the reader to deposition

answers for the immigration status of board members Jaime Avalos, Paula Contreras, Agustin Garcia, Ildefonso Mendoza, and Margarita Sanchez. CP 1084. In their respective depositions, Avalos, Contreras, Garcia, Mendoza, and Sanchez refused to answer questions regarding citizenship and the legality of his or her presence in the United States. CP 1084.

Carlos Diaz' counsel sought to gain, through depositions of board members, the information denied Diaz in written discovery. CP 453. Nevertheless, counsel was unable to effectively cross-examine Washington State Migrant Council board members. CP 453. For example, counsel sought to explore board members' mental states, including possible fear and anger, resulting from Diaz' stating he would report their illegal status to the government. CP 453. Counsel sought further to explore the impact of a member's immigration status and Diaz' threat to report the status upon a board member's decision-making process. CP 453. Counsel could not get answers to these questions, because board members refused to answer questions concerning their respective immigration status. CP 453.

Because of the violation of the discovery order, Carlos Diaz filed a motion to hold the Migrant Council in contempt and to enter a default

judgment. CP 1510, 1. After giving the Migrant Council one last chance to obey the discovery order, the court declared the Migrant Council to have willfully violated the order and entered a default order. CP 1673-5.

In its December 11 order, the superior court noted that the Migrant Council failed to comply with the court order of September 8, 2009, in the following respects: (1) failing to fully answer interrogatory 20, by refusing to provide the immigration status of board member Jaime Avalos; (2) failing to fully answer interrogatory 20, by refusing to provide the immigration status of board member Paula Contreras; (3) partially, but not fully, answering interrogatory 20, concerning the immigration status of board member Agustin Garcia; (4) partially, but not fully, answering interrogatory 20, concerning the immigration status of board member Ildefonso Mendoza; (5) failing to fully answer interrogatory 20, by refusing to provide the immigration status of board member Margarita Sanchez; (6) failing to fully respond to request for production 8, by failing to produce documentation of immigration status for Margarita Sanchez; (7) failing to fully respond to request for production 8, by failing to produce documentation of immigration status for Jaime Avalos; (8) failing to fully respond to request for production 8, by failing to produce

documentation of immigration status for Paula Contreras; (9) failing to fully respond to request for production 8, by failing to produce documentation of immigration status for Agustin Garcia; and (10) failing to fully respond to request for production 8, by failing to produce documentation of immigration status for Idelfonzo Mendoza. CP 1673-5.

The Migrant Council filed a motion for reconsideration of the court's order of default. CP 1082-1103. In response to the motion, the court directed Diaz to brief the issue of whether the law precluded an illegal alien from serving on the Migrant Council Board of Directors. CP 968-73 and 977-96. The court never asked Diaz to address whether lesser sanctions should be imposed. CP 968-73 and 977-96.

On February 5, 2010, the court orally granted the Migrant Council's motion for reconsideration and vacated the default judgment. RP 2/5/10. Without the opportunity for Carlos Diaz to address the issue of lesser sanctions, the court ruled that lesser sanctions should be imposed in the form of a declaration that Migrant Council board members are illegal aliens. RP 2/5/10.

Thereafter Carlos Diaz filed a motion for an award of terms and gave the Migrant Council notice. CP 456, 7. The superior court awarded

Carlos Diaz terms in the amount of $1,500. CP 154, 5. The order specifically ties the $1,500 to attorneys fees and costs "incurred as a result of defendant's violation of the court order compelling discovery." CP 154, 5.

After refusing discovery of information relevant to the claims of Diaz, the Migrant Council filed a summary judgment motion to dismiss Diaz's suit. CP 785-812. Because of the unfairness of the Council's attempt to dismiss the suit while hiding relevant facts, Diaz moved the court to strike the Migrant Council's motion. CP 343-88. The court granted the motion in part and denied the motion in part. RP 4/19/10.

In order to prevail on a claim of wrongful discharge in violation of public policy, an employee must show three things: (1) that Washington has a clear public policy (the clarity element), (2) that discouraging the conduct would jeopardize the public policy (the jeopardy element), and (3) that policy-protected conduct caused the dismissal (the causation element). If these three elements are met, (4) an employer may still prevail if it is able to offer an overriding justification for the termination decision (the absence of justification element). The Migrant Council sought a summary judgment dismissal of the case on elements 1, 2, and 4. The Superior

Court ruled that, because of the violation of the order compelling discovery, the Migrant Council could proceed on its motion, only with respect to elements 1 and 2.[2] RP 4/19/10.

IV. ARGUMENT

A. THE MIGRANT COUNCIL'S APPEAL IS BASED UPON FALSE OR MISLEADING ASSUMPTIONS AND ASSERTIONS.

The Migrant Council posits unfair and misleading assertions on appeal, which Carlos Diaz will now summarize and correct.

1. The Migrant Council contends it has no obligation to obtain information in the control or possession of its Board of Directors. The law, as analyzed below, establishes that a corporation must produce, in discovery, information known by its employees. This principle applies even stronger when the agent of the corporation is a member of the Board of Directors, the highest authority at the corporation.

2. The Migrant Council contends that the illegal status of its board members is irrelevant, since Carlos Diaz need not prove that any of the board members are illegal. He need only prove that he threatened to report

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[2] The court first ruled that the Migrant Council could proceed with the motion only on element 1, but modified the ruling because the Migrant Council would not take "no" for an answer.

their illegal status.

The Migrant Council's sophistic argument fails to note that the Migrant Council denies both that any of its board members were illegal aliens and that it fired Carlos Diaz because he threatened to report their illegal conduct. The argument also fails to recognize that the motivation of each board member, when firing Carlos Diaz, is the critical issue at trial. An illegal board member is more likely to fire Carlos Diaz for threatening to report him or her than would be a "legal" board member. Thus, the immigration status of each board member is crucial to the case and should be available for discovery in order that Carlos Diaz might prepare for trial.

Because of the willful refusal to provide discovery, the Migrant Council prevents Carlos Diaz from effectively cross-examining board members. For example, Carlos Diaz cannot ask critical questions, such as: are you in the United States illegally? What steps do you take to avoid detection as an illegal alien? What reaction did you have when Diaz told you he would report you to authorities? Did it frighten you when Diaz stated he would report you to the authorities? Did it anger you or concern you that Carlos Diaz stated he would report you to the authorities? Did

you seek to fire Diaz because he intended to report you as an illegal alien? Did you discuss this issue with other board members? All of these questions are avoided by board members because they have asserted fifth amendment rights.

3. The Migrant Council boasts that it requested information and documents from board members to comply with the discovery order. This bluster begs the questions: Who at the Migrant Council asked the board members? The Board of Directors controls Council actions. Did the Board of Directors ask themselves to provide the information? Did the Board of Directors, in turn, refuse its own request? If the Migrant Council wanted to obey the discovery order, the Board of Directors would have adopted a resolution demanding that board members, i.e., themselves, provide information or resign. These questions alone illustrate the willful nature of the Migrant Council's disobedience of the court order demanding production of the relevant information.

4. The Migrant Council contends it engages in no unlawful conduct and is free to maintain illegal aliens on its Board of Directors. It even ignores the fact that being illegally in the United States is a crime. In support of its argument, it unfairly emphasizes Carlos Diaz's testimony

that he had not earlier expressed concern about the presence of illegal aliens, despite the fact that the issue was only recently brought to his attention.

As illegal aliens, Migrant Council board members Jaime Avalos, Agustin Garcia, Idelfonzo Mendoza, Paula Contreras, Margarita Sanchez, Abraham Gonzalez, and Carla Correa, all of whom voted to fire Carlos Diaz, are guilty of a federal crime. 8 U.S.C. § 1325 renders unlawful presence in the country a crime. The statute reads:

> (a) Improper time or place; avoidance of examination or inspection; misrepresentation and concealment of facts
>
> Any alien who
>
> (1) enters or attempts to enter the United States at any time or place other than as designated by immigration officers, or
>
> (2) eludes examination or inspection by immigration officers, or
>
> (3) attempts to enter or obtains entry to the United States by a willfully false or misleading representation or the willful concealment of a material fact, shall, for the first commission of any such offense, be fined under title 18 or imprisoned not more than 6 months, or both, and, for a subsequent commission of any such offense, be fined under title 18, or imprisoned not more than 2 years, or both.

Title 18 is the United States criminal code.

Another statute imposes criminal sanctions upon the illegal Migrant Council board members. 18 U.S.C. §911 reads:

> Whoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both.

The purchasing or use of a false Social Security number is also a crime. Publication of the story about Agustin Garcia's purchase of a false Social Security number prompted Carlos Diaz to take steps to rid the Board of Directors of illegal aliens. The Council's refusal to provide records concerning the immigration status of its board members leads one to question whether others may have also procured false Social Security numbers. Any board member who did so is guilty of the additional crime of perjury or false statement. See 18 U.S.C. § 1621; 26 U.S.C. § 6065; 26 U.S.C. § 7206; 28 U.S.C. § 1746; "Longmont mother convicted of using false social security number," December 8, 2009, **Boulder Daily Camera**, http://www.dailycamera.com/ci_13956180. By engaging illegal aliens on the board and knowingly using false Social Security numbers to report board member income to the Internal Revenue Service, the Migrant Council is a clear participant in this criminal misconduct.

Not only its board members, but the Migrant Council itself, is

committing crimes by facilitating the activities of illegal aliens on its board. Among other criminal misconduct, the Migrant Council pays a stipend to its board members. During board meetings and other functions, the Migrant Council provides shelter for board members. One meeting occurred off Migrant Council headquarters in order to shield board members from detection from immigration officials. The Migrant Council purchases plane tickets and hotel accommodations. In fact, simply by employing board members, the Migrant Council encourages illegal members to continue their presence in the United States.

Under 8 U.S.C. § 1325; 18 U.S.C. §911; 18 U.S.C. § 1621; 26 U.S.C. § 6065; 26 U.S.C. § 7206; and 28 U.S.C. § 1746, the Migrant Council and its officials are subject to sanctions as accessories to the immigration crimes committed by illegal board members. 18 U.S.C. § 2 reads:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

A decision of some relevance is **United States v. Pulido-Santoyo,**

580 F.2d 352 (9th Cir.1978). Esteban Pulido-Santoyo was convicted of knowingly assisting an alien to avoid apprehension in violation 8 U.S.C. § 2 and 18 U.S.C. § 1325. Although the conduct of Pulido-Santoyo was more egregious than the actions of the Migrant Council, the case shows that knowingly providing any assistance to an illegal alien can lead to criminal sanctions. Similarly, a United States citizen who, by willful concealment of material facts, assists an illegal alien is also guilty of a crime. **United States v. Rubenstein**, 151 F.2d 915 (2nd Cir.1945).

Another statute directly imposes principal liability, under criminal law, for harboring, paying and assisting an illegal alien. 8 U.S.C. § 1324, the most alarming of the criminal statutes, exposes the Migrant Council and its officials to liability for working with illegal aliens on the board. The statute reads, in relevant part:

> (a) Criminal penalties
>
> (1)(A) Any person who -
>
> ...
>
> (ii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

> (iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;
>
> (iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or
>
> (v)(I) engages in any conspiracy to commit any of the preceding acts, or
>
> (II) aids or abets the commission of any of the preceding acts,
>
> shall be punished as provided in subparagraph (B).
>
> ...
>
> (3)(A) Any person who, during any 12-month period, knowingly hires for employment at least 10 individuals with actual knowledge that the individuals are aliens described in subparagraph (B) shall be fined under Title 18 or imprisoned for not more than 5 years, or both.

Numerous reported decisions affirm criminal convictions of defendants for the type of conduct in which the Migrant Council engages with respect to its illegal board members. For example, the Migrant Council arranges for transportation of illegal board members. Transportation of aliens illegally within the country is a felony.

Banderas-Aguirre v. United States, 474 F.2d 985 (5th Cir.1973); **Vega-Murrillo v. United States**, 247 F.2d 735 (9th Cir.1957). Persons who merely transport aliens within the country, but who do not actually smuggle them into the United States, do not escape punishment. **United States v. Sanchez-Vargas,** 878 F.2d 1163 (9th Cir.1989).

The Migrant Council provides premises for member meetings and pays for hotel accommodations. An employer, who knowingly or recklessly disregards an employee's status as an alien and keeps the employee in his employ, engages in "harboring" within the meaning of the statute proscribing harboring an illegal alien. **United States v. Kim**, 193 F.3d 567 (2nd Cir.1999). The term "harbor," as used in provisions of 8 U.S.C. § 1324, means affording shelter to such aliens, and is not limited to clandestine sheltering only. **United States v. Acosta DeEvans**, 531 F.2d 428 (9th Cir.1976). Merely providing shelter to an alien, with knowledge of his illegal presence in United States, is sufficient to constitute "harboring" in the purview of 8 U.S.C. § 1324. **United States v. Lopez**, 521 F.2d 437 (2nd Cir.1975).

The criminal statute prohibiting encouragement of an alien to reside in the United States illegally also applies to encouraging illegal

aliens who are already in the country to remain here. **United States v. Oloyede**, 982 F.2d 133 (4th Cir.1992). Although a defendant is not implicated in an aliens' illegal entry, his offer of employment to and voluntary transportation of aliens sufficiently furthers their illegal presence in the United States to constitute a violation of 8 U.S.C. § 1324. **United States v. Shaddix**, 693 F.2d 1135 (5th Cir.1982). Under the statute, "harboring" aliens includes more than smuggling aliens into United States, since the statute is aimed at preventing unauthorized aliens from remaining in United States as well as preventing them from entering. **U. S. v. Rubio-Gonzalez,** 674 F.2d 1067 (5th Cir.1982); **United States v. Acosta DeEvans**, 531 F.2d 428 (9th Cir.1976).

The Migrant Council pays board members for their services. Paying money to an illegal alien exposes the payor to criminal sanctions. A defendant's payment of money to an alien to support a residence here qualifies as "encouragement" to reside unlawfully in the United States, and supports a conviction for encouraging or inducing an alien to reside in the United States illegally. **United States v. Nidaye**, 434 F.3d 1270 (11th Cir.2006).

It is not just the Migrant Council employees who assist illegal board members, but the Migrant Council itself that is subject to criminal sanctions. Under 8 U.S.C. § 1324, an institution that hires the illegal alien is criminally liable. **American Friends Service Committee Corp. v. Thornburgh**, 961 F.2d 1405 (9th Cir.1991). The Migrant Council also exposes itself to liability under RICO. The Racketeer Influenced and Corrupt Organizations Act (RICO) applies to an employer engaged in open and ongoing pattern of violations of the Immigration and Nationality Act, in particular, by knowingly hiring at least ten individuals, with actual knowledge the individuals were aliens. **Williams v. Mohawk Industries, Inc.**, 465 F.3d 1277 (11th Cir.2006). An institution violates RICO by concealing, harboring, or shielding from detection, or attempting to conceal, harbor or shield from detection aliens that illegally entered the United States. **Id**.

In addition to the criminal exposure, the Migrant Council exposes itself to public ridicule by continuing to employ numerous known illegal aliens on its board. One newspaper initiated the unmasking with the story of Agustin Garcia's false Social Security number. The Migrant Council would suffer extreme embarrassment if an Immigration and Custom

Enforcement raid occurred during a Migrant Council Board of Directors meeting.

The Washington State Migrant Council continues to engage in criminal misconduct by employing illegal aliens on its Board of Directors. By its intense advocacy in this litigation, the Migrant Council also encourages the continued criminal conduct of its board members. Instead of attempting to thwart this litigation process by repeated motions and excuses for its misconduct, the Migrant Council should take immediate steps to remove from the board its illegal members.

5. The Migrant Council characterizes board members as "volunteers," not employees. Along these lines, the Migrant Council argues the board members are not paid wages. These assertions are misleading, since the Migrant Council pays a stipend to the board members and must report, to the Internal Revenue Service, the income it pays board members as if board members were employees. It is in any event criminal to pay a known illegal alien regardless of the technicalities of his or her the employment status, as outlined above.

6. The Migrant Council seeks to shield its responsibility for the refusal of board members to answer questions, by stating members'

independent counsel advised the members not to answer questions. The Migrant Council conveniently omits the fact that it paid the lawyer who gave that advise rather than leaving it to each board member to seek independent counsel.

7. The Migrant Council cites a series of cases, including **Salas v. Hi-Tech Erectors**, 168 Wn.2d 664, 230 P.3d 583 (2010), in which a party was denied discovery of another party's immigration status. Nevertheless, in each decision the immigration status of a party was either irrelevant, or at most tangentially relevant, to the claims in the suit. Here the immigration status of Migrant Council board members is directly related to the claims in the case and Carlos Diaz cannot effectively litigate his claim that he was fired for addressing board members' immigration status without discovery of that status.

8. The Migrant Council characterizes a party's immigration status as "politically sensitive." There is, however, no privilege protecting politically sensitive or prejudicial information.

One should entertain political and humanitarian concern for illegal aliens. From that concern it does not follow, however, that one should encourage or protect illegals who are serving on a board administering

millions of dollars of public funds. As an organization that serves the farm worker and low income immigrant population, the Migrant Council may have particular empathy for the plight of illegal aliens. Still this empathy does not excuse its own lawless conduct or the firing of its Executive Director, who sought to end the lawless conduct.

B. THE SUPERIOR COURT HELD THE AUTHORITY TO ENTER THE DISCOVERY ORDER COMPELLING DISCLOSURE OF IMMIGRATION STATUS.

The superior court imposed sanctions because of the Migrant Council's refusal to disclose the immigration status information of board members. The refusal of the board members is no different from a case in which a corporation's chief executive officer refuses to provide corporate information compelled by a court order. If anything, the refusal is worse since the Board of Directors ultimately controls the Migrant Council. See RCW 24.03.095.

The Migrant Council's argument is based, in part, upon the flawed analysis that it must exercise "control" or possess a legal right to obtain the information, and that information in the minds of its board members is not within the Migrant Council's control. This claim ignores critical

language in the Court Rules controlling discovery. CR 33(a) requires "officers" of the corporation to provide information sought in interrogatories that are directed to the corporation. In turn, CR 37(b)(2) allows sanctions when a "director" of the corporation disobeys a court order. The Migrant Council also fails to read the entire Civil Rule imposing the duty to produce records upon a party. CR 33(a)(1) imposes an obligation to produce records "in the *possession, custody or control* of the party upon whom the request is served." Italics added. Thus, control is not at issue if the corporation has possession or custody of the records.

The Migrant Council cannot hide behind an argument that board members are distinct from the Council and that it does not have possession of information known to its Board of Directors. A person upon whom interrogatories are propounded is bound to furnish relevant information from whatever sources are available. **Williams v. Johanns**, 235 F.R.D. 116 (D.D.C.2006). A corporate party cannot avoid interrogatories by making an allegation of ignorance if it can obtain information from agents or sources under its control.[3] A command to the corporation is in effect a

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[3] **Skelton & Co. v. Goldsmith**, 49 F.R.D. 128 (S.D.N.Y.1969); **Holt v. Southern Railway Company**, 51 F.R.D. 296 (E.Tenn.1969); **United States v. 58.16 Acres of Land in Clinton County**, 66 F.R.D. 570 (E.D.Ill.1975).

command to those officially responsible for the conduct of its affairs.[4] The knowledge of a corporation's officers, if relevant to the subject matter of the interrogatory or production request, is imputed to the corporation. **Wyle v. R.J. Reynolds Industries**, 709 F.2d 585, 590 (9th.Cir.1983).[5] Thus, the Council was bound to answer discovery requests based upon the knowledge of its board members, and the court correctly entered an order compelling discovery.

The Migrant Council contends that the alien status of its board members lacks a business connection with the Council. There are, however, many important connections. The Migrant Council compensates board members for their services; compensating illegal aliens is a crime.[6] The Migrant Council transports, provides accommodations, and otherwise harbors its illegal alien board members, all of which further constitute a

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[4] **Wilson v. United States**, 221 U.S. 361, 376 (1911); **Gehling International Insurance Company v. Comissioner of Internal Revenue Service**, 839 F.2d 131, 138 (3rd.Cir.1988).

[5] In **Citric Acid Litigation**, 191 F.3d 1090 (9th.Cir.1999), upon which the Migrant Council relies, a corporation was absolved of an obligation to produce records, since it had no custody of the records and the records were in the hands of a related Swiss corporation, over whom the corporation had no authority.

[6] 8 U.S.C. § 1324; **Banderas-Aguirre v. United States,** 474 F.2d 985 (5th Cir.1973); **United States v. Sanchez-Vargas,** 878 F.2d 1163 (9th Cir.1989); **United States v. Kim**, 193 F.3d 567 (2nd Cir.1999); **United States v. Acosta DeEvans**, 531 F.2d 428 (9th Cir.1976); **American Friends Service Committee Corp. v. Thornburgh**, 961 F.2d 1405 (9th Cir.1991).

crime.[7] The Migrant Council has also provided false Social Security numbers to the IRS for its illegal board members.

When Carlos Diaz discussed with the illegal board members the need for them to resign, the immigration status of the board members became central to running the business of the Migrant Council. When the Migrant Council, in turn, fired its veteran Executive Director - who previously received high grades - because he told illegals to resign from the board, the immigration status of directors had an integral connection to the Migrant Council's business. In turn, the Migrant Council holds a business reason to collect information about board members' immigration status when it faces a lawsuit that its Executive Director was fired because he reported the immigration status.[8]

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[7] 8 U.S.C. § 1324; **Banderas-Aguirre v. United States,** 474 F.2d 985 (5th Cir.1973); **United States v. Sanchez-Vargas,** 878 F.2d 1163 (9th Cir.1989); **United States v. Kim**, 193 F.3d 567 (2nd Cir.1999); **United States v. Acosta DeEvans**, 531 F.2d 428 (9th Cir.1976); **American Friends Service Committee Corp. v. Thornburgh**, 961 F.2d 1405 (9th Cir.1991).

[8] In **Gehling International Insurance Company v. Commissioner of Internal Revenue Service**, 839 F.2d 131 (3rd.Cir.1988), relied upon by the Migrant Council, the government sought records from the president of the corporate party, but the records did not concern the party to the case. The records held by the president were records he held as the president of another unrelated corporation in his role as president of the other corporation.

C. THE SUPERIOR COURT ENTERED APPROPRIATE SANCTIONS.

When the Migrant Council and its board members violated the discovery order, the superior court held authority to enter sanctions, despite pleas of the fifth amendment. Whereas board members may be able to buffer themselves from testifying to their own criminal behavior, the exercise of this shield has consequences to the Migrant Council. Sanctions are appropriate when a party uses her fifth amendment privilege to preclude the opposing party from obtaining relevant discovery. **Bomar v. Moser,** 369 Ark. 123, 251 S.W.3d 234, 240 (2007).

The Migrant Council complains of the form of sanctions entered. Nevertheless, the superior court acted within its discretion when declaring that the Migrant Council admitted the illegal immigration status of its board members and that there was an inference that the Board fired Diaz for encouraging resignations. In fact, the Migrant Council is lucky the court revised its order of default against it, since a default judgment was the appropriate sanction for violating the discovery order. CR 37(b)(2)(c). When a party claims the privilege of not answering a proper question, the court may dismiss his action. **Annest v. Annest**, 49 Wn.2d 62, 64, 298

P.2d 483 (1956). In at least three cases, Washington courts have entered judgments against defendants who refused to obey a discovery order.[9]

If default was an available sanction, the lesser sanction of an instruction that the Migrant Council admits certain facts and that other facts are inferred is even more permissible.[10] Such sanctions are explicitly authorized by CR 37(b)(2)(A) and (B). Case law also supports the conclusion that when a party claims the fifth amendment privilege, a court is warranted in drawing a negative inference against that party. **Baxter v. Palmigiano**, 425 U.S. 308, 318 (1976); Annotation, *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).

Many other courts in various circumstances have entered default judgments or inferred facts when a party claims the fifth amendment

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[9] **Smith v. Behr Process Corp.**, 113 Wn.App. 306, 324 (2002); **RCL Northwest, Inc. v. Colorado Resources, Inc.**, 72 Wn.App. 265 (1993); **Delany v. Canning**, 84 Wn.App. 498 (1997).

[10] The Migrant Council argues entry of such an order violates the constitutional provision against a judge commenting on the evidence. Nevertheless, the constitutional prohibition does not apply to a jury instruction commenting on a fact which is not in issue. **Hansen v. Wightman**, 14 Wn.App. 78, 84 (1975). If the Migrant Council is correct, a court could never enter a default judgment or an order declaring a fact admitted as a discovery sanction when a party files a jury demand.

privilege in civil litigation. For example, if a spouse invokes a fifth amendment privilege regarding questions about adultery, the divorce court is free to impose a variety of sanctions against that spouse, including the denial of affirmative relief. **Anonymous v. Anonymous**, 353 So. 2d 510 (Ala. 1977) (as result of wife's claim against self-incrimination, court was free to make any and all inferences against her regarding substance of questions propounded).[11] The rationale for this rule was explained in **Dodson v. Dodson**, 855 S.W.2d 383 (Mo. Ct. App. 1993). In that case, the court stated:

> Although a party has the right to take the Fifth Amendment against self-incrimination in a civil case, the right is not without its price. Where a party takes the Fifth Amendment in a dissolution action and thereby conceals pertinent information, the party is

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[11] See also **Christenson v. Christenson**, 281 Minn. 507, 162 N.W.2d 194 (1968) (after wife claimed privilege, court was free to dismiss her claim); **Harwell v. Harwell**, 355 S.W.2d 137 (Mo. Ct. App. 1961) (court free to make any inferences against party claiming privilege); **Levin v. Bornstein**, 13 Misc. 2d 161, 174 N.Y.S.2d 574 (Sup. Ct. 1958), aff'd, 7 A.D.2d 995, 183 N.Y.S.2d 868, aff'd, 6 N.Y.2d 892, 190 N.Y.S.2d 702 (1959) (court free to impose sanctions on party who invokes fifth amendment privilege); **Davis v. Davis**, 233 Va. 452, 357 S.E.2d 495 (1987) (moving party in civil action who exercises privilege against self-incrimination to refuse to answer questions pertinent to the issues involved will have his complaint dismissed upon timely motion); **Donaldson v. Donaldson**, 27 Va. Cir. 327 (Fairfax County 1992) (court free to impose noncriminal sanctions on the husband who invoked his fifth amendment privilege against self-incrimination); **Molloy v. Molloy**, 46 Wis. 2d 682, 176 N.W.2d 292 (1970) (it was error for court not to take an adverse inference against wife who claimed privilege). See generally Annotation, *Dismissing Action or Striking Testimony Where Party to Civil Action Asserts Privilege Against Self-Incrimination as to Pertinent Question*, 4 A.L.R.3d 545 (1965); Kaminsky, *Preventing Unfair Use of the Privilege Against Self-Incrimination in Private Civil Litigation*, 39 Brooklyn L. Rev. 121 (1972); Madsen, *Penalizing the Civil Litigant who Invokes the Privilege Against Self-Incrimination*, 24 U. Fla. L. Rev. 541 (1972).

> not entitled to affirmative relief when timely objection is made.... Furthermore, whether asserted by the petitioner or the respondent, invocation of the Fifth Amendment privilege will, in most cases, require some form of judicial response of a remedial nature to eliminate any undue advantage which might flow from the ability to conceal pertinent evidence. In this regard, the trial court is vested with discretion in fashioning an appropriate remedy to prevent unfairness and disadvantage from the concealment of pertinent information.

855 S.W.2d at 385. In **Mahne v. Mahne**, 66 N.J. 53, 328 A.2d 225, 227 (1974), the Garden State court noted that, in civil proceedings, courts have, in the interest of truth and justice, displayed understandable readiness to impose noncriminal sanctions for refusal to submit to pretrial discovery on the basis of the privilege.

The Migrant Council cannot avoid sanctions by distancing itself from its board members. It is responsible for the conduct of its board members. Being a legal fiction, the Migrant Council can only act through its agents and members of the Board of Directors are the body's most important agents. **Threthewey v. Green River Gorge**, 17 Wn.2d 697, 724, 136 P.2d 999 (1943). Thus, the principle that a court is warranted in drawing a negative inference against a party that claims the fifth amendment privilege also extends by natural implication to employees of a

party if the employee's role in the dispute is material. **Data General Corp. v. Grumman Systems Support Corp.**, 825 F.Supp. 340, 352, 3 (D.Mass.1993). [12] Courts have even imposed an adverse inference against a party when a nonparty witness, who is neither an employee nor officer, asserts the privilege. **LiButti v. U.S.**, 107 F.3d 110 (2nd Cir.1997) (father's invocation admissible to prove daughter's business was alter ego for his assets); **F.D.I.C. v. Fidelity & Deposit Co. of Maryland**, 45 F.3d 969 (5th Cir.1995) (fraudulent loan recipient's invocation of privilege admissible in action against fidelity bond insurer of bank for fraudulent loans made by bank's lending officer).

The Migrant Council complains that the superior court struck some of the arguments asserted by it in support of its summary judgment motion. Nevertheless, the Council's failure to afford discovery on the issue of immigration status rendered it difficult for Diaz to respond to those arguments. The superior court has authority under CR 37(b)(2)(B) to strike some of a party's claims. In **Felsman v. Kessler**, 2 Wn.App. 493, 468 P.2d 691 (1970), the court of appeals reversed a summary judgment in

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[12] See also **Rad Services, Inc. v. Aetna Cas. and Sur. Co.**, 808 F.2d 271 (3rd Cir.1986) and **Brink's, Inc. v. City of New York**, 717 F.2d 700 (2nd Cir.1983).

favor of the defendant, in part because of his refusing to answer questions based upon his fifth amendment privilege.

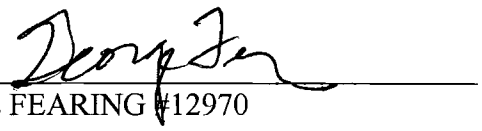
CR 37 demands that the superior court award the opposing party reasonable attorneys' fees and costs incurred because of a party's violation of a discovery order. Pursuant to this rule, the court ordered the Migrant Council to pay $1500 in fees to Carlos Diaz. The Migrant Council disingenuously claims it lacked an opportunity to respond to the request for attorneys' fees. Carlos Diaz filed a motion for an award and scheduled the motion for hearing.

V. CONCLUSION

Carlos Diaz respectfully requests that the court of appeals affirm the Superior Court's discovery rulings.

DATED this 9TH day of March, 2011.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
Attorneys for Plaintiff Carlos Diaz



GEORGE FEARING #12970

CERTIFICATE OF SERVICE

I, Kristi Flyg, hereby certify that on the 9th day of March, 2011, I caused to be served a true and correct copy of the foregoing document to KAREN KRUSE, by the method indicated below, and addressed to the following:

☐	Hand-delivered	KAREN KRUSE
☑	First-Class Mail	**JACKSON LEWIS, LLP**
☐	Overnight Mail	One Union Square
☐	Facsimile	600 University St. Ste 2900
		Seattle, WA 98101

KRISTI FLYG

Appendix 10

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MICHAEL J. KILLIAN
FRANKLIN COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF FRANKLIN

CARLOS DIAZ and ROSALINDA DIAZ, husband and wife; Plaintiffs, v. WASHINGTON STATE MIGRANT COUNCIL, a Washington non-profit corporation, Defendant.	**Case No. 09-2-50216-4** **~~[PROPOSED]~~ ORDER GRANTING DEFENDANT'S MOTION FOR A PROTECTIVE ORDER AND DENYING PLAINTIFFS' MOTION TO COMPEL** **[CLERK'S ACTION REQUIRED]**

THIS MATTER came on before the undersigned Judge for hearing on September 8, 2009 on the following cross-motions by the parties:

1. Plaintiffs' Motion to Compel Complete Discovery Responses ("Motion to Compel"), and

2. Defendant's Motion for a Protective Order Limiting Discovery of Immigration-Related Matters ("Motion for Protective Order").

The Court has considered Plaintiff's papers in support of their Motion to Compel and Defendant's papers in opposition thereto. The Court also has considered Defendant's papers in support of its Motion for Protective Order and Plaintiffs' papers in opposition thereto. Finally,

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the Court has considered the parties' oral arguments on September 8, 2009, and the records and files herein.

Being fully advised, the Court finds ~~good~~ there is not cause to limit discovery of immigration-related matters as Defendant requests in its Motion for Protective Order, and to deny the immigration-related discovery that constitutes the only remaining issue on Plaintiff's Motion to Compel.

NOW, THEREFORE, the Court rules that Plaintiffs' Motion to Compel Complete Discovery Responses is hereby ~~DENIED~~ Granted, and Defendant's Motion for a Protective Order Limiting Discovery of Immigration-Related Matters is hereby also GRANTED. The Court ORDERS the following:

1. Plaintiffs may ~~not~~ obtain written discovery answers or document production related to the actual immigration or citizenship status of any current or former Board members of Defendant Washington State Migrant Council, including but not limited to Plaintiffs' Interrogatory No. 20 and Request for Production No. 8.
2. Plaintiffs ~~shall not~~ may CFM. ask any witness about the actual immigration or citizenship status of any current or former Washington State Migrant Council Board member.
3. Plaintiffs may question witnesses regarding alleged conversations that Plaintiff Carlos Diaz had with current or former Washington State Migrant Council Board members regarding their own immigration or citizenship status, or the immigration or citizenship status of any other Board member(s). Any and all such testimony regarding any aspect of a Board member's immigration status shall be designated as "CONFIDENTIAL" and shall be protected by the Protective Order Governing the Disclosure and Use of Confidential Information and Documents the Court is entering in this action, until further order of the Court.

DONE IN OPEN COURT this 9 day of September, 2009.

The Honorable Craig J. Matheson

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Presented by:

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By: Karen P. Kruse
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Approved as to Form; Notice of Presentation Waived:

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.

By: _____
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on this date, a true and accurate copy of the document to which this declaration is affixed was delivery by hand to:

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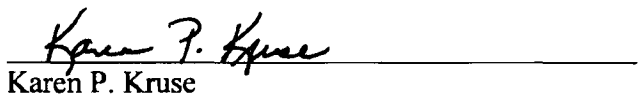
DATED this 8th day of September, 2009.



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Appendix 12

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

CARLOS and ROSALINDA DIAZ, husband and and wife; Plaintiffs, vs. WASHINGTON STATE MIGRANT COUNCIL, a Washington non-profit corporation Defendant	)	CAUSE NO. 09-2-50216-4 AMENDED MOTION TO HOLD DEFENDANT IN CONTEMPT AND SUPPORTING BRIEF

LAWSUIT

Carlos Diaz sues his former employer, Washington State Migrant Council, for wrongful termination of employment. The Migrant Council fired Diaz in violation of public policy, because of his opposition to the illegal immigration status of members seated on the Migrant Council Board of Directors. Rosalinda Diaz, the wife of Carlos Diaz, joins in the lawsuit, because of the emotional distress she has suffered from the wrongful termination.

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MOTION

The plaintiffs bring this motion pursuant to CR 37 and the court's inherent power to hold a party in contempt for violating a court order.

On September 8, 2009, the court granted the plaintiffs' motion to compel discovery. By October 5, the defendant had yet to obey the court's order. On October 5, plaintiffs filed a motion to hold the defendant in contempt, grant the plaintiffs judgment, and award the plaintiffs reasonable attorneys fees and costs incurred for bringing the motion. After plaintiffs filed the motion, defendant provided a supplemental response to the discovery requests, but the supplemental response does not comply with the court order. Therefore, plaintiffs renew and amend their motion to hold the defendant in contempt, grant the plaintiffs judgment, and award the plaintiffs reasonable attorneys fees and costs incurred for bringing this motion.

FACTS

In their first set of interrogatories, sent on April 1, 2009, Carlos and Rosalinda Diaz asked the Migrant Council, among other questions:

> INTERROGATORY NO. 17: During his employment, did Carlos Diaz speak with any directors, managers or supervisors about the status, within the United States, of any member or members of the Board of Directors? If so, please indicate: (1) the date of the conversation; (2) with whom the conversation occurred; and (3) what was said during the conversation.
>
> INTERROGATORY NO. 20: For each board member of the board of directors, indicate: (1) the nation of his or her citizenship; and (2) whether the member was illegally within the United States at the time of Carlos Diaz' termination from employment.

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In response to both interrogatories, the Migrant Council first refused to answer, despite the information being critical to the claims of Carlos and Rosalinda Diaz. The Diazes were forced to bring a motion to compel, and, on September 8, 2009, the court entered an order compelling responses to both interrogatories. Unfortunately, the Migrant Council still has not fully responded to the interrogatories.

In its supplemental answer to interrogatory 17, the Migrant Council writes, in part, that it has been unable to reach board member Israel Trujillo. The Migrant Council also answers that Carla Correa agrees to have discussed the subject with Carlos Diaz, but Correa refuses to provide details of the conversation.

The Migrant Council supplemented its answer to interrogatory 20 in a similar vein. The Migrant Council stated it has been unable to reach board member Israel Trujillo, that board member Carla Correa refuses to provide information on her immigration status, and that board member Abraham Gonzalez also refuses to provide information on his status. The Migrant Council also refers the reader to deposition answers for the immigration status of board members Jaime Avalos, Paula Contreras, Agustin Garcia, Ildefonso Mendoza, and Margarita Sanchez. In their respective depositions, Avalos, Contreras, Garcia, Mendoza, and Sanchez refused to answer, based upon fifth amendment grounds, questions regarding citizenship and the legality of his or her presence in the United States.

In their initial requests for production of documents, sent on April 1, 2009, Carlos and Rosalinda Diaz demanded, in part, production of:

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REQUEST FOR PRODUCTION NO. 8: Documents of citizenship for each member of the Board of Directors at the time of the termination of Carlos Diaz' employment.

The Migrant Council initially refused to respond to the request for production and, on September 9, the court ordered a response. The Migrant Council recently supplemented its response, but failed to provide documents from any board member, other than Yesenia Salgado.

ARGUMENT

The Washington State Migrant Council is in violation of the September 9, 2009, order compelling responses to the two interrogatories and the request for production. CR 37(b) (2) authorizes a variety of sanctions for discovery violations, from the exclusion of evidence to a default judgment. **Smith v. Behr Process Corp.**, 113 Wn.App. 306, 324, 54 P.3d 665 (2002). The rule reads:

> (2) Sanctions by Court in Which Action Is Pending. If a party or an officer, director, or managing agent of a party or a person designated under rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under section (a) of this rule or rule 35, or if a party fails to obey an order entered under rule 26(f), the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:
>
> (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
>
> (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceedings or any part thereof, or rendering a judgment by default against

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the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to physical or mental examination;

(E) Where a party has failed to comply with an order under rule 35(a) requiring him to produce another for examination such orders as are listed in sections (A), (B), and (C) of this subsection, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The trial court possesses wide latitude in determining appropriate sanctions, since the trial court is in the best position to determine this issue. **Smith v. Behr Process Corp.**, 113 Wn.App. 306, 324 (2002).

Carlos and Rosalinda Diaz ask the court to enter a default judgment against the Migrant Council for its disobedience to the court order. A default judgment for discovery violations may be entered when the court finds willfulness and substantial prejudice. **Smith v. Behr Process Corp.**, 113 Wn.App. 306, 325 (2002). The Diazes are substantially prejudiced, since the withheld discovery is critical to the central issue in the suit.

The Washington State Migrant Council's violation of the order is also willful. According to the state high court, a party's disregard of a court order without reasonable excuse or justification is deemed willful. **Rivers v. Washington State Conference of Mason Contractors**, 145 Wn.2d 674, 686, 7, 41 P.3d 1175 (2002).

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The Washington State Migrant Council has failed to provide a reasonable excuse for not obtaining the information from its former board member, Israel Trujillo. The Migrant Council simply states it "was unable to reach Israel Trujillo," without any description of the attempts to reach him.

There is no excuse for the withholding of the immigration status information from current board members Carla Correa and Abraham Gonzalez. Despite being part of the control group of the Migrant Council, the two board members wilfully violate the court's order demanding disclosure. The refusal of the board members is no different from a chief executive officer of a corporation refusing to provide corporate information compelled by a court order. If anything the refusal is worse, since the Board of Directors ultimately controls the Migrant Council.

The Migrant Council cannot hide behind an argument that the board members are distinct legal entities from the Council. A person upon whom interrogatories are propounded is bound to furnish relevant information from whatever sources are available to him or her. **Williams v. Johanns,** 235 F.R.D. 116 (D.D.C.2006). Such a person cannot claim ignorance in response to an interrogatory, or limit an answer to matters within his or her own knowledge, where the information sought is available from sources under his or her control. **Essex Builders Group, Inc. v. Amerisure Ins. Co.,** 230 F.R.D. 682 (M.D.Fla.2005). A corporate party cannot avoid answering interrogatories by making an allegation of ignorance if it can obtain information from agents, from persons who have acted in its behalf, or from sources under its control. **Skelton & Co. v. Goldsmith,** 49 F.R.D. 128 (S.D.N.Y.1969); **Holt v. Southern Railway Company,** 51 F.R.D. 296 (E.Tenn.1969); **United States v. 58.16 Acres of Land in Clinton County**, 66 F.R.D.

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570 (E.D.Ill.1975).

The Washington State Migrant Council is also in violation of the court order by allowing board members to assert the fifth amendment privilege against self incrimination. A corporation is not protected by the constitutional privilege against self-incrimination. **Curcio v. United States**, 354 U.S. 118, 77 S.Ct. 1145, 1 L.Ed.2d 1225 (1957); **State v. Mecca Twin Theater & Film Exchange, Inc.**, 82 Wn.2d 87, 91, 507 P.2d 1165 (1973). Going further, individuals, when acting as representatives of a corporation, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. **State v. Mecca Twin Theater & Film Exchange, Inc.**, 82 Wn.2d 87, 91 (1973). Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. **State v. Mecca Twin Theater & Film Exchange, Inc.**, 82 Wn.2d 87, 91 (1973). In their official capacity, therefore, the board members have no privilege against self-incrimination. **State v. Mecca Twin Theater & Film Exchange, Inc.**, 82 Wn.2d 87, 91 (1973).

Even assuming board members' exercise of a fifth amendment privilege is appropriate, this court should still impose sanctions upon the Migrant Council. Stated differently, whereas board members may be able to buffer themselves from testifying to their criminal behavior, the exercise of this shield should still have consequences to the Migrant Council. Those consequences should include entering a default judgment against the Council. Sanctions are appropriate when a party uses his or her fifth amendment privilege to preclude the opposing party from obtaining relevant and critical discovery. **Bomar v. Moser,** 369 Ark. 123, 251 S.W.3d 234, 240 (2007).

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In at least three cases, Washington courts have entered judgments against defendants who refuse to obey a discovery order. In **Smith v. Behr Process Corp.**, 113 Wn.App. 306, 324 (2002), Behr failed to disclose an important test report about its product, during discovery. The class plaintiffs discovered the omission and the investigation of the omission led to the discovery of additional undisclosed documents. Behr blamed the omissions on an "institutional memory [that] forgot." The trial court noted that Behr was responsible to establish a workable discovery system. The trial court then entered a default judgment against Behr as to liability on all of the class' claims and ordered trial to proceed solely on the issue of damages. The Court of Appeals affirmed.

In **RCL Northwest, Inc. v. Colorado Resources, Inc.**, 72 Wn.App. 265, 864 P.2d 12 (1993), shareholders sought an accounting from the corporation's president. The trial court ordered the president to furnish the shareholders with receipts and other documents. The president refused. As a sanction for refusing to comply with its discovery orders, the trial court entered a default judgment for a total of $639,732.30. The sanction was affirmed on appeal.

In **Delany v. Canning,** 84 Wn.App. 498, 929 P.2d 475 (1997), the defendant failed to comply with earlier orders to allow discovery, with the result that the Superior Court entered judgment against the defendant. The Court of Appeals affirmed.

CONCLUSION

Carlos and Rosalinda Diaz first sought information regarding immigration status of board members on April 1. More than six months has passed, without the Migrant Council providing the information. Judgment should be entered against Migrant Council for this persistent and

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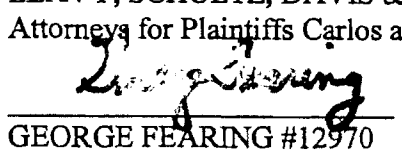
critical abuse of discovery.

DATED this 12th day of October, 2009.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
Attorneys for Plaintiffs Carlos and Rosalinda Diaz



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Appendix 25

FILED
FRANKLIN CO CLERK
2010 MAR -9 P 3:31
MICHAEL J. KILLIAN
BY a DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

CARLOS and ROSALINDA DIAZ, husband and and wife; Plaintiffs, vs. WASHINGTON STATE MIGRANT COUNCIL, a Washington non-profit corporation Defendant	)	CAUSE NO. 09-2-50216-4 PLAINTIFF'S MOTION FOR AWARD OF ATTORNEYS FEES, ORAL ARGUMENT, EVIDENTIARY HEARING, AND RECONSIDERATION

On February 5, 2010, the court orally granted the defendant's motion for reconsideration and vacated a default judgment against the defendant for willful violation of an order compelling discovery. The court ruled that sanctions should be imposed in the form of a declaration that Migrant Council board members are illegal aliens, instead of a default judgment.

Prior to granting the motion for reconsideration, the court directed plaintiffs to address the issue of whether it is unlawful for an illegal alien to serve on the Migrant Council Board of Directors. The court never directed the plaintiffs to address the issue of whether a lesser sanction

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should be entered against the defendant for its violation of the discovery order. Thus, plaintiffs had no opportunity to address the basis upon which the court granted the motion for reconsideration.

Plaintiffs request this court grant oral argument on the issue of lesser sanctions and to conduct an evidentiary hearing whereby Migrant Council board members must appear and answer questions concerning their refusal to provide testimony concerning their immigration status and how the status influenced their decision to fire Carlos Diaz. Along these lines, the plaintiffs move this court for reconsideration of its oral decision granting defendant's motion for reconsideration.

Plaintiffs also request an award of reasonable attorneys fees and costs incurred because of the defendant's violation of the discovery order, requiring the Migrant Council and its Board of Directors to answers questions concerning the immigration status of board members.

DATED this 1ST day of March, 2010.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
Attorneys for Plaintiffs Carlos and Rosalinda Diaz

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Appendix 26

FILED
FRANKLIN CO CLERK
2010 MAR 17 P 1:42
MICHAEL J. KILLIAN
BY DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

CARLOS and ROSALINDA DIAZ, husband and and wife; Plaintiffs, vs. WASHINGTON STATE MIGRANT COUNCIL, a Washington non-profit corporation Defendant	CAUSE NO. 09-2-50216-4 MOTION TO STRIKE OR POSTPONE SUMMARY JUDGMENT HEARING

Plaintiffs Carlos and Rosalinda Diaz move this court for an order striking defendant's summary judgment motion. The summary judgment motion is presently scheduled for hearing on April 5, 2010.

Defendant's summary judgment motion should be stricken because of defendant's willful failure to comply with a court order compelling discovery[1]. The circumstances of this willful

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1 Pending before the Honorable Craig Matheson is a request for sanctions against defendant for the willful violation of the court order. The request for sanctions includes a request to strike the summary judgment motion. If Judge Matheson grants this request, this motion to strike or postpone will be rendered moot.

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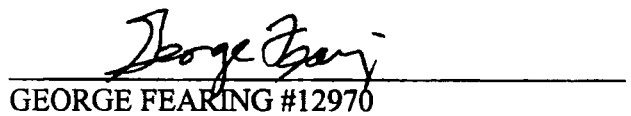
violation are outlined in an accompanying affidavit of George Fearing, counsel for Carlos and Rosalinda Diaz.

In the event the court does not strike the summary judgment motion, the plaintiffs request a continuance of the summary judgment motion. Plaintiffs' counsel, George Fearing, was in trial, when the summary judgment motion was filed and remained in trial until March 16. He has another trial scheduled for the week of March 22, and a third trial for March 31 through April 6. Counsel likely does not have time to respond to the summary judgment motion. If the third trial occurs, he will be unavailable for the summary judgment hearing. The second trial is Yakima County Superior Court case, Strickland v. Tieton. The third trial is Franklin County Superior Court case, Nunez v. Pasco.

As a condition to granting the continuance of the summary judgment hearing, plaintiffs Carlos and Rosalinda Diaz will agree to a trial continuance.

DATED this 17th day of March, 2010.

LEAVY, SCHULTZ, DAVIS & FEARING, P.S.
Attorneys for Plaintiffs Carlos and Rosalinda Diaz



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