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THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

No. 64776-8-1

MIGUEL BERNAL HERNANDEZ, a seaman

Plaintiff/Appellant

v.

GLACIER FISH COMPANY, LLC., a Washington Corporation

Defendant/Respondent/Cross Appellant

APPEAL FROM KING COUNTY SUPERIOR COURT
CAUSE NO. 08-2-12754-1 Sea
Douglass A. North, Judge

BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	vi
INTRODUCTION	1
ASSIGNMENTS OF ERROR AND ISSUES RELATED TO ASSIGNMENTS OF ERROR	9
<i>(A) Assignments of Error</i>	9
(1) The trial court abused its discretion and committed reversible error by sanctioning Plaintiff’s Counsel \$5,000 and excluding Plaintiff’s Counsel from rescheduled IMEs for refusing to agree to surprise, additional, un-agreed exam conditions, imposed at the last second by Glacier’s IME examiner at an agreed CR 35(c) exam	9
(2) IME examiner Rosen’s three page “Information Form” were not merely “required informed consent” conditions but were instead illegal and unagreed extra-judicial conditions.	9
(3) The trial court erred in awarding Glacier’s costs for its private interpreters.	9
(4) The trial court erred in awarding Glacier the expenses of the video deposition of William Skilling Glacier’s vocational expert witness	9
(5) While <i>Endicott V. Icicle Seafoods, Inc.</i> , 167 Wn. 2d 873 (January 7, 2010) affirmed, under Washington Law, a maritime Defendant’s right to jury trial in a Jones Act (46 U.S.C. § 30104) proceeding, this issue is still open, as a matter of Federal Law, under the Federal Employees Liability Act, 45 U.S.C. § 51-60, and should remain open in this proceeding as	

Endicott is the subject of appeal to the United States Supreme Court and failure to designate this issue in these proceedings could foreclose application of any subsequent United States Supreme Court ruling to these proceedings.9

(B) Issues Pertaining to Assignments of Error.10

(1) May a CR 35(c) IME Psychologist examiner, conducting an examination by agreement under CR 35(c), insist the examinee agree to the examiners surprise additional special terms and conditions for conducting the exam, including agreeing to the examiner’s beliefs and understanding regarding attorney-client privilege and whether the examinee should waive attorney-client privilege; agree that under certain circumstances the examinee may be liable for the examiners fees; and agree the examinee has a non-existent right under the Consumer Protection Act, to a different examiner?10

(2) Under circumstances where a Defendant is on notice of an examiner’s inappropriate conditions, and a United States District Court (Federal) has ruled that an examinee should not be required to agree to the examiner’s special terms and conditions, may the examiner, nonetheless, orally require the examinee to agree to his special terms and conditions for conducting an agreed State Court CR 35(c) exam and may the examiner unilaterally cancel the exam as a result of Plaintiff’s Counsel advising the examinee not to agree to the special additional conditions? 11

(3) Under circumstances where CR 35(a)(2), CR 35(c) and, case precedent, *Tiejn v. Department of Labor & Industries*, 13 Wn. App. 86; 534 P. 2d 1151; 1975 WASH APP. LEXIS 1308 (1975), allow for an attorney representative at an IME examination, may a Court nonetheless order the exclusion of Plaintiff’s

Counsel from attendance at a rescheduled IME on grounds Plaintiff’s Counsel is “interfering” with the exam and “harassing” by asking the examiner to not require the examinee to agree to the examiners special terms and conditions? 13

(4) Did the trial court, Douglass A. North, Judge, abuse it’s discretion in sanctioning Plaintiff’s Counsel \$5,000, and ordering Plaintiff’s Counsel excluded from rescheduled IME exams, under circumstances where Plaintiff’s Counsel asked Defendant’s IME psychologist examiner to please not ask Plaintiff to agree to his special terms and conditions and urged the examiner to discuss the issue with Defendant’s Counsel, and the examiner not only refused to discuss the question with Defendant’s Counsel but unilaterally cancelled the exams, forced Plaintiff’s Counsel and his client from the office, which required the exam to be rescheduled with the forced absence of Plaintiff’s Counsel? 12

(5) Is a CR 35(c) examiners three page “Information Form” which requires an examinee to discuss and agree with the examiner’s advice on attorney-client privilege; to be responsible for the examiner’s charges under certain conditions; and to agree that the examinee has a non-existent right to a different examiner under the Consumer Protection Act, merely necessary “informed consent” or the extra judicial imposition of un-agreed, inappropriate, illegal additional terms and conditions, for the exam? 12-13

(6) May a trial court impose the costs of privately retained interpreters, hired by a Defendant solely for purposes of assisting Defendant at trial, under circumstances where Plaintiff provided, paid for, and the court appointed, a different interpreter to interpret throughout the proceedings? 13

- (7) May a trial court impose the costs of a video tape deposition of an expert, where the expense of video taping and preserving the deposition testimony is made necessary solely as a result of Defendant's expert's conflict with the appointed trial date? 13
- (8) Where an issue of mixed Federal and State Law exists regarding the issue of whether a Defendant has a right to a jury trial in a State Court Jones Act maritime law proceeding, remains an open issue under Federal Law, and is the subject of a pending petition for Writ of Certiorari to the United States Supreme Court (*Endicott, supra*) must a litigant in the exact same circumstances, in order to obtain the benefit of any subsequent United States Supreme Court ruling, keep the issue open by designating the issue for appeal? 13-14

STATEMENT OF THE CASE14

ARGUMENT40

- (1) ***The trial court abused its discretion and committed reversible error in sanctioning Plaintiff's Counsel \$5,000 and ordering Plaintiff's Counsel's exclusion from re-scheduled exams.40***

- (a) *Standard for Review. 40-42*

- (b) *The trial court's finding of improper, unreasonable, harassing, and obstructive conduct are completely unsupported by the record and provide no basis for sanctions and entry of a Protective Order excluding Plaintiff's Counsel from the re-scheduled IME's 42-43*

- (c) *Nothing in Washington Law requires Rosen's conditions. 43-44*

(d) <i>CR 35 and substantive law relating to attendance at IME exams.</i>	44-45
(2) <i>Recoverable costs do not include the costs of Glacier's private translators.</i>	45
(3) <i>Recoverable costs do not include the video presentation expense of preserving by video deposition the testimony of Glacier's absent vocational expert for trial.</i>	46
(4) <i>Federal Substantive Law provides that a Jones Act Plaintiff has an exclusive right to determine whether a trial is a jury or non-jury trial.</i>	47
CONCLUSION	48
APPENDIX	Attached
CERTIFICATE OF COMPLIANCE [Rule 32(a)(7)]	51

TABLE OF AUTHORITIES

Cases

<i>Dice v. Akron, Canton & Youngstown R. Co.</i> , 342 US 359 (1952)	48
<i>Endicott v. Icicle Seafoods, Inc.</i> 167 Wn.2d 873 (January 7, 2010)	9-10, 13, 49
<i>Endicott v. Icicle Seafoods, Inc.</i> , 167 Wn.2d 873 (January 7, 2010) Petition for cert, filed April 17, 2010.	13
<i>In re Firestorm</i> 1991, 129 Wn.2d 130, 916 P.2d 411 (1996)	45
<i>Flores v. Glacier Fish Company</i> U.S.D.C. W.D. Wash. Cause No. C08-1267 TSZ	2, 17
<i>Hall v. Northwest Lumber Co.</i> , 61 Wash. 351, 112 P. 369 (1910).	45
<i>Hernandez v. Glacier Fish Company.</i> King County Superior Court Cause No. 08-2-18009-3 SEA	2, 17, 27-28
<i>Loudon v. Myhre</i> , 110 Wn.2d 675 (1998).	45
<i>Moore, Federal Practice, Section 35.08(1)</i>	8
<i>Mothershead v. Barclay Seafood & Meat</i> 2000 Wn. App. LEXIS 2000	44
<i>Rodriguez-Garcia v. Glacier Fish Company</i> King County Superior Court Cause No. 08-2-12754-1 SEA.	2, 17

<i>Stout v. United Airlines</i> U.S.D.C. W.D. Wash. Cause No. 07-0682-JCC	8
<i>Tiejen v. Department of Labor & Industries</i> 13 Wn.App. 86; 534 P. 2d 1151; WASH APP LEXIS 1308 (1975) .11, 44-45	
<i>Vanbruwaene v. Barclay Seafood & Meat,</i> 2000 Wn.App. LEXIS 2000.....	44
<i>Washington State Physicians, et al. v. Fisons.</i> 122 Wn.2d 299 (1993)	40

Statutes

Federal Employees Liability Act (“FELA”) 45 U.S.C. § 51-60.....	10
Jones Act (46 U.S.C. § 30104)	9, 15
RCW 2.43.030	35-36
RCW 2.43.030(c)(2)	36
RCW 2.43.040(3).....	45
RCW 4.84.010	45
RCW 4.84.010(7)	46-47
RCW 4.84.080(7)	46
RCW 18.83.115.....	43
Washington Consumer Protection Act (“CPA”) RCW 19.86.020	12
WAC 246-924-359.....	43

Other Authorities

Civil Rule 26(b)(5) 45

Civil Rule 35..... 3, 23, 28, 34, 39, 44

Civil Rule 35(c) 1, 3, 9-12, 18, 40-41, 44-45, 48

Civil Rule 35(a)(2) 11

Civil Rule 37(a)(4) 37

Civil Rule 37(d) 37

I. INTRODUCTION

The trial court, Douglass A. North, King County Superior Court Judge, abused his discretion and committed reversible error in sanctioning Plaintiff's Counsel \$5,000 and excluding Plaintiff's Counsel at re-scheduled IMEs for refusing to agree to three pages of surprise, last second, special IME conditions, imposed by Glacier's¹ CR 35(c) examiner, Gerald Rosen. Glacier never disclosed to Bernal or his attorney prior to the exam, Rosen's surprise additional conditions. Rosen's conditions would have required Bernal and his attorney to: (1) **agree to** reimburse Rosen for the costs of the IME under certain circumstances; (2) **agree** with Rosen's advice and understanding as to whether to waive the attorney-client privilege; (3) **agree** Bernal had a non-existent right to a different examiner under "Consumer Protection Act" laws. The trial court also erred in awarding Glacier the costs of its private, un-appointed translators assisting Glacier during trial, and the costs of video taping the trial testimony of

¹ Hereafter, Glacier Fish Company LLC is referred to as "Glacier" and Plaintiff/Appellant Miguel Bernal Hernandez as "Bernal."

an unavailable Glacier expert. The trial court also should have granted Bernal's timely Motion to Strike Glacier's Jury Demand, under Federal Substantive Law.

On February 26, 2008, Glacier's factory processor, F/T PACIFIC GLACIER caught fire necessitating the evacuation of the vessel. The processing crew experienced smoke inhalation, panic, and fear. The fire created a threat of possible imminent vessel sinking, required the donning of survival suits, and the witnessing of the near death of two processors trapped in their cabin. Plaintiff's Counsel represented three crew members filing suit against Glacier, all alleging Post Traumatic Stress Syndrome ("PTSD"): (1) Jesus Flores ("Flores") Federal Court, Cause No. C08-1267 TSZ; (2) Ancelmo Rodriguez-Garcia ("Rodriguez"), King County Superior Court, Cause No. 08-2-12754-1 SEA and; (3) Bernal, King County Superior Court Cause No. 08-2-18009-3 SEA. All three processors had many years of experience with Glacier, none could return to work following the fire due to PTSD. The Rodriguez and Bernal actions were consolidated

into King County Cause No. 08-2-12754-1 SEA, Douglass A. North, Judge. The Flores and Rodriguez matters were ultimately settled. Bernal was tried to a jury ending in a defense verdict on December 4, 2009.

Glacier relied upon well known defense psychologist, Gerald Rosen, as its appointed IME examiner in all three cases. Rosen uniquely requires examinees to agree to a three page form titled “Information Pertaining to Legal, Insurance, and Employee Evaluation”² otherwise he will refuse to do the exam. He, and Glacier, now claim these forms are “required.” He also requires a CR 35 observer to sign a one page “Observer Information Form,” which was not objected to in this case.

The Bernal/Rosen IME was scheduled for June 9 and Rodriguez for June 10, 2009. These were agreed CR 35(c) exams, the conditions for which were spelled out in an email exchange dated March 11, 2009. Nothing was mentioned by Glacier about Bernal having to agree to Rosen’s conditions as

² Hereafter “Information Form”

of the time of the exam. Rosen's conditions had been the subject of an earlier proceeding in Federal Court where Judge Zilly ruled Rosen could not require an examinee to agree to his conditions. Glacier and its counsel, David Bratz, never even informed Rosen of that ruling or even of the issue.

At the first exam, on June 9, 2009, Plaintiff's Counsel attended with Bernal. At the onset of the exam, Rosen presented two written forms for signature. The entirety of all discussions at the exam, including these preliminary discussions, were tape recorded and a verbatim transcript has been made. Plaintiff's Counsel completed and signed Rosen's Observer Information form, which asked Plaintiff's Counsel to agree to not interfere with the exam (agreed) and also asked whether there were any conditions or issues Rosen should be aware of regarding the exam. On the Observer Information Form, Plaintiff's Counsel asked Rosen to not ask Bernal to agree to his three pages of terms and conditions on his "Information Form" and if Rosen had any questions about the impropriety of the Information Form, to call Glacier's

attorney, David Bratz. Bratz's phone number (206) 623-4990 was written on the Observer Information Form.

Rosen initially stated he would not require Bernal to either sign or agree to his Information Form but he would like to have the form read to Bernal. Plaintiff's Counsel allowed the Information Form to be read to Bernal. This was accomplished by the interpreter Glacier provided, who read aloud, in Spanish, the entirety of the Information Form to Bernal. After the reading of the form, Rosen ushered Plaintiff's Counsel into his private office (the tape recording continued by agreement) and Rosen then stated he had changed his mind and he now would not do the exam unless Bernal orally **agreed to all of the conditions on the three page Information Form**. Plaintiff's Counsel urged Rosen to not require this and again urged Rosen to immediately contact Defendant's Counsel. Plaintiff's Counsel again gave Rosen the phone number for Defendant's Counsel and urged him to discuss the issue with Defendant's Counsel. Rosen, however, then unilaterally cancelled both exams, Bernal and the

pending June 10, 2009 Rodriguez exam, and ordered the parties out of his office. As the verbatim transcript shows, Plaintiff's Counsel was, at all times, polite, respectful, considerate, and there is no allegations of any angry tone or disrespect at any time during the contact.

Glacier then moved for \$13,820 in attorney's fees, sanctions, and costs, and to exclude Plaintiff's Counsel from attending rescheduled IMEs with Rosen. The court, Judge North, on June 26, 2009 awarded \$5,000 in sanctions against Plaintiff's Counsel, and ordered Plaintiff's Counsel be excluded from rescheduled Rosen exams. Judge North held Plaintiff's Counsel's actions were ". . . improper, unreasonable, harassing, and obstructive. . ." and Plaintiff's Counsel was at fault for failing to ". . . raise any issues regarding informed consent prior to [the exam] date."

The issue regarding Rosen's Information Form came before the United States District Court, Western District of Washington, Honorable Thomas S. Zilly, in the Flores matter. There, the parties did not agree to the terms for the exam and

The court was asked to set conditions by motion and order. On February 26, 2009, Judge Zilly specifically ordered Flores should not be required to sign and agree to any of Rosen's forms, including his Information Form, at his March 2, 2009 IME.³ Fearing Rosen might be unaware of the Court's ruling, Plaintiff's Counsel prepared a letter to Rosen attaching a copy of Judge Zilly's ruling and directing Rosen to not require Flores to sign or agree to his Information Form. Plaintiff's Counsel sent a copy of this letter to Defendant's Counsel, Bratz, before sending it to Rosen. Bratz demanded Plaintiff's Counsel not send the letter to Rosen, only to Bratz. Plaintiff's Counsel complied with that request assuming Bratz had/would advise Rosen of Judge Zilly's ruling. Unbeknownst to Plaintiff's Counsel, Bratz did not provide Rosen with a copy of Plaintiff Counsel's letter or Judge Zilly's ruling and did not advise Rosen of any of these issues. Unbeknownst to

³ Judge Zilly's ruling stated Flores should not sign any of Rosen's documents. Glacier now argues the Order only covers signing documents, and an IME examinee can be required to orally agree to documents, just not "sign" them.

Plaintiff's Counsel, Rosen **did** require Flores to orally agree to the terms of his Information Form.⁴

The trial court denied Bernal's Motion to Strike Defendant Glacier's Jury Demand. The case proceeded to jury trial and defense verdict on December 4, 2009. In its Cost Bill, Glacier sought, and was awarded, over objection, costs for two private Spanish interpreters even though Bernal paid for and the Court appointed Bernal's interpreter to interpret during the trial. The trial court also awarded video tape deposition expenses made necessary from the inability of Glacier's Vocational Expert, William Skilling, to attend trial. Bernal's Motion to Strike Glacier's Jury Demand was denied. Appeal designating all of the above issues for review was filed January 5, 2010.

⁴ In Federal Court, monitors are not permitted and there was no monitor at the Flores exam. The Federal Rule and Federal case precedent precludes an examinee's attorney from attending a Rule 35 IME. See: Moore, Federal Practice, § 35.08(1) and *Stout v. United Airlines*, W,D, Wash. Cause No. C07-0682-JCC, Order of September 15, 2008.

II. ASSIGNMENTS OF ERROR & ISSUES PERTAINING THERETO

A. Assignments of Error

The trial court:

(1) Abused its discretion and committed reversible error by sanctioning Plaintiff's Counsel \$5,000 and excluding Plaintiff's Counsel from rescheduled IMEs for refusing to agree to Rosen's surprise, additional, and un-agreed exam conditions at the agreed CR 35(c) exam;

(2) Erred in finding Rosen's Information Form to be required consent conditions;

(3) Erred in awarding Glacier's costs for its private interpreters;

(4) Erred in awarding Glacier the expenses of the video deposition of Glacier's vocational expert witness, William Skilling;

(5) While *Endicott V. Icicle Seafoods, Inc.*, 167 Wn. 2d 873 (January 7, 2010) affirmed, under Washington Law, a maritime Defendant's right to jury trial in a Jones Act (46 U.S.C. § 30104) proceeding, this issue is still open, as a matter

of Federal Substantive Law, under the Federal Employees Liability Act, 45 U.S.C. § 51-60, and remains open in this proceeding matter as *Endicott* is the subject of petition to the United States Supreme Court and failure to designate this issue in these proceedings could foreclose application of any subsequent United States Supreme Court ruling to these proceedings.

B. Issues Pertaining to Assignments of Error.

(1) May a CR 35(c) IME Psychologist examiner, conducting an examination by agreement under CR 35(c), insist the examinee agree to the examiners surprise additional special terms and conditions for conducting the exam, including agreeing to the examiner's beliefs and understanding regarding attorney-client privilege and whether the examinee should waive attorney-client privilege; agree that under certain circumstances the examinee may be liable for the examiners fees; and agree the examinee has a non-existent right under the Consumer Protection Act, to a different examiner?

(2) Under circumstances where a Defendant is on notice of an examiner's inappropriate conditions, and a United States District Court (Federal) has ruled that an examinee should not be required to agree to the examiner's special terms and conditions, may the examiner, nonetheless, orally require the examinee to agree to his special terms and conditions for conducting an agreed State Court CR 35(c) exam and may the court sanction Plaintiff's Counsel \$5,000 for advising the examinee not to agree to the special additional conditions?

(3) Under circumstances where CR 35(a)(2), CR 35(c) and, case precedent, *Tiejn v. Department of Labor & Industries*, 13 Wn.App. 86; 534 P. 2d 1151; 1975 WASH APP. LEXIS 1308 (1975), allow for an attorney representative at an IME examination, may a Court nonetheless order the exclusion of Plaintiff's Counsel from attendance at a rescheduled IME on grounds Plaintiff's Counsel is "interfering" with the exam and "harassing" by asking the examiner to not require the examinee to agree to the examiners special terms and conditions?

(4) Did the trial court, Douglass A. North, Judge, abuse its discretion in sanctioning Plaintiff's Counsel \$5,000, and ordering Plaintiff's Counsel excluded from an agreed CR 35(c) exam, under circumstances where Plaintiff's Counsel asked Glacier's IME psychologist examiner to please not ask Bernal to agree to his special terms and conditions and urged the examiner to discuss the issue with Defendant's Counsel, and the examiner not only refused to discuss the question with Defendant's Counsel but unilaterally cancelled the exam, forced Plaintiff's Counsel and his client from the office, which required the exam to be rescheduled with the forced absence of Plaintiff's Counsel?

(5) Is a CR 35(c) examiners three page "Information Form" which requires an examinee to discuss and agree with the examiner's advice on attorney-client privilege; to be responsible for the examiner's charges under certain conditions; and to agree the examinee has a non-existent right to a different examiner under the Consumer Protection Act, merely necessary "informed consent" or the extra judicial

imposition of un-agreed, inappropriate, illegal additional terms and conditions?

(6) May a trial court assess the costs of privately retained interpreters, hired by a party solely for purposes of assisting that party at trial, under circumstances where Plaintiff provided, paid for, and the court appointed, a different interpreter to interpret throughout the proceedings?

(7) May a trial court assess the costs of a video tape deposition of an expert, where the expense of video taping and preserving the deposition testimony is made necessary solely as a result of Defendant's expert's conflict with the appointed trial date?

(8) Where an issue of mixed Federal and State Law exists regarding the issue of whether a Defendant has a right to a jury trial in a State Court Jones Act maritime law proceeding, remains an open issue under Federal Substantive Law, and is the subject of a pending petition for Writ of Certiorari to the United States Supreme Court (*Endicott*, supra) must a litigant, to obtain the benefit of any subsequent

United States Supreme Court ruling, keep the issue open by designating the issue for appeal?

III. STATEMENT OF THE CASE

Bernal was born on November 29, 1969 in the small town of Los Mesas, Mexico, the fourth of seven siblings. His mother died when he was six years old. He left Mexico in 1985 crossing into the United States illegally but without using false documentation. (*All CP 1939-1862, CP 1844, CP 1846, Rosen Report 8/7/09*). For two years Bernal worked in Southern California as a field hand and personal gardener, living in a cardboard shack. Hearing about money to be made by working in fishing in the Bering Sea, he traveled to Seattle, Washington where he obtained a job as a fish processor. (*CP 1844*). Successfully completing his contract, Bernal went on to work for several small factory trawler fishing companies, before being hired by Glacier as a processor aboard the F/T PACIFIC GLACIER. (*All CP 1839-1862, Rosen Report 8/7/09*).

From 1999 and until the fire on February 28, 2008, Glacier was Bernal's sole employer and he worked exclusively aboard the F/T PACIFIC GLACIER. Continuing to move up in pay scale, Bernal, as of the time of the fire, was making an average of \$55,000 per year for approximately 6 to 9 months work at sea each year. (*All CP 1839-1862, Rosen Report 8/7/09*).

The fire aboard the PACIFIC GLACIER began in, and spread from, the laundry room and the processors had no idea the boat was on fire. (*CP 1842*). Although the fire was thought to have been initially extinguished, it was not and it reignited and progressed through the laundry exhaust system into the bulwarks, eventually spreading throughout the entire vessel.⁵ (*CP 1842*). Bernal and his fellow processors evacuated the lower deck processing floor after the factory foreman, prior to any alarms sounding, yelled at the processors to evacuate due to fire. During the course of the evacuation, Bernal was forced to evacuate through blinding

⁵ Glacier stipulated to Jones Act negligence and unseaworthiness liability for any provable damages. See Answer of Glacier, CP 6-12, Sub. No. 7.

smoke. (CP 1842). After he made his way outside to the shelter deck, he was told to get on his survival suit and to prepare for jumping overboard to swim to a life raft. (CP 1842). At the same time, two processors, Monica and Troy, were stuck in their cabin unable to leave their room due to a smoke/fire filled corridor. (CP 1842). They were screaming for help from the portholes of their cabin. A group of processors, including Bernal, lowered a rope and saved them by pulling them up to safety. (CP 1842). The smoke on the shelter deck became so bad the crew were evacuated to the trawl deck waiting for rescue by approaching vessels. (CP 1842).

Bernal was rescued and taken back to Dutch Harbor Alaska. Within just a few days (March 13, 2008) of the fire and evacuation, the Human Resource Director for Glacier, Renee Julianne, met with most of the processors, releases and checks in hand. Julianne explained to each processor that the amount of money paid, (\$3,950 for Bernal) was “all they were entitled to.” The payment contained no compensation for pain,

suffering, fright, fear, harm, Post Traumatic Stress Syndrome (PTSD). Bernal, but for the fire, would have earned at least \$20,000 - \$25,000 for the missed season. Glacier did offer counseling, if requested within 6 months. Bernal sought some counseling and initially believed he would be able to return to work with Glacier. (*CP 1845-1846*). That was his goal. However, by mid June of 2008, when it became time to return to the vessel for B Season, Bernal found he was unable to do so and he was continuing to experience nightmares, anxiety, and other PTSD symptoms. (*CP 1846-1847*). Bernal retained counsel, as did two additional processors, Flores and Rodriguez. (*CP 1443-1456*). All filed suit. The cases were Flores, USDC W.D. Wash. Cause No. 08-1267-TSZ; Rodriguez-Garcia KCSC Cause No. 08-2-12754-1 SEA – Judge North; and Miguel Bernal Hernandez KCSC Cause No. 08-2-18009 – 3 SEA – Judge Eadie. Flores was filed August 25, 2008. Rodriguez-Garcia was filed April 15, 2008 and originally assigned to Catherine Shaffer. Bernal was filed May 20, 2008 and assigned to Richard D. Eadie. The

Rodriguez and Bernal cases were subsequently consolidated into KCSC Cause No. 08-2-12754-1 SEA, Judge Douglass A. North. (*All CP 1443-1456, AP 1-152*).

Glacier retained Rosen as its PTSD expert for all three cases. (*CP 1443-1456, AP 36-48*). Rosen is an extremely well known defense psychologist who never does any work for Plaintiff's or Claimants. (*CP 1663-1779, AP 60-68*). Rosen has never found PTSD on any cases on his disclosed case list, and did not find PTSD in any of the three Plaintiff claimants. (*CP 1663-1779, AP 62*). His billings indicate he was paid an astounding \$65,541.58 for his work in these three cases, before trial. (*CP 1698, AP 61, Deposition of Rosen, P. 36, Lns. 6-9*).

Rodriguez and Bernal, through Plaintiff's Counsel, agreed per CR 35(c) to specific terms and conditions for IME examinations by Rosen. (*CP 1607-1608, AP 7*). Bernal's exam was scheduled for June 9, 2009, and Rodriguez's for June 10, 2009. The conditions for the Bernal exam were memorialized by email from Defendant's Counsel, Carey

Gephart, dated March 11, 2009, 12:04 p.m. (*CP 1607-1608, AP 7*). There were six agreed conditions: (1) examiner will be Rosen; (2) exam will be conducted over the course of one full day and a non-consecutive half day; (3) Plaintiff's Counsel will be present as monitor; (4) a Court certified Spanish Interpreter provided by Defendant will interpret; (5) the examination will be audio taped; (6) Glacier will reimburse mileage expense at the rate of .51 dollars per mile. (*CP 1607-1608, AP 7*). There were no other conditions and no mention of "informed consent" or other conditions.

When Plaintiff's Counsel appeared with Bernal on June 9, 2009 at 9:20 am, for the first exam, Rosen presented Bernal with a form "Information Pertaining to Legal, Insurance, and Employee Evaluations." (*AP 12-17, Verbatim Transcript of IME*). Rosen likewise presented Plaintiff's Counsel with his "Observer Information Form." (*CP 1431, AP 11*). An audio recording was made and a verbatim transcript has now been made of the entirety of the contact between the parties, including all discussion on the morning of June 9, 2009

between Rosen and Plaintiff's Counsel. (*CP 1443-1438, AP 12-17*). The exam lasted only 20 minutes ending after Rosen unilaterally cancelled the exam and told Bernal and Plaintiff's Counsel to leave. (*CP 1433-1438, AP 12-17*).

Plaintiff's Counsel filled out Rosen's "Observer Information Form." (*CP 1431, AP 11*). Plaintiff's Counsel agreed, as Rosen requested, not to interfere with the interview process. (*CP 1431, AP 11*). Plaintiff's Counsel wrote on the portion of the form where Rosen asks the monitor to list any "concerns or questions" the following: "You should not ask our client to agree or accept your conditions in your information sheet." (*AP 11*). On that same form, Plaintiff's Counsel also wrote if Rosen had any questions as to why the Information Form would not be signed or agreed to by Bernal, Rosen should consult David Bratz, Glacier's Counsel. (*CP 1431, AP. 11*). Several times Plaintiff's Counsel provided Rosen with Bratz's telephone number, urging him to call Bratz, the attorney who had set up the exam, if Rosen had any questions about the propriety of his asking Bernal to agree to

his Information Form. *(For example see: Transcript of Proceedings, IME exam of Bernal (referred to as Mr. Hernandez in the transcript), contained at CP 1433-1438, AP 12-17, including Transcript P. 4, Lns. 19-23, Transcript P. 6, Lns. 16-19;, Transcript P. 16 Lns. 16-18).*

Initially, Rosen stated he would *not* require Bernal to sign the forms nor would he ask Bernal to orally agree to the form:

“I don’t expect Mr. Hernandez to sign this. I told him that I would like him to read this . . .

So . . .is alright with you if he acknowledges that he understands what is on the form?

Mr. Evans: If you want to read that paper to Mr. Hernandez, you may do so. . “

(CP 1434, AP 13-14). (Transcript P. 5).

The parties agreed Rosen’s Information Form would be read by the interpreter to Bernal and Bernal would signify that he understood it but would **NOT** be required to agree to it. This occurred precisely as requested. *(CP 1435 AP 14). (Transcript, P. 8, Lns. 17-19).*

Most unfortunately, and for reasons not at all clear, *Rosen then changed his mind and demanded that Bernal now specifically agree to the terms and conditions in his form.* Rosen **INSISTED** Bernal agree to the terms and conditions of his Information Form:

“Dr. Rosen: I can’t conduct an evaluation **unless a person agrees** to it, and accepts the notion that I am going to be conducting it under the kinds of conditions that I am speaking about in this form. . .”

(Emphasis added)

(CP 1436, AP 15, Transcript P. 10, L. 23 – P. 11, L. 1).

Rosen then threatened to cancel the exam unless Bernal immediately agreed to all of the terms and conditions in his Information Form: “If you are not going to let him formally accept it, then it would not be proper for me to conduct the exam.” *(CP 1436, AP 15. Transcript P. 11, Lns. 5-7).* Plaintiff’s Counsel then again urged Rosen to call Defendant’s Counsel, Bratz, the attorney who arranged for the exam and again provided Rosen with Bratz’s phone number 623-4990: “And I will again, for one more time, before you adjourn this,

strongly suggest that you call Mr. Bratz and tell him your situation and your dilemma. And we will wait here for you to be able to do that. And seek his counsel on what he would advise you to do.” (*CP 1437, AP 15, Transcript P. 16, Lns. 16-20*). During the exam, Plaintiff’s Counsel specifically advised Rosen it would be inappropriate for Plaintiff’s Counsel to advise Rosen of what Rosen’s obligations and duties were with respect to a CR 35 exam and that if he – Rosen – had any questions, he should discuss those matters with Defendant’s Counsel, not Plaintiff’s Counsel:

“Mr. Evans: . . . once again, I can’t advise you, and should not advise you, in any respect with respect to what the duties and obligations are from your standpoint in this exam. That is totally inappropriate for me to do. I can only advise my client. If you have some concerns because my client, in your opinion, isn’t doing something that he should do, please take that up with Mr. Bratz and not with me.

Dr. Rosen: Okay.”

(CP 1437, AP 16, Transcript of IME, June 9, 2009, P. 14, Lns. 1-10).

Rosen absolutely refused to call Bratz, told the parties to leave his office, and stated he did not want to discuss the situation any further. *(CP 1437, AP 16, Transcript, P 17 Lns.*

8 – 13). The exam was concluded as follows:

“Mr. Evans: . . . I hope that you understand correctly what I have written here. What I have written is you should not ask our client to agree or accept your conditions on your Information Sheet.

Dr. Rosen: And I have to ask him to accept it, because the conditions in the Information Sheet, many of them are specified by State Law that govern psychologists. And so I think we can just stop for today because you have told me to not ask questions that I have to ask.”

(CP 1437, AP 16, Transcript of IME June 9, 2009, P. 15, Lns. 7-16)

The Rodriguez exam, scheduled for the next day, was also cancelled by Rosen. *(CP 1437, AP 16. Transcript P. 17, Lns, 15 – 19)*. The Information Form clearly required that examinee both understand **and agree to** Rosen’s terms and conditions:

“If you understand **and accept** the above information, please sign the lines below. Do

not sign this form if you have any questions, instead wait for our interview and discuss with me the questions you have. This form should not be signed until your concerns have been clarified.”

Emphasis added

(CP 1429, AP 10, Information Form, P. 3).

The provision where Rosen discusses the possibility of an examinee having to pay for the exam is contained in the “Financial Arrangements” portion of the Information Form:

“The cost of my services are billed directly to the law firm or company that has retained me and they, not you are responsible for the charges. The only exception is charge that results from missed appointments or late cancellations. In such cases, an attorney may attempt to recover the costs from you.”

(CP 1428, AP 9, Information Form, P. 2).

Rosen absolutely believes that an examinee has the right to a different examiner and that he – Rosen – has the **legal obligation** to advise an examinee that the examinee has a right, in Rosen’s opinion, to a different psychologists for the CR 35 exam:

“. . . Mr. Evans objects to my instructing that the individual may have **the right to request**

a different psychologist for this evaluation.
This statement is in fact correct and necessary to explain to a Plaintiff unless a Court Order is in place that restricts the individuals' choice.”

Emphasis added

(CP 1464, AP 57, Declaration of Rosen, P. 8, Lns. 1-6, June 17, 2009).

This is obviously a completely incorrect legal statement and condition. Rosen's affidavit presents much more like an attorney's brief and argument than a detached, professional psychologist's opinion.

The provisions in Rosen's Information Form regarding Rosen's opinion and definition of attorney-client privilege and whether the examinee should waive the privilege is contained in P. 1, bottom paragraph – P2. top paragraph “Information Form” as follows:

“. . . you should keep in mind that communications between you and your attorney are privileged. You can, of course, waive this privilege but most attorneys would advise against this and you should check with your own attorney before doing so.”

Emphasis added

(CP 1428, AP 9, Information Form. P. 2 top paragraph).

Rosen specifically advises the examinee that they have a right, if they chose, to waive attorney-client privilege during the interview, with or without their attorney being present: “If, however, . . . information was provided by your counsel, you could answer “yes” . . . “yes meaning yes, information has been provided by my attorney and I wish to discuss it with you, Dr. Rosen, and waive the attorney-client privilege.” *(CP 1428, AP 9, Information Form P. 2, top paragraph).*

Bernal filed a Motion and Memorandum to Exclude Rosen, for Sanctions, Fees, and Expenses. *(CP 1381-82)*. This was noted for June 22, 2009 in Cause No. 08-2-18009-3 SEA, Honorable Richard D. Eadie (just before consolidation). *(CP 1381)*. Glacier moved for an order forcing Bernal’s agreement to Rosen’s conditions, for an ex-parte exam with the forced exclusion of Plaintiff’s Counsel, and for \$13,820 for attorney’s fees, costs, and sanctions. *(CP 1443-56, AP 23-35)*. The \$13,820 is derived of interpreter fees of \$900, cancellation fees from Rosen of \$7,920, and “no less” than

\$5,000 in attorney's fees. (*CP 1454, AP 34, Defendant's Motion Memorandum P. 12, Lns. 9-17*).

Incredibly, even though no exam of Rodriguez actually occurred as scheduled for June 10, 2009, Glacier presented to North, and North signed, an order written as if the Rodriguez exam had actually occurred and at that exam, Plaintiff's Counsel had engaged, at the time of the non-existent exam, in “. . . unlawful substantive ex-parte conduct with Defendants retained expert. . .” as well as other findings based entirely upon alleged misconduct, all at an exam that had never actually occurred! (*See: CP 1423-1425, AP 69-73, Order Granting Motion to Compel Rule 35 Examination, Entering Protective Order Excluding Plaintiff's Counsel From Rule 35 Examination, and Ordering Sanctions*). Glacier's motion in Bernal to compel a Rule 35 exam and for protective order excluding Plaintiff's Counsel and for sanctions, fees, and costs, was originally filed in Cause No. 08-2-18009-3 SEA, The Honorable Richard D. Eadie, but moved to Judge North due to case consolidation. (*CP 571-573*). After Judge North

granted Glacier's motion, Plaintiff's Counsel moved both for reconsideration and also for immediate relief for clear error under CR 60(a) and (b). (*CP 2240-47, AP 74-81*). Judge North, on July 15, 2009, without oral argument, denied both motions. (*CP 2248-2249, AP 82-83*). Plaintiff's Counsel sought to bring to the attention Judge North, a number of anomalies in his Order, not the least of which were sanctions based, in part, upon alleged misconduct at an exam (Rodriguez) that never occurred. (*CP 2240-47, AP 74-81*). On August 7, 2009 commencing at 1:30 p.m. the parties conducted a live, in person, discovery conference with the Court, and Plaintiff's Counsel arranged for a verbatim transcript, attempting yet one more time to get North's attention to the anomalies of his Order. (*CP 2258-2274, AP 86-102*). Prior to that conference, Plaintiff's Counsel went so far as to send Judge North a letter in yet another attempt to awaken Judge North to the fact he had sanctioned Plaintiff's Counsel for a non-existent exam, so this could be discussed at the August 7, 2009 conference. (*CP 1522-25, Letter of*

Thomas C. Evans to Judge North, dated July 6, 2009).

Moburg & Associates, Court Reporters, made a transcript of the proceedings. (*CP 2258-74, AP 86-102*). The transcript shows it was clear Judge North did not understand, at all, what had happened on June 9, 2009 at the Bernal exam. Judge North believed, for whatever reason, and in spite of the clear record to the contrary, Rosen had not actually required Bernal to **actually agree** to his terms and conditions, only that it that they be read aloud:

“. . . I did believe that you did improperly interfere with Dr. Rosen because, as I read the transcript of what happened, ***Dr. Rosen made clear that he didn't have to have your client's agreement to all the terms.*** What he had to have was your client's signature that he had read all of it and not that he was necessarily agreeing to all of it, but that he was aware of all of those.”

Emphasis added

(CP 2270, AP. 98, Transcript P. 13, Lns. 3-10).

Clearly, the court completely misunderstood the situation. Rosen most definitely did require agreement to his terms and conditions, and cancelled both exams because the Plaintiffs

would not do so. Why the trial court held this belief even after dozens of pleadings showing to the contrary, and absolutely no dispute on Glacier's part, is one of the unsolved mysteries of this case.

Following the August 7, 2009 proceedings, on August 14, 2009, Judge North signed a "Substituted" Order which the parties prepared to accurately reflect the obvious errors of the trial court's prior rulings. (*CP, 2288, AP 103-107*). The "Substituted Order" eliminated only the obvious errors of the original order, including making findings of improper conduct at an IME exam (June 10, 2009) that had never actually occurred.

Plaintiff's Counsel alerted Glacier long before the June 9 and June 10 Rosen exams that Rosen was asking examinees to agree to inappropriate and illegal conditions. In the Flores matter, where the IME occurred well before the other two cases (March 2, 2009) Plaintiff's Counsel prepared a letter to send to Rosen, dated February 27, 2009. (*CP 1599-1600, AP 21-22*). That letter advised Rosen ". . . please do not ask Mr.

Flores orally to agree . . . with any specific terms or conditions for conducting this exam as referenced in your declaration and written standard terms and conditions.” (*CP 1599-1600, AP 21-22*). Prior to delivering the letter, Plaintiff’s Counsel contacted Defendant’s Counsel, and informed him of Plaintiff’s Counsel’s intention to deliver the letter to Rosen. Defendant’s Counsel specifically requested Plaintiff’s Counsel not deliver the letter to Rosen and as a result, Plaintiff’s Counsel did not do so, but Plaintiff’s Counsel did deliver it to Defendant’s Counsel for Defendant’s Counsel to deliver to Rosen. Defendant’s Counsel **never** did deliver the letter and never advised Rosen of the concerns with respect to Rosen’s Information Form. Rosen’s deposition was taken 2:10 p.m. September 23, 2009 at his offices. (*CP 1663-79 AP 60-68*). The February 27, 2009 letter was Exhibit 8 at the deposition. Rosen acknowledges that he had never seen the letter before and Bratz had never discussed these issues with him. He states this as follows:

“Q: And I would further understand that no one informed you as of the time and place of the

Flores exam that his lawyer was objecting to you asking him to agree to your exam conditions either orally or in writing. No one told you that. Is that right?

A: That is correct.”

(CP 1723, AP 66, Transcript, P. 651, :ns 4-21).

Plaintiff’s Counsel assumed the terms and conditions would be as agreed to between the parties and their attorneys and that there would be no “surprise” additional terms and conditions. Judge Zilly specifically ruled Rosen *should not* require signature/agreement to his “Information Form.” *(CP 1602-04, AP 18-20. Order of Thomas S. Zilly, dated February 26, 2009, P. 3, L. 17: “Dr. Rosen will not require Plaintiff to sign any documents”).* Rosen’s statement about how the “Information Form” came about is as follows:

“Well, there has been drafts over the years. I guess, and I am the person who writes it. Years ago I ran it by an attorney. And I don’t know if years ago I also ran it by a colleague. I am basically the author of it and had it checked over by at least one person.”

(CP 1720, AP 66, Deposition of Rosen P. 58, Lns. 11-16).

Even Rosen's own affidavit makes clear the Ethical Principles of Psychologists and Code of Conduct, published by the American Psychological Association, do not require signature on or agreement to Rosen's Information form. As Rosen states in his Sworn Statement (AP 36-48) at P. 5, Lns. 16-21, Affidavit of June 15, 2009:

“3.10 Informed Consent (a) When psychologists . . . provide assessment, therapy, counseling, or consulting services in person or via electronic transmission or other forms of communication, they obtain the informed consent of the individual or individuals using language that is reasonably understandable to that person or persons except when conducting such activities without consent is mandated by law or government regulation . . .”

(CP 1387 AP 40-41)

Clearly the ethical principles, supra, provide for situations where, just like in CR 35, consent is “mandated by law or government regulation,” and consent need **not** be documented by additional oral consent. Further still, that same subparagraph makes it clear nothing in the rules requires an examinee to sign or agree to any specific form or statement of understanding:

“ . . . when psychological services are Court Ordered or otherwise mandated, psychologists inform the individual of the nature of the anticipated services, including whether the services are Court Ordered or mandated and any limits of confidentiality before proceeding. . .”

(CP 1388, AP 41, Declaration of Gerald Rosen, P. 6, Lns. 3-6)

The jury trial in this matter occurred over a period of eight trial days, ending December 4, 2009 with a defense verdict. *(CP 2281-84, AP 144-147)*. The jury determined the release Bernal signed was enforceable and denied Bernal’s claims without ever reaching any damage or PTSD issues. *(CP 2317-18, Special Verdict Form)*.

Bernal retained interpreter Rosa Manriquez, who Judge North approved and appointed as the interpreter for the trial on November 30, 2009. *(CP 137-142, AP 108-131)*. The trial transcript reveals Judge North followed the law correctly and appointed Rosa Manriquez as interpreter and properly gave her the interpreters oath as required. *(CP 137-142, AP 108-13)*. Statutory provisions regarding appointment of an interpreter are contained at RCW 2.43.030 “Appointment of

Interpreter.” Under RCW 2.43.030 the “appointing authority” in this case the Court, makes a preliminary determination on the basis for testimony and/or the stated needs of the non-English speaking person, that an interpreter is necessary, and that the appointing authority shall on the record make a determination that the proposed interpreter is capable of communication effectively with the Court and has read, understands, and will abide by the ethics required by the Court Rules. RCW 2.43.030(c)(2). The transcript of the appointment of Rosa Manriquez shows the Court faithfully went through the provision of the required appointing Ms. Manriquez. *[(CP 2173-76, AP 108-131) Exhibit 4, Transcript of Proceedings reported by Darr Cannon, Moburg & Associates, Report of Proceedings, 9:05 a.m., November 30, 2009].*

Private interpreters, exclusively hired for and paid by Glacier, began to appear in the court room; Glacier relied upon two separate private interpreters including Pablo Sepulveda, and Ms. Sheila Harrington. *(CP 1199-1205,*

Defendant's Reply in Support of Cost Bill, P. 2, L. 16 – P. 3, L.6. The trial court awarded Glacier the costs of these two interpreters at \$552.50 (*CP 2280*) over Bernal's objection, and this was included in Glacier's Cost Bill. (*CP 2177-2221, AP 132-136; AP P. 143*). Glacier was also awarded its costs for the preservation video tape testimony of its vocational expert, William Skilling. (*CP 2280, AP 143*). This cost was made necessary solely as a result of Mr. Skilling's alleged inability to attend trial personally.

Bernal filed formal objections to Glacier's proposed Cost Bill seeking a reduction of the billed \$5,694.17 by \$4,300.7, to a total cost of \$1,393.46. (*CP 2173-76, AP 137-142*). Bernal's objection to Glacier's private interpreter billings is contained at AP 138 P. 2, L. 2 – P. 139, L. 21. The objection to the video tape deposition expense of William Skilling in the amount of \$1,100.20 is contained at AP 141, Lns. 12-20. That objection requested striking Glacier's interpreter fees request in the total amount of \$1,252.50 and video deposition cost of Skilling in the amount of \$1,100.20.

(*AP 141, Objection, P. 6, Lns. 1-10*). The objection to interpreters fees are those requested outlined on Defendant's Cost Bill, AP 134, P. 3, Lns. 16-19 as follows:

“(1) Sheila Harrington – Cross and redirect of Plaintiff 12/1/09 \$260.00

(2) Pablo Sepulveda – (11/30/09) Cross of Plaintiff and “standby” \$292.50

(3) Mercedes D'Antona (standby) for 11/25/2009 and 11/30 cancellation (\$700.00). “

(*AP 134*).

The Court reduced the total request by \$700.00 declining Ms. D'Antona's fees due to conflict, in that she had initially been retained by Bernal. (*CP 2280, AP 143*).

The Judgment entered by North on December 24, 2009 imposes a principal Judgment in the amount of \$5,000, individually, against Plaintiff's Counsel (*CP 2281-84, AP 144-147, Judgment, P. 1, L. 3*) with interest beginning on August 14, 2009 in the amount of 12 percent per anum. Taxable costs are imposed in the total amount of \$3,376.88. (*CP 2280, AP 143*). In the final ruling by the Court on Costs,

dated December 4, 2009 “Order Awarding Costs” the Court stated:

“. . . the Court finds no authority for Defendant’s claim for legal messenger expense (\$923.55) or Court filing fees for working copies (\$993.74) and does not consider Ms. D’Antona fees appropriate since she was never used as an interpreter because she had a conflict (\$700). Therefore total costs awarded are \$3,076.88.”

(CP 2280, AP 143, Order Awarding Costs, Cause No. 08-2-12754-1 SEA, December 24, 2009, Judge Douglass A. North).

The trial court also denied Bernal’s Motion to Strike Glacier’s Jury Demand, *(CP1623-1624)*. On January 5, 2010, Bernal appealed attaching a copy of the Order awarding costs dated December 24, 2009, challenging costs resulting from the above in the amount of \$3,076.88; challenging the substituted Order of August 14, 2009 imposing sanctions and compelling CR 35 examination in the absence of Plaintiff’s Counsel and challenging the Order of August 4, 2009, copy also attached, denying Bernal’s Motion to Strike Glacier’s Jury Demand. *(CP 2285-2318, AP 148-149)* Glacier cross appealed on February 17, 2010. *(AP 150-151)*.

IV. ARGUMENT

(1) The trial court abused its discretion by sanctioning Plaintiff's Counsel \$5,000 and ordering Plaintiff's Counsel's exclusion from re-scheduled IMEs.

Glacier, and its expert Rosen, not Plaintiff's Counsel, are at fault for the cancelled June 9 and June 10 IMEs. Glacier and Glacier's expert Rosen, not Plaintiff's Counsel, clearly violated CR 35(c) and the law as it relates to an agreed IME.

(a) Standard for Review- Abuse of Discretion

This Court reviews the trial court's imposition of sanctions under an abuse of discretion standard, and the purpose of sanctions is to punish, deter, compensate, and educate. *Washington State Physicians, et al. v. Fisons*, 122 Wn.2d. 299 (1993). Here the trial court punished Plaintiff's Counsel for something that was, at the bare minimum, the result of Glacier's own negligence.

A trial court abuses its discretion when its order is “. . . manifestly unreasonable or based on unreasonable grounds.” *Fisons*, P. 66. Included in this would be an erroneous view of the law, as was the case here. Clearly, Judge North mis-

read the law, as contained in CR 35(c). The whole purpose of CR 35(c) is that the parties layout the conditions for an IME before the exam. The Rule does not allow for surprise, additional, un-agreed conditions and to allow what Judge North allowed, would render CR 35(c) completely useless.

The trial court also took action that was both manifestly unreasonable and based on unreasonable grounds. To sanction an attorney for the negligence and error of opposing counsel is manifestly unreasonable. The trial court did not even understand that Rosen had required actual **AGREEMENT** to his unique and unusual terms. (*See Page 30 herein*).

The trial court in its August 14, 2009 substituted Order states the basis for sanctions as follows:

“. . . therefore, the Court orders entry of sanctions under Civil Rule 37(a)(4) and 37(d) and the Court’s inherent power, against Plaintiff’s Counsel, Mr. Thomas Evans, personally, for improperly obstructing Dr. Rosen’s ability to obtain Plaintiff Bernal’s informed consent causing the last minute cancellation of that examination, for engaging in ex-parte discussions with defense expert, Dr.

Rosen on June 10, 2009, for expressly indicating and attempting to similarly obstruct the examination of Plaintiff Rodriguez which forced cancellation of Plaintiff Rodriguez's examination at the last minute and for inexcusably failing to raise any issues regarding obtaining of conformed consent of Plaintiff Rodriguez or Bernal prior to that date, in the combined amount of \$5,000."

(CP 2292, AP 107, Substituted Order, August 14, 2009, P5, Lns. 3-14).

(b) The trial court's finding of improper, unreasonable, harassing, and obstructive conduct are completely unsupported by the record and provided no basis for entry of a Protective Order excluding Plaintiff's Counsel from the re-scheduled IME's made necessary as a result of unilateral actions of Rosen.

The trial court's Substituted Order is loaded with unsupported findings of "improper" conduct "Failed to raise any issues with Dr. Rosen's informed consent" "engaged in improper ex-parte conduct with a defense expert" "demonstrated that he could not attend any examination in a true observer capacity. . ." *(CP 2291, AP 106, Substituted Order of August 14, 2009).*

The transcript of the June 9, 2009 contact with Rosen *(CP 1433-48, AP 12-17)* discloses Plaintiff's Counsel was, at

all times, extremely polite, respectful, and engaged in conduct aimed at resolving the issues. Nothing in the record suggests there was any harassment or unlawful substantive ex-parte conduct. To the contrary, the written record shows Plaintiff's Counsel repeatedly attempted to get Rosen to discuss the issues with Defendant's Counsel. The record also shows Plaintiff's Counsel declined Rosen's repeated efforts to engage Plaintiff's Counsel in discussions with him about the substantive issues which would have been inappropriate.

(c) Nothing in Washington Law requires Rosen's conditions.

Rosen/Glacier's reliance on RCW 18.83.115 and WAC 246-924-359 is sorely misplaced. Both address "client" welfare and "client" related conditions: "Psychologists licensed under this chapter shall provide clients at the commencement of any program of treatment with accurate disclosure. . . [RCW 18.83.115]. . . the Psychologist shall keep the client fully informed as to the purpose and nature of any evaluation, treatment, or any other procedure . . . [WAC 246-924-359]. Bernal was not Rosen's client.

(d) CR 35 and substantive law relating to attendance at IME Exams.

An IME is a critical proceeding where a party is entitled to have their attorney present and be allowed to follow the legal advice of legal counsel. *Mothershead v. Adams*, 35 Wn.App. 325 (1982).

In *Vanbruwaene v. Barclay Seafood & Meat*, 2000 Wn. App. LEXIS 2000, an IME failed where the physician, Dr. Billington, insisted no monitor be present unless he was given 48 hours advance notice and since notice had not been given, the doctor cancelled the exams. This Court, Division I, found the doctor's imposition of this extra-judicial condition inappropriate.

An attorney has an absolute right to be present at a CR 35(c) exam and advise a client of something inappropriate during the exam. *Teitjen v. Department of Labor & Industries*, 13 Wn.App. 86; 534 P.2d 151; 1975 WASH APP LEXIS 1308: "CR 35 medical and mental examination is a legal proceeding, at which the Plaintiff is entitled to representation . . . there may be questions which the Plaintiff may refuse to

answer . . .” *Teitjen* at P. 90. Ex-parte contact with a party’s expert is covered by CR 26(b)(5), and also *In re Firestorm*, 1991, 129 Wn.2d 130, at P. 137-8, 916, P.2d 411 (1996), *Loudon v. Myhre*, 110 Wn.2d. 675, 677 (1988).

Where the parties agree to an exam per CR 35(c) the agreement between the parties specifies the terms and conditions for the exam. Here, absolutely nothing specified or suggested Rosen would require signature and agreement to his special terms and conditions, indeed, the email agreement between the parties, confirming the exam, and listing the condition, makes no mention of having to agree to three pages of special terms and conditions.

(2) Recoverable costs do not include the costs of Glacier’s private translators.

RCW 2.43.040(3) requires the party requiring interpreter services bare the cost of an interpreter at trial, which Bernal did do. An interpreter appointment by the Court is a recoverable costs per RCW 4.84.010 “Costs otherwise authorized by law” and case precedent, *Hall v. Northwest Lumber Co.* 61 Wash 351, 356-57, 112 P. 369 (1910) all of

which provide only for interpreter fees for Court appointed/approved interpreters.

(3) Recoverable costs do not include the video presentation expense of preserving by video deposition testimony of its vocational expert for trial to Glacier.

For reasons having nothing to do with Bernal, and in spite of the trial having been scheduled almost 18 months in advance, Glacier's vocational expert, Skilling, claimed a conflict and testified by video tape deposition. The court awarded \$1,100.20 for these costs. Recoverable costs do not include depositions or video taped depositions made solely for the purpose of the convenience of a party. (See RCW 4.84.080(7):

“ . . . the reasonable use of the transcription of depositions used at trial or at mandatory arbitration hearing, provided, that the deposition shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence for purposes of impeachment.”

RCW 4.84.010(7)

The deposition was taken on Wednesday, November 25, 2009 in the afternoon as a result of Skilling's vacation

plans. (*CP 1199-1205 at CP 1205, Defendant's Reply in support of Cost Bill. P. 6, Lns. 11-23*). RCW 4.84.010(7) which allows recovery of the reasonable expenses of the transcriptions of depositions used at trial, is intended to cover depositions used at trial for purposes of impeachment purposes only and there is no basis in RCW 4.84.010(7) to recover expenses for a videotape deposition made necessary by an experts vacation plans.

(4) Federal Law provides that a Jones Act Plaintiff has an exclusive right to determine whether a trial is jury or non-jury trial

Endicott, supra, is now on appeal to the United States Supreme Court. This Court is urged to take judicial notice of Attachment to Appendix, copy of the Petition to the United States Supreme Court filed by Plaintiff/Appellant Justin Endicott seeking review before the United States Supreme Court of the Washington Supreme Court's Ruling. Should Endicott prevail, Bernal clearly would be entitled to a new trial as he demanded a trial before the court and moved to strike Glacier's jury demand. (*CP 1506-1516*).

Bernal is also required to keep the issue alive, or forever be foreclosed from benefiting from any possible United States Supreme Court ruling. He is required to designate, for that purpose only, this matter as an issue on appeal before this Court.

The maritime Plaintiff has exclusive right to elect a jury or non-jury trial in State Court is a substantive federal right. *Dice v. Akron, Canton & Youngstown R. Co.*, 342 US 359 (1952).

V. CONCLUSION

The trial court's action in granting \$5,000 in sanctions and excluding Plaintiff's Counsel from a CR 35(c) exam is unprecedented and outrageous. The facts do not support and the law cited by the trial court provide no basis for the sanctions imposed. It is clear an abuse of discretion occurred under the facts and circumstances of this case. Plaintiff's Counsel was doing what was required under the time and place of the Rosen IME exam. It was Glacier/Rosen who failed to alert Bernal/Plaintiff's Counsel of this surprise

condition and it is well beyond irony that this trial court, not even understanding Rosen had indeed required agreement to his special terms and conditions, actually did sanction Plaintiff's Counsel for the misconduct of Glacier and Rosen. The trial court also erred in awarding Glacier its private interpreter expenses and video taped deposition expenses for convenience purposes only of its vocational expert, Skilling. Finally, under *Endicott*, supra, and the pending Petition to the United States Supreme Court, Bernal preserves his right to benefit from the possible subsequent favorable ruling by the United States Supreme Court which would entitle him to a new trial as a result of error by the trial court in denying Bernal's Motion to Strike Glacier's Jury Demand.

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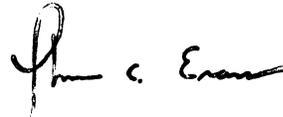
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This Court should reverse on all issues, and direct the trial court to enter judgment on remand consistent with this Court's ruling.

Respectfully submitted this 15th day of April 2010.

INJURY AT SEA

A handwritten signature in black ink, appearing to read "Th. C. Evans". The signature is written in a cursive style with a large initial "T" and "E".

THOMAS C. EVANS

CERTIFICATE OF SERVICE

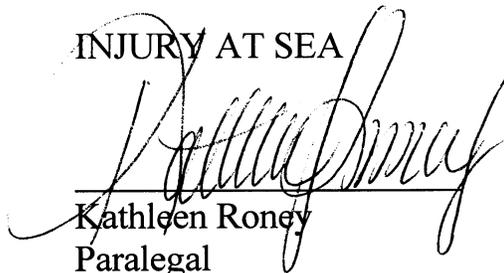
I hereby certify that on 15th of April, I filed this Brief of Appellant and Appendix with the Clerk of the Court of Appeals, Division I and sent copies of the same to the following via legal messenger

David Carl Bratz
LeGros Buchanan & Paul
701 Fifth Avenue, Suite 2500
Seattle, WA 98104

I certify under penalty of perjury under the laws of the United States of America and the State of Washington that the foregoing is true and correct.

Dated this 15th day of April, 2010.

INJURY AT SEA



Kathleen Roney
Paralegal

APPENDIX

	AP	CP
Complaint for Damages	1-6.	1370-1374
3-11-09 Email from Gephart to Evans, listing agreed CR 35(c) conditions . . . . .	.7.	1607-1608
Rosen’s “Information Form” . . . . .	.8-10.	1431
Rosen’s “Observer Information Form” . . . . .	.11	1427-1429
Transcript of Bernal IME. . . . .	.12-17.	1433-1438
2/26/09 Federal Court Order Prohibiting Rosen’s Information Form . . . . .	.18-20.	1602-1604
2-27-09 Letter to Rosen from Evans . . . . .	.21-22.	1599-1600
Defendant’s Motion to Compel Rule 35 Examination; For Protective Order Excluding Plaintiff’s Counsel from Rule 35 Examination; and For Sanctions, Fees, and Costs . . . . .	.23-35.	1443-1456
Declaration of Rosen June 15, 2009 in support of Motion to Compel Exam . . . . .	.36-48.	1383-1395
Declaration of Rosen June 17, 2009 in opposition to Plaintiff’s Motion to Exclude Rosen . . . . .	.49-59.	1457-1466
Deposition of Gerald M. Rosen, 9/23/09 . . . . .	.60-68.	1663-1779

Order Granting Motion to Compel Rule 35 Examination; Entering Protective Order Excluding Counsel from Rule 35 Examination; and Ordering Sanctions	69-73.	1423-1425
Motion for Immediate Relief Motion for Reconsideration	74-81.	2240-2247
Order Denying Reconsideration	82-83.	2248-2249
Order Denying Plaintiff's Motion for Immediate CR 60 Relief From June 26, 2009 Order	84-85.	2250-2251
Transcript of August 7, 2009, trial court hearing	86-102.	2258-2274
Substituted Order Granting Motion to Compel Rule 35 Examination Protective Order Excluding Counsel from Rule 35 Examination and Sanctions	103-107.	2288-2292
Transcript of trial court proceedings 11-30-2009 Regarding appointment of interpreter.	108-131.	2173-2176
Defendant's Cost Bill	132-136.	2177-2221
Plaintiff's Objection To and Memorandum In Opposition to Defendant's Cost Bill	137-142.	2115-2172*
Order Awarding Costs	143.	2280
Judgment	144-147.	2281-2284
Notice of Appeal	148-149.	2285-2318

* The Clerk mistakenly lists the page numbers for Plaintiff's Objections to Defendant's Cost bill as "2115-2117" when this is in fact, Defendant's Cost Bill. AP 137-142 is a copy of Plaintiff's objections. CP 2173-76 is a copy of Plaintiff's Counsel's affidavit in opposition to Defendant's Cost Bill.

Defendant's Notice of Cross Appeal150-152

Justin Endicott, Petitioner v. Icycle Seafoods,
Petition to United States Supreme Court
For Certiorari.Attached

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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

MIGUEL BERNAL HERNANDEZ, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation

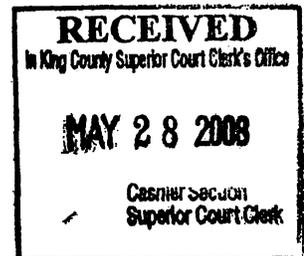
Defendant.

RICHARD D. EADLE

08-2-18009-3 SEA

CASE NO.

COMPLAINT FOR DAMAGES



For an amended Complaint against Glacier Fish Company, LLC, Plaintiff Miguel Bernal Hernandez does hereby submit this Complaint to allege as follows:

I. JURISDICTION

1.1 This is a claim for relief brought by Plaintiff, Miguel Bernal Hernandez, a seaman, against the owner/operator of a vessel for personal injuries; maintenance and cure; failure to pay maintenance and cure, and unearned wages. Jurisdiction is vested in the Court by virtue of general maritime law, 28 U.S.C. § 1333; the "Jones Act", 46 U.S.C. § 688 et. seq. and common law negligence.

COMPLAINT FOR DAMAGES - 1



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1 **II. PARTIES**

2 2.1 At all times material hereto, Plaintiff was a seaman and employed by
3 Defendant GLACIER FISH COMPANY LLC who owned and operated the vessel
4 PACIFIC GLACIER in navigation in the navigable waters of the United States.
5 Plaintiff is a resident of the State of Washington.

6 2.2 At all times material hereto, Defendant, GLACIER FISH COMPANY, LLC
7 was the employer of the Plaintiff herein. GLACIER FISH COMPANY, LLC is a
8 Washington corporation and does business in the State of Washington.

9 2.3 The PACIFIC GLACIER, Official No. 933627, is now or during the
10 pendency of this cause will be within the jurisdiction of this Court.

11 **III. FIRST CAUSE OF ACTION: "JONES ACT" CLAIMS**

12 3.1 Plaintiff restates paragraphs 1.1 – 2.3.

13 3.2 On or about February 26, 2008, while working as a processor aboard the
14 PACIFIC GLACIER, in navigable waters, Plaintiff suffered severe traumatic injuries as
15 a direct result of a fire onboard the PACIFIC GLACIER. He developed these injuries
16 due to the negligence of Defendant and/or the unseaworthiness of the PACIFIC
17 GLACIER. The full extents of Plaintiff's injuries are presently unknown.

18 3.3 Defendants were negligent as were the officers, agents and employees
19 acting on their behalf by reason of including but not limited to: allowing a fire to
20 break out and failing to control the same, which fire became so large as to engulf
21 most of the vessel, including the area where Plaintiff was working. Defendants also
22 had no fire suppression plan, nor proper escape plan, and as a result Plaintiff nad

COMPLAINT FOR DAMAGES - 2

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1 many other workers became trapped on the vessel. Some crew members were only
2 rescued as a result of actions taken by other crew members to save them. Plaintiff
3 was responsible, in part, for the rescue and saving of two crew members who escaped
4 though a portal on the vessel.

5 3.4 Defendant, and all persons acting on their behalf, failed to provide
6 Plaintiff with a safe place to work, in that the work place of Plaintiff was unsafe by
7 reason of including, but not limited to, all of the above. Further, at the time and
8 place of this injury, Plaintiff was acting entirely within the scope of his employment
9 and did not contribute to any negligent act or to the cause of his injury. Defendant
10 did, at the time and place of Plaintiff's injury, retain exclusive control over the area in
11 which Plaintiff worked, and the manner and fashion in which the work was to be
12 performed by Plaintiff.

13 3.5 As a result of the injury sustained by Plaintiff, Plaintiff has suffered
14 substantial personal injuries including pain, suffering, disability, mental anguish,
15 psychological injury, wage loss, permanent impairment of income producing ability,
16 future pain, suffering and anguish. Plaintiff sues herein as further claimed in
17 Plaintiff's prayer below for recovery for all such personal injuries, wage loss, income-
18 earning capacity, and prejudgment interest on any award entered herein.

19 **IV. SECOND CAUSE OF ACTION: UNSEAWORTHINESS**

20 4.1 Plaintiff restates paragraphs 1.1 – 3.5.

1 4.2 For additional cause of action against Defendant, Plaintiff alleges
2 Defendants' vessel was unseaworthy at the time and place of Plaintiff's injury and
3 was not reasonably fit for seamen.

4 4.3 The unseaworthiness of the vessel included but is not limited to: lack of
5 fire protection and suppression; faulty equipment causing a fire to break out and
6 become uncontrollable. Defendants were in violation of minimum standards
7 established by applicable codes and regulations with respect to providing adequate
8 and safe equipment, this was a cause of Plaintiff's injury. A combination of the items,
9 and each of them, rendered the PACIFIC GLACIER unseaworthy at the time and place
10 of Plaintiff's injury.

11 4.4 Plaintiff further alleges that at the time and place of his injury, Plaintiff
12 was not contributorily negligent and did not cause or contribute to the cause of his
13 injury nor did he assume any of the risk of his injury.

14 **V. THIRD CAUSE OF ACTION: MAINTENANCE AND CURE, UNEARNED WAGES**

15 5.1 Plaintiff restates paragraphs 1.1 - 4.4.

16 5.2 As a seaman injured in the course and scope of his employment aboard
17 the PACIFIC GLACIER, Plaintiff is entitled to maintenance, cure, and unearned
18 wages. Plaintiff has yet to be paid maintenance nor has cure been provided for in
19 the form of appropriate psychological debriefing and follow through assistance.
20 Based upon prior acts and conduct of Defendant, Plaintiff believes that Defendant
21 has, in the past, and thus will again, willfully and persistently, fail to provide
22 maritime benefits when they are clearly owed, including but not limited to,

COMPLAINT FOR DAMAGES - 4

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1 underpaying of medical, psychological, or other bills when submitted, necessitating
2 that Plaintiff hire an attorney to obtain the full benefits to which he is entitled.
3 Based on these past practices, Plaintiff believes that he is at risk for underpayment
4 of his medical and psychological providers, and at risk for personal payment of
5 balances that are underpaid. In addition, Plaintiff believes that he is entitled to
6 maintenance at an amount of not less than \$50 (fifty) dollars per day based upon his
7 personal needs, costs, and expenses.

8 **VI. PRAYER**

9 Plaintiff prays for the following relief:

10 6.1 For judgment against PACIFIC GLACIER and GLACIER FISH
11 COMPANY, LLC in an amount to be proven at trial for general and special
12 damages;

13 6.2 For maintenance and cure in an amount to be proven at trial, and for
14 failure to pay the full amount of cure as billed by Plaintiff's medical providers;

15 6.3 For failure to pay unearned wages for a complete fishing season, in an
16 amount to be proven at trial;

17 6.4 For prejudgment and post-judgment interest;

18 6.5 For the reasonable costs of maintaining this suit;

19 6.6 For reasonable attorney's fees;

20 6.7 For an award of compensation for marine rescue, having been part of the
21 rescue of at least two processors who, but for Plaintiff's action, might have
22 perished in the fire.

COMPLAINT FOR DAMAGES - 5

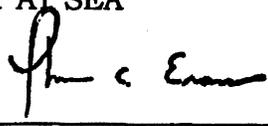
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6.8 For an award to Plaintiff of any other relief this Court deems equitable
or just.

DATED this 28th day of May, 2008.

INJURY AT SEA



THOMAS C. EVANS, WSBA #5122
Attorney for Plaintiff

Carey Gephart

From: Carey Gephart
Sent: Wednesday, March 11, 2009 12:04 PM
To: 'Tom Evans'
Cc: David Bratz
Subject: Pacific Glacier

Tom:

This letter is intended to memorialize the agreement reached in this morning's telephonic Rule 37 conference regarding the independent mental examinations of plaintiffs Miguel Bernal Hernandez and Ancelmo Rodriguez-Garcia ("Plaintiffs"):

- (1) Plaintiffs agree to examination by Dr. Gerald Rosen.
- (2) Plaintiffs agree to examination over the course of one full day and a nonconsecutive half day. Interview of the Plaintiffs can be conducted on both of the examination days.
- (3) You will be present as monitor for the interview portions of the Plaintiffs' examinations.
- (4) A court certified Spanish interpreter will be provided by Defendant and will be present for all portions of the plaintiffs examinations.
- (5) Dr. Rosen will audiotape the examinations, and provide you with a copy of this recording.
- (6) Defendant will reimburse the mileage expenses (at the rate of \$0.51/mile) and reasonable documented food/lodging expenses associated with plaintiffs attendance at their respective examinations.

Please let me know if you have any disagreements regarding the foregoing, and we can arrange another telephone discussion.

Under the foregoing arrangement, Dr. Rosen is available to conduct independent mental examinations of Mr. Bernal Hernandez and Mr. Rodriguez-Garcia during the weeks of June 8th, 15th and 22nd (excluding June 16). Please consult with your clients and provide two non-consecutive dates for each of them that fit within Dr. Rosen's availability.

During the Rule 37 conference, we also discussed Dr. Rosen's request for a collateral interview with Mrs. Flores, which you denied. We do want to take Mrs. Flores deposition. You indicated you would provide assistance in facilitating the same. As such please let us know her, and your, availability for this deposition.

Regards,

Carey M. F. Gephart

LeGros Buchanan & Paul, P.S.

☎ Phone: 206.623.4990 📠 Fax: 206.467.4828

📍 701 Fifth Avenue, Suite 2500

Seattle, WA 98104-7051

Email: cgephart@legros.com

Visit us at www.legros.com

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GERALD M. ROSEN, PH.D.
CLINICAL PSYCHOLOGIST

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PMB 229
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groser@u.washington.edu

PHONE: (206) 322-2700
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LICENSED: WA, AK, OR
www.forensicptsd.com

**INFORMATION PERTAINING TO
LEGAL, INSURANCE, AND EMPLOYER EVALUATIONS**

This information discusses the basic features of my practice and the purpose of today's evaluation. Please feel free to speak with me at the start of our meeting if you have additional questions about any of these matters.

PROFESSIONAL QUALIFICATIONS:

I have been licensed as a Clinical Psychologist in Washington State since 1976. In addition to my private practice, I hold an appointment as Clinical Professor in the Department of Psychology, University of Washington, and in the Department of Psychiatry and Behavioral Sciences, University of Washington Medical School. My Ph.D. is in clinical psychology and was obtained from the University of Wisconsin, Madison, in 1972. I then completed a one-year internship at the University of Washington School of Medicine. Subsequent to that I was on the faculty in the Department of Psychology, University of Oregon, from 1973-1976. In 1976, I returned to Seattle and began my private practice. If you have further interest in my professional background and publications, you may ask for a copy of my Vitae.

PURPOSE OF EVALUATION:

For today's evaluation, I have been asked to conduct an independent psychological assessment. In this context, you are not my patient. Instead, the law firm or company that has requested the assessment is my client. Therefore, you do not have direct access to my records as would typically be the case with a patient. Also, you should not directly contact me at a future date, just as I will not directly contact you. For example, it is not appropriate for you to ask that I interview you again or review additional records at your request. If you have concerns about such matters, these should be brought to the attention of the law firm or company that has retained me or with whom you are working.

You are not under oath during this evaluation, as you would be when testifying in a deposition or a court of law. Nevertheless, it is important that you be honest and provide accurate information about your problems and issues. Similarly, it is very important that you respond carefully and honestly to any psychological tests that may be given to you. For example, if you take a performance test, such as a test that assesses math abilities or your ability to remember information, it is important to do your best.

We will discuss many issues during the assessment interview. If at any point in our meeting(s) it becomes unclear why we are discussing a particular matter, please feel free to ask me. Also, at different times during our meetings you may be asked if anyone has provided you with information on certain tests or psychiatric issues. When responding to

these questions you should keep in mind that communications between you and your attorney are privileged. You can, of course, waive this privilege but most attorneys would advise against this and you should check with your own attorney before doing so. Please keep this important issue in mind during our meetings. For example, let's say you are asked "Has anyone provided you with information about Depression, either in written or verbal form," and your therapist has given you an information pamphlet on that disorder. In this example, you would of course answer "Yes," and you could then discuss the materials in detail. If, however, similar information was provided by your counsel you could answer "Yes," or you might instead protect the communication and respond by stating, "I can't discuss that," or "That involves attorney-client privilege." If you have any questions about these points, you should speak with someone from your attorney's office.

CONFIDENTIALITY:

When I see patients in my regular clinical practice I assure them that everything we discuss is confidential, unless there is an exception under Washington State law. However, in legal and employment evaluations all topics discussed and all materials generated are *not confidential*. In this context, everything we discuss can be made available to the party that has hired me, and they have full use of that information in any legal action or employment decision. Your attorney also can request the information and the information may become part of a public record if filed with the court. This is an important point for you to understand since it is just the opposite of the usual policies that protect confidentiality for a patient. Also, please note that *the assessment interviews will be tape recorded* to assure an accurate record of what we discuss.

You also should know that I am obligated by the laws of Washington State to report cases of child abuse. I also am obligated to report people who I believe are a serious threat to harm themselves or an identified third party.

APPOINTMENTS:

Regular office hours are Monday through Friday, between 9:00 AM and 5:00 PM. Missed appointments and last-minute cancellations are a problem for my schedule. Therefore, there is a full charge for time that has been scheduled when you change or fail an appointment without sufficient notice. You want to be aware that charges for missed appointments may be passed on to you and become your responsibility. If you need to change or cancel an appointment, you can call my office at any time and leave a message with my voice mail. My office telephone is 206-322-2700.

FINANCIAL ARRANGEMENTS:

If you have been sent by your own attorney for an evaluation, he or she will be billed. Depending on your arrangement with your attorney, these charges may be passed on to you. If this situation applies, then you should discuss with me any questions you have about fees.

In all other cases, there is no need for you to be concerned about financial arrangements. The cost of my services are billed directly to the law firm or company that has retained me and they, not you, are responsible for the charges. The only exception is a charge that results from missed appointments or late cancellations. In such cases, an attorney may attempt to recover the costs from you.

CONSUMER PROTECTION LAWS: Washington State Licensing Law requires that psychologists inform consumers of their rights and issues of quality of care. In accord with these laws I want to emphasize your right to raise questions about my services. You also may have the right to request a different psychologist for this evaluation. Lastly, a forum for complaints is available through the Examining Board of Psychology and information regarding complaint procedures is available through this office.

CONSENT: If you understand and accept the above information, please sign on the lines below. Do *not* sign this form if you have any questions. Instead, wait for our interview and discuss with me the questions you have. This form should not be signed until your concerns have been clarified.

I understand and accept the purpose of this evaluation and agree to its being recorded.

Signature

Date

I understand that a law firm or company has retained Dr. Rosen and I am not his client. Findings and records from this evaluation will be shared with that law firm or company, and are not directly available to me. Also, it is not appropriate for me to contact Dr. Rosen about his findings or to request at some future date that he review additional records, meet with me again, or perform any type of follow-up service, unless such contact occurs at the direction of the law firm or company that has retained Dr. Rosen.

Signature

Date

I will provide honest and accurate information during the assessment, and perform to the best of my abilities on psychological performance tests.

Signature

Date

I understand that communications with my attorney are protected by the attorney-client privilege and it is my right to not disclose these communications.

Signature

Date

Revised: 9/08

GERALD M. ROSEN, PH.D.

2825 EASTLAKE AVENUE EAST, SUITE 205
SEATTLE, WASHINGTON 98102

CORRESPONDENCES TO:
117 EAST LOUISA STREET, PMB 229
SEATTLE, WA 98102
groesen@u.washington.edu

PHONE: (206) 322-2700
FAX: (206) 322-5100
LICENSED: WA, AK
URL: www.forensicptsd.com

OBSERVER INFORMATION FORM

(Please provide the following information as regards your role today as an observer)

Date: June

Your Name: Thomas E. Evans

Name of case/plaintiff on whose behalf you are here:
Miguel Hernandez

Your Employer: Injury At Sea

Job Title: Attorney

In your role as an observer it is expected that you will not interfere with the interview process. If you take notes, please do so quietly and without disturbing the interview. If you take exception to these points, or if you feel there are circumstances when you should be allowed to interrupt the interview process, please explain:

Please do not ask our client to agree to terms or conditions for this exam, these terms and conditions are established by state law and you consult MR Bratz on these questions.

Do you have any concerns or questions about this case and/or the planned assessment that you want to clarify before the interview begins?

Yes No If you answered "Yes" please explain:
You should not ask our client to agree to or accept your conditions in your information sheet

The information provided above is correct (please sign): [Signature]

In Re: HERNANDEZ v. GLACIER FISH COMPANY

Case No. 08-2-08009-3 SEA

INDEPENDENT MEDICAL EXAM

OF

MIGUEL BERNAL HERNANDEZ

Examination conducted by:

DR. GERALD ROSEN

June 9, 2009

Transcribed by: Matthew Ginther, CCR, CET

Reed Jackson Watkins 206-624-3005

Date Transcribed: June 10, 2009

APPEARANCES

1
2
3 Examiner: GERALD ROSEN
4
5 For Mr. Hernandez: THOMAS CHARLES EVANS
6 Injury at Sea
7 4705 16th Avenue Northeast
8 Seattle, Washington 98105
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1 listed by state law and case precedent.
2 And as a condition of Mr. Hernandez being here
3 today and undergoing this examination, he should not be
4 required to agree to any special terms or conditions,
5 including some of the conditions and statements that
6 Dr. Rosen evidently wishes Mr. Hernandez to agree to at
7 this time. On page 3 of Dr. Rosen's form, revised 9/08,
8 he has four spaces where he evidently expects
9 Mr. Hernandez to sign in some form of agreement.
10 Mr. Hernandez will not sign that form. And he
11 does not agree to any special terms or conditions or other
12 restrictions. And so I will ask Dr. Rosen to please not
13 ask our client to agree to any of these terms or
14 conditions.
15 We're here to carry out the exam as ordered by
16 state law and the civil rules. And nothing more, and
17 nothing less. So Doctor, please don't ask for anything
18 beyond that. I will make a suggestion to you, and that is
19 that if you have any questions about what you should or
20 should not do, that you should not rely on what I say, but
21 you should contact the attorney who scheduled the exam.
22 And his name is David Bratz. And his phone number is
23 623-4990.
24 So now at this time, I am returning this form
25 titled Information Pertaining to Legal Insurance and

-o0o-

1
2
3 DR. ROSEN: Excuse me one sec.
4 MR. EVANS: Okay.
5 DR. ROSEN: Okay. Yes, the tape is going.
6 MR. EVANS: All right. For the record, my name
7 is Tom Evans. I'm here as attorney for Mr. Hernandez.
8 And we are here for the independent medical examination --
9 psychological examination with Dr. Rosen. The date today
10 is June 9, I believe. And it is now 9:31. And I believe
11 that we were here at 9:25.
12 Upon entry to Dr. Rosen's office, Dr. Rosen
13 presented me with a form on a metal plate that says,
14 Observer Information Form. And this form has certain
15 statements about what I understand to be Dr. Rosen's
16 expectations of an observer. I have filled that out and I
17 have signed that. And I am handing that back to
18 Dr. Rosen.
19 Dr. Rosen also, immediately upon entry, presented
20 to Mr. Hernandez, and asked him to read and review and
21 sign in three places, a form titled Information Pertaining
22 to Legal Insurance and Employer Evaluations. This exam is
23 being conducted in accordance with the civil rules of the
24 superior courts, CR 35, and case precedent. The only
25 conditions that apply to this exam are the ones that are

1 Employer Regulations to Dr. Rosen. And I'm asking him,
2 once again, to please do not ask our client to agree to or
3 accept these special terms and conditions. And we are
4 here prepared, ready to go.
5 DR. ROSEN: In response to what seems to be an
6 extraordinarily long statement, I want to clarify that I
7 don't expect Mr. Hernandez to sign this. I told him that
8 I would like him to read this. And if he had any
9 questions or for any reason did not want to sign it, he
10 should not.
11 Next thing is, I would need to ask you, after
12 your statement, to tell me what conditions are in this
13 form that you believe I'm asking Mr. Hernandez to agree to
14 that he cannot agree to, since some of these conditions
15 guide psychologists in terms of obligations under the
16 State to inform. And so if you could look at this and we
17 can go through that, that would be great.
18 MR. EVANS: Yeah. I have read it, Doctor. And
19 I'm handing it back to you. And we're here for an
20 independent psychological exam. If you want to read it to
21 Mr. Hernandez -- you can read whatever you want to
22 Mr. Hernandez, if you believe it's part of your
23 independent medical exam. But as far as his agreeing or
24 signing any statement about the conditions --
25 DR. ROSEN: That's fine. So is it all right with

1 you if he acknowledges that he understands what's on the
2 form?

3 MR. EVANS: You can read whatever you want to
4 him. I am telling you, as his attorney, that regardless
5 of what is on that form, the only conditions for this exam
6 are those conditions that are required by the court rules
7 and civil cases. And so as far as an agreement is
8 concerned, that governs the agreement.

9 Nothing on that form may or may not parallel
10 state law, but we are not here for any purpose other than
11 to have the exam. And let's go ahead and have the exam.
12 And if you want to read that paper to Mr. Hernandez, you
13 may do so. But I will ask you, again, to please do not
14 ask Mr. Hernandez to agree to any special terms or
15 conditions.

16 And if you have any questions about what you want
17 to do or feel like you should do, I would again suggest
18 you call Mr. Bratz at 623-4990. He's the gentleman who
19 should advise you on what to do or not to do.

20 DR. ROSEN: Do you agree that there are laws that
21 guide the performance of psychologists and issues of
22 informed consent, and that those also apply to the current
23 assessment?

24 MR. EVANS: Well, I'm not here to have an
25 academic discussion with you or anyone else about those

1 issues. We're here for a psychological exam. It's
2 already almost 20 minutes to. And I would suggest we get
3 on with it so that we can get this exam completed.

4 We're ready to go into your room here. I've
5 signed your statement about not interfering with the exam
6 and promise you I will not interfere with this exam. And
7 we'd like to get started.

8 DR. ROSEN: So in terms of usual procedures and
9 such, I'll have the interpreter go over with Mr. Hernandez
10 the consent form. Do you want your own copy of that?

11 MR. EVANS: Yeah.

12 DR. ROSEN: Okay.

13 Excuse me. When -- when you're done and he
14 expresses an understanding of the things, then that would
15 be great. And then everyone can come in.

16 THE INTERPRETER: Okay.

17 MR. EVANS: Okay. Before you leave, Doctor, I
18 just want to make it clear to the translator, I will ask
19 you that you read this to Mr. Hernandez. Do not ask
20 Mr. Hernandez whether he agrees or disagrees.

21 DR. ROSEN: I would like you to establish if he
22 understands, which would be communicating my question of
23 concern. And then if he has questions, then you could
24 still come in and we can discuss the questions he has.

25 MR. EVANS: And I have no objection to your

1 asking him if he understands what you're saying. But
2 please do not seek his consent or agreement.

3
4 (The Spanish interpreter spoke with Mr. Hernandez.)

5
6 THE INTERPRETER: I just asked him if he
7 understood.

8
9 (The Spanish interpreter spoke with Mr. Hernandez.)

10
11 THE INTERPRETER: I asked if he understood.

12
13 (The Spanish interpreter spoke with Mr. Hernandez.)

14
15 THE INTERPRETER: Dr. Rosen?
16 DR. ROSEN: Yes?

17 THE INTERPRETER: I have read and he signifies
18 he's understanding. If I might -- if I might take a
19 bathroom break, I'll be right back.

20 DR. ROSEN: Oh, sure.

21 You could bring your stuff in. But I'm going to
22 want to speak to Mr. Evans a bit before. Also, the tape
23 is still on. (Inaudible) speaking with Mr. Evans, but
24 privately about things.

25 THE INTERPRETER: Okay.

1 DR. ROSEN: So I'm just keeping the tape running
2 the whole time. And -- okay.

3 Oh. So Mr. Evens, I wanted to speak with you a
4 little bit before I begin things.

5 MR. EVANS: Sure.

6 DR. ROSEN: If you could come in.

7 MR. EVANS: Sure.

8 DR. ROSEN: I still have the tape running. Is
9 that okay with you?

10 MR. EVANS: Yes. Okay, good you've got your tape
11 recording.

12 DR. ROSEN: All right. So you're going to end up
13 sitting here.

14 MR. EVANS: Okay.

15 DR. ROSEN: Yeah, you have the desk.

16 MR. EVANS: That's fine.

17 DR. ROSEN: And he'll sit here. But for the
18 purposes of our speaking, you can sit here for the
19 moment.

20 MR. EVANS: Okay.

21 DR. ROSEN: Yeah. So on my form, it says I
22 understand and accept the purpose of this evaluation and I
23 agree -- and agree to its being recorded. So now, you
24 don't have a problem with his agreeing that it's
25 recorded?

1 MR. EVANS: You're reading from the --
 2 DR. ROSEN: My form.
 3 MR. EVANS: Oh, yeah. No, that's fine.
 4 DR. ROSEN: So he's agreeing to that condition?
 5 MR. EVANS: Right, to the --
 6 DR. ROSEN: Which is not required in the CR 35.
 7 MR. EVANS: My understanding from talking with
 8 Mr. Bratz, was that we agreed that you would record it.
 9 DR. ROSEN: Okay.
 10 MR. EVANS: I understood that he had told you
 11 that. Actually, we have another one that I think you did
 12 where you recorded it.
 13 DR. ROSEN: Yes. Okay. So now, there's the
 14 general statement, though, I understand and accept the
 15 purpose of this evaluation. You're telling me that I'm
 16 not to ask him if he accepts the purpose -- if he accepts
 17 the evaluation being conducted?
 18 MR. EVANS: Yeah. I don't want to get into a
 19 discussion with you, Dr. Rosen, about those issues.
 20 That's something that --
 21 DR. ROSEN: Well, here's the problem.
 22 MR. EVANS: Uh-huh.
 23 DR. ROSEN: I can't conduct an evaluation unless
 24 a person agrees to it, and accepts the notion that I'm
 25 going to be conducting it under the kinds of conditions

1 that I'm speaking about in this form. So I've had many
 2 people who don't sign this, but they do agree that they
 3 understand it, and they accept it.
 4 MR. EVANS: Well --
 5 DR. ROSEN: If you're not going to let him
 6 formally accept it, then it would not be proper for me to
 7 conduct the exam. Because I can't conduct exams that
 8 people aren't themselves accepting, unless there's a court
 9 order that has them doing it against their wishes.
 10 MR. EVANS: Well, this is a question I can't
 11 answer for you. You need to talk to Mr. Bratz.
 12 DR. ROSEN: No. I think, then, you should call
 13 Mr. Bratz.
 14 MR. EVANS: No. No.
 15 DR. ROSEN: Here's the problem. I'm quite aware
 16 of my responsibilities, in terms of needing informed
 17 consent, and having people agree to the procedures that
 18 I'm going to be doing.
 19 MR. EVANS: Understandably.
 20 DR. ROSEN: And it seems like you're taking the
 21 position that I'm not to ask him if he agrees.
 22 MR. EVANS: Rule 35 of the civil rules compels a
 23 person against their will to appear for an independent
 24 medical exam. Like it or not, under that rule --
 25 DR. ROSEN: Yes, but we haven't had a judge order

1 the exam.
 2 MR. EVANS: I don't know in this one if we
 3 haven't. It seems to me we had some litigation over that
 4 issue. And I can't remember --
 5 DR. ROSEN: I believe that applied only to
 6 Mr. Florez.
 7 MR. EVANS: It's possible. It's possible.
 8 But --
 9 DR. ROSEN: Well, I'm not going forward on
 10 possibilities. It would be an extraordinary situation for
 11 a person -- for me not to have a person say that they
 12 basically accept being here, having me interview them;
 13 functioning under the rules of the State in terms of
 14 certain obligations I have to report under certain
 15 conditions; that they accept the conditions financially
 16 which are explained to them; that they accept the
 17 conditions of not having confidentiality.
 18 MR. EVANS: Is the tape going now?
 19 DR. ROSEN: Yes.
 20 MR. EVANS: Good. Okay.
 21 DR. ROSEN: So I need the person to accept that,
 22 unless the Court -- this is my understanding, anyway --
 23 unless the Court orders them to participate, whether
 24 they're agreeable or not.
 25 MR. EVANS: And, Doctor, again, I can't answer or

1 advise you on any of those issues, because --
 2 DR. ROSEN: But you're advising your client to --
 3 you're advising me that I can't ask him if he accepts the
 4 conditions.
 5 MR. EVANS: My advice is to my client. It's not
 6 to you.
 7 DR. ROSEN: No. You clearly have written, on the
 8 observer form, advice to me. You wrote, "Please do not
 9 ask our client to agree to terms or conditions for this
 10 exam. The terms and conditions are established -- these
 11 terms and conditions are established by state law." So
 12 you're clearly telling me -- limiting me in terms of what
 13 I should ask.
 14 MR. EVANS: Well, I don't know that I'm limiting
 15 you. What I'm telling you, though, is that --
 16 DR. ROSEN: What do you think this makes, when it
 17 says please do not ask?
 18 MR. EVANS: Actually, I've got to be able to
 19 finish answering the question.
 20 DR. ROSEN: Okay.
 21 MR. EVANS: I can only answer one at a time.
 22 DR. ROSEN: Okay.
 23 MR. EVANS: And I wasn't quite done with the
 24 first one.
 25 DR. ROSEN: Okay.

1 MR. EVANS: And in order to finish the answer to
2 that first one: Once again, I can't advise you, and
3 should not advise you, in any respect with respect to what
4 the duties and obligations are from your standpoint in
5 this exam. That's totally inappropriate for me to do. I
6 can only advise my client.

7 If you have some concerns because my client, in
8 your opinion, isn't doing something that he should do,
9 please take that up with Mr. Bratz and not me.

10 DR. ROSEN: Okay.

11 MR. EVANS: It may be after you talk to
12 Mr. Bratz, that he advises you it's totally inappropriate
13 and they shouldn't do that. It may be that he advises you
14 to go forward. I can't do that.

15 DR. ROSEN: I think we're actually going to stop
16 for today, then. Because you're telling me you are not
17 advising me. And, yet, on this form you wrote, quote,
18 "You should not ask our client to agree or accept your
19 conditions in your informed sheet -- or in your
20 information sheet."

21 You're directly telling me what I should not ask.
22 What you're telling me I should not ask, I believe I need
23 to ask under certain rules that guide the practice of
24 psychology. And I think we have this all on tape.

25 I think it's extraordinary what's happened this

1 morning. And that you have started off being
2 obstructionist. And I will give this tape to Mr. Bratz.
3 And he can, if he wishes, ask the judge to listen to it.

4 MR. EVANS: Well, um--

5 DR. ROSEN: Thank you, very much. Unless you
6 wish to modify what you wrote on this observer form.

7 MR. EVANS: Well, I hope that you understand
8 correctly what I've written here. What I have written is,
9 you should not ask our client to agree or accept your
10 conditions on your information sheet.

11 DR. ROSEN: And I have to ask him to accept it,
12 because the conditions in the information sheet, many of
13 them are specified by state laws that govern
14 psychologists. And so I think that we can just stop for
15 today, because you have told me not to ask questions that
16 I have to ask.

17 MR. EVANS: And I appreciate your dilemma and
18 your position. And insofar as my client is concerned, and
19 my advice to my client, and my understanding of the law as
20 it relates to these examinations, is that the law sets the
21 terms and conditions for the examination. And that an
22 examinee has a duty to comply with the requirements of the
23 law.

24 Those requirements do not include special terms
25 and conditions such as are suggested in your particular

1 form. And that with respect to my client, again --

2 DR. ROSEN: Uh-huh.

3 MR. EVANS: -- Mr. Bratz may disagree --

4 DR. ROSEN: That's excellent, so you and --

5 MR. EVANS: Wait, wait, wait, I'm not done. With
6 respect to my client, it is apparent to me that if you ask
7 him to agree to your form, you're asking him to agree to
8 certain terms and conditions that are not required by
9 state law. And are, in my opinion, with respect to my
10 client, inappropriate.

11 So from my client's standpoint, I have advised
12 him, and I've indicated to you here, that he will not
13 agree to special terms and conditions beyond the
14 requirements of state law and the court rule, which
15 governs these exams.

16 And I will again, for one more time, before you
17 adjourn this, strongly suggest that you call Mr. Bratz and
18 tell him your situation and your dilemma. And we'll wait
19 here for you to be able to do that. And seek his counsel
20 on what he would advise you to do.

21 DR. ROSEN: I see. Well, I don't feel I have a
22 dilemma, because I know what my responsibilities are and
23 feel confident in that. If I understand it correctly, you
24 are not willing to speak to Mr. Bratz about the position
25 that you've taken. You seem to be focusing on state law

1 related to CR 35, without reference to state laws that
2 govern the performance and practice of psychology.

3 And given all of that, I think that everyone
4 should reconsider what's going on here. We should not
5 proceed today and this can go to the judge. And we'll
6 regroup.

7 MR. EVANS: Well --

8 DR. ROSEN: So that's my decision. And I don't,
9 in fact, want to continue speaking with you about this. I
10 think what you wrote on that form is very clear in terms
11 of what you're instructing me about. And I think we're
12 going to stop, because -- let's just reset this.

13 We will meet tomorrow with Mr. Rodriguez. I'm
14 sorry for the mix-up in my book about the two individuals.
15 If, in the course of today, you're going to hold the same
16 position for tomorrow, then you could notify Mr. Bratz and
17 then you can take up both cases with the Court. And you
18 won't have to -- he won't have to come here tomorrow.

19 If you rethink your position, then we can
20 approach differently tomorrow with Mr. Rodriguez. But as
21 far as I'm concerned, this case is ready to be discussed
22 between you and Mr. Bratz and it can go to the judge.
23 Thank you.

24 MR. EVANS: Okay. Can I ask you for one other
25 favor here? Can I get a copy of the sheet that I signed?

1 I don't have a copy of that.
 2 DR. ROSEN: Yes. Sorry.
 3 MR. EVANS: Thank you.
 4 DR. ROSEN: This is a very slow machine.
 5 MR. EVANS: That's all right.
 6 DR. ROSEN: I apologize for that. So there's a
 7 copy of that.
 8 MR. EVANS: All right. Thank you, very much.
 9 DR. ROSEN: Yes.

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(Proceedings were concluded.)

1 CERTIFICATE
 2
 3 STATE OF WASHINGTON)
 4) ss
 5)
 6 COUNTY OF KING)

7 I, the undersigned, under my commission as a
 8 Notary Public in and for the State of Washington, do
 9 hereby certify that the foregoing recorded deposition
 10 and/or hearing was transcribed under my direction as a
 11 transcriptionist; and that the transcript is true and
 12 accurate to the best of my knowledge and ability; that I
 13 am not a relative or employee of any attorney or counsel
 14 employed by the parties hereto, nor financially interested
 15 in its outcome.

16
 17 IN WITNESS WHEREOF, I have hereunto set my
 18 hand and seal this _____ day of _____,
 19 2008.

20
 21
 22 NOTARY PUBLIC in and for
 23 The State of Washington,
 24 Residing at Kirkland.
 25 My commission Expires 03-27-11

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JESUS FLORES, a seaman,

Plaintiff,

No. C08-1267Z

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation; and the F/V Pacific
Glacier, Official No. 933627, a vessel, her
engine, equipment, tackle and appurtenances,
In Rem,

Defendant.

ORDER GRANTING
DEFENDANT'S MOTION FOR
RULE 35 EXAMINATION

THIS MATTER comes before the Court on Defendant Glacier Fish Company, LLC's Motion for Rule 35 Examination, docket no. 12. The Court has reviewed all files, pleadings, memoranda, and supporting declarations submitted by the parties in support and in opposition to the Motion, and finding itself fully apprised of all issues presented, GRANTS Defendant's Motion.

In granting Defendant's Motion, the Court specifically FINDS:

1. The Plaintiff's mental state is "in controversy" and the Defendant has established "good cause" for the requested independent medical examination, as required under Rule 35.

- 1 2. Defendant's proposed expert, clinical psychologist Dr. Gerald M. Rosen, is a suitably
2 licensed or certified examiner under Rule 35.
- 3 3. There is no legal basis nor extenuating circumstance justifying the presence of
4 Plaintiff's counsel nor any lay observers during any portion of the Rule 35 mental
5 examination.
- 6 4. The duration and timing of the examination—one full day and one half day (on
7 nonconsecutive days)—is reasonable and proper.
- 8 5. Pursuant to the parties' agreement, pre-examination disclosure to Plaintiff or his
9 counsel of the standardized tests to be administered during the examination is
10 unnecessary in light of Rule 35(b). Plaintiff's counsel and/or Plaintiff's qualified
11 expert shall be provided copies of all raw data and test results generated by the
12 examination.
- 13 6. Defendant will reimburse Plaintiff for his examination-related mileage (at the
14 requested rate of \$0.51 per mile) and for documented reasonable food and lodging
15 expenses associated with his attendance.

16
17
18 As such it is hereby ORDERED that Defendant's Motion for Rule 35 Examination of
19 Plaintiff is GRANTED. Plaintiff is ORDERED to submit to a mental examination with the
20 following specifications:

21
22 Examiner: Dr. Gerald M. Rosen, Ph.D., will perform Plaintiff's Rule 35 examination.

23 Date/Time: March 2, 2009 from 9:30 a.m. to 5:00 p.m. (with appropriate breaks);
24 March 4, 2009 from 9:30 a.m. to 1:30 p.m. (with appropriate breaks); or
25 at such other times as the parties agree
26

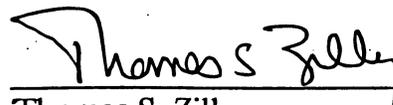
1 Place: Office of Gerald M. Rosen, Ph.D.
2 2825 Eastlake Avenue East, Suite 205
3 Seattle, WA 98102

4 Manner, conditions, and scope:

- 5
- 6 1. Interviews and testing of Jesus Flores at Dr. Rosen's office for clinical assessment to
7 include: (a) a thorough evaluation of all presenting problem(s); (b) an assessment of
8 the individual's beliefs as to what caused the alleged problems; (c) an exploration of
9 all reasonable competing hypotheses; (d) an evaluation of treatment efforts to date;
10 and (e) an assessment of the individual's prognosis with recommendations for any
11 future treatment that appears indicated.
 - 12 2. An interpreter, Court-certified in the Spanish language, will be present for all portions
13 of the mental examination.
 - 14
 - 15 3. Dr. Rosen will digitally audio tape the examination, and a copy of this recording will
16 be made available to Plaintiff's counsel and/or Plaintiff's qualified expert.
 - 17 4. Dr. Rosen will not require Plaintiff to sign any documents.

18 IT IS SO ORDERED.

19 DATED this 26th day of February, 2009.

20
21
22 
23 Thomas S. Zilly
24 United States District Judge
25
26

February 27, 2009

Via Hand Delivery

Dr. Gerald Rosen, Ph.D.
2825 Eastlake Avenue East, Suite 205
Seattle, WA 98102

*Re: Flores v. Glacier Fish Company – Independent Medical Exam
Monday, March 2, 2009 & Wednesday, March 4, 2009*

Dear Dr. Rosen:

* We are sending this letter and attached Order for Mr. Flores to give to you at the commencement of his meeting with you beginning Monday, March 2, 2009. You may have already been provided with a copy of the attached Order by the attorney arranging for this exam, Mr. David Bratz, and any questions that you have about its contents, or the contents of this letter, should be referred to Mr. Bratz and not to us. Mr. Bratz may be reached at (206)623-4990.

Please note that the Order specifically provides (Page 3, Item 4) that Mr. Flores may not be required to sign any documents, which we understand to include the documents referenced in the several declarations provided to the Court stating your understanding of certain terms and conditions for the conducting of this exam. Please be advised that Mr. Flores will faithfully carry out his obligations with respect to this exam, however, please do not ask Mr. Flores orally to agree or disagree with any specific terms or conditions for conducting this exam as referenced in your declaration and written standard terms & conditions. In others words, please do not ask Mr. Flores to agree orally with terms and conditions that you indicated you sometimes require an

Dr. Gerald Rosen
February 27, 2009
Page 2 of 2

examinee to agree to in writing. Mr. Flores does not agree to any terms or conditions for the carrying out of this exam other than those that are required by Fed. R. Civ. P. 35, the Court's Order, and applicable law. So, again, we ask that you not seek, either orally or in writing, Mr. Flores' agreement on any matters as to how the exam is to be carried out, its purpose, your rights and/or obligations, his rights and/or obligations.

Mr. Flores also does **NOT** waive the attorney-client privilege, will not waive the attorney client privilege, and you are specifically requested not to ask Mr. Flores to waive this privilege or whether or not he should waive the privilege, or if he has/will waive the privilege at any time during your contact with him. Please also do not ask Mr. Flores any questions about what he may or may not have discussed with his attorney, at any time, on any matter, or what he may or may not have been advised of by his attorney, at any time, on any matter.

Finally, please also note the scope of the examination as described in the Court's Order at P. 3, Lns. 6-11, and that we are to receive (from Mr. Bratz) a complete copy of the recording of the entire oral exam.

Thank you for your courtesies and cooperation. Again, should you have any questions about the content of this letter or the attached Order, please do not refer them to us, but instead, to Mr. Bratz. A copy of this letter is being sent to Mr. Bratz in advance of Monday's exam, namely by email today (Friday, February 27, 2009).

Very Truly Yours,

Thomas C. Evans

TCE:kr
Enclosure
cc: David Bratz via email & legal messenger

HONORABLE RICHARD D. EADIE
Noted for: June 23, 2009
Without oral argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

MIGUEL BERNAL HERNANDEZ,

Plaintiff,

v.

GLACIER FISH COMPANY,

Defendant.

No. 08-2-18009-3 SEA

**DEFENDANT'S MOTION TO COMPEL
RULE 35 EXAMINATION;
FOR PROTECTIVE ORDER
EXCLUDING PLAINTIFF'S COUNSEL
FROM RULE 35 EXAMINATION;
AND FOR SANCTIONS, FEES AND
COSTS**

I. RELIEF REQUESTED

Defendant Glacier Fish Company, LLC ("Glacier"), by and through its attorneys of record, moves the Court to compel the warranted independent medical examination of Plaintiff Miguel Bernal Hernandez by Dr. Gerald Rosen, Ph.D. The evaluation agreed to by the parties was aborted when plaintiff's counsel (Mr. Thomas Evans)—attending under the guise of an "observer"— expressly refused to allow Dr. Rosen to obtain Mr. Hernandez' informed consent to the evaluation. Mr. Evans' obstructionist and adversarial position with Dr. Rosen justifies entry of a protective order excluding him attending any subsequent Rule 35 examination. Further, an award of sanctions against Plaintiff's counsel, in the amount of

DEFENDANT'S MOTION TO COMPEL IME, PROTECTIVE
ORDER & SANCTIONS, - Page 1

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

1 fees costs and expenses incurred as a result of his forced cancellation of plaintiff's long-ago
2 scheduled Rule 35 examination, is warranted.

3 II. STATEMENT OF RELEVANT FACTS

4 As the thrust of the relief requested, and the impropriety of Mr. Evans' conduct in this
5 instance, Motion cannot be fully understood in a vacuum, Defendants here provide a birds-
6 eye view of pertinent events in all three companion cases.

7 On February 26, 2008, the PACIFIC GLACIER caught on fire while fishing in the
8 Bering Sea. With the assistance of several nearby vessels, all of the 80+ non-fireteam
9 crewmembers ("Evacuated Crewmembers") were safely evacuated from the boat within 1 -
10 1.5 hours after the fire alarm sounded, and taken in to Dutch Harbor. After 10-12 hours of
11 effort, the fire team suppressed the fire. None of the 106 individuals aboard the PACIFIC
12 GLACIER sustained any reported physical injuries.

13 Only three crewmembers filed suit against Defendant, each alleging PTSD injuries--
14 (1) Jesus Flores (W.D. Wash. No. 08-1267 TSZ); (2) Ancelmo Rodriguez-Garcia (King
15 County Superior Court No. 08-2-12754-1SEA); and (3) Miguel Bernal Hernandez (King
16 County Superior Court No. 08-2-18009-3SEA). *See Complaints of Flores, Rodriguez and*
17 *Hernandez (Exhibit B-1). All three of the plaintiffs are represented by Mr. Thomas C. Evans*
18 *of "Injury at Sea." Id.* In each of these cases, Defendant Glacier retained psychologist Gerald
19 M. Rosen, Ph.D. as an independent forensic psychological examiner.

20 In January 2009, counsel for the parties engaged in correspondence and telephonic
21 discussions regarding Defendant's requested Rule 35 examination of plaintiff Flores. When
22 counsel could not agree to the terms and conditions governing the exam, the matter was
23

1 submitted to the presiding Court on Defendant's Motion to Compel Rule 35 Examination. In
2 those pleadings, Mr. Evans made several unfounded and unwarranted accusations regarding
3 Dr. Rosen's views, character and professional integrity. *See Flores' Opposition to Motion to*
4 *Compel* (Exhibit B-2 to *Bratz Decl.*). Mr. Evans additionally raised ungrounded assertions
5 regarding Dr. Rosen's procedures of obtaining informed consent. *Id.* Dr. Rosen corrected
6 Mr. Evans' misconception in his responsive declaration:

7
8 An individual is never forced to sign my informed consent materials, but it
9 certainly saves time when they do. Professional standards and state law
10 require that I provide information to an individual who is about to undergo
11 an assessment and/or treatment, whether this is for forensic or purely
12 clinical purposes. If Mr. Evans wishes to instruct his client to not sign
13 anything, it will then be necessary for me to spend a portion of the interview
14 going over the information and getting verbal acknowledgement that the
15 information is understood and acceptable to the party being evaluated.

16 *Flores-Second Rosen Decl.* ¶ 14 (Exh. R-3 to Declaration of Dr. Gerald Rosen). Ultimately,
17 presiding Judge Thomas A. Zilly granted Defendant's Motion to Compel and summarily
18 resolved any issues regarding the obtaining of Flores' informed consent by simply stating that
19 Flores would "not be required to sign any documents." *See* February 26, 2009, Order, p.3
20 (Exh. B-3 to Declaration of David C. Bratz; Exh. R-4 to Rosen Decl.).

21 The day after the order issued, Mr. Evans forwarded Glacier's counsel a 2-page letter
22 addressed to Dr. Rosen--which he expressly intended for Mr. Flores to deliver to Dr. Rosen
23 on the first day of his court-ordered evaluation. *See February 27, 2009, Letter* (Exh. B-4 to
24 Bratz Decl.). This letter contained improper, inaccurate, and convoluted instructions
25 purporting to limit and/or alter Dr. Rosen's conduct during the examination--none of which
26 were contained in Judge Zilly's order. *Id.* On that same day, Glacier's counsel
27 teleconferenced with Mr. Evans regarding the proposed letter, advised Mr. Evan's that the

1 correspondence constituted unethical and improper ex parte contact with a defense expert,
2 contained unilateral restrictions unsupported in law, and advised him not to send the
3 correspondence with Mr. Flores to his examination. *Bratz Decl.*, ¶ 3. Ultimately, Mr. Evans
4 decided against sending the correspondence via his client, and Dr. Rosen's evaluation of
5 plaintiff Flores proceeded as ordered on March 2 and 4, 2009. *Rosen Decl.*, ¶ 18.

6 On February 27, 2009, Defendant renewed its request for an independent medical
7 examination of plaintiffs Hernandez and Rodriguez by Dr. Rosen--specifically requesting
8 examinations identical in term and condition to that ordered in the Flores matter. *See*
9 *February 27, 2009, Letter & Enclosure* (Exh. G-1 to Gephart Decl.). Mr. Evans' took issue
10 with three aspects of the examination (duration, presence of an observer, recording), and as
11 such a telephonic discovery conference on the matter was held on March 11, 2009. *See Email*
12 *From Mr. Evans, March 2, 2009* (Exh. G-2 to Gephart Decl.); *Gephart Decl.*, ¶ 4. During
13 this conference, Mr. Evans never mentioned, let alone objected, to Dr. Rosen's informed
14 consent materials being provided or read to Plaintiff, nor with Dr. Rosen seeking Plaintiff's
15 verbal acceptance of the terms and conditions of the examination. *Gephart Decl.*, ¶ 5.
16 Ultimately, counsel agreed to Dr. Rosen's evaluation of plaintiffs Rodriguez and Hernandez
17 under the following terms and conditions:

- 18 1) Plaintiffs agree to examination by Dr. Gerald Rosen
- 19 2) Plaintiffs agree to examination over the course of one full day and a
20 nonconsecutive half day. Interview of the Plaintiffs can be conducted on both
of the examination days.
- 21 3) [Mr. Evans] will be present as monitor for the interview portions of the
Plaintiffs' examinations.
- 22 4) A court certified Spanish interpreter will be provided by Defendant and will
be present for all portions of the plaintiffs examinations.
- 23 5) Dr. Rosen will audiotape the examinations, and provide [Mr. Evans] with a

1 copy of this recording.

- 2 6) Defendant will reimburse the mileage expenses (at the rate of \$0.51/mile) and
3 reasonable documented food/lodging expenses associated with plaintiffs
attendance at their respective examinations.

4 *March 11, 2009, Email* (Exh. G-3 to Gephart Decl.); *March 11, 2009, Response from Mr.*
5 *Evans* (Exh. G-4 to Gephart Decl.) (indicating accuracy of parties' agreement). Accordingly,
6 notices of Hernandez' and Rodriguez' Rule 35 examination-setting the first evaluation
7 sessions for June 10 & 11, 2009, respectively, were issued. *See Notices of Rule 35*
8 *Examination* (Exh. G-3 to Gephart Decl.).

9 Three months later, on June 10, 2009, plaintiff Hernandez appeared for the first
10 session of his Rule 35 examination accompanied by Mr. Evans. *Rosen Decl.*, ¶ 19. Upon
11 entry, Dr. Rosen requested Mr. Evans complete an "Observer Information Form" detailing
12 his role and listing any questions or concerns. Dr. Rosen also provided Mr. Hernandez with
13 his written informed consent materials. *Evaluation Information Sheet* (Exh. R-5 to Rosen
14 Decl.); *June 10, 2009, Transcript* (Exh. R-7 to Rosen Decl.), p. 5, ll. 5-10. Mr. Evans
15 completed and returned the observer form, on which he specifically and unequivocally
16 prohibited Dr. Rosen from obtaining the necessary informed consent from Mr. Hernandez:

17 Please do not ask our client to agree to terms or conditions for this exam, these
18 terms and conditions are established by state law and you (sic) consult Mr.
Bratz on those questions.

19 * * *

20 You should not ask our client to agree to accept your conditions in your
21 information sheet.

22 Mr. Evans' Observer Form (Exh. R-6, to Rosen Decl.) (emphasis added). Consistent with
23 Mr. Evans' unilaterally-imposed, and unlawful, terms and conditions, he "allowed" the
interpreter to read the Evaluation Information Sheet to Mr. Hernandez, but expressly

1 prohibited Dr. Rosen from seeking Mr. Hernandez consent or agreement to those terms and
2 conditions. See Transcript from June 10, 2009 (Exh. R-7 to Rosen Decl.), p. 6, ll.4-7, ll. 13-
3 15; p. 7, ll. 17-20; p. 7, l.25 - p.8, l.2 and *CD audio recording*. As Mr. Evans' improper
4 directives prevented Dr. Rosen from obtaining the necessary informed consent required by
5 applicable law and ethical standards, the session was adjourned before it ever started.
6

7 At 4:00pm on June 10, 2009, counsel for both parties engaged in a discovery
8 conference focused, in large part, on Mr. Evans' conduct and position taken earlier that day at
9 the agreed to, scheduled and noted Rule 35 examination. *Bratz Decl.*, ¶ 4. Mr. Evans
10 refused to retract his improper instructions to Dr. Rosen under any circumstances, reiterated
11 his position that Dr. Rosen could not ask the plaintiffs to agree to accept the terms and
12 conditions of the examination, and unequivocally stated that his position would be the same
13 at plaintiff Rodriguez' first evaluation scheduled for the following day. Mr. Rodriguez'
14 evaluation was accordingly cancelled, and this Motion followed. *Id.*

15 III. STATEMENT OF ISSUES

- 16 1. Is there good cause for a Rule 35 forensic psychological examination of
17 Plaintiff? Yes.
- 18 2. Is Dr. Rosen a suitably licensed and qualified examiner? Yes.
- 19 3. Is there good cause for excluding Mr. Evans from attending Plaintiff's
20 Rule 35 examination? Yes.
- 21 4. Should sanctions of fees, costs and expenses, be ordered against Plaintiff
22 and his counsel for Mr. Evans' objectionable and unethical behavior?
23 Yes.

IV. EVIDENCE RELIED ON

22 In support of this Motion, Defendant relies on this memorandum, and the arguments
23 and authorities contained herein, and the Declarations of David C. Bratz, Carey M.E.

1 Gephart, and Gerald M. Rosen, Ph.D., each with exhibits.

2
3 **V. AUTHORITY**

4 **A. There is Good Cause for Rule 35 Examination of Plaintiff.**

5 As Hernandez' mental condition is a central issue in this litigation, good cause exists
6 for the requested independent medical evaluation by Dr. Rosen. Civil Rule 35 vests the
7 Court with the power to order a party whose mental condition is "in controversy" to undergo
8 a mental examination by a suitably licensed or certified examiner where "good cause" for
9 such an examination has been established. See Civil Rule 35(a); *Schlagenhauf v. Holder*, 379
10 U.S. 104, 117 (1964); *In re Welfare of Green*, 14 Wn. App. 939, 942-43 (1976) (recognizing
11 *Schlagenhauf* and applicability of federal precedent construing Federal Rule 35 on
12 interpretation of Washington Civil Rule 35). "[A] plaintiff in a negligence action who asserts
13 mental or physical injury places that mental or physical condition clearly in controversy and
14 provides the defendant good cause for an examination to determine the existence and extent
15 of such asserted injury." *Schlagenhauf*, 379 U.S. at 119-120 (internal citation omitted). A
16 plaintiff's claim of suffering ongoing psychiatric harm due to Defendant's alleged
17 negligence, satisfies both the "in controversy" and "good cause" prerequisites. See *Ragge v.*
18 *MCA/Universal Studios*, 165 F.R.D. 605, 608 (C.D. Cal. 1995); *Tomlin v. Holecek*, 150
19 F.R.D. 628 (D. Minn. 1993); *Peters v. Nelson*, 153 F.R.D. 635 (N.D. Iowa 1994).

20 In this instance, Hernandez allegedly suffered "severe traumatic injuries as a direct
21 result of a fire onboard the PACIFIC GLACIER," *Complaint* (Exh. B-1) ¶ 3.2, and claimed
22 that Defendant's negligence and/or the vessel's unseaworthiness directly and proximately
23 caused him "personal injuries including pain, suffering, disability, mental anguish,

1 psychological injury, wage loss, permanent impairment of income producing ability, future
2 pain and suffering and anguish." *Id.* ¶ 3.5. Further, Hernandez has treated with psychologist
3 Dr. Eden Deutsch, and Consejo Counseling--during which sessions he alleged unusual,
4 severe and continuing psychological stress, which could permanently prevent him from
5 returning to work as a commercial fisherman, and has expressed an intention to prove the
6 causation and depth of his alleged psychological condition through expert testimony. *See*
7 *Responses to Defendant's First Discovery Requests* (Exhibit B-6) Accordingly, Defendant is
8 entitled to a Rule 35 mental examination sufficient to evaluate all presenting problems, assess
9 Hernandez' beliefs as to causation, explore reasonable hypotheses, evaluate his treatment to
10 date, and assess his prognosis. *See Rosen Decl.*, ¶ 5. As such, there is no question that
11 Hernandez placed his mental state in controversy in this litigation, and that there is good
12 cause for the requested examination by Dr. Rosen. *See Alexander v. City of Bellingham*, 2008
13 WL 2077970 (W.D. Wash. 2008) (Exh. B-7); *Duncan v. Upjohn Co.*, 155 F.R.D. 23, 24-25
14 (D. Conn. 1994) (finding claim of ongoing psychological harm caused by defendant placed
15 the plaintiff's mental state in controversy).

16 **B. Dr. Rosen is a Suitably Licensed and Qualified Examiner**

17 Dr. Rosen has a Ph.D. in clinical psychology from the University of Wisconsin, and is
18 board certified in Clinical Psychology with the American Board of Professional Psychology.
19 *See Rosen Decl.* ¶ 2. Dr. Rosen has been licensed to practice in Washington since 1976, and
20 holds appointment as a clinical professor with both the Department of Psychology at the
21 University of Washington and the Department of Psychiatry & Behavioral Science at the
22 University of Washington School of Medicine. *Id.* Dr. Rosen has considerable professional
23

1 experience in the area of post-traumatic and stress reactions— including clinical work, giving
2 lectures, participating in workshops, editing texts and authoring journal articles on these
3 subjects. *See Id.* ¶ 3; *Curriculum Vitae of Dr. Rosen* (Exh. R-1 to Rosen Decl.). Finally, Dr.
4 Rosen has served as an independent expert witness in personal injury cases involving
5 psychological issues for more than fifteen (15) years. Rosen Decl. ¶ 4; *Case Testimony 2003*
6 – 2008 (Exh. R-2 to Rosen Decl.). There is no question that Dr. Rosen is “suitably licensed”
7 and more than qualified to professionally conduct the requested Rule 35 examination of
8 Hernandez. *See CIVIL RULE 35(A)*; *See Stout v. United Air Lines, Inc.*, C07-0682-JCC (W.D.
9 Wash. 2008) (Exh. B-5 to *Bratz Decl.*) at pp. 3-4 (finding Dr. Rosen to be a suitably licensed
10 and certified examiner for a Rule 35 examination identical in structure to what is requested in
11 this instance); *Flores v. Glacier Fish Company*, C08-1275-TSZ (W.D. Wash. 2009) (Exh. B-
12 3 to *Bratz Decl.*)(same).

13 **C. A Protective Order Excluding Mr. Evans from Attendance is Necessary.**

14 Mr. Evans' demonstrated and documented abuse of the "observer" moniker warrants
15 his exclusion from any ordered Rule 35 examination of Plaintiff. Civil Rule 26 vests the
16 Court with broad discretion to enter protective orders for good cause shown, and “which
17 justice requires” in order to protect any person from annoyance, embarrassment, undue
18 burden, expense or harassment—including, orders limiting the scope of certain discovery,
19 setting terms and conditions for discovery, and modifying the methods by which discovery
20 can be had. *See CR 26(c)(2)(3) & (4)*; *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 16
21 P.3d 25 (2000) (detailing Court’s broad discretion in regard to particularized protective
22 orders). Nothing short of a protective order barring his attendance will prevent Mr. Evans
23

1 from attending future Rule 35 examinations with an obstructionist tenor and objective.

2 From the second Mr. Evans stepped into Dr. Rosen's office, he took an inappropriate
3 adversarial tone and position--using the knowingly recorded interaction between himself and
4 Dr. Rosen as an advocacy platform, and demanding Dr. Rosen's compliance with unilaterally
5 imposed restrictions which prevented Hernandez from providing informed consent to the
6 evaluation. *See Rosen Decl.*, ¶¶ 19-22; *Transcript from June 10, 2009 Aborted IME and CD*
7 *Audio-recording* (Exh. R-7). Specifically, Mr. Evans repeatedly told Dr. Rosen that Mr.
8 Hernandez could not be asked to consent or accept the examination:

9 Mr. Evans: Well, I hope that you understand correctly what I've written
10 here [on the observer information form]. What I have written
11 is, you should not ask our client to agree or accept your
conditions on your information sheet.

12 Dr. Rosen: And I have to ask him to accept it, because the conditions in
13 the information sheet, many of them are specified by state laws
14 that govern psychologists. And so I think we can just stop for
today, because you have told me not to ask questions that I
have to ask.

15 *See Transcript* (Exh. R-7 to *Rosen Decl.*) p. 15, ll.7-16; *See also id.*, pp. 6, ll. 4-6, 13-15;
16 p.7, ll. 17-20; p.8, ll. 1-2; p.13, ll.2-13(same); *Observer Information Sheet* (Exh. R-6). Mr.
17 Evans' vehemently refused to recognize any authority governing the examination other than
18 Civil Rule 35, and refused to acknowledge Dr. Rosen's considerably more informed opinion
19 on the matter--which correctly advised Mr. Evans of the constraints and requirements of
20 Washington law and professional standards requiring Plaintiff's pre-examination informed
21 consent. *See Transcript* (Exh. R-7); *Rosen Decl.*, ¶¶ 11-15 (detailing professional standards
22 and Washington state requirements of informed consent). Moreover, Mr. Evans repeated
23 instructions and admonitions to Dr. Rosen, all the while refusing to contact Defendant's

1 counsel regarding the issues, violated Washington law expressly prohibiting ex parte contact
2 with an opposing party's expert. CR 26(b)(5); *In re Firestorm 1991*, 129 Wn.2d 130, 137-38,
3 916 P.2d 411 (1996); *Loudon v. Mhyre*, 110 Wn.2d 675, 677 (1988); *Rowe v. Vaagen Bros.*
4 *Lumbar, Inc.*, 100 Wn. App. 268, 278-79 (2000); *Transcript (Exh. R-7)*, pp. 11, 16-17 (Mr.
5 Evans' repeated refusals to contact defense counsel). In obstructing and interfering with
6 Plaintiff's scheduled Rule 35 examination, Mr. Evans' violated the very provision of the Civil
7 Rules that allowed his attendance: "The party being examined may have a representative
8 present at the examination, who may observe but not interfere with or obstruct the
9 examination." Rule 35(a)(2). As fully documented by the audio-recording of the aborted
10 June 10, 2009 evaluation, Mr. Evans is incapable of acting as an observer, engaged in
11 unauthorized and unlawful ex parte contact with a retained defense expert, and has
12 demonstrated annoying, harassing, burdensome, and obstructionist conduct toward Dr.
13 Rosen. Unequivocal good cause exists for the issuance of a protective order limiting
14 excluding Mr. Evans from attending Plaintiff's Rule 35 examination. Defendant Glacier
15 respectfully requests the Court grant its motion and enter such a protective order.

16 **D. Sanctions Should Be Levied Against Plaintiff's Counsel**

17 Defendant has incurred significant costs due to Mr. Evans' unreasonable,
18 obstructionist, and unlawful conduct and interaction with Dr. Rosen on June 10, 2009.
19 During the March 11, 2009, discovery conference in which the terms and conditions of the
20 scheduled Rule 35 examinations for plaintiffs Hernandez and Rodriguez were discussed, Mr.
21 Evans never raised any issue regarding Dr. Rosen's need to inquire acquire informed consent.
22 Not once in the three month interim between the parties agreement to these Rule 35
23

1 examinations did Mr. Evans raise any of these issues. Rather, Mr. Evans waited until the
2 morning of plaintiff Hernandez' scheduled evaluation on June 10, 2009 to instruct Dr. Rosen
3 to follow his unilateral questioning parameters, engaged Dr. Rosen in unlawful ex parte
4 contact, and despite Dr. Rosen's repeated requests, refused to contact defense counsel. Mr.
5 Evans' behavior and conduct was deplorable and unlawful, and needlessly obstructionist.
6 Further, this conduct has prejudiced Defendant in preparation of a defense as had Mr. Evans'
7 raised these matters during the March 11, 2009, discovery conference, this matter would have
8 been resolved months ago, and Plaintiff's independent medical examination timely
9 completed. Further, as a result of Mr. Evans' improper conduct, Defendant needlessly
10 incurred cancellation fees from the certified Spanish interpreter (\$900), and cancellation fees
11 and motion-related expenses from Dr. Rosen (\$7,920). *See Rosen Invoice* (Exh. R-8 to
12 *Rosen Decl.*); *Interpreter Invoice* (Exh. B-8 to *Bratz Decl.*) Additionally, Defendant has
13 expended no less than \$5,000 in attorneys' fees in preparing and defending the present
14 motion. *Bratz Decl.*, ¶ 10. Defendant requests an award of sanctions against Plaintiff's
15 counsel in the amount total fees and costs incurred as a result of his conduct in this instance =
16 \$13,820. CR 37(a)(4).

17 VI. PROPOSED ORDER AND PROTECTIVE ORDER

18 Accompanying this Motion, Defendant provides a proposed order which (1) grants the
19 relief requested, (2) orders the examination of Plaintiff by Dr. Rosen on the terms and
20 conditions set forth in his accompanying declaration, (3) enters a protective order excluding
21 Mr. Evans from attending Plaintiffs Rule 35 examination, and (4) awarding Defendant
22 sanctions in the amount of fees and costs incurred.
23

1 DATED this 15 day of June, 2009.

2 LE GROS, BUCHANAN & PAUL

3 By: 
4 DAVID C. BRATZ, WSBA #15235
5 CAREY M.E. GEPHART, WSBA #37106
6 701 Fifth Avenue, Suite 2500
7 Seattle, WA 98104-7051
8 Phone: 206.623.4990
9 Facsimile: 206.467.4828
10 Attorneys for Defendant
11 Glacier Fish Company, LLC

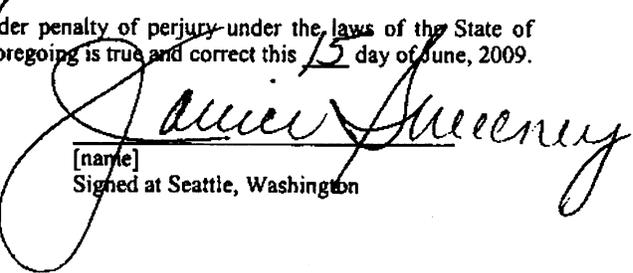
12 **CERTIFICATE OF SERVICE**

13 The undersigned certifies that on this day she caused to be served
14 in the manner noted below, a copy of the document to which this certificate is
15 attached, on the following counsel of record:

16 Thomas C. Evans
17 4705 16th Avenue NE
18 Seattle, WA 98105
19 Tel: (206) 527-5555
20 Fax: (206) 527-0725

- 21 Via Mail
22 Via Facsimile
23 Via Messenger

I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct this 15 day of June, 2009.


[name]
Signed at Seattle, Washington

HONORABLE RICHARD D. EADIE

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IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

MIGUEL BERNAL HERNANDEZ,

Plaintiff,

v.

GLACIER FISH COMPANY,

Defendant.

No. 08-2-18009-3 SEA

DECLARATION OF GERALD ROSEN IN
SUPPORT OF MOTION TO COMPEL
RULE 35 EXAMINATION

I, Gerald M. Rosen, Ph.D., declare as follows:

1. I am over 18 years of age, a resident of Washington State, and I am otherwise competent to make this declaration. I have first-hand knowledge of the matters set forth in this declaration.

I. CREDENTIALS AND GENERAL ISSUES PERTAINING TO THE CONDUCT OF AN INDEPENDENT PSYCHOLOGICAL ASSESSMENT

2. I obtained a Ph.D. in Clinical Psychology from the University of Wisconsin at Madison in 1972. From 1973 to 1976, I was on the faculty with the Department of

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 1

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1 Psychology, University of Oregon and was licensed as a clinical psychologist in Oregon
2 State from 1975 to 1976. Since 1976 I have been licensed as a clinical psychologist in
3 Washington State, and I have practiced in Seattle, Washington. I hold concurrent licenses
4 with the States of Alaska and Oregon, and I am Board Certified in Clinical Psychology with
5 the American Board of Professional Psychology (ABPP). I also hold an appointment at the
6 level of clinical professor with the Department of Psychology at the University of
7 Washington, and with the Department of Psychiatry & Behavioral Sciences at the University
8 of Washington's School of Medicine. Attached to this declaration as Exhibit A is a true and
9 correct copy of my curriculum vitae.

10 3. I have considerable professional experience in the area of post-traumatic and
11 stress reactions. In addition to clinical work with numerous patients over the span of my
12 practice, I have been involved academically. I have taught graduate level seminars in the
13 Psychology Department at the University of Washington, provided lectures and workshops in
14 both the Departments of Psychology and Psychiatry, presented Grand Rounds at the
15 University of Washington School of Medicine and other hospitals, and published papers on
16 the assessment and treatment of posttrauma reactions. I also have edited a text entitled
17 "*Posttraumatic Stress Disorder: Issues and Controversies*," (John Wiley, England, 2004),
18 and have served as a guest co-editor for the *Journal of Anxiety Disorders* on a special issue
19 concerning "Challenges to the PTSD Construct and its Database" (2007). Currently, I am co-
20 editing a text with B. Christopher Frueh, entitled "*Clinician's Guide to Posttraumatic Stress*
21 *Disorder*." (John Wiley, USA, planned publication 2010).

22 4. For over 15 years, I have consulted as an expert in numerous personal injury
23 cases. My independent assessments routinely involve one full day meeting, and a one half-

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 2

1 day meeting on a nonconsecutive date. When unusually complex issues are involved I have
2 requested and obtained a third meeting to facilitate the assessment. Attached as Exhibit B is
3 a list of cases in which I have provided testimony in the past five years.

4 5. An IME to evaluate claims of psychological distress and specific
5 psychological diagnoses requires: (a) a thorough evaluation of all presenting problem(s); (b)
6 an assessment of the individual's beliefs as to what caused the alleged problems; (c) an
7 exploration of all reasonable competing hypotheses; (d) an evaluation of treatment efforts to
8 date; and (e) an assessment of the individual's prognosis with recommendations for any
9 future treatment that appears indicated. Individuals can have different presentation styles.
10 Some are forthright and verbal while others are guarded and need a good deal of prompting
11 to help them discuss relevant issues. It is difficult to predict how much time will be needed
12 to conduct an interview of sufficient depth to cover all the issues previously stated. Usually,
13 two or three interviews, each three to four hours in length (excluding breaks) are adequate.
14 The need for additional testing is determined by the presenting issues of the particular case.
15 The time needed to conduct an adequate clinical assessment interview significantly increases
16 when an interpreter is required.

17 6. Articles on the proper conduct of forensic assessments recommend a "multi-
18 method" approach to assessment, wherein multiple sources of data are considered, including
19 psychological tests. Because studies have shown that foreknowledge of psychological tests
20 can affect the performance of scales and the validity of results, I prefer not to disclose the
21 names of specific psychological assessment instruments.¹

22
23 ¹ Multiple references in the professional peer review literature bear on this issue. See, for
example: (a) A.S. Bury & R.M. Bagby (2002). The detection of feigned uncoached and coached

1 7. It takes an individual approximately two-and-a-half to three hours to complete
2 the tests most often used when presenting problems involve anxiety and/or depression. If
3 other issues are relevant, then additional assessment instruments may be used. In all cases,
4 appropriate tests should be determined by a psychologist or other properly trained mental
5 health profession, and not by the preferences of counsel for either side of a personal injury
6 matter. I assure the court that any test I administer during a clinical assessment will be a
7 known instrument that is accepted within the field and appropriate to the presenting issues of
8 the case. Any decision to administer a test will also take into consideration language barriers
9 and/or other cultural issues.

10 8. It is best to conduct clinical assessment interviews with as few distractions as
11 possible. For this reason, observers should only be present as allowed or required by
12 applicable laws. Of course, when an interpreter is required this need is accommodated.

13 9. There are concerns that recording devices can intrude on the interview
14 process. Nevertheless, it is important to maintain an objective record for the court in the
15 event of conflicting claims regarding the conduct of an assessment. Therefore, I maintain a
16 digital audio recording of the assessment interviews by using a small, high quality recorder.

17
18 posttraumatic stress disorder with the MMPI-2 in a sample of workplace accident victims. Psychological
19 Assessment, 14, 472-484; (b) G.L. Walters & J.R. Clopton (2000). Effect of symptom information and
20 validity scale information on the malingering of depression on the MMPI-2. Journal of Personality
21 Assessment, 75, 183-199; (c) R.A. Baer, M.W. Wetter, & D.T.R. Berry (1995). Effects of information
22 about validity scales on underreporting of symptoms on the MMPI-2: An analogue investigation.
23 Assessment, 2, 129-200; (d) J. Storm and J.R. Graham (2000). Detection of coached general malingering
on the MMPI-2. Psychological Assessment, 12, 158-165; (e) M.W. Wetter & S.K. Corrigan (1995),
Providing information to clients about psychological tests: A survey of attorneys' and law students'
attitudes. Professional psychology: Research and Practice, 26, 1-4; (f) P.R. Lees-Haley (1997),
Attorneys influence expert evidence in forensic psychological and neuropsychological cases, Assessment,
4, 321-324; and (g) T.L. Victor & N. Abeles (2004), Coaching clients to take psychological and
neuropsychological tests: A clash of ethical obligations, Professional Psychology: Research and Practice,
35, 373-379).

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 4

27066 kf153901

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1 Copies of the recorded interviews can be made available to counsel and the Court upon
2 request.

3 10. It should be emphasized that the procedures I follow for the proper conduct of
4 an independent psychological assessment are not simply a matter of personal opinion. Rather,
5 the procedures are supported by recommendations from the professional literature on
6 conducting forensic assessments. For example, articles on the proper conduct of forensic
7 assessments recommend that clinical assessment interviews should be conducted on more
8 than one occasion.²

9
10 **II. NEED TO OBTAIN INFORMED CONSENT PRIOR TO THE
CONDUCT OF AN INDEPENDENT ASSESSMENT**

11 11. Obtaining informed consent before providing services is required by ethical
12 guidelines adopted by professional societies, as well as by Washington State Law.

13 12. The *Ethical Principles of Psychologists and Code of Conduct*, published by the
14 American Psychological Association, provides these instructions regarding informed
15 consent:

16 3.10 Informed Consent (a) When psychologists conduct research or provide
17 assessment, therapy, counseling, or consulting services in person or via electronic
18 transmission or other forms of communication, they obtain the informed consent of
19 the individual or individuals using language that is reasonably understandable to that
20 person or persons except when conducting such activities without consent is
21 mandated by law or governmental regulation or as otherwise provided in this Ethics
Code. (See also Standards 8.02, Informed Consent to Research; 9.03, Informed
22 Consent in Assessments; and 10.01, Informed Consent to Therapy.) (b) For persons
23 who are legally incapable of giving informed consent, psychologists nevertheless (1)
provide an appropriate explanation, (2) seek the individual's assent, (3) consider such

² Keane (1995) observed, "The greater the diversity and number of interviews, the larger the sample of behavior and, thereby, the more reliable the findings." [T.M. Keane (1995), Guidelines for the forensic psychological assessment of posttraumatic stress disorder claimants, In R.I Simon (ed.), *Posttraumatic stress disorder in litigation*, Washington, D.C.: American Psychiatric Press.]

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 5

27066 kf153901

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1 persons' preferences and best interests, and (4) obtain appropriate permission from a
2 legally authorized person, if such substitute consent is permitted or required by law.
3 When consent by a legally authorized person is not permitted or required by law,
4 psychologists take reasonable steps to protect the individual's rights and welfare. (c)
5 When psychological services are court ordered or otherwise mandated, psychologists
6 inform the individual of the nature of the anticipated services, including whether the
7 services are court ordered or mandated and any limits of confidentiality, before
8 proceeding. (d) Psychologists appropriately document written or oral consent,
9 permission, and assent. (See also Standards 8.02, Informed Consent to Research;
10 9.03, Informed Consent in Assessments; and 10.01, Informed Consent to Therapy.)

11 13. Division 41 of the American Psychological Association and the American
12 Psychology-Law Society formed a committee to develop ethical guidelines for forensic
13 psychologists. In 1991 they published their *Specialty Guidelines for Forensic Psychologists*
14 in the journal of *Law and Human Behavior*. The following sections pertain to the issue of
15 informed consent.

16 E. Forensic psychologists have an obligation to ensure that prospective clients are
17 informed of their legal rights with respect to the anticipated forensic service, of the
18 purposes of any evaluation, of the nature of procedures to be employed, of the
19 intended uses of any product of their services, and of the party who has employed the
20 forensic psychologist.

21 1. Unless court ordered, forensic psychologists obtain the informed consent of the
22 client or party, or their legal representative, before proceeding with such evaluations
23 and procedures. If the client appears unwilling to proceed after receiving a thorough
notification of the purposes, methods, and intended uses of the forensic evaluation,
the evaluation should be postponed and the psychologist should take steps to place
the client in contact with his/her attorney for the purpose
of legal advice on the issue of participation.

14 14. Ethical Guidelines published by the American Academy of Forensic Psychiatry
15 and the Law provide these instructions regarding informed consent:

16 At the outset of a face-to-face evaluation, notice should be given to the evaluatee of the
17 nature and purpose of the evaluation and the limits of its confidentiality. The
18 informed consent of the person undergoing the forensic evaluation should be obtained
19 when necessary and feasible. If the evaluatee is not competent to give consent, the
20 evaluator should follow the appropriate laws of the jurisdiction.

21 15. Washington State law specifies the need for informed consent. RCW 18.83.115

22 DECLARATION OF GERALD ROSEN RE: MOTION TO
23 COMPEL HERNANDEZ EXAM- Page 6

27066 kf153901

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1 addresses a psychologists, "Duty to disclose information to client:"

2 (1) Psychologists licensed under this chapter shall provide clients at the
3 commencement of any program of treatment with accurate disclosure
4 information concerning their practice, in accordance with guidelines
5 developed by the board, which will inform clients of the purposes of and
6 resources available under this chapter, including the right of clients to
7 refuse treatment, the responsibility of clients for choosing the provider and
8 treatment modality which best suits their needs, and the extent of
9 confidentiality provided by this chapter. The disclosure information
10 provided by the psychologist, the receipt of which shall be acknowledged
11 in writing by the psychologist and client, shall include any relevant
12 education and training, the therapeutic orientation of the practice, the
13 proposed course of treatment where known, any financial requirements,
14 and such other information as the board may require by rule.

9 WAC 246-924-359 addresses "Client welfare:"

10 (1) Providing explanation of procedures. The psychologist shall upon
11 request give a truthful, understandable, and reasonably complete account
12 of the client's condition to the client or to those responsible for the care of
13 the client. The psychologist shall keep the client fully informed as to the
14 purpose and nature of any evaluation, treatment, or other procedures, and
15 of the client's right to freedom of choice regarding services provided
16 subject to the exceptions contained in the Uniform Health Care
17 Information Act, chapter 70.02 RCW.

15 **III. PRESENT CASE AND MR. EVANS' OBSTRUCTION OF** 16 **REQUIRED INFORMED CONSENT**

17 16. In this instance, I was retained by Glacier Fish Company to conduct independent
18 psychological assessments of three individuals who were aboard the PACIFIC GLACIER on
19 February 26, 2008, when a fire broke out on the vessel—Mr. Jesus Flores, Mr. Miguel Bernal
20 Hernandez, and Mr. Ancelmo Rodriguez-Garcia, all of whom are represented by Mr. Tom
21 Evans, of Injury at Sea.

22 17. The first of the three PACIFIC GLACIER crewmembers that I was asked to
23 assess, Mr. Flores, has his case in Federal Court. In February of this year, Mr. Evans

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM— Page 7

27066 kf153901

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1 submitted a brief, a declaration and exhibits to Judge Zilly in opposition of my being allowed
2 to conduct a psychological evaluation of Mr. Flores. Mr. Evans also took exception to
3 several procedural specifics. In response to Mr. Evans' numerous objections and concerns, I
4 submitted a declaration to the Court. A true and correct copy of my declaration is attached
5 hereto as Exhibit C. One of the points I addressed concerned Mr. Evans' allegation that I had
6 a "required statement." Mr. Evans stated: "Prior to conducting an examination, he [Dr.
7 Rosen] *requires* [emphasis provided by Mr. Evans] the examinee to sign a written statement
8 prepared by him." I responded to Mr. Evans' charge in the following manner (§ 14):

9 An individual is never forced to sign my informed consent materials, but it certainly
10 saves time when they do. Professional standards and state law require that I provide
11 information to an individual who is about to undergo an assessment and/or treatment,
12 whether this is for forensic or purely clinical purposes. If Mr. Evans wishes to
13 instruct his client to not sign anything, it will then be necessary for me to spend a
14 portion of the interview going over the information and getting verbal
15 acknowledgement that the information is understood and acceptable to the party
16 being evaluated.

17 18. Ultimately, in regard to Mr. Flores, presiding Judge Thomas A. Zilly, United
18 States District Judge, signed an Order Granting Defendant's Motion for Rule 35 Examination
19 on February 26, 2009. A true and correct copy of that order is attached as Exhibit D. In that
20 order, Judge Zilly approved the examination of Mr. Flores; he ruled that "defendant's
21 proposed expert, clinical psychologist Dr. Gerald M. Rosen, is a suitably licensed or certified
22 examiner under Rule 35." Judge Zilly also ruled, among other matters, that "Dr. Rosen will
23 not require Plaintiff to sign any documents." Implicit in Dr. Zilly's ruling was an
understanding that verbal acknowledgment would substitute for written informed consent in
order to establish that information regarding the proposed assessment was "understood and
acceptable." I conducted Mr. Flores' court-ordered examination on March 2 and 4, 2009.

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 8

27066 kf153901

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1 Before the evaluation began on March 2, 2009, I explained (via the court-certified Spanish-
2 language interpreter) the terms and conditions of the examination to Mr. Flores, and obtained
3 his consent to proceed with the evaluation under those terms and conditions. These terms
4 and conditions (waiver of privilege, nature of examination, etc.) are detailed in my
5 Evaluation Information Form, a true and correct copy of which is attached hereto as
6 Exhibit E. Mr. Flores' evaluation was completed without incident—and per the Court order,
7 without the presence of a monitor/observer.

8 19. On June 10, 2009, Mr. Hernandez presented at my office for the first session of a
9 scheduled psychological assessment. Mr. Evans attended as an observer and was provided
10 with a form that I routinely have observers complete. A true and correct copy of the
11 "Observer Information Form" completed by Mr. Evans is attached to this declaration as
12 Exhibit F. On the form, Mr. Evans directed me in writing that I was not to ask Mr.
13 Hernandez if he accepted the conditions of the evaluation and other pertinent points outlined
14 in my informed consent materials. Specifically, Mr. Evans wrote:

15 Please do not ask our client to agree to terms or conditions for this exam, these terms
16 and conditions are established by state law and you consult Mr. Bratz on these
17 questions... You should not ask our client to agree to or accept your conditions in
18 your information sheet.

19 20. Mr. Evans asked that conversations regarding the forms be audio recorded. Mr.
20 Hernandez was asked by this examiner if he also gave permission for the audio recorder to be
21 turned on. With Mr. Hernandez's permission all subsequent discussions were recorded. A
22 true and correct copy of a transcript of this audio-recording is attached to this declaration as
23 Exhibit G. A true and correct copy of the audio-recording (burned to CD) is also submitted
with the Court's working documents.

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 9

27066 kf153901

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1 21. With Mr. Hernandez and the retained Spanish interpreter remaining in the lobby,
2 I had a private conversation with Mr. Evans in my office. The audio recording continued
3 during this conversation, with Mr. Evans' knowledge and approval. During this discussion,
4 Mr. Evans referenced laws governing the conduct of CR35 exams without acknowledging
5 laws that govern the conduct of psychologists in the performance of their services. Mr.
6 Evans denied he was telling this examiner what could be done in the exam, despite his clear
7 written instructions that I should not ask for consent, and despite his unwillingness to retract
8 that position or his written comments on the observer's form. I made clear to Mr. Evans that
9 governing legal and ethical principles required me to obtain Mr. Hernandez' informed
10 consent to the examination.

11 22. Mr. Evans stated that he appreciated this examiner's "dilemma." The recording
12 documents that I told Mr. Evans that I did not have a dilemma as I clearly understood my
13 responsibilities to obtain proper informed consent. Because I could not ethically or lawfully
14 proceed with a psychological assessment without informed consent, and because Mr. Evans
15 told me that I could not request consent to the examination from his client, I informed Mr.
16 Evans that his stance was (a) extraordinary, (b) obstructionist, and (c) creating a condition
17 under which the assessment could not go forward.

18 23. After a discussion with Mr. Evans in which I made clear the requirements of
19 informed consent, and Mr. Evans maintained his stance banning the obtaining of such
20 consent, I ended the day's scheduled assessment of Mr. Hernandez.

21 24. Mr. Evans stated he would take the exact same position with regard to my
22 examination of Mr. Anselmo Rodriguez-Garcia, whose full day assessment was scheduled
23 for June 11, 2009. For the reasons set forth in detail above, the inability to obtain Mr.

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 10

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LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98101-7051
(206) 623-4990

1 Rodriguez' informed consent likewise forced cancellation of this scheduled evaluation.
2

3 **IV. FEES INCURRED BY MR. EVAN'S INTERFERENCE WITH**
4 **THE ASSESSMENT PROCESS**

5 25. Attached hereto as Exhibit H is a true and correct copy of my invoice for
6 services during the past week. The fees and costs incurred by Defendant Glacier Fish
7 Company for Mr. Evans' forced cancellation of the independent medical examinations of Mr.
8 Hernandez and Mr. Rodriguez, and my fees and costs associated with preparation of this
9 declaration, are reflected on these invoices.

10 **V. REQUEST TO CONDUCT CR35 EXAMS**

11 26. In consideration of the above, I respectfully request that the court approve (a)
12 a full day meeting (with appropriate breaks) for the purpose of conducting the initial
13 interview and testing; and (b) a second meeting, on a nonconsecutive date, of no more than
14 four hours for the purpose of additional interview and/or testing as required by the individual
15 case. The meetings can be scheduled as follows:

- 16
- 17 • Mr. Rodriguez - July 13, 2009, and July 15, 2009, beginning each day at 9:30 a.m.
 - 18 • Mr. Hernandez - July 20, 2009 and July 22, 2009, beginning each day at 9:30 a.m.

19 27. It is not anticipated that a third meeting will be required to assess the issues of
20 the present case. However, I respectfully request that the court leave open the possibility for
21 additional time if unusual circumstances present themselves, or if the plaintiff is unable to
22 cooperate with scheduled procedures in a usual fashion.
23

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 11

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& PAUL
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SUITE 2500
SEATTLE, WASHINGTON 98104-7151
(206) 623-1990

1 28. Meetings with Mssrs. Hernandez and Rodriguez will be conducted at my
2 office which is located at 2825 Eastlake Avenue East, Suite 205, Seattle, WA 98102.

3 29. A certified Spanish language interpreter will be available for all portions of
4 the examinations.

5 30. In order to obtain the informed consent required by law and governing ethical
6 practices, prior to each of their examinations Mssrs. Hernandez and Rodriguez will : (1) be
7 provided with my Evaluation Information Form (attached hereto as Exhibit E - contains the
8 terms and conditions of the examination), (2) have the Evaluation Information Form read to
9 them by the certified Spanish interpreter, and, (3) be asked if they understand the terms and
10 conditions of the examination, as set forth in the Evaluation Information Form, and after
11 answering questions they may have pertaining to the informed consent. After all questions
12 are answered to the satisfaction of Mssrs. Hernandez and Rodriguez, they will be asked if the
13 understand and accept the conditions of the examination. I request that any observer or
14 monitor accompanying Mr. Hernandez and/or Mr. Rodriguez to their evaluations be ordered
15 not to interfere in any way with my ability to obtain informed consent, nor interfere or
16 obstruct the examination in any other manner.

17 31. Upon completion of my expert report, I will make all raw data and test
18 results generated during the examination of Mssrs. Hernandez and Rodriguez available to his
19 treating psychiatrist or any licensed or certified examiner of their choosing.

20 //

21 //

22 //

23 //

DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 12

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LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

1 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF
2 WASHINGTON THAT THE ABOVE IS TRUE AND CORRECT TO THE BEST OF MY
3 KNOWLEDGE AND BELIEF.

4 DATED this 15th day of June, 2009 in Seattle, Washington.

5
6 

7
8 Gerald M. Rosen, Ph.D.
Clinical Psychologist

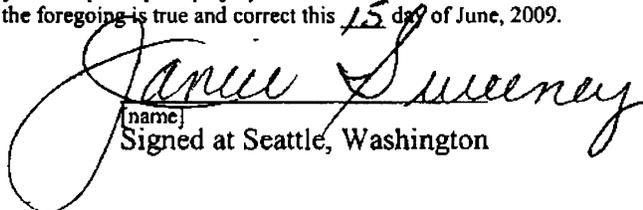
9
10
11 **CERTIFICATE OF SERVICE**

12 The undersigned certifies that on this day she caused to be served
13 in the manner noted below, a copy of the document to which this certificate is
14 attached, on the following counsel of record:

15 Thomas C. Evans
4705 16th Avenue NE
Seattle, WA 98105
Tel: (206) 527-5555
Fax: (206) 527-0725

- 16 Via Mail
 Via Facsimile
 Via Messenger

17 I certify under penalty of perjury under the laws of the State of
18 Washington that the foregoing is true and correct this 15th day of June, 2009.

19 
[name]
Signed at Seattle, Washington

20
21
22
23
DECLARATION OF GERALD ROSEN RE: MOTION TO
COMPEL HERNANDEZ EXAM- Page 13

27066 kf153901

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HONORABLE RICHARD D. EADIE

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

MIGUEL BERNAL HERNANDEZ,

Plaintiff,

v.

GLACIER FISH COMPANY,

Defendant.

No. 08-2-18009-3 SEA

DECLARATION OF GERALD ROSEN IN
OPPOSITION TO PLAINTIFF'S MOTION
TO EXCLUDE

I, Gerald M. Rosen, Ph.D, declare as follows:

1. I am over 18 years of age, a resident of Washington State, and I am otherwise competent to make this declaration. I have first-hand knowledge of the matters set forth in this declaration.

2. I obtained a Ph.D. in Clinical Psychology from the University of Wisconsin at Madison in 1972. Since 1976 I have been licensed as a clinical psychologist in Washington State, and I have practiced in Seattle, Washington. I hold concurrent licenses with the States of Alaska and Oregon, and I am Board Certified in Clinical Psychology with the American Board of Professional



1 Psychology (ABPP). I also hold an appointment at the level of clinical professor
2 with the Department of Psychology at the University of Washington, and with
3 the Department of Psychiatry & Behavioral Sciences at the University of
4 Washington's School of Medicine. Other credentials and a copy of my current
5 CV were submitted to this Court with my June 15, 2009, Declaration in Support
6 of Defendant's Motion to Compel. I respectfully request the Court's
7 consideration of these materials in judging my competence and experience.

8 3. In my June 15, 2009, Declaration, I outlined the ethical and legal
9 requirements for psychologists to obtain informed consent prior to conducting
10 services. By way of review, I included excerpts from the ethical principles
11 and/or standards developed by the American Psychological Association,
12 Division 41 of the American Psychological Association with specific reference
13 to forensic examinations, and the American Academy of Psychiatry and the
14 Law. I also included excerpts from relevant law in Washington State. *See* June
15 10, 2009, Declaration, ¶¶ 11-15.

16 4. The informed consent materials I provide to patients and evaluatees
17 comply with the requirements imposed by law, ethics, and professional
18 organizations governing forensic and treating psychological treatment and
19 evaluations. A true and correct copy of my informed consent materials is
20 attached hereto as Exhibit R-1 ("Evaluation Information Form").

21 5. There is no foundation to dispute that informed consent is required of
22 psychologists before they proceed with any service, unless there is a Court order
23 or other mandated condition. A CR35 exam without a Court order, like other

1 services, falls under these considerations. An agreement between attorneys that
2 an individual can undergo a CR35 exam does not relieve a professional from
3 obtaining similar consent from the person to be assessed. In my experience,
4 psychologists always provide information about their practice and procedures
5 and obtain informed consent.

6 6. Mr. Evans is familiar with the need for informed consent, and in
7 previous years he allowed me to obtain a parties acceptance prior to
8 commencing a Rule 35 examination. In general, I cannot site the names of
9 undisclosed parties without permission. However, in Mr. Evans' declaration to
10 Judge Zilly, he specifically named a case involving Mr. Chmielewski. With
11 permission from Mr. Evans, his client, and the attorney who retained me, I
12 would be please to provide the Court with my copy of Mr. Chmielewski's signed
13 informed consent form from the year 2000. Other cases involving "Injury at
14 Sea" clients who have signed my informed consent materials up through 2004
15 also can be provided with appropriate releases.

16 7. Mr. Evans routinely refers to and/or directly retains Dr. Eden Deutsch
17 to provide treatment and/or to evaluate his clients. As is required of all
18 psychologists, Dr. Deutsch also obtains informed consent. A true and correct
19 copy of Mssrs. Flores, Hernandez and Rodriguez-Garcia's executed consent
20 forms for their treatment with Dr. Deutsch related to this matter are attached
21 hereto as Exhibit R-2.

22 8. Over time it appears that Mr. Evans has adopted the position that his
23 clients are not to sign my informed consent forms. Mr. Evans recently took this

1 stance in a brief and declaration submitted to Judge Zilly in the matter of *Jesus*
2 *Flores v. Glacier Fish Company* (CV08-1267-TSZ). As indicated by Mr. Evans,
3 Judge Zilly supported the position that a client does not have to sign any forms
4 at the time of a CR35 exam. At no time, however, did Judge Zilly rule that oral
5 informed consent was not required.

6 9. Ethical guidelines and state laws make clear the need to obtain verbal
7 consent to procedures before they are performed, in those cases when written
8 consent is not provided.

9 10. To appreciate the context of prior issues with Judge Zilly, and
10 in consideration of Mr. Evans submitting to the current Court a copy of his
11 earlier declarations, I attach hereto as Exhibit R-3 a true and correct copy of my
12 declaration responsive to a substantial list of derogatory and inflammatory
13 accusations by Mr. Evans.

14 11. The Observer Consent Form Mr. Evans executed on June 10,
15 2009, in which he expressly instructed me that I could not ask plaintiff
16 Hernandez to “agree to accept your conditions in your information sheet” is
17 attached hereto as Exhibit R-5.

18 12. In his memorandum in support of a motion to exclude me as an
19 expert witness, Mr. Evans writes under “II. STATEMENT OF FACT,” the
20 following: “This is one of those cases where the proposed expert likely has been
21 in Court and practicing law (without a license), as much as if not more than
22 many attorneys.” If by this statement, Mr. Evans means to suggest that my
23 knowledge of laws pertaining to the practice of psychology are greater than his, I

1 must agree this is possible. Rules adopted by the Washington State Examining
2 Board of Psychology require that psychologists obtain a minimum of 4 hours of
3 continuing education in ethics during each review cycle. During such
4 workshops, laws governing the practice of psychology--including the need for
5 informed consent--are routinely covered.

6 13. Mr. Evans repeatedly states in his documents to the Court that I
7 insist that individuals sign my informed consent form. This is absolutely
8 incorrect and the accusation misleads the Court. As noted in my June 15, 2009,
9 declaration, and as attested to in the *Flores* matter:

10 An individual is never forced to sign my informed consent materials, but it certainly
11 saves time when they do. Professional standards and state law require that I provide
12 information to an individual who is about to undergo an assessment and/or treatment,
13 whether this is for forensic or purely clinical purposes. If Mr. Evans wishes to
14 instruct his client to not sign anything, it will then be necessary for me to spend a
15 portion of the interview going over the information and getting verbal
16 acknowledgement that the information is understood and acceptable to the party
17 being evaluated.

18 June 15, 2009, Declaration, ¶ 17; *Flores Declaration* (R-3), ¶ 14.

19 14. If the Court refers to the transcript of the exchange between
20 myself and Mr. Evans, on the occasion of the scheduled examination of Mr.
21 Hernandez, it will clearly see that I corrected Mr. Evans who continued to
22 misrepresent my stance on the matter of signing informed my forms.

23 Specifically, I stated:

In response to what seems to be an extraordinarily long statement, I want to clarify
that I don't expect Mr. Hernandez to sign this. I told him that I would like him to read
this. And if he had any questions or for any reason did not want to sign it, he should
not.

Page 5 of Transcript. A true and correct copy of a transcript of my June 10, 2009, exchange

1 with Mr. Evans is attached hereto as Exhibit R-4.

2 15. An actual reading of my informed consent form demonstrates
3 that I do not insist that the document be signed. On the last page of the informed
4 consent form, an individual is instructed as follows:

5 If you understand and accept the above information, please sign the lines below. Do
6 *not* sign this form if you have any questions. Instead, wait for our interview and
7 discuss with me the questions you have. The form should not be signed until your
8 concerns have been clarified.

9 Evaluation Information Form, (R-1) p.3 (emphasis as in original).

10 16. Despite very clear statements on my part to Judge Zilly, clear
11 qualifications on my informed consent form, and my conversation with Mr.
12 Evans at the time of Mr. Hernandez's scheduled examination (which is fully and
13 accurately represented in the attached transcript), Mr. Evans repeatedly misstates
14 in his Motion to Exclude that I insisted and "continued" to insist that Mr.
15 Hernandez sign the form.

16 17. Mr. Evans further misstates that I initially agreed that it would
17 be sufficient if Mr. Hernandez expressed an understanding of the informed
18 consent information provided on my form, and there would not be a need to
19 obtain his consent. I respectfully request that the Court consider the transcript
20 provided with this declaration. In this transcript it can be seen that I spoke of
21 "usual procedures" and my wanting to proceed with seeing if Mr. Hernandez
22 understood information presented in the form. I also suggested that everyone
23 would come into my office after this task was accomplished. The only change in
 my decision making was to determine that it would be best to have an individual

1 discussion with Mr. Evans, rather than having Mr. Hernandez listen any further
2 to an exchange on ethical and legal requirements for informed consent.

3 18. Mr. Evans references and misrepresents specific sections of my
4 informed consent form. Several examples of this issue are provided in the
5 following points.

6 19. Mr. Evans' motion, and Mr. Hernandez's declaration, suggest
7 that my form is confusing and creates the impression that the plaintiff may be
8 responsible for charges. With regard to any confusion Mr. Hernandez may have
9 had on this matter, this issue could have been addressed during the interview
10 when questions would be asked and answered. With regard to Mr. Evans, the
11 basis for his purported concerns are difficult to understand. All writings on
12 informed consent, of which I am aware, make it crystal clear that individuals
13 must have an understanding of financial arrangements before psychologists
14 proceed with services. Dr. Deutsch's informed consent form has such a section,
15 as I am confident would be the case for any psychologist with whom Mr. Evans
16 has worked.

17 20. My informed consent form clearly speaks to the difference in
18 arrangements that results from whether I am retained by the individual's attorney
19 or by opposing counsel. The statement also informs individuals under what
20 conditions opposing counsel may attempt to recover costs.

21 If you have been sent by your own attorney for an evaluation, he or she
22 will be billed. Depending on your arrangement with your attorney, these
23 charges may be passed on to you. If this situation applies, then you should
discuss with me any questions you have about fees.

1 In all other cases, there is no need for you to be concerned about financial
2 arrangements. The cost of my services are billed directly to the law firm
3 or company that has retained me and they, not you, are responsible for the
4 charges. The only exception is a charge that results from missed
5 appointments or late cancellations. In such cases, an attorney may attempt
6 to recover the costs from you.

7 Evaluation Information Form, (R-1) p. 2. This is nothing improper in my providing this
8 information, despite Mr. Evans' aspersions. Quite the contrary, this is exactly the type of
9 information a psychologist should provide.

10 21. Mr. Evans' Motion suggests that my form "requires that the
11 examinee state whether or not the examinee waives the attorney client
12 privilege." To the contrary, the form reminds individuals of this privilege so they
13 will not in some casual or accidental manner reveal discussions with their
14 attorney. As can be seen from a review of my consent form, the statement an
15 individual is asked to sign reads: "I understand that communications with my
16 attorney are protected by the attorney-client privilege and it is my right to not
17 disclose these communications." Evaluation Information Form, (R-1) p.3. The
18 information in my form, and my request that individuals acknowledge this issue,
19 is a direct result of protecting the plaintiff and myself from accusations made by
20 individuals (such as Mr. Evans) who portray me as trespassing a respected
21 privilege.

22 22. It is difficult to imagine that anyone would argue that
23 individuals should not be informed of their rights under the Consumer Protection
Act. Yet, Mr. Evans cites this portion of my informed consent form among
those sections that he finds objectionable. With reference to this section, Mr.

1 Evans objects to my instructing that the individual “may have the right to request
2 a different psychologist for this evaluation.” This statement is in fact correct and
3 necessary to explain to a plaintiff, unless a court order is in place that restricts
4 the individual’s choice.

5 23. Apart from issues pertaining to informed consent, Mr. Evans
6 tells the Court in his motion, “In the undersigned’s experience, Dr. Rosen has
7 never opined that a plaintiff claimant has suffered from PTSD.” Mr. Evans
8 should know that his statement misleads the Court. In my declaration to Judge
9 Zilly in the *Flores* Matter, a document I assume Mr. Evans read, it was clarified
10 that I provided a “firm or provisional” diagnosis of post-incident PTSD to five
11 survivors of the ALEUTIAN ENTERPRISE maritime accident. *Flores*
12 *Declaration*, (R-3) ¶ 5.

13 24. There are other examples of my “opining” that a plaintiff
14 suffers from the symptoms of PTSD, although in fairness to Mr. Evans, he
15 would not necessarily know of these. For example, just two months ago I
16 testified at a video-taped perpetuation deposition on the matter of Atkinson vs.
17 Taylor et al. (Board of Industrial Insurance Appeals, State of Washington, Cause
18 No: 08-2-04333-4), that Ms. Atkinson met criteria for the diagnosis of PTSD
19 after a car accident and assault. In the Atkinson case, like the present cases, I
20 was retained by defense counsel. Suffice it to say, in the course of many years
21 serving as a forensic expert, I have assessed individuals who suffered substantial
22 injury that on occasion met criteria for the diagnosis of PTSD.

23 25. It is my sincere belief that Mr. Evans created an untenable

1 situation that he had not fully thought out, when he acted in an obstructionist
2 manner and insisted that this examiner could not obtain oral informed consent.

3 26. Mr. Evans' stance regarding informed consent is of relatively
4 recent origin, given that he allowed such consent in past cases. While I cannot
5 determine the motivation or origins of his current stance, it can be observed that
6 Mr. Evans' statements regarding informed consent have occurred in the context
7 of numerous other derogatory statements that misrepresent my experience,
8 opinions, and professional conduct.

9 27. I appreciate the Court's consideration of the issues and the
10 materials that accompany my declaration.

11 I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE
12 STATE OF WASHINGTON THAT THE ABOVE IS TRUE AND CORRECT TO THE
13 BEST OF MY KNOWLEDGE AND BELIEF.

14 DATED this 17th day of June, 2009 in Seattle, Washington.

15
16 

17 _____
18 Gerald M. Rosen, Ph.D.
19 Clinical Psychologist

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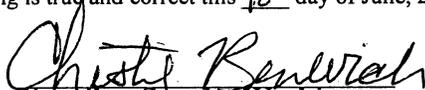
CERTIFICATE OF SERVICE

The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

Thomas C. Evans
4705 16th Avenue NE
Seattle, WA 98105
Tel: (206) 527-5555
Fax: (206) 527-0725

- Via Mail
- Via Facsimile
- Via Messenger

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 18th day of June, 2009.


Signed at Seattle, Washington

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

JESUS FLORES, a seaman,

Plaintiff,

-vs- Case No. CV08-01267 TSZ

GLACIER FISH COMPANY, LLC,
a Washington corporation;
and the F/V PACIFIC GLACIER,
Official No. 933627, a vessel
her engines, equipment, tackle
and appurtenances, In Rem,
Defendants.

Deposition Upon Oral Examination

of

GERALD M. ROSEN, Ph.D.

2:10 p.m.
September 23, 2009
2825 Eastlake Avenue East, Suite 205
Seattle, Washington

SUSAN CANNON, CCR #2314

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1 letter that comes with the records that I didn't keep.
 2 So it's possible that I don't have. Yeah, I think
 3 otherwise I've produced things. Let me read this first
 4 section.
 5 **Q. I don't mean to suggest you haven't. I'm**
 6 **just trying to make sure that we have everything here**
 7 **for all three cases.**
 8 A. I see. No, I do not have copies here of any
 9 of the declarations or things that I signed related to
 10 trying to compel the exams and related to my trying to
 11 have the ability to get informed consent, I didn't bring
 12 any of those with me. I figured that those are papers
 13 everybody has; right? So I didn't bring that with me.
 14 **Q. Okay.**
 15 A. Right. I think that covers it.
 16 **Q. Very good. Put those down somewhere where**
 17 **we can get them back.**
 18 (Exhibit Nos. 1, 2 & 3 are marked
 19 for identification.)
 20 **Q. You also kindly gave us copies of your**
 21 **billing invoices, and I've had these marked as Exhibits**
 22 **1, 2 and 3. And I don't have extras of these because**
 23 **you just gave them to us. Would you tell us what**
 24 **Exhibits 1, 2 and 3 are?**
 25 A. Well, Exhibit 1 are my charges up to

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1 yesterday pertaining to services on these three
 2 individuals. Exhibit 2 are charges that were separated
 3 out from what I will call the regular bill and relates
 4 to time spent on dealing with a motion to exclude. And
 5 Exhibit 3 lists charges that are separated from the,
 6 quote, regular bill that deals with time lost with
 7 cancelled IMEs and time spent on another declaration,
 8 whose official name I don't recall.
 9 **Q. Can I borrow those back from you? Again, I**
 10 **apologize. Normally we would hand out copies to**
 11 **everybody here, but I'm going to assume you remember**
 12 **some of this stuff anyway.**
 13 **Based upon the exhibits that you have given**
 14 **me, your cumulative charges for all three cases to date**
 15 **is \$65,514.58. Is that correct?**
 16 A. That doesn't sound right. It shouldn't have
 17 printed this out. I actually corrected this for you.
 18 Anyway, let me explain. So somewhere along the way
 19 there was a zero; right? Somewhere along the way there
 20 was a zero balance. When that zeroed out, it shows up
 21 as a payment.
 22 So if you look at the last page there are
 23 two payments of \$19,505. One of those is a true payment
 24 and the other one is an artifact of the billing program.
 25 So if you take \$65,000 and subtract \$19,000, then you

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1 would have a closer estimate. So, that comes to about
 2 46,000, and that sounds more right.
 3 And I apologize. I actually thought I had
 4 gone into the computer and took away this temporary
 5 zeroing which creates confusion.
 6 **Q. This document which is the billing lists**
 7 **cumulative charges of \$65,514.58. That's what is listed**
 8 **there; correct?**
 9 A. That is correct. And to explain that
 10 figure, there is an artifact from the billing program of
 11 the 19,505.
 12 **Q. And it also lists cumulative payments of**
 13 **58,954; correct?**
 14 A. And within that also would be the artifact.
 15 **Q. So you believe that your work total cost to**
 16 **date is around \$47,000. Is that right?**
 17 A. On that bill that's correct. The actual
 18 cumulative charges would be about that.
 19 (Exhibit No. 6 is marked
 20 for identification.)
 21 **Q. Doctor, before we started today's deposition**
 22 **I handed you a check for \$1,400; correct?**
 23 A. That's correct.
 24 **Q. And you insisted that before you would talk**
 25 **to us today at this deposition that you be paid \$1,400**

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1 **in advance. Isn't that correct?**
 2 A. I don't know that I used those words, but I
 3 like to be prepaid before a deposition.
 4 **Q. So if we hadn't prepaid it you wouldn't be**
 5 **here?**
 6 A. Actually that's not correct. If you had
 7 come in without a check, I would have observed that you
 8 had made that decision and I would have gone forward.
 9 But I appreciate the courtesy of your bringing the
 10 check.
 11 **Q. I don't see anywhere here on your Exhibit 1**
 12 **where you have ever actually charged Mr. Bratz your**
 13 **stated retainer. Would that be correct?**
 14 A. Can I look at the bill, please?
 15 **Q. Sure.**
 16 A. Thank you. So, there would have once been a
 17 charge for the retainer. This is a lack of bookkeeping
 18 sophistication probably. But in order for me to have
 19 the retainer applied to charges, I send a bill that has
 20 the retainer on it. And when I get paid the retainer, I
 21 then take that charge off and the payment sits there.
 22 So that for a period of time there is a deficit -- not a
 23 deficit, what's it called -- whatever it's called when
 24 more has been paid than services have been performed.
 25 So it's likely that a bill was sent out at

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1 **patient and you're treating them? What's the difference**
 2 **between those two things?**
 3 A. There are large differences and the roles
 4 actually can be conflicting, because as the therapist my
 5 alliance and allegiance is to my client. I am
 6 attempting to establish rapport and help that client
 7 toward the stated goals. I'm working with a number of
 8 assumptions in that framework, which is the clients are
 9 typically motivated to report information as accurately
 10 as they can in order to further assessment and
 11 treatment. And then there are all sorts of benefits and
 12 pitfalls to that model.
 13 The model of a forensic assessor is that the
 14 allegiance is to the issues that are trying to be
 15 determined in relation to whatever is before the court
 16 and to apply what's known in psychology to those issues.
 17 Rapport is established for the purpose of furthering the
 18 assessment, but not to establish a therapeutic alliance.
 19 **Q. The allegiance is to the client, isn't it,**
 20 **the person who hired you?**
 21 A. Actually the allegiance would be to the
 22 issues at hand and applying what's known in the field to
 23 try to clarify the issues for the court. To the extent
 24 that a particular side hires one, if that creates bias,
 25 the responsibility is to try to counter that bias so

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1 that you can accurately be informing the court.
 2 So I think of the allegiance as being to the
 3 court. That's my responsibility in terms of who I'm
 4 trying to talk to about the issues. I'm being asked to
 5 do that by the party that retains me and pays me.
 6 **Q. Have you ever turned down a case from a**
 7 **defense firm?**
 8 A. Well, there are times where I'm called and
 9 I'm not appropriate. I have been called by defense
 10 firms and actually a plaintiff attorney on head injury
 11 cases. I'm not a neuropsychologist. So I turn those
 12 down. I've turned cases down because I'm too busy and I
 13 can't take cases. Is this what you mean?
 14 **Q. Have you ever turned a case down for a**
 15 **defense firm that you had the time for, you weren't too**
 16 **busy, and they were willing to pay?**
 17 A. And it was in an area where I had expertise?
 18 **Q. Yes.**
 19 A. Okay. So it isn't that they were calling me
 20 and I was the wrong expert.
 21 **Q. Right.**
 22 A. Okay. Have I ever been called by a law firm
 23 and just don't take the case. Not that I can recall. I
 24 can't say it's never happened. So I turn cases down if
 25 I don't have the expertise or if I don't have the time.

44

1 That's the best I can recall.
 2 **Q. If you take a look at page 33 of the exhibit**
 3 **that we just handed to you through -- I'm sorry?**
 4 A. I can think of a case where I -- a couple of
 5 instances where I've turned down a case because I got a
 6 phone call from the other side, if that's what you mean.
 7 But anyway, okay.
 8 **Q. Pages 33 through 36.**
 9 A. Yes.
 10 **Q. This is a list of cases that you provided to**
 11 **us where you have testified before. Is that correct?**
 12 A. Yes.
 13 **Q. And does this go through all of 2008 or only**
 14 **part of 2008? Turning to page 36.**
 15 A. The only way I would know that is to look on
 16 my computer for the most recent thing. It looks pretty
 17 complete for 2008, but I could be forgetting something.
 18 So when was this provided, I guess would be the answer
 19 to that. If this was provided in 2009, then it
 20 certainly includes all of 2008.
 21 **Q. Is this your latest document that you have**
 22 **generated for purposes of showing testimony at trial or**
 23 **deposition?**
 24 A. I see. No, because I have testified now in
 25 2009. So there is clearly a newer copy of this.

45

1 **Q. There is one?**
 2 A. In my computer, yes. Do you want me to
 3 print that out?
 4 **Q. Possibly.**
 5 A. Okay.
 6 **Q. Why don't we work with what we've got first.**
 7 A. Okay.
 8 **Q. On the cases that you now have in front of**
 9 **you which are pages 33 through 36, a list of cases**
 10 **involving testimony 2003 to current, can you identify**
 11 **any case in there where you opined that an injured**
 12 **person had post traumatic stress syndrome on a chronic**
 13 **basis?**
 14 A. And this is for what time frame again?
 15 **Q. From 2003.**
 16 A. The entire time frame?
 17 **Q. Through 2008.**
 18 A. Okay.
 19 **Q. The entire list.**
 20 A. There is one case where -- no, I don't think
 21 that that I did decide PTSD. Let me just think. Okay.
 22 Does it apply if I would have been testifying that in a
 23 group of individuals one of them or several of them
 24 could have PTSD on a chronic basis but I couldn't say
 25 which ones?

46

1 **Q. I'd just like to know whether or not you can**
 2 **identify a single person where you as the professional**
 3 **opining on the case opined on a more probable than not**
 4 **basis that the person had post traumatic stress syndrome**
 5 **on a chronic basis. Just identify one for me.**
 6 A. So on this list there would be no one where
 7 I specify a particular individual, where I specified
 8 that a named individual had PTSD on a chronic basis.
 9 **Q. So just to be clear, in all cases listed by**
 10 **you from the beginning of 2003 through the cases listed**
 11 **here for 2008 where you have testified at trial or by**
 12 **deposition, you have not testified or opined on any**
 13 **single case that the person had PTSD on a chronic basis;**
 14 **correct?**
 15 A. Well, one of these cases involves a group.
 16 And so in terms of these -- all of these cases with
 17 individuals, that is correct. And in terms of the
 18 group, I did not specify any one individual that I
 19 determined had PTSD on a chronic basis.
 20 **Q. Now, in addition to the list that we have**
 21 **here, as you identified earlier in your deposition you**
 22 **have a number of cases that you have worked on where you**
 23 **haven't testified?**
 24 A. That's correct.
 25 **Q. In fact, that's even larger than this list**

47

1 **of cases where you have testified. Quite a bit larger,**
 2 **isn't it?**
 3 A. That's correct.
 4 **Q. As to those persons, can you name one case**
 5 **where you opined that the person had PTSD on a chronic**
 6 **basis and so stated on a more probable than not basis in**
 7 **your report?**
 8 A. And this is going from 2003 to 2008?
 9 **Q. Yes.**
 10 A. Well, I can't think of names. And you want
 11 names?
 12 **Q. I want anything that would identify a case**
 13 **for me.**
 14 A. I see. I know I had a case where I opined
 15 the person met criteria for PTSD, but I'm not thinking
 16 of the name of the case. And, in addition, if the case
 17 hadn't involved testimony I don't know that I would
 18 disclose the name of the case.
 19 So I have had cases where I have
 20 testified -- not testified. I've had cases where I have
 21 determined -- well, first in 2009 I did have a case
 22 where I testified. But then I have had cases where I
 23 have determined that an individual meets criteria for
 24 PTSD, if that's what you are asking. And not that many,
 25 but I have had some.

48

1 **Q. You have identified one. So is it correct**
 2 **to say then out of all of the cases that you have worked**
 3 **on since 2003, now including both the cases we talked**
 4 **about earlier that you testified on and the cases where**
 5 **you have a written report on, all those cases as you sit**
 6 **here and testify today you can think of one case where**
 7 **the person in your opinion met the PTSD criteria. Is**
 8 **that correct?**
 9 MR. BRATZ: Object to the form of the
 10 question.
 11 A. No. I can think of one case where I
 12 testified to that, and that was in 2009. And then if I
 13 were to estimate, I would say that over those years
 14 there's probably been only two or three other cases. So
 15 a very small number of cases.
 16 **Q. (By Mr. Evans) And going back, I think you**
 17 **said you handle about 30 cases a year, 25 to 30 cases a**
 18 **year?**
 19 A. In various degrees, right.
 20 **Q. So if we go from 2003 to 2008, we have five**
 21 **years, that would be about 150 cases. So would it be**
 22 **fair to say out of 150 cases that you have reviewed you**
 23 **have opined that the person met the PTSD criteria in**
 24 **approximately two to three cases?**
 25 A. Out of approximately 125 to 150 cases, not

49

1 all of which involved independent assessments, I would
 2 have opined in probably less than five that people met
 3 criteria for PTSD.
 4 **Q. And of those five, did you opine --**
 5 A. Less than five.
 6 **Q. Less than five, okay. Of those -- well, can**
 7 **we be a little more precise? Would three be a better**
 8 **number?**
 9 A. We could say that it's probably three or
 10 four, and at most five.
 11 **Q. Of those cases did your opinion state that**
 12 **in any of those cases that the post traumatic stress**
 13 **syndrome was chronic and permanent in any respect?**
 14 A. No. I would not have had any case where I
 15 was testifying that the PTSD in my opinion was
 16 permanent. It could be chronic in the sense of more
 17 than six months, but I would not have testified that it
 18 was permanent.
 19 **Q. You would never testify that PTSD is a**
 20 **permanent condition. Is that correct?**
 21 A. That's interesting. Well, I think I could
 22 entertain the concept of someone having permanent
 23 residuals from a trauma that was sufficiently
 24 unresponsive to treatment that they still met criteria.
 25 I can conceptualize that possibility. I don't

50

1 currently, but in my practice I've had clients who met
 2 criteria for PTSD who have had problems for years. So I
 3 guess I could say that the concept exists and it's
 4 conceivable that it could be applied to a case, and that
 5 hasn't been the situation in the cases that I've
 6 evaluated over these years in my forensic work.

7 **Q. Of those cases that we are talking about**
 8 **here -- the approximate 150 cases, is it?**

9 A. I think we said 125 to 150.

10 **Q. Okay, 125 to 150 cases.**

11 A. Not all of which are assessed.

12 **Q. Right. Have you in any of those cases ever**
 13 **made any effort to determine after you issued an opinion**
 14 **whether your opinion was correct; followed up, pursued**
 15 **the individual to see whether or not you were right?**

16 A. No, I don't think so. And I don't know if I
 17 ethically could do so. No.

18 **Q. In these cases in some instances you suggest**
 19 **that these three claimants or some of them may in some**
 20 **way be motivated by secondary gain. You know what**
 21 **secondary gain is?**

22 A. Yes. We are talking about the three
 23 plaintiffs here?

24 **Q. Right.**

25 A. Okay, yes.

51

1 **Q. And you I presume have made that suggestion**
 2 **in other reports that you have issued in other opinions**
 3 **that you have expressed in cases?**

4 A. Yes.

5 **Q. Have you ever where you've opined that an**
 6 **individual is involved in secondary gain, that is where**
 7 **they are motivated by the gain of litigation or a claim,**
 8 **have you ever after making that opinion ever followed up**
 9 **to find out whether or not you were right or not; looked**
 10 **at the individual after your assessment, a year after,**
 11 **two years?**

12 A. No. I would like to do that. I don't think
 13 there is an ethical way that I can.

14 **Q. So you don't have any real idea how accurate**
 15 **you are when you make that prediction in a report, do**
 16 **you, that a person is motivated by secondary gain? You**
 17 **don't really have any way of knowing whether or not you**
 18 **are accurate when you do that. Isn't that correct?**

19 A. The way I would know if I was accurate is if
 20 I had the data that supported the conclusion. If you
 21 are saying that -- I don't have any independent
 22 confirmation of the accuracy of my opinion based upon
 23 data subsequent to my evaluation.

24 **Q. So you don't have any independent evidence**
 25 **at all to know whether or not the opinions that you**

52

1 **write in a case in fact turn out to be correct or**
 2 **accurate. Isn't that correct?**

3 A. I think for the most part that is correct.
 4 I don't have feedback after the assessment in terms of
 5 the case on most cases. I mean, I can think of -- there
 6 are some cases where there is some feedback that I get
 7 in terms of how the plaintiff reacted when the case
 8 settled or things that were said after, but I don't have
 9 any data in terms of their adjustment a year later.

10 **Q. Out of all of those cases, the 125 to 150,**
 11 **where you have opined that a person did not have PTSD**
 12 **and could go back to some occupation --**

13 A. I just need to interrupt, because not all of
 14 the 125 to 150 cases involved claims of PTSD.

15 **Q. Okay.**

16 A. So I wasn't on some cases opining they
 17 didn't have it, on some cases it wasn't a question being
 18 raised in terms of what their concern was.

19 Now having said that, I would need to say
 20 that as a psychologist evaluating someone I could wonder
 21 if the person was suffering in some way with reactions
 22 that would meet criteria for PTSD even though it wasn't
 23 being claimed. But I just want to make clear not all my
 24 cases involve claims of PTSD.

25 **Q. Are you aware of any case where you have**

53

1 **opined that a person did not have post traumatic stress**
 2 **syndrome and could go back to an occupation working in**
 3 **fishing, and actually did go back and work in fishing**
 4 **after their case settled or after their claim was**
 5 **resolved?**

6 A. Just to be clear under the question. In my
 7 forensic role did I ever have a case where I opined that
 8 a fisherman could go back to fishing if he or she had
 9 appropriate treatment, and then learned that they didn't
 10 go back. Is that what you are asking?

11 **Q. And --**

12 A. Or learned that they did go back?

13 **Q. Let me rephrase the question. Do you have**
 14 **any information or understanding at all with respect to**
 15 **any of the persons who you opined did not have post**
 16 **traumatic stress syndrome and could go back and work on**
 17 **a fish boat where the person claimed that they did have**
 18 **post traumatic stress syndrome and couldn't go back and**
 19 **work on a fish boat, and the person ended up going back**
 20 **and working on a fish boat after their case was**
 21 **resolved? Do you have any information or evidence of**
 22 **that?**

23 A. None that I can recall at the moment. And
 24 I'm sure you don't want me to go through my computer and
 25 identify all the maritime cases. So I could say none

54

1 that I can think of at the moment related to my forensic
 2 work.
 3 **Q. Do you have any professional studies or**
 4 **evidence that relates to how often a professional like**
 5 **yourself makes an opinion that a person is involved in**
 6 **secondary gain and can go back to an occupation if they**
 7 **choose, and after making this claim and resolving their**
 8 **claim they then go back to their occupation? Do you**
 9 **have any academic information in that regard or studies,**
 10 **anything of that sort?**
 11 MR. BRATZ: Object to the form.
 12 A. If I understand the question, yes, there is
 13 literature on people's adjustments after their claims
 14 are settled. And the literature is kind of mixed. I
 15 haven't looked at the literature in a few years so I
 16 can't give you specific studies, but I can find them.
 17 And some studies indicate that people continue to have
 18 problems after their cases are settled. And there are
 19 some studies that indicate, I think, that some people
 20 get better.
 21 Now, those studies don't speak to what the
 22 experts were saying in the course of the case. But if
 23 one assumes that there is a large number of cases where
 24 people are saying there's secondary gain, the studies
 25 would suggest that there are certainly at least some

55

1 cases where after the case is settled the people
 2 continued to have their problems. I don't think those
 3 cases are specific to maritime work, but they do bear on
 4 this question of how do people adjust after their
 5 lawsuits are over.
 6 Now, that doesn't answer the question of the
 7 accuracy of a specific person's opinions. And as you
 8 were pointing out, I don't have data that tells me a
 9 year out, three years out was I correct.
 10 And there are some other issues related to
 11 this, but since I don't think they are contained in your
 12 question I will stop there.
 13 **Q. (By Mr. Evans) Okay, fair enough. Back to**
 14 **the billings for a moment here. I have a couple other**
 15 **exhibits. One of them is Exhibit 3. This is the**
 16 **billing that you issued for the IME on these two**
 17 **individuals that was cancelled.**
 18 A. Yes.
 19 **Q. Is that correct?**
 20 A. Yes.
 21 **Q. And the total amount that you charged for**
 22 **that was how much?**
 23 A. \$7,920.
 24 **Q. So you charged \$7,920 for two days of exams**
 25 **that never occurred; correct?**

56

1 A. No, that's not correct.
 2 **Q. What is the \$7,920 for then? What is it?**
 3 A. That's for two days of exams that never
 4 occurred and time spent preparing a declaration and
 5 responding to the circumstances of the two days that
 6 never occurred.
 7 **Q. How much did you charge for the two days of**
 8 **exams that never occurred?**
 9 A. \$2,800 each day is \$5,600.
 10 **Q. So you charged \$5,600 for two days of exams**
 11 **that you never conducted; correct?**
 12 A. That's correct.
 13 **Q. And those were exams that you cancelled?**
 14 A. Those were exams that could not go forward
 15 because you would not allow informed consent.
 16 **Q. But you are the one who cancelled the exam.**
 17 **You are the one who said the exams are off and you**
 18 **cancelled them; correct?**
 19 A. I wouldn't phrase it that way. I would say
 20 I was the one who informed you that it would not be
 21 ethical for me to proceed without informed consent, and
 22 you were the one who continued to not allow informed
 23 consent.
 24 **Q. But you cancelled the exams?**
 25 A. No. You took a stand that did not allow the

57

1 exams to go forward.
 2 **Q. Doctor, I don't mean to argue with you, but**
 3 **you are the one who said the exam is over, you are the**
 4 **one who shoed us out of your office; right?**
 5 A. I'm the one who told you that the exams
 6 could not go forward with the stance you took. You are
 7 the person who maintained your stance and therefore
 8 prevented the exams from going forward.
 9 **Q. And it was suggested at that time that you**
 10 **call Mr. Bratz, and his phone number was given to you;**
 11 **correct?**
 12 A. That's correct. You had said that that was
 13 a possibility, that I could call Mr. Bratz if I had any
 14 confusion or questions about what we were discussing.
 15 **Q. In fact, I asked you to do that; right?**
 16 A. You encouraged me to do that if I wanted to
 17 do that.
 18 **Q. And you declined to do that?**
 19 A. I advised that it would be more appropriate
 20 for you to call Mr. Bratz because I was quite clear on
 21 my responsibilities with informed consent, and that
 22 perhaps it was something you wanted to discuss with Mr.
 23 Bratz. But I didn't need to call him to determine what
 24 I knew about informed consent.
 25 **Q. So the answer is, no, you did not call Mr.**

58

1 **Bratz?**
 2 A. That's correct. I did not call him.
 3 **Q. That form that you call informed consent, in**
 4 **fact that has a lot more on it than things relating to**
 5 **informed consent, doesn't it?**
 6 A. I think it all bears on issues that I have
 7 some responsibility to communicate to a person about to
 8 undergo a forensic exam.
 9 **Q. Did you prepare the form, or how was that**
 10 **form prepared?**
 11 A. Well, there's been drafts over the years, I
 12 guess, and I am the person who writes it. Years ago I
 13 ran it by an attorney. And I don't know if years ago I
 14 also ran it by a colleague. But I'm basically the
 15 author of it and had it checked over by at least one
 16 person.
 17 **Q. How long have you used a written form like**
 18 **that? Or I should say how long have you used that**
 19 **particular form?**
 20 A. You mean that version of the form?
 21 **Q. Yes.**
 22 A. I don't know. It was probably -- well,
 23 there is probably a date on it in terms of when the
 24 revision occurred. So I would have been using it since
 25 that date.

59

1 (Exhibit No. 8 is marked
 2 for identification.)
 3 **Q. Doctor, I have handed you what's marked as**
 4 **Exhibit 8. Do you have that in front of you?**
 5 A. Yes.
 6 **Q. And that is a letter dated February 27,**
 7 **2009; correct?**
 8 A. That appears to be correct, yes.
 9 **Q. And it says via hand delivery and it appears**
 10 **to be hand delivery to you, Dr. Gerald Rosen, at your**
 11 **address here?**
 12 A. Yes.
 13 **Q. Have you ever seen this letter before?**
 14 A. No.
 15 **Q. I want you to take a couple minutes to look**
 16 **at it.**
 17 A. Do you want me to read the whole thing with
 18 some care?
 19 **Q. Whatever you feel is necessary to answer my**
 20 **question. Why don't I pitch a question to you and then**
 21 **you tell me if you need to.**
 22 A. Sounds good.
 23 **Q. In the second paragraph, can you recognize**
 24 **there that this was a letter on February 27, 2009 asking**
 25 **in the Flores case, which was the first case where you**

60

1 **saw one of my three individuals, that you not either**
 2 **orally or in writing ask him to agree to the conditions**
 3 **in your three page form? Do you see where it says that?**
 4 A. It says please note that the order
 5 specifically provides, this paragraph?
 6 **Q. Yes, that paragraph. And if you want to**
 7 **take a few minutes to review the whole thing, because my**
 8 **question deals with whether you were aware at the time**
 9 **of the Flores exam you had been requested not to ask Mr.**
 10 **Flores to agree to your form either orally or in**
 11 **writing. That's the question.**
 12 A. I'm trying to think. This goes back to
 13 Judge Zilly. Is that correct? I'm trying to think in
 14 terms of I wasn't aware of -- I haven't seen this letter
 15 and I wasn't aware of this orally thing. I can't
 16 remember if there was something about how Mr. Flores
 17 didn't have to sign anything.
 18 So I think there was, I think that there had
 19 to be motions to compel the assessment of Mr. Flores. I
 20 think in that Judge Zilly said that he didn't have to
 21 sign anything. I don't recall there was anything about
 22 not getting oral acceptance. So the --
 23 **Q. Do you think that -- I'm sorry. Am I**
 24 **interrupting your answer?**
 25 A. I guess I was going to finish with one extra

61

1 sentence. Which was that, because I think you were
 2 asking on the day that -- maybe I forget what you were
 3 asking, so I'll stop.
 4 **Q. I'll represent to you that this is a letter**
 5 **that I prepared to send to you on February 27, 2009, and**
 6 **before sending the letter I sent it to Mr. Bratz for his**
 7 **review, that Mr. Bratz said don't send that to Dr. Rosen**
 8 **and requested that I give it to him, him being Mr.**
 9 **Bratz, without Mr. Bratz saying he would or he wouldn't**
 10 **give it to you or making any commitment.**
 11 So my question is whether or not Mr. Bratz
 12 ever showed this letter to you. And I understand your
 13 answer to that question to be, no, you have never seen
 14 this letter before. Is that correct?
 15 A. That's correct.
 16 **Q. And I would further understand that no one**
 17 **informed you as of the time and place of the Flores exam**
 18 **that his lawyer was objecting to your asking him to**
 19 **agree to your exam conditions either orally or in**
 20 **writing. No one told you that. Is that right?**
 21 A. That's correct.
 22 **Q. Then we are done with that exhibit. Do you**
 23 **need to take a short break or do you want to keep going?**
 24 A. I'm okay.
 25 MR. EVANS: Why don't we take a real short

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September 28, 2009

DAVID C. BRATZ
 Attorney at Law
 LeGros, Buchanan & Paul
 701 Fifth Avenue, Suite 2500
 Seattle, WA 98104

IN RE: FLORES V. GLACIER FISH

DEPOSITION OF: GERALD M. ROSEN, Ph.D. (9/23/09)

A copy of the deposition transcript of the above-named deponent is provided via E-transcript along with scanned exhibits. Please have the deponent review the deposition and sign the Correction Sheet and Affidavit. The signed Correction Sheet and Affidavit should then, within 30 days, be forwarded to:

THOMAS C. EVAN
 Attorney at Law
 INJURY AT SEA
 4705 16th Avenue
 Seattle, WA 98105

who is retaining the original deposition until time of the trial.

If you have any questions, feel free to contact me at the number listed above.
 Sincerely,

 SUSAN CANNON, CCR

cc: THOMAS C. EVANS

HONORABLE DOUGLASS NORTH

LE GROS BUCHANAN AND PAUL
JUL 01 2009
RECEIVED

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ANCELMO RODRIGUEZ-GARCIA, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

No. 08-2-12754-1SEA

D.A.N.
~~[proposed]~~ ORDER GRANTING MOTION
TO COMPEL RULE 35 EXAMINATION;
ENTERING PROTECTIVE ORDER
EXCLUDING PLAINTIFF'S COUNSEL
FROM RULE 35 EXAMINATION; and
ORDERING SANCTIONS

THIS MATTER has come on before the above-entitled Court on Defendant Glacier Fish Company, LLC's Combined Motion to Compel Rule 35 Examination; for Protective Order Excluding Plaintiff's Counsel from Rule 35 Examination; and for Sanctions. The Court has reviewed the files and records herein, the memoranda and declarations submitted by the parties in support of, and in opposition to the motion (if any), and finding itself fully apprised of all issues presented, **GRANTS** Defendant's Motion.

In granting Defendant's Motion, the Court specifically FINDS:

[proposed] ORDER GRANTING MOTION TO COMPEL RULE 35 EXAMINATION; ENTERING PROTECTIVE ORDER EXCLUDING PLAINTIFF'S COUNSEL FROM RULE 35 EXAMINATION; and ORDERING SANCTIONS – Page 1

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

- 1 (1) The Plaintiff's mental state is "in controversy" and the Defendant has
2 established "good cause" for the requested independent medical examination,
3 as required under Civil Rule 35.
- 4 (2) Defendant's proposed expert, clinical psychologist Dr. Gerald M. Rosen, is a
5 suitably licensed or certified examiner under Civil Rule 35.
- 6 (3) The duration and timing of the examination--one full day and one half day (on
7 nonconsecutive days)--is reasonable and proper.
- 8 (4) Pre-examination disclosure of the standardized tests to be administered shall
9 not be required.
- 10 (5) Dr. Rosen is expressly allowed to: (i) read the document entitled "Information
11 Pertaining to Legal, Insurance, and Employer Evaluation" to the Plaintiff; (ii)
12 seek Plaintiff's verbal understanding of the information contained therein; and
13 (iii) seek the Plaintiff's verbal acknowledgement and/or acceptance to those
14 terms and conditions. No Civil Rule 35(a)(2) representative shall impede Dr.
15 Rosen's process of obtaining informed consent.
- 16 (6) Defendant will reimburse Plaintiff for his examination-related mileage at a
17 rate of \$0.51/mile and for documented reasonable food and lodging expenses
18 associated with his attendance.

19 As such it is hereby ORDERED that Plaintiff submit to a mental examination with the
20 following specifications:

21 Examiner: Dr. Gerald M. Rosen, Ph.D., will perform Plaintiff's Rule 35 examination.
22 Date/Time: July 13, 2009 from 9:30 a.m. to 5:00 p.m. (with appropriate breaks);
23 July 15, 2009, from 9:30a.m. to 1:30 p.m. (with appropriate breaks).

[proposed] ORDER GRANTING MOTION TO COMPEL RULE 35
EXAMINATION; ENTERING PROTECTIVE ORDER
EXCLUDING PLAINTIFF'S COUNSEL FROM RULE 35
EXAMINATION; and ORDERING SANCTIONS

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

1 Place: Office of Gerald M. Rosen, Ph.D.
2 2825 Eastlake Avenue East, Suite 205
3 Seattle, Washington, 98102

4 Manner, conditions & scope:

- 5 1. Interviews and testing of Ancelmo Rodriguez-Garcia at Dr. Rosen's office for clinical
6 assessment to include (a) a thorough evaluation of all presenting problem(s); (b) an
7 assessment of the individual's beliefs as to what caused the alleged problems; (c) an
8 exploration of all reasonable competing hypotheses; (d) an evaluation of treatment
9 efforts to date; and (e) an assessment of the individual's prognosis with
10 recommendations for any future treatment that appears identified.
- 11 2. An interpreter, Court-certified in the Spanish language, will be present for all portions
12 of the mental examination.
- 13 3. Dr. Rosen will digitally audio-tape the examination, and a copy of this recording will
14 be made to Plaintiff's counsel and/or Plaintiff's qualified expert.
- 15 4. Dr. Rosen will not require Plaintiff to sign or fill out any documents.
- 16 5. Any representative present under Civil Rule 35 must strictly comply with the
17 limitations of subpart (a)(2), and must not engage in any conduct or actions that
18 obstructs or interferes with the examination. Per the protective order entered
19 concurrently with this Order, Plaintiff's counsel Thomas C. Evans is prohibited from
20 acting as the Rule 35(a)(2) representative and from attending the examination in any
21 other capacity.

22 In addition, the Court specifically **FINDS** that Mr. Evan's improper, unreasonable,
23 harassing and obstructive conduct at the agreed to Rule 35 examination of plaintiff

1 Hernandez on June 10, 2009, persistent unjustified refusal to allow Dr. Rosen to obtain the
2 Plaintiff's informed consent, and unlawful substantive ex parte conduct with Defendant's
3 retained expert, and the unabated likelihood of further interruptive and/or inappropriate
4 behavior at other examinations conducted by Dr. Rosen, is good cause for his exclusion from
5 Plaintiff's Court ordered Rule 35 examination. NOW, having found good cause established,
6 the Court **ORDERS ENTRY OF A PROTECTIVE ORDER** excluding Mr. Thomas
7 Evans from attending, in any capacity, the Rule 35 examination of Plaintiff.

8 Moreover, the Court **ORDERS ENTRY OF SANCTIONS** under Civil Rule
9 37(a)(4) & (d) against Plaintiff's counsel Mr. Thomas Evans, personally, for his improper and
10 unlawful conduct with defense expert Dr. Rosen on June 10, 2009, and for inexcusably
11 failing to raise any issues regarding obtaining of informed consent prior to that date, in the
12 amount of ~~\$13,820~~ ^{\$5,000.00}, which sum represents the fees and costs incurred by Defendant as
13 ~~result of said conduct~~ ^{P.A.N.}

14
15 DATED this 26th day of June, 2009.

16
17 Douglas A. North
18 HONORABLE DOUGLASS A. NORTH
19 King County Superior Court Judge

20
21
22
23
[proposed] ORDER GRANTING MOTION TO COMPEL RULE 35
EXAMINATION; ENTERING PROTECTIVE ORDER
EXCLUDING PLAINTIFF'S COUNSEL FROM RULE 35
EXAMINATION; and ORDER

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

1 Presented By:

2 

3 DAVID C. BRATZ, WSBA #15235
4 CAREY M.E. GEPHART, WSBA #37106
5 Attorney for Defendant Glacier Fish Company, LLC
6 LeGros, Buchanan & Paul
7 701 Fifth Avenue, Ste. 2500
8 Seattle, WA 98104
9 Telephone: (206) 623-4990
10 Fax: (206) 467-4828

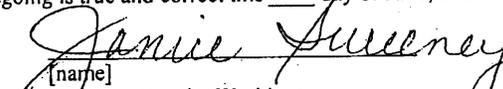
11 **CERTIFICATE OF SERVICE**

12 The undersigned certifies that on this day she caused to be served
13 in the manner noted below, a copy of the document to which this certificate is
14 attached, on the following counsel of record:

15 Thomas C. Evans
16 4705 16th Avenue NE
17 Seattle, WA 98105
18 Tel: (206) 527-5555
19 Fax: (206) 527-0725

- 20 Via Mail
21 Via Facsimile
22 Via Messenger

23 I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct this 15 day of June, 2009

24 
25 [name]
26 Signed at Seattle, Washington

1 Defendant's Order, this Court is now urged to reconsider the punitive and
2 unsupported provisions of said order. Plaintiff's request for relief is also outlined in
3 a companion letter served with these motions documents, also dated July 6, 2009,
4 and directed to The Honorable Douglass North, Judge.

5 I. RELIEF REQUESTED

6 ~~(1) Pursuant to CR 60(b), vacate this Court's June 26, 2009 Order in its~~
7 entirety, upon a finding said Order was mistakenly entered without full
8 consideration of Plaintiff's Opposition.

9 (2) As an alternative to the above, and in accordance with CR 60(b), vacate
10 those provisions of the June 26, 2009 Order at P. 2, ¶ 5, to the extent that Dr.
11 Rosen advises and discuss with Plaintiff, Ancelmo Rodriguez-Garcia, and seeks
12 consent with respect to, issues regarding attorney-client privilege, and further
13 vacate that portion of said Order imposing a undefined \$5,000 payment.

14 (3) In alternative to each of the above, pursuant to CR 59(a), reconsider the
15 above this Court's June 26, 2009 Order.

16 II. STATEMENT OF FACTS

17 This Court's Order of June 26, 2009 is extraordinarily punitive, unsupported,
18 and suggests relief that frankly likely only would be entered upon default.

19 This Court's Order puts Plaintiff's counsel in an extraordinary ethical
20 dilemma. The Court has signed an Order, which at P. 2, ¶ 5, requires that
21 Plaintiff's counsel deliver up his client to Defendant's hired representative, Dr.
22 Gerald Rosen, on July 13, 2009, and in the forced absence of Plaintiff's counsel,

1 Plaintiff is required to allow Defendant's hired representative, Dr. Gerald Rosen, to
2 advise Plaintiff as to what this non-attorney doctor believes is the definition of
3 attorney-client privilege and then seek in some form or another, Plaintiff's possible
4 consent to waiver of the attorney-client privilege. See specifically, Exhibit 3,
5 attached to Letter to the Honorable Douglass A. North, July 6, 2009 wherein Dr.
6 Rosen specifically advises that IME examinees may waive the attorney-client
7 privilege and further specifically seeks to determine whether or not the examinee
8 will waive attorney-client privilege. Absolutely nothing in civil litigation could
9 provide more of an anathema to an attorney, than a Court Order, requiring that
10 the attorney deliver his client, ex-parte, to a paid representative of Defendant to
11 discuss attorney client privilege issues and waiver of attorney client privilege. It is
12 inconceivable that any Court, appellant or otherwise, would ever support such a
13 requirement. Requiring a party in civil litigation, to be put in the hands of the
14 other party's opponent (ex-parte) to discuss attorney-client issues and waiver of
15 attorney client privilege, is so offensive and so contrary to civil litigation practice
16 that no attorney, in good conscience, can, ethically, consent to his client doing so.
17 Such a requirement nullifies any concept of attorney client privilege and gives one
18 party, in this case, Defendant, a clearly extra judicial advantage. Yet, this is
19 precisely what this Court's Order of June 26, 2009 would require. It is
20 inconceivable that this Court would have signed such a requirement except on a
21 default basis.
22

1 For equally unexplained reasons, this Court's Order of June 26, 2009 (P. 4,
2 *Lns.*, 8-12) orders Plaintiff's counsel to pay \$5,000 "under Civil Rule 37(a)(4) and
3 (d)" under circumstances where none of the proceedings involved even arguably
4 concern CR 37(a)(4) and (d) matters, which relate entirely to deposition, and
5 discovery matters. Even what the \$5,000 is for is thrown into question as a result
6 of the Court's interlineations, striking reference to fees and costs. Again, the
7 Court's action is suggestive of relief entered solely by default.

8 Plaintiff's counsel vigorously opposes Dr. Rosen quizzing his client on
9 attorney-client privilege issues and at the risk of further censure, states that
10 absolutely nothing counters an attorney right, indeed, obligation, to advise a client
11 not to engage in such discussions with an opponent's representative. That an
12 attorney would be subject to monetary penalty for rendering such advise, as
13 appears to have happened here, is a little like being sent to the firing squad, for
14 refusing to lie. Plaintiff's counsel cannot lie. Plaintiff counsel's client, Mr. Garcia,
15 cannot be compelled, under any circumstances in civil litigation, to discuss and
16 potentially waive, his attorney client privilege, ex-parte, by compulsion of Court
17 Order.

18 Time and time again, during Dr. Rosen's June 9, 2009 encounter in the
19 Hernandez case (Cause No. 08-2-080009 - 3, Dr. Rosen insisted, not just
20 suggested, that an IME examinee must agree to his Terms & Conditions. The
21 transcript of proceedings in that case are replete with Dr. Rosen's insistence on an
22

1 IME examinee's acceptance of the conditions, not just discussing them, and his
2 clear cancellation of the exam for the failure to do so:

3 "Dr. Rosen: I can't conduct an evaluation unless a person
4 agrees to it, and accepts the notion that I am going to be
5 conducting it under the kinds of conditions that I am
6 speaking about in this form. So I have had many people
7 who don't sign this, but they do agree that they understand
8 it and they accept it."

9 *Transcript, P. 10, Ln. 23 - P. 11, Ln. 3*

10 "Dr. Rosen: If you are not going to let him formally accept it,
11 then it would not be proper for me to conduct the exam.
12 Because I can't conduct the exams that people aren't
13 themselves accepting, unless there is a Court Order that has
14 them doing it against their wishes."

15 *Transcript, P. 11, Ln. 5-9.*

16 "Mr. Evans: . . . I hope that you understand correctly what I
17 have written here. What I have written is, you should not
18 ask our client to agree or accept your conditions on your
19 Information sheet.

20 Dr. Rosen: And I have to ask him to accept it . . . and so I
21 think we can just stop for today . . ."

22 *Transcript, P. 15, Lns. 7-16*

Dr. Rosen made it extremely clear – only if a Plaintiff agrees to his conditions, will he continue with the exam and that is completely and utterly contrary to state law, CR 35, case precedent, and any authority of this Court with respect to attorney-client privilege issues. As stated in Plaintiff's motion documents, at Plaintiff's counsel suggestion, the complete examination form was read to Plaintiff so that Dr. Rosen could be assured that Plaintiff was aware of his form and originally Dr.

1 Rosen agreed that would be sufficient. Dr. Rosen simply wanted to make sure that
2 in that specific case (Hernandez) that Mr. Hernandez understood the form:

3 "Dr. Rosen: I would like you to establish that if he
4 understands, which would be communicating my questions
5 of concern. And then, if he has questions, then you could
6 still come in and we can discuss the questions he has."

7 *Transcript, P. 7, Lns. 21-24.*

8 However, as stated above, Dr. Rosen later changed his mind.

9 It is inconceivable, that there was not even an IME examination in this case,
10 that punishment would be imposed. Further still, it is also inexplicable that
11 punishment would be imposed given that the entire discourse between Plaintiff's
12 counsel and Dr. Rosen in the other related matter, was courteous, polite, to the
13 point, and respectful.

14 **III. STATEMENT OF ISSUES**

15 (1) Should this Court vacate in whole or in part, its Order of June 26, 2009,
16 as to Ordering Plaintiff to appear, ex-parte, and discuss/decide whether or not to
17 waive attorney-client privilege and force Plaintiff's counsel to pay a \$5,000 penalty
18 of some sort? Answer, No.

19 (2) Short of immediate vacation in whole or part of this Court's Order under
20 CR 60(a) and/or (d) should the Court order reconsideration under CR 59? Answer:
21 Yes.

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IV. EVIDENCE RELIED UPON

(1) Letter to the Honorable Douglass A. North, July 6, 2009 and Exhibits attached thereto.

(2) Declaration of Thomas C. Evans, submitted herewith.

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V. AUTHORITY & ARGUMENT

This Court has the authority under CR 60 to provide immediate relief as to matters that are clearly entered in legal error, mistake, inadvertence, or on similar grounds:

“CR 60 Relief from Judgment or Order. (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the Court may relieve a party or legal representative from final judgment, order, or proceeding, for . . . (1) mistake, inadvertence, surprise, excusable neglect, or irregularity in obtaining a judgment or order. . .”

13 Two provisions of this Court’s Order are especially suspect and likely have been
14 entered either by default and/or error, as identified by above, namely the provision
15 in this Court’s Order that would order ex-parte discussion of attorney-client
16 privilege with Defendant’s representative, and imposing of a \$5,000 unidentified
17 fine and/or penalty of some sort. The Court has ample authority to vacate the
18 Order of June 26, 2009 entering that relief in part or in total.

19 In any event, the Court has the authority under CR 59 to reconsider it’s
20 ruling, however, that is small solace in light of the fact that the Court must first
21 order argument on reconsideration and Plaintiff in this case has been ordered to
22 an ex-parte IME for July 13, 2009. See Order of June 26, 2009, ordering Plaintiff

1 to an IME exam with Dr. Rosen starting July 13, 2009 at 9:30 a.m., P. 2, Lns, 21-
2 23. There simply is not enough time remaining for consideration of reconsideration
3 and for that reason the Court is strongly urged to act, now, under CR 60(b).

4 **VI. PROPOSED ORDER**

5 Plaintiff submits three Proposed Orders, the first of which would vacate this
6 Court's June 26, 2009 Order in whole; the second, to vacate the order in part,
7 either upon a finding of impropriety with respect to attorney-client privilege and
8 monetary fine issues, or in whole, with respect to entry of the Order by default. The
9 third order is for reconsideration however this relief would be useless given the
10 July 13, 2009 compliance date of the existing Order.

11 Respectfully submitted this 6th day of July 2009.

12 **INJURY AT SEA**

13
14 */s Thomas C. Evans*
15 **THOMAS C. EVANS, WSBA #5122**
16 **Attorney for Plaintiff**

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NOW, THEREFORE, the Court does hereby ORDER that this Court's Order of June 26, 2009 shall ^{not} be reconsidered, and the Clerk/Bailiff shall notify Defendant of ~~such reconsideration and provide Defendant an opportunity to respond to Plaintiff's motion documents as advised by the Bailiff/Clerk.~~

Reconsideration denied.

DATED this 17th day of July, 2009.

Douglass A. North
THE HONORABLE DOUGLASS A. NORTH
KING COUNTY SUPERIOR COURT JUDGE

Presented By:

INJURY AT SEA

Thomas C. Evans, WSBA #5122
Attorney for Plaintiff

4

HONORABLE DOUGLASS NORTH

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ANCELMO RODRIGUEZ-GARCIA, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

No. 08-2-12754-1SEA

**[proposed] ORDER DENYING
PLAINTIFF'S MOTION FOR
IMMEDIATE CR 60 RELIEF FROM
JUNE 26, 2009 COURT ORDER**

THIS MATTER has come on before the above-entitled Court on Plaintiff's Motion for Immediate Relief from June 26, 2009, Court Order (CR 60(a) and (b)) filed on July 6, 2009. The Court has reviewed the files and records herein, the memoranda and declarations submitted and incorporated by the parties in support of and in opposition to the motion, *including plaintiff's letter dated 7/8/09* and *D.A.N.* and deems itself fully advised in the premises. NOW, THEREFORE,

IT IS HEREBY ORDERED that Plaintiff's Motion is DENIED. The Court's June 26, 2009, Order Compelling the Examination of Plaintiff Ancelmo Rodriguez Garcia, and all conditions detailed and sanctions awarded therein, remains in full force and effect.

[proposed] ORDER DENYING PLAINTIFF'S MOTION FOR
IMMEDIATE CR 60 RELIEF FROM JUNE 26 COURT ORDER -

Page 1

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Page 84

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

1
2 DATED this 9th day of July, 2009.

3
4 Douglas A. North
5 HONORABLE Douglas A. North
6 King County Superior Court Judge

7 Presented By:

8 s/ David C. Bratz
9 Washington State Bar Number #15235
10 LeGros, Buchanan & Paul
11 701 Fifth Avenue, Ste. 2500
12 Seattle, WA 98104
13 Telephone: (206) 623-4990
14 Fax: (206) 467-4828
15 Attorney for Defendant Glacier Fish Company, LLC

The court notes that it did read and consider all of plaintiff's materials, even though late-filed before issuing its original decision dated June 26, 2009.

16 **CERTIFICATE OF SERVICE**

17 The undersigned certifies that on this day she caused to be served in the manner noted below, a copy of the document to which this certificate is attached, on the following counsel of record:

18 Thomas C. Evans
19 4705 16th Avenue NE
20 Seattle, WA 98105
21 Tel: (206) 527-5555
22 Fax: (206) 527-0725

- 23 Via Mail
 Via Facsimile
 Via Messenger

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct this 8th day of July, 2009.

[Signature]
Signed at Seattle, Washington

1 THE COURT: Please be seated. Good
2 afternoon.

3 MR. BRATZ: Afternoon Your Honor.

4 THE COURT: So we're here on the combined
5 cases of -- well, Glacier Fish is the defendant in both
6 of them. I guess we've got Rodriguez/Garcia in one and
7 Hernandez in the other. And we've got a bunch of
8 motions at pretrial conference, and we can just set a
9 trial date, I guess. I think Mr. Bratzki these are
10 mostly your motions.

11 MR. BRATZ: David Bratz.

12 THE COURT: You're Bratz, I'm sorry. I
13 guess I haven't met you folks.

14 MR. BRATZ: My associate (inaudible).

15 MR. EVANS: I'm Tom Evans, Your Honor.

16 THE COURT: Okay. So Mr. Bratz, I don't
17 know if you have an order that you would like to
18 proceed through with your motions.

19 MR. BRATZ: I can just kind of get started
20 if the Court doesn't mind.

21 THE COURT: Sure.

22 MR. BRATZ: Some of the issues that we have
23 today are (inaudible).

24 THE COURT: Right. And actually, I want to
25 hold off on that one because I had neglected earlier,

1 and I'm having my bailiff do that while we're arguing.
2 I don't know whether I'm currently assigned to the
3 criminal calendar, and I need to inquire of the chief
4 criminal judge, Judge Armstrong, whether she wants me
5 to go ahead with these cases or whether we ought to
6 pre-assign them to another civil judge to try them, and
7 hopefully we can get an answer to that in the next half
8 hour, 45 minutes, because it would make sense to -- if
9 it's going to be -- if there's another judge going to
10 be assigned to do it, then we ought to set up -- have
11 that judge do the determination of when the trial is
12 going to be.

13 MR. EVANS: Your Honor, I think we're in
14 agreement, and Mr. Bratz was kind enough to come
15 halfway in terms of our request for trial date, it was
16 separated by two weeks. We still would like a little
17 more separation time, but that's probably the one item
18 on the list of eight items that I have where we're
19 pretty much in agreement.

20 THE COURT: Right. And I think that's great
21 that you are in agreement, largely in agreement, on
22 that, but as I said I want to basically defer that for
23 a moment until I get some direction from Judge
24 Armstrong on whether I'm going to keep this case or
25 whether we should give it to another judge who is on

1 the civil calendar to actually try it.

2 MR. BRATZ: Yes, Your Honor.

3 THE COURT: So perhaps you want to move on
4 to something else, Mr. Bratz.

5 MR. BRATZ: Okay. Next item I think that
6 needs to be addressed is we have a pending motion in
7 the Granall [ck sp] matter civil rule 35 exam. That
8 motion is moot insofar as the exam itself is concerned
9 because it has been conducted. There's an issue of
10 sanctions that goes along with it that has not been
11 addressed by the court. The court has addressed a
12 similar issue in the Rodriguez matter, but the Pernall
13 matter remains outstanding. I don't know if the Court
14 cares to hear argument from me on that subject beyond
15 what --

16 THE COURT: Right. I mean, I understand Mr.
17 Bratz, you put forth all the extensive work that you
18 feel has gone into doing this. I basically felt that
19 the sanctions that I entered in the Hernandez matter
20 were sufficient to cover really both cases, because it
21 was really directed at the fact that the original CR 35
22 were cancelled but you had to reschedule, that you had
23 to make a motion, that you had to do all of that. And
24 so I don't know that it's really -- I don't really feel
25 we need to enter additional sanctions.

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1 I know that you feel that there's more owed

2 to your client on this, but the original \$5,000 that I
3 awarded was basically designed to cover the
4 cancellation and rescheduling and the motions and so on
5 relating to both cases.

6 MR. BRATZ: So no further sanctions is the
7 Court's --

8 THE COURT: Right.

9 MR. BRATZ: Next on the agenda, this is the
10 plaintiff's motion which (inaudible) outstanding motion
11 by the plaintiff to exclude Dr. Rosen which I think is
12 probably moot (inaudible) grant that motion.

13 THE COURT: Right. I mean basically Mr.
14 Evans filed that motion at the same time you filed the
15 motion to compel, and I granted your motion, so sort of
16 by necessary implication I'm denying Mr. Evans' motion.

17 MR. EVANS: I understand that, Your Honor.
18 But I would -- of course, the Court willing, like to
19 address the court briefly on that issue because the
20 circumstances have changed. Now what has happened is
21 that there has been an IME with the forced removal of
22 counsel during the IME. And I think that that makes
23 somewhat of a different situation in terms of whether
24 or not this doctor can testify. And I appreciate where
25 the Court is coming at overall on those issues, but at

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5

1 some point I would like to address the Court on the Dr.
2 Rosen issue. I think this has all sort of pulled it

3 together. I'm prepared to do that relatively briefly.

4 THE COURT: All right. I guess what I don't
5 quite understand, Mr. Evans, and perhaps you can
6 enlighten me on this, is that my feeling is sort of, I
7 understand you have arguments that Dr. Rosen is biased,
8 that he's not a proper expert, et cetera. My feeling
9 basically is that when it's appropriate to give the
10 defense an opportunity to have a medical exam, in the
11 absence of the guy being not licensed or a butcher or
12 something or other, they ought to be able to choose who
13 they want, and all the bias and so on of the expert is
14 in your cross-examination. I mean, you can tear the
15 guy apart at trial if in fact he's really biased.

16 And so I'm not quite understanding what your
17 concern is at this point.

18 MR. EVANS: Let me say that I agree with the
19 court that they're entitled to Dr. Rosen in terms of
20 the examiner. And I don't want to replot already
21 plowed ground.

22 The circumstances leading to how these
23 things got cancelled have always been of concern to me,
24 and of course still are, because there's the sanction
25 order that's still outstanding.

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6

1 THE COURT: Right.

2 MR. EVANS: And so I was looking at an
3 opportunity to go through briefly with the Court the

4 circumstances regarding the cancellation and what
5 happens when we appear with Dr. Rosen and the forms
6 that he asked us to fill out and things of that sort.
7 what I did is I just took the essential forms and I
8 brought a little Elmo projector to go over that.

9 At the end of the day it's getting back to
10 what happened in that interaction when we first met
11 with Dr. Rosen. To the extent that it's still relevant
12 in this case, I cannot understand to this point in time
13 how what happened, and what I did was wrong in any
14 respect.

15 THE COURT: well, I understand your point,
16 Mr. Evans, that you felt that your client was being
17 asked to sign a form that was waiving certain rights
18 that he had, but I just didn't see the form as doing
19 that. I saw that as being something that Dr. Rosen
20 needed to have signed in order to feel like he had, you
21 know, an appropriate acknowledgement by the person that
22 he was examining of what his role in the case was.

23 Certainly I'm -- I would not treat that form
24 as waiving attorney-client privilege, regardless of
25 what it says on it, because it wouldn't be appropriate

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1 to waive the attorney-client privilege based upon
2 something like that.

3 But I did feel after -- I read, you know,
4 the transcript of what occurred there, and it just

5 seemed to me that your actions, Mr. Evans, were
6 designed to obstruct the exam. And that was why I came
7 out the way I did on it is that you were just basically
8 obstructing the exam.

9 MR. EVANS: I understand that, and I
10 appreciate that, Your Honor, and then of course I have
11 the utmost respect for the Court's ruling and any
12 ruling like that which goes directly to an attorney's
13 conduct is very critical and very, very important, and
14 I appreciate that. But I firmly believe, at the risk
15 of opening the door here, that I didn't do anything
16 wrong. And that I could not have done anything
17 differently than what I did given the process that
18 evolved and because of the forms that Dr. Rosen had.

19 Now, again, I appreciate the Court's ruling
20 here, and I don't want to replot ground again, but if
21 the Court would allow me to take just a few minutes. I
22 have a couple of forms that I brought with me to show
23 to the Court to help maybe explain -- it may not make
24 any difference at the end of the day in terms of how
25 that ruling --

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1 THE COURT: I guess at this point, Mr.
2 Evans, I'm trying to figure out how that's relevant to
3 anything now, because unless you're making a motion for
4 reconsideration, which I think we're already past, I'm
5 not sure how it bears on any issues that are currently

6 before the Court.

7 MR. EVANS: It doesn't, and the Court is
8 absolutely correct in that regard. The Court has ruled
9 on that issue. The only possible way that the Court
10 could affect the issue at this point would be under
11 rule 60 if there was an error, and I have of course
12 addressed that issue with the Court. The Court may be
13 familiar with it, but the wording in that order speaks
14 to an IME that never occurred. It has me being
15 sanctioned for appearing at and obstructing Dr. Rosen
16 in an IME that actually never occurred.

17 what happened here is that, as most counsels
18 do, when Mr. Bratz drafted his orders for the two cases
19 he made them exactly the same. Not his fault. The
20 first IME occurred, but the second IME never actually
21 occurred, but nonetheless the order was written as if
22 it had occurred. So there's a sanction order out there
23 that sanctions me for my conduct at an IME with a
24 doctor and an individual that actually never occurred.

25 THE COURT: Okay. Well, to the extent that

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1 that's true, maybe what we need to do is enter an
2 amended order. I understood that only one had
3 occurred, but that it was clear that the other was
4 going to be -- the same issues were going to arise and
5 that therefore it was, you know, that basically it was
6 appropriate to enter the same order in each, although

7 obviously the actual sanctions for misconduct would
8 probably only occur in one case, but that was the only
9 one that actually occurred, but it was clear that the
10 same issue was going to occur in the other one.

11 MR. BRATZ: I understand, your Honor, that
12 (inaudible) the Court specifically finds that Mr. Evans
13 (inaudible) improper, unreasonable harassment and
14 obstructed conduct of the agreed-to rule 35 exam of
15 plaintiff Hernandez, on June 10 (inaudible). So the
16 order was entered in the Rodriguez case (inaudible)
17 but it definitely referred to the behavior as the
18 Hernandez exam (inaudible) Rodriguez exam

19 THE COURT: Right.

20 MR. EVANS: Well, I wonder if I could borrow
21 (inaudible) copy of the testimony --

22 THE COURT: Sure.

23 MR. EVANS: (Inaudible) if the Court
24 (inaudible)

25 THE COURT: Uh-huh.

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1 MR. EVANS: The top of the order finds
2 specifically that on June 10, 2009 there was
3 (inaudible) refusal to allow Dr. Rosen to obtain
4 plaintiff informed consent (inaudible) unlawful
5 substantive expert conduct with retained expert
6 (inaudible).

7 The exam never occurred, and the transcript

8 will show that Dr. Rosen is the one who actually
9 suggested that the first exam, that we not have the
10 second exam. And during the first exam, Your Honor,
11 four times I asked Dr. Rosen, please call Mr. Bratz.
12 And I told Dr. Rosen, I can't advise you. I can't
13 discuss with you. Only Mr. Bratz can do that. I
14 understand that when a counsel is preparing an order
15 they want to prepare it for the most favorable outcome,
16 but these are serious and substantive findings and
17 charges here that I intentionally obstructed this
18 doctor during the course of his exam when I believe I
19 did just the opposite. I asked him -- I have the
20 transcript.

21 THE COURT: Right. And I read the
22 transcript when I originally read -- ruled on the
23 motion.

24 MR. EVANS: Right. And the other part of
25 this order that causes me a lot of concern is that it

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1 also includes the finding that I never actually told
2 Mr. Bratz of my concerns regarding that issue.

3 And here is the letter, February 27, 2009.
4 It's addressed to Dr. Gerald Rosen. If you look at it
5 it says that on the bottom, please do not -- at the
6 very bottom: Please do not ask my client to agree or
7 disagree with any specific terms or conditions for
8 conducting this exam as records in your form. Do not

9 ask (inaudible).

10 THE COURT: Uh-huh.

11 MR. EVANS: Now, this came out in February.

12 And before I sent it to Dr. Rosen I gave it to Mr.

13 Bratz, because I wanted it him to know, before I was

14 doing this, that I was planning on doing it. He tells

15 (inaudible) -- he says don't do that, don't send it to

16 Dr. Rosen. I said okay, Dave, I won't do it. I'll

17 send it to you instead. So I sent it to him with the

18 understanding -- and we have three cases that he would

19 get on the phone and do something about this and talk

20 to Dr. Rosen about these concerns.

21 I think as the Court knows full well, we

22 litigated this issue in federal court --

23 THE COURT: Right.

24 MR. EVANS: -- that that very same form was

25 before Judge Zilly. And Judge Zilly, in his words,

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1 said no, the doctor cannot go through (inaudible).

2 Now, I appreciate Mr. Bratz's argument,

3 because it's very creative, that, okay, well, it says

4 he can't sign the form, but he can orally go ahead and

5 ask him about the form. Well, you know, maybe I missed

6 a class in law school, but it would seem to me that if

7 you're prohibited from having somebody agree to

8 something in writing, you have a federal judge that

9 says you can't do that, that doesn't mean that you can

10 orally do it.

11 So I believe -- this is my contact with Mr.
12 Bratz well before this examination, that he had to
13 inform specifically of what these issues were and what
14 the problems were. So it's a little surprising to me
15 to see the allegations as they show up in this case,
16 that I didn't let them know in advance.

17 One other issue if the Court will indulge
18 me.

19 THE COURT: All right. Then we need to move
20 on to the other things.

21 MR. EVANS: If the Court wishes to not get
22 into this again, then I'll of course bring it to an
23 end. This is the form that Dr. Rosen gave me when I
24 showed up --

25 THE COURT: Uh-huh.

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1 MR. EVANS: -- with my client. And what I
2 would like to do is focus in on one part of that. And
3 he asked me in the form, if you feel there are
4 circumstances that you should be allowed to interrupt
5 the interview, please explain. That was him. He asked
6 me that. Then in this other part: Do you have any
7 concerns or questions, he asked me, and if so, please
8 so indicate.

9 So the doctor himself is saying to me do I
10 have any concerns, what are those, talk to me about it.

11 And I have an order now, your Honor, out there that
12 says that I harassed this man, that I interrupted the
13 IME that -- the language in that order is almost a
14 disbarable offense. It has me going into an IME, and
15 it sounds like I roughed this guy up or something. And
16 again, I -- frankly thinking about it, if I had to do
17 it all over again, I don't know what else I could have
18 done. If I hadn't filled his form out, if I hadn't
19 responded to his questions, then I think probably
20 something untoward would have happened, too.

21 So yes, I would like to leave the door open
22 perhaps, at least to the extent that we can frame an
23 order that properly reflects the Court's opinion and
24 understanding.

25 THE COURT: well, I still think that the

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1 basic outcome of the order is correct and the sanctions
2 are correct. It may be that the order overstates
3 things in certain ways. I did believe that you did
4 improperly interfere with Dr. Rosen because, as I read
5 the transcript of what happened, Dr. Rosen made clear
6 that he didn't have to have your client's agreement to
7 all the terms. What he had to have is your client's
8 signature that he had read all of it and not that he
9 was necessarily agreeing to all of it, but that he was
10 aware of all of those.

11 MR. EVANS: Your Honor, I appreciate that,

12 but unfortunately that is not what happened. The
13 doctor actually, absolutely insisted that he agree to
14 those terms and conditions. I have the transcript
15 here.

16 THE COURT: Okay. Well, I don't want to
17 take a lot of time with this right now, Mr. Evans, but
18 I'm certainly willing to look at amending the language
19 of that order, not really changing the substance of it
20 in terms of the sanction or the outcome, but if it
21 overstates what occurred in some way, I'll certainly
22 take a look at the language of it.

23 MR. EVANS: Perhaps we can sit down and work
24 something up and give it to the Court. Here is the
25 portion where Dr. Rosen cancelled the IME because my

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1 client -- I asked my client and the interpreter to read
2 the form for Dr. Rosen as he requested. That occurred.
3 After that happened Dr. Rosen said no, that's not
4 enough. Now I insist that your client agree to it.
5 You must agree to it. And what I said, I can't advise
6 my client to do that. You need to call Mr. Bratz.
7 Then Dr. Rosen cancelled the IME. He's the one that
8 kicked us out out of the room.

9 And again, Your Honor, I've never had
10 anything like this happen. I fully appreciate the
11 Court is of the opinion that I did something wrong. I
12 just want to know what it is and I want to have it in

13 the order, and I'm happy to have it in the order and
14 perhaps Mr. Bratz (inaudible) work something out in the
15 order.

16 THE COURT: Unfortunately, I think that
17 there's been a level of animosity between you and Mr.
18 Bratz that's gotten in the way of trying to get at the
19 merits of this controversy here, because there's been a
20 tendency for both sides to push for everything they
21 could possibly get, and it's possible that this order
22 may overstate it slightly. I still adhere to the basic
23 outcome of the order, but I'm willing to review the
24 language of the order to see whether it perhaps
25 overstates things in some way.

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1 So why don't we move on to the other things
2 that Mr. Bratz has put before the Court for today.

3 MR. BRATZ: Thank you. Your Honor, there's
4 a (inaudible) full outstanding (inaudible) defendant's
5 motion to strike (inaudible) this in the file. The
6 court has issued --

7 THE COURT: Right. See, I don't think I can
8 actually strike them at this point, Mr. Bratz, because
9 they're in the Court file. All I can do is seal the
10 documents that are in the file that have been attached
11 to them. I did issue -- now, I don't know if I've got
12 all of them, but I issued orders to seal for the ones
13 that I was aware of.

14 MR. BRATZ: I think the Court got them all.
15 I'm going to double-check the Court file and make sure
16 there's something out there that (inaudible).

17 THE COURT: Okay.

18 MR. BRATZ: Then there's a motion to compel
19 depositions of Mr. Rodriguez and Mr. Granall based on
20 instructions by counsel not to answer questions
21 (inaudible) lawyer. I don't have a whole lot more to
22 say on that but what's in the brief. The rule is
23 pretty clear, instructions not to answer are improper
24 unless based on privilege. This instruction is not
25 based on the privilege. The only other basis for

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1 instruction not to answer is you're going to under rule
2 30 B immediately terminate the deposition and move for
3 a (inaudible)

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HONORABLE DOUGLASS A. NORTH

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ANCELMO RODRIGUEZ-GARCIA, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

No. 08-2-12754-1SEA

MIGUEL BERNAL HERNANDEZ, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

D.A.N.
[proposed] SUBSTITUTED ORDER
GRANTING MOTION TO COMPEL RULE
35 EXAMINATION (Plaintiff Rodriguez);
PROTECTIVE ORDER EXCLUDING
COUNSEL FROM RULE 35
EXAMINATION (Plaintiff Rodriguez); and
SANCTIONS (Plaintiffs Rodriguez and
Bernal)

[proposed] SUBSTITUTED ORDER GRANTING MOTION TO
COMPEL; PROTECTIVE ORDER & SANCTIONS - Page 1

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7
(206) 623-4990

1 THIS MATTER has come on before the above-entitled Court on Defendant Glacier
2 Fish Company, LLC's Combined Motions to Compel Rule 35 Examination; for Protective
3 Order Excluding Plaintiff's Counsel from Rule 35 Examinations; and for Sanctions. The
4 Court has reviewed the files and records herein, the memoranda and declarations submitted
5 by the parties in support of, and in opposition to the motion.

6 Prior to consolidation of these two matters, the Court entered an order on June 26,
7 2009, Granting Defendant's Motion in its entirety as to Plaintiff Rodriguez based on the
8 following findings, terms, conditions and restrictions:

9 In granting Defendant's Motion, the Court specifically FINDS:

- 10 (1) The Plaintiff's mental state is "in controversy" and the Defendant has
11 established "good cause" for the requested independent medical
12 examination, as required under Civil Rule 35.
- 13 (2) Defendant's proposed expert, clinical psychologist Dr. Gerald M.
14 Rosen, is a suitably licensed or certified examiner under Civil Rule 35.
- 15 (3) The duration and timing of the examination--one full day and one half
16 day (on nonconsecutive days)--is reasonable and proper.
- 17 (4) Pre-examination disclosure of the standardized tests to be administered
18 shall not be required.
- 19 (5) Dr. Rosen is expressly allowed to: (i) read the document entitled
20 "Information Pertaining to Legal, Insurance, and Employer
21 Evaluation" to the Plaintiff; (ii) seek Plaintiff's verbal understanding of
22 the information contained therein; and (iii) seek the Plaintiff's verbal
23 acknowledgement and/or acceptance to those terms and conditions.
No Civil Rule 35(a)(2) representative shall impede Dr. Rosen's process
of obtaining informed consent.
- (6) Defendant will reimburse Plaintiff for his examination-related mileage
at a rate of \$0.51/mile and for documented reasonable food and
lodging expenses associated with his attendance.

As such it is hereby ORDERED that Plaintiff submit to a mental examination
with the following specifications:

Examiner: Dr. Gerald M. Rosen, Ph.D., will perform Plaintiff's Rule 35
examination.

Date/Time: July 13, 2009 from 9:30 a.m. to 5:00 p.m. (with appropriate
breaks);
July 25, 2009, from 9:30 a.m. to 1:30 p.m. (with appropriate
breaks).

1 Place: Office of Gerald M. Rosen, Ph.D.
2 2825 Eastlake Avenue East, Suite 205
 Seattle, Washington, 98102

3 Manner, conditions & scope:

- 4 1. Interviews and testing of Ancelmo Rodriguez-Garcia at Dr.
5 Rosen's office for clinical assessment to include (a) a thorough
6 evaluation of all presenting problem(s); (b) an assessment of
7 the individual's beliefs as to what caused the alleged problems;
8 (c) an exploration of all reasonable competing hypotheses; (d)
9 an evaluation of treatment efforts to date; and (e) an assessment
10 of the individual's prognosis with recommendations for any
11 future treatment that appears identified.
- 12 2. An interpreter, Court-certified in the Spanish language, will be
13 present for all portions of the mental examination.
- 14 3. Dr. Rosen will digitally audio-tape the examination, and a copy
15 of this recording will be made to Plaintiff's counsel and/or
16 Plaintiff's qualified expert.
- 17 4. Dr. Rosen will not require Plaintiff to sign or fill out any
18 documents.
- 19 5. Any representative present under Civil Rule 35 must strictly
20 comply with the limitations of subpart (a)(2), and must not
21 engage in any conduct or actions that obstructs or interferes
22 with the examination. Per the protective order entered
23 concurrently with this Order, Plaintiff's counsel Thomas C.
 Evans is prohibited from acting as the Rule 35(a)(2)
 representative and from attending the examination in any other
 capacity.

 In addition, the Court specifically **FINDS** that Mr. Evan's improper,
unreasonable, harassing and obstructive conduct at the agreed to Rule 35
examination of plaintiff [Bernal] Hernandez on June 10, 2009, persistent
unjustified refusal to allow Dr. Rosen to obtain Plaintiff Bernal's informed
consent, and unlawful substantive ex parte conduct with Defendant's retained
expert, and the unabated likelihood of further interruptive and/or inappropriate
behavior at other examinations conducted by Dr. Rosen, is good cause for his
exclusion from Plaintiff's Court ordered Rule 35 examination. **NOW**, having
found good cause established, the Court **ORDERS ENTRY OF A
PROTECTIVE ORDER** excluding Mr. Thomas Evans from attending, in
any capacity, the Rule 35 examination of Plaintiff [Rodriguez].

June 26 Order. Plaintiff Rodriguez' examination occurred under the terms of the June 26
Order on July 13 and 15, 2009. By agreement of the parties, but without prejudice to either
party's position, Plaintiff Bernal's Rule 35 examination occurred under the terms, conditions

1 and restrictions of the Court's June 26 Order on July 20 and 22, 2009 before entry of any
2 decision on the merits of Defendant's Motion to Compel. Accordingly, to the extent
3 Defendant sought to compel the Rule 35 examination of Plaintiff Bernal, that motion is now
4 **DENIED AS MOOT.**

5 The June 26, 2009, Order is VACATED, and this order is substituted in its place. The
6 Court does find that Mr. Evans' conduct was obstructive and improper, and that sanctions for
7 this conduct are warranted. Accordingly, the Court specifically **GRANTS** Defendants'
8 motions (in both the *Rodriguez* and *Bernal* matters) to the extent they seek sanctions against
9 Mr. Evans. The Court specifically **FINDS** that Mr. Evans obstructed the agreed-to Rule 35
10 examination of Plaintiff Bernal on June 10, 2009, and expressly indicated that he would
11 engage in the exact same conduct at Plaintiff Rodriguez' agreed-to Rule 35 examination the
12 following day. At oral argument on August 7, 2009, Mr. Evans still indicated that he would
13 have done nothing differently. Mr. Evans' obstruction was improper, and forced the
14 cancellation of both Plaintiffs agreed to examinations. Additionally, Mr. Evans failed to
15 raise any issues with Dr. Rosen's informed consent materials at any of the Rule 26(i)
16 conferences, or in any of the email exchanges between counsel, specifically regarding the
17 Rule 35 examinations of Plaintiffs Bernal or Rodriguez. Further, Mr. Evans engaged in
18 improper *ex parte* contact with a defense expert on June 10, 2009, and demonstrated that he
19 could not attend any examinations in a true "observer" capacity with Dr. Gerald Rosen, thus
20 requiring entry of a protective order under Rule 26(c) barring his presence at Plaintiff
21 Rodriguez' examination. Defendants incurred significant documented costs attendant to the
22
23

1 cancellation of Plaintiffs Bernal's and Rodriguez' examinations, and in moving for the
2 protective order under Rule 26(c).

3 **THEREFORE, the Court ORDERS ENTRY OF SANCTIONS** under Civil Rule
4 37(a)(4) & 37(d), and the Court's inherent power, against Plaintiff's counsel Mr. Thomas
5 Evans, personally, for improperly obstructing Dr. Rosen's ability to obtain Plaintiff Bernal's
6 informed consent causing the last-minute cancellation of that examination, for engaging in *ex*
7 *parte* discussions with defense expert Dr. Rosen on June 10, 2009, for expressly indicating
8 an intent to similarly obstruct the examination of Plaintiff Rodriguez which forced
9 cancellation of Plaintiff Rodriguez' examination at the last minute, and for inexcusably
10 failing to raise any issues regarding obtaining of informed consent of Plaintiff Rodriguez or
11 Bernal prior to that date, in the combined total amount of \$5,000. Mr. Evans is ordered to
12 pay the full sanction amount to Defendant's counsel of record within fourteen (14) days of
13 the date this substituted order is executed by the Court.

14 DATED this 14th day of August, 2009.

15
16 Douglas A. North
17 HONORABLE DOUGLASS A. NORTH
18 King County Superior Court Judge

18 Presented By:

19 s/ David C. Bratz
20 Washington State Bar Number 15235
21 Attorney for Defendant Glacier Fish Company, LLC
22 LeGros, Buchanan & Paul
23 701 Fifth Avenue, Ste. 2500
Seattle, WA 98104
Telephone: (206) 623-4990
Fax: (206) 467-4828
Email: dbratz@legros.com

[proposed] SUBSTITUTED ORDER GRANTING MOTION TO
COMPEL; PROTECTIVE ORDER & SANCTIONS – Page 5

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

MIGUEL BERNAL HERNANDEZ,
A Seaman,

Plaintiff,

Vs.

08-2-12754-1 SEA

GLACIER FISH COMPANY, LLC,
A Washington Corporation,
Defendant.

TRANSCRIPT OF PROCEEDINGS

9:05 a.m.

November 30, 2009

Honorable Douglass A. North
King County Courthouse
Courtroom W764
Seattle, WA 98104

DARR CANNON
COURT REPORTER

MOBURG & ASSOCIATES
SEATTLE, WA

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A P P E A R A N C E S

FOR PLAINTIFF:

THOMAS C. EVANS
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1 THE COURT: So I've received a motion from
2 Mr. Evans with regard to interpreters in this matter. I
3 have read the motion. I just skimmed the other
4 materials, but I haven't had a chance to go through the
5 other materials. I just got it ten minutes ago. But I
6 guess we probably need to address that.

7 MR. EVANS: Yes, your Honor. The Court has
8 the documents. I gave a copy to counsel.

9 My number one concern is the issue with
10 respect to bringing matters before this Court if there
11 is a claim or going to be a claim by the defendant that
12 somehow the jury is not hearing the proper evidence or
13 the proper testimony. That's my number one concern, to
14 make it clear on the record here that I believe the
15 defendant has that obligation to do so; not after the
16 case, but during the case. That's the first thing.

17 The second issue, of course, is the shock of
18 having someone who sat in on trial strategy and
19 preparation be hired by the other side and show up in
20 Court. And as I said in my motion documents, I frankly
21 did not recognize Ms. D'Antona because of the changed
22 appearance, and it was only after on our way back that
23 it was brought to my attention as to who that person
24 was.

25 The Court I know is familiar with the ethics

1 with respect to translators. I originally attempted to
2 see if the interpreter who had been hired by defendant
3 to be at the depositions could serve in the trial, and
4 she informed me it's very clear in the code of ethics
5 that, no, once you've done work for one side then you
6 can't do it for the other.

7 I asked Ms. D'Antona to be sure and bill me
8 for the time that she spent. She did that, she billed
9 me for that time, and she billed me for --

10 MS. D'ANTONA: Your Honor, I'm here, and I
11 would like to clarify.

12 THE COURT: Ma'am, you will be given an
13 opportunity, but let me take people one at a time. So
14 you need to wrap up your presentation material so I can
15 get on to finding out what's going on here.

16 MR. EVANS: Right. So I was informed by Ms.
17 D'Antona that she sent me an e-mail bill for \$500
18 covering that time period as well as a cancellation
19 expense. She indicated that she had been hired by the
20 other side and that she did intend to come to court, and
21 that with respect to translation issues that there is
22 some arrangement between her and Mr. Bratz and she said
23 it was confidential. I said, fine, I will not inquire
24 any further.

25 So I want to be very clear here. First

1 of all, I will object to any claim of error by the
2 defendant in this case with respect to inadequacy of
3 translation. I brought a court reporter here this
4 morning to make it abundantly clear and have a record
5 beyond reproach with respect to that first issue.

6 And, second, in light of the
7 confidential aspects of our discussions -- and I do not
8 believe that Ms. D'Antona is in a position where three
9 persons were in attendance, and there are three
10 affidavits now talking about the length and the extent
11 of that conversation -- I do not believe that she is in
12 a position to come here and say that attorney/client
13 privilege and private confidential communications were
14 not exchanged.

15 And so I'm asking the Court to exclude
16 her from these proceedings. I'm asking that the Court
17 be clear with the defendant that if they have claims of
18 alleged error in the record or translation, they need to
19 bring that to the attention of the Court.

20 And, finally, I am asking for sanctions. I
21 think that if I went out and tried to hire somebody who
22 had worked for the opposing side who sat in on
23 confidential discussions that that would not be within
24 the code of ethics.

25 THE COURT: Okay. Mr. Bratz?

1 MR. BRATZ: This is the first I've heard of
2 this this morning. As the Court probably noticed, after
3 the Court allowed Ms. Manriquez we were concerned
4 because she wasn't court certified. So I asked Griselda
5 Ruiz to come in and potentially serve, depending on how
6 things went. She came and she had one morning available
7 last week. She wasn't available beyond that. She's in
8 Argentina now. She suggested Ms. D'Antona to substitute
9 in her place.

10 And Ms. D'Antona came in in the afternoon
11 and is court certified, to my understanding, and I was
12 going to ask the Court for the opportunity to use her on
13 cross-examination. Because I was concerned the way the
14 direct is going, I would like to use a court certified
15 interpreter.

16 I had no information about any confidential
17 communications that Ms. D'Antona was involved in. In
18 fact, I had no conversations with her on that subject at
19 all.

20 Ms. Ruiz told me that Ms. D'Antona had been
21 asked to translate or interpret for Mr. Evans, and she
22 showed up in his office and that she was asked to leave
23 and that she didn't do anything. That was all I knew.
24 I have had no conversations with her beyond that, other
25 than to ask her to show up and tell me if the

1 interpreter that's being used is doing a good job.

2 THE COURT: First of all, I would say that
3 at this point I'm not considering Ms. Manriquez as
4 acting as an interpreter, because an interpreter would
5 be providing a full-time translation from English to
6 Spanish and Spanish to English.

7 Mr. Bernal is in fact testifying in English.
8 What Ms. Manriquez has been doing is helping him out if
9 there's a word or two that he doesn't understand. So I
10 don't think we are in a situation where we are in a
11 thing where we necessarily have to have a certified
12 interpreter.

13 I would feel compelled to have a certified
14 interpreter if Mr. Bernal's grasp of English were such
15 that he really needed to have the interpreter full-time.
16 At this point what we've been doing is he's been
17 testifying in English, and we've been having Ms.
18 Manriquez help if there's a word he doesn't understand
19 or he needs to know what the English word for something
20 is.

21 Now, beyond that, I guess we have a
22 question. Certainly the norm is that an interpreter has
23 a loyalty to one party in a case. And so if they
24 interpret for that party, then they don't interpret for
25 the other party in the same case. We seem to have a

1 disputed issue of fact here as to whether in fact Ms.
2 D'Antona has a loyalty to the plaintiff's case by virtue
3 of having had a meeting with them, and perhaps a
4 differing interpretation as to what occurred there.

5 One thing I suppose that we may have to do
6 is take evidence with regard to that. I hate to have a
7 mini-trial on that, but we may have to do that. I don't
8 know that there's any other way to resolve this.

9 Counsel, do you have any other thoughts
10 about that?

11 MR. BRATZ: As soon as I got this motion
12 this morning -- and I really wish this issue would have
13 been raised over the weekend or last week -- but as soon
14 as I got the issue this morning, I called my office and
15 asked if they could find an alternative court certified
16 interpreter. I'm not sure we've got one yet, but we're
17 working on that.

18 I think the Court ought to hear from Ms.
19 D'Antona, however. She seems to have something to say.
20 And, like I said, defendant was unaware of any kind of
21 conflict or any confidential communications that she
22 would have been privy to. I certainly don't intend to
23 ask her about any of that anyway. All I want her to do
24 is be here to provide an accurate interpretation of Mr.
25 Bernal's testimony if we need her on his

1 cross-examination, or we need a court certified
2 interpreter on his cross-examination.

3 I have a feeling the way the direct is
4 going, there's been a lot of leading questions on the
5 direct, that that might be necessary in order to get an
6 adequate interpretation. I do note Mr. Bernal testified
7 through an interpreter in his deposition. He went to
8 his IME with Dr. Rosen and talked to Dr. Rosen with an
9 interpreter. And he also talked to Dr. Deutsch at the
10 forensic evaluation through an interpreter.

11 It does seem that when the English gets
12 complicated at all that his ability to speak in English
13 clearly may become compromised and he may be better off
14 to do it in Spanish.

15 THE COURT: I'm thinking we probably ought
16 to take the testimony of Ms. D'Antona, but I don't know
17 if you have any further thoughts about this, Mr. Evans.

18 MR. EVANS: Well, your Honor, it sounds like
19 the defense intends to find a different interpreter. I
20 support that. My continued direct with Mr. Bernal I'm
21 sure will be at least another hour, or perhaps another
22 hour and a half. Maybe by then they can find someone
23 else to assist them. That's the first issue.

24 The second issue, of course, is I think that
25 counsel should definitely let this Court know if for

1 some reason there is some claimed deficiency in terms of
2 the testimony going to the jury. I appreciate that
3 counsel says that he wants assistance with
4 cross-examination, but it's an awful easy leap to go
5 from there to procure an affidavit from an interpreter
6 claiming that there was something that wasn't
7 interpreted right and the jury didn't hear things right.

8 I just want it to be clear here that if the
9 defense believes during this trial there's something
10 that's wrong in terms of that testimony that they
11 correct that, bring it to the Court's attention.

12 But, if they intend to substitute
13 interpreters, that certainly would eliminate the issue
14 of the continued services of Ms. D'Antona and would mean
15 the Court would not have to get into a hearing on that
16 issue. And taking counsel at his word that the problem
17 here is cross-examination, we're not going to be in
18 cross-examination for, I think, at least an hour, hour
19 and a half at least. So I would suggest maybe this is a
20 way to avoid the mini hearing, take up time, expect that
21 there will be a substituted interpreter.

22 THE COURT: Well, I mean, that would
23 obviously be my preference is to not have to get into a
24 side trial on what happened here with Ms. D'Antona. But
25 I don't know whether you're going to be able to --

1 whether you feel you have to have somebody, Mr. Bratz,
2 and whether you are going to be able to find somebody
3 within the period of time that we are likely to have the
4 cross-examination.

5 The other possibility, I suppose, would be
6 to delay Mr. Bernal's cross and take some other
7 witnesses while you find an interpreter, and come back
8 to Mr. Bernal for cross later on.

9 MR. EVANS: We could probably do that, your
10 Honor. I have two witnesses on standby, one who will be
11 here at noon who is coming from Yakima, and then my
12 vocational rehabilitation expert is on about 15 minutes
13 notice.

14 THE COURT: So I don't know how you want to
15 proceed, Mr. Bratz. I appreciate, Ms. D'Antona, that
16 you want to have an opportunity to speak, but I don't
17 really want to get there if I don't have to.

18 MS. D'ANTONA: I know that, your Honor. But
19 this attorney is damaging my name and my reputation on
20 the record with lies. So I feel very much attacked
21 here.

22 THE COURT: And I understand you feel
23 attacked, Ms. D'Antona, but I'm just trying to get this
24 case done. And if we're going to have somebody else in
25 here as an interpreter, then we don't really have to

1 resolve the issue of what happened.

2 MS. D'ANTONA: But it's on the record, your
3 Honor.

4 THE COURT: All right. So, Ms. D'Antona, do
5 you want to come up here and tell us what happened?

6 MS. D'ANTONA: Sure.

7 THE COURT: Let's do that quickly.

8
9 MERCEDES D'ANTONA, having been duly sworn by the
10 Court, testified as follows:

11
12 MR. EVANS: Before the witness testifies,
13 your Honor, may I make my objection on the record?

14 THE COURT: Sure.

15 MR. EVANS: Because this concerns
16 confidential attorney/client communications.

17 This witness is about to testify, granted
18 her version, of communications that occurred in our law
19 offices for approximately 25 minutes on Friday, the 20th
20 of November, and I think those things are confidential
21 and privileged.

22 THE COURT: Well, Ms. D'Antona, I don't want
23 you to tell me about the substance of anything that went
24 on --

25 MS. D'ANTONA: Sure.

1 THE COURT: -- but just tell me, you know, I
2 showed up, I talked to them for this period of time, I
3 talked to this person, this person, this person, without
4 getting into the substance of it. So do you want to
5 tell us your understanding of what happened?

6 MS. D'ANTONA: Yes. I came to the office at
7 5:30 in the afternoon.

8 THE COURT: Okay. This was when?

9 MS. D'ANTONA: That was -- I don't remember
10 the date. It was a Friday before the trial. The
11 attorney asked me to come in the office.

12 THE COURT: That would be Mr. Evans?

13 MS. D'ANTONA: Mr. Evans. His client was
14 there. He introduced me. I sat down and he mentioned
15 what the case was about, I didn't know. He asked me if
16 I was certified -- if I had interpreted at a trial
17 before, I said yes. I couldn't remember when, but I've
18 been before, your Honor. And then he says, well, that's
19 all right, we don't know when the case is going to
20 start, you can go now.

21 And if 25 minutes can be summarized in five,
22 that's exactly what happened and that's how long I was
23 there most likely.

24 I was quite offended, and I actually called
25 my colleague, Ms. Griselda Ruiz, to let her know what

1 had transpired. And that was it. There was no
2 discussion of anything whatsoever that had anything to
3 do with the case.

4 THE COURT: Okay.

5 MS. D'ANTONA: And I swear that under
6 penalty of perjury.

7 THE COURT: And I don't know, Mr. Evans, if
8 you have any questions.

9 MR. EVANS: Yes, I do.

10

11

EXAMINATION

12 BY MR. EVANS:

13 Q. Ms. D'Antona, you have billed our law offices for
14 your time --

15 A. Yes, I have.

16 Q. I'm sorry. Would you please let me finish my
17 question before you respond.

18 You have billed our law offices for the time
19 on Friday, November 20th, as well as a cancellation fee
20 for Monday; correct?

21 A. That's correct.

22 Q. And you came to my offices at my request to meet
23 with me and my client knowing that we were preparing for
24 a trial and that we might be involving you in that trial
25 and trial testimony; correct?

1 A. That's correct.

2 Q. All right. And when you first came to my law
3 offices you were out in the corridor, and then I invited
4 you into our private room where my client, the
5 plaintiff, was present and Rosa Manriquez; correct?

6 A. There was a woman there. I'm assuming that was
7 Ms. Manriquez.

8 Q. Okay. There were four people, three people
9 excluding you; correct?

10 A. There were four people including me.

11 Q. Right, okay. And I discussed with you the issues
12 regarding trial strategy regarding problems regarding
13 language issues. I told you that the defendant in this
14 case had raised an issue about the ability of my client
15 to speak English. Do you recall that?

16 A. No.

17 Q. You don't --

18 A. Do you want me to tell you what you say?

19 Q. Just a second. I told you that I wanted you to
20 see if you would be comfortable with my client, and I
21 asked you to talk with my client for awhile in Spanish.
22 And you spoke with my client in Spanish, didn't you?

23 A. No.

24 Q. How do you explain then the fact that there are
25 now three affidavits of the other three witnesses, all

1 of whom attest to the fact that you were there for 25
2 minutes --

3 A. You mean your other witness as well?

4 Q. I'm sorry, ma'am -- that you were there for 25
5 minutes, and during that period you spoke with my client
6 in Spanish, we discussed with you the issues of trial
7 preparation, we discussed with you what the case was
8 about, three persons who say that all of that occurred.
9 Now you're --

10 A. People lie --

11 Q. Oh, okay. So all three of those people?

12 A. When they're interested in the outcome.

13 Q. I see. Now have you made arrangements with the
14 defendant in this case to be hired by the defendant?

15 A. I guess you could say so.

16 Q. Okay. And you expect to be --

17 A. After I was informed that you were not using me
18 as an interpreter at the trial.

19 Q. And you expect to be paid by the defendant in
20 this case for services for the defendant. Isn't that
21 correct?

22 A. That is correct.

23 Q. And when you were in court on Wednesday afternoon
24 when this session last occurred, you spoke with Mr.
25 Bratz in the courtroom and discussed what your

1 instructions would be from Mr. Bratz. Isn't that
2 correct?

3 A. I spoke with Mr. Bratz.

4 Q. Okay. And when I called you on the telephone on
5 Saturday to find out if you were working for the
6 defense, you indicated, did you not, that you had a
7 confidential relationship with the defendant, that you
8 considered it confidential, and that you had now been
9 retained by the defendant and that you had a
10 confidential relationship with the defendant. Isn't
11 that correct?

12 A. I said I was not at the liberty of discussing.
13 You asked me what he asked me to do.

14 MR. EVANS: Thank you, your Honor.

15 THE COURT: Mr. Bratz, do you have any
16 questions of Ms. D'Antona?

17

18 EXAMINATION

19 BY MR. BRATZ:

20 Q. Could you tell the Court the full extent of the
21 conversations you and I have had?

22 A. Hello, how are you. Are you Mercedes D'Antona?
23 Yes, I am. I expect you to sit here and interpret for
24 me during the cross-examination by the defense. And if
25 there are any mistakes by the other interpreter, I would

1 like to know.

2 There are ways that we solve mistakes in
3 court with professional interpreters. So that's the way
4 I would do it. That's the extent of the conversation.

5 Q. Anything else that we talked about?

6 A. Nothing.

7 Q. Did we have any conversation concerning what may
8 or may not have transpired in Mr. Evans' office?

9 A. Nothing.

10 Q. And have you shared with me any confidential
11 communications, if any, that you had with Mr. Evans or
12 anybody else?

13 A. I haven't, and there were none.

14 MR. BRATZ: That's all I have.

15 MR. EVANS: One follow-up, your Honor.

16 THE COURT: All right.

17

18 EXAMINATION

19 BY MR. EVANS:

20 Q. So you view your work here, Ms. D'Antona, as in
21 part that you uncover mistakes in translation and bring
22 that to Mr. Bratz's attention. Is that correct?

23 A. In a way. What we do as interpreters is we
24 interrupt and confer with the other interpreter to make
25 sure the translation, because what we care most is that

1 it's clear on the record.

2 Q. Okay. But you were asked by Mr. Bratz, not to
3 the Court, but to advise Mr. Bratz of what you felt
4 would be mistakes in the translation. Isn't that
5 correct?

6 A. That is correct.

7 Q. And Mr. Bratz didn't ask you to tell the Court
8 that, he asked you just to tell Mr. Bratz that. Isn't
9 that correct?

10 A. You might say that.

11 Q. I might say that. Yes, I am saying that.

12 MR. EVANS: All right.

13 THE COURT: Thank you, Ms. D'Antona. I
14 think that if we just get another interpreter here, then
15 we don't have to get any further into this. But it
16 seems to be a rather big misunderstanding all the way
17 around. I would really like to move forward with the
18 trial.

19 One of the things I wanted to tell counsel
20 is that I have a board meeting I'm supposed to attend on
21 Thursday afternoon. I'm hoping we can finish testimony
22 by Wednesday and we can do instructions and closing
23 argument on Thursday morning and get this thing to the
24 jury, which means obviously we need to move forward here
25 with some dispatch.

1 an obligation to update those things.

2 So if he's talking about something that, you
3 know, that he should have a rental receipt for or
4 something like that, then that evidence ought to be
5 excluded.

6 MR. EVANS: I'll accept the Court's
7 criticisms, your Honor. Part of the problem is we are a
8 smaller office and things get a little busy, but I
9 accept the Court's criticisms. With that in mind, I
10 certainly am prepared to limit the direct-examination on
11 that issue.

12 THE COURT: Okay. Anything else we need to
13 take up at this point?

14 MR. BRATZ: That's all from the defense at
15 this point.

16 THE COURT: Okay.

17 MR. EVANS: May we ask that Ms. D'Antona
18 then be excluded during the trial, your Honor, until
19 it's determined what the status is?

20 THE COURT: Well, I think she is -- Ms.
21 D'Antona, did you want to say something about that?

22 MS. D'ANTONA: If I'm not going to
23 interpret, I'm going to leave.

24 THE COURT: That is what my thought was, is
25 we are not going to use your services any further in

1 this case.

2 MS. D'ANTONA: I am, too.

3 MR. BRATZ: Your Honor, I would like her to
4 sit in trial when the plaintiff is on the stand in case
5 she perceives something that is amiss in the
6 interpretation from the plaintiff's interpreter.

7 THE COURT: I appreciate your concern, Mr.
8 Bratz. But given the concerns raised by the plaintiff,
9 in order to do that I'd have to finish hearing all the
10 evidence and make a factual determination as to whether
11 in fact she heard enough that there was a conflict or
12 not. We can avoid all that if she just isn't here.
13 That's why I was inclined to do that.

14 Because, as I said, we're not in a situation
15 where we are relying on the interpreter. Mr. Bernal is
16 testifying in English. All Ms. Manriquez is doing is
17 simply helping him out when he might have a word he
18 doesn't understand.

19 MR. EVANS: The other aspect, your Honor, is
20 counsel just represented to this Court also that the
21 only purpose was cross-examination. So if the purpose
22 is cross-examination, to help in cross-examination,
23 there's no reason for her to be here.

24 THE COURT: We can get somebody else in for
25 cross-examination. If you haven't been able to secure

1 anybody else right away, as I said, we can delay
2 cross-examination for awhile.

3 MR. EVANS: That's fine with me. I'm
4 prepared.

5 THE COURT: Okay.

6 MR. BRATZ: For the record, I remain
7 concerned about the interpreter that was hired by the
8 plaintiff because of the acquaintance connection that
9 she has.

10 THE COURT: And I probably would not approve
11 of Ms. Manriquez if she were actually interpreting; that
12 is, we were doing translating everything from Spanish to
13 English and English to Spanish. But I think it's
14 appropriate to allow her when all she's doing is
15 assisting Mr. Bernal when he has a word he doesn't
16 understand when he's actually testifying in English.

17 MR. EVANS: Thank you, your Honor.

18 THE COURT: Could you get Juror No. 3 for
19 us, please.

20 MR. EVANS: I guess we're ready to proceed
21 with the juror question.

22 THE COURT: Right.

23 MR. EVANS: I don't have a clue.

24 THE COURT: I don't know what's going on
25 either. I'm disappointed that the juror is raising it

C E R T I F I C A T E

STATE OF WASHINGTON)

COUNTY OF KING)

I do hereby certify:

1. That I am a Notary Public in and for the State of Washington;

2. That each witness before examination was by me duly sworn to testify to the truth, the whole truth and nothing but the truth;

3. That the foregoing deposition was taken stenographically by me and reduced to transcript form under my direction;

4. That I am not a relative or employee or attorney or counsel of any of the parties to said action, or a relative or employee of any such attorney or counsel, and that I am not financially interested in the said action or the outcome thereof;

5. That each witness was given the opportunity to read and sign the deposition after the same was transcribed, unless indicated in the record that the parties and each witness waived the signing;

6. That all objections made at the time of said examination to my qualifications or the manner of taking the deposition, or to the conduct of any party, have been noted by me upon said deposition;

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7. That the deposition as transcribed is a full, true and correct transcript of the testimony, including questions and answers, and all objections, motions, and exceptions of counsel made and taken at the time of the foregoing examination;

8. That I have made arrangements for delivery of the deposition to the appropriate place of filing.

IN WITNESS HEREOF, I have hereunto set my hand and affixed my official seal this 1st day of December, 2009.

Notary Public in and for the State
Of Washington, residing at
Kirkland. Commission expires
5/13/2010. CCR # 2710.

HONORABLE DOUGLASS A. NORTH
Noted: Monday December 21, 2009
Without oral argument

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

MIGUEL BERNAL HERNANDEZ, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

No. 08-2-12754-1SEA
(formerly 08-2-18009-3SEA)

DEFENDANT'S COST BILL

On December 3, 2009, the jury reached a verdict for Defendant Glacier Fish Company, LLC which foreclosed all of the claims brought by Plaintiff Miguel Bernal Hernandez in this action. As the prevailing party, Defendant hereby submits is Cost Bill under RCW 4.84.060 and Civil Rule 54(d)(1).

The undersigned certifies and declares that the following costs and disbursements, including statutory attorneys' fees, were incurred from the commencement of this litigation through the entry of the jury's verdict on December 4, 2009:

DEFENDANT'S COST BILL
(No. 08-2-12754-1SEA) – Page 1

27066 K111901

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

- 1 • Original Deposition (6/24/09)
- 2 • Court Reporter and Transcript Fees - \$894.35
- 3 • Interpreter - \$450.00

4 Published at trial during cross examination on December 1, 2009 and 1 page
 5 used for impeachment (pro rata: 1/115 deposition pages x (894.35 + 450.00) =
 6 11.69).

7 **6. Video deposition of William Skilling (RCW 4.84.010(7))= \$1,100.20**

8 Entire transcript published and video played at trial on December 3, 2009.

- 9 • Court Reporter = \$453.70
- 10 • Videographer = \$646.50

11 **7. Deposition of Robert Eden Deutsch-prorata (RCW 4.84.010(7))= \$ 6.85**

- 12 • Total Court Reporter Fee = \$890.50
- 13 • Deposition transcript published during trial and 1 page used for impeachment
- 14 • (pro rata: 1/130 deposition pages x 890.50 = \$6.85).

15 **8. Interpreter Fees (RCW 4.84.010(6)): = \$ 1,252.50**

- 16 • Sheila Harrington: Cross and re-direct of Plaintiff (12/1/09): \$260.00
- 17 • Pablo Sepulveda (11/30/09 beginning cross of Plaintiff & standby): \$292.50
- 18 • Mercedes D'Antona (standby 11/25/2009 + 11/30 cancellation): \$700.00

19 Standby interpreters were required for 3 court days due to plaintiff's decision to
 20 interrupt his testimony with several witnesses taken out of order. Plaintiff also used
 21 the interpreter for his re-direct examination. *See also* RCW 2.43.040(3) (party
 22 needing interpreter must bear cost of interpreter at trial); *Trial Record for December*
1, 2009 (Plaintiff used interpreter for both cross-examination and re-direct); *Hall v.*
Northwest Lumber Co., 61 Wn. 351 (1910) (reasonable interpreter fees recoverable as
 costs).

23 **9. Records Fees and Costs (RCW 4.84.010(5)): = \$871.92**

DEFENDANT'S COST BILL
 (No. 08-2-12754-1SEA) – Page 3

27066 kl111901

LE GROS BUCHANAN
 & PAUL
 701 FIFTH AVENUE
 SUITE 2500
 SEATTLE, WASHINGTON 98104-7051
 (206) 623-4990

1 Defendant incurred the following costs for retrieval of records regarding Plaintiff
2 which were used at trial. Supporting documentation is attached.

- 3
- 4 • Swedish Medical Center (IOD Incorporated) – 8/19/09
Defendant's Exhibit 113 \$43.42
 - 5 • Sea Mar Community Health Center – 2/11/09
Defendant's Exhibit 114 \$42.93
 - 6 • Consejo Counseling (2/19/09, 12/4/08, 7/5/08)
7 Plaintiff's Exhibit 4; Defendant's Exhibit 101 \$90.00
 - 8 • Dr. Deutsch Medical Records (7/17/08, 7/31/09)
Plaintiff's Exhibit 3; Defendant's Exhibit 100 \$186.42
 - 9 • US Healthworks Medical Records (7/17/08)
10 Plaintiff's Exhibit 5; Defendant's Exhibit 102 \$26.10
 - 11 • Social Security Administration (6/25/08; 11/5/08)
Plaintiff's Trial Exhibit 1 \$64.00
 - 12 • Employment Security Records (7/25/08)
13 Incorporated into Plaintiff's Trial Exhibit 2 \$128.05
 - 14 • Internal Revenue Service Records (6/25/08; 7/9/09)
15 Plaintiff's Trial Exhibit 2 \$291.00

16 **TOTAL STATUTORY COSTS (Nos. 1 through 10): \$5,694.17**

17
18 I declare under penalty of perjury under the laws of the State of Washington that the
19 foregoing is true and correct, and that the attached invoices are true and accurate copies of
20 those costs incurred by Defendant during the course of this litigation.

21
22
23
DEFENDANT'S COST BILL
(No. 08-2-12754-1SEA) – Page 4

27066 kl111901

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

1 DATED this 11 day of December, 2009

2 LE GROS BUCHANAN & PAUL

3
4 By: 

5 DAVID C. BRATZ
6 Washington State Bar Number 15235
7 Attorney for Defendant
8 Glacier Fish Company, LLC

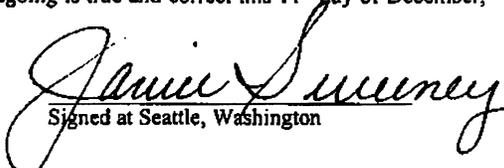
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12 **CERTIFICATE OF SERVICE**

13 The undersigned certifies that on this day she caused to be served
14 in the manner noted below, a copy of the document to which this certificate is
15 attached, and all therein referenced exhibits, on the following counsel of
16 record for the plaintiff:

17 Thomas C. Evans
18 4705 16th Avenue NE
19 Seattle, WA 98105
20 Tel: (206) 527-5555
21 Fax: (206) 527-0725

- 22 Via Mail
23 Via Facsimile
 Via Messenger

I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct this 11th day of December,
2009.


Signed at Seattle, Washington

DEFENDANT'S COST BILL
(No. 08-2-12754-1SEA) – Page 5

27066 k111901

LE GROS BUCHANAN
& PAUL
701 FIFTH AVENUE
SUITE 2500
SEATTLE, WASHINGTON 98104-7051
(206) 623-4990

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

MIGUEL BERNAL HERNANDEZ, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation

Defendant.

AT LAW AND IN ADMIRALTY

CASE NO. 08-2-12754-1 SEA

**PLAINTIFF’S OBJECTION
TO AND MEMORANDUM IN
OPPOSITION TO
DEFENDANT’S COST BILL**

I. GENERAL STATEMENT REGARDING DEFENDANT’S COST BILL

Defendant, Glacier Fish, lists a substantial number of cost items that are clearly not allowed or recoverable by law. Its cost bill clearly is very over-reaching in its scope. Two significant parts of Defendant’s costs bill are clearly inappropriate. First, Defendant seeks costs for its interpreters even though they were hired purely for its own convenience. Second, RCW 4.84.010 “Cost Allowed to Prevailing Party” (*copy attached as Exhibit 2*) lists seven specific items that are allowed as costs. These seven specific items are well known, and well established as prevailing party costs, yet it apparent that Defendant has strayed considerably

1 from the statutory parameters for its specific requests.

2 **(A) Item No. 8 - Interpreters**

3 The Court will recall the issues with respect to interpreters used during this
4 trial. The first issue arose when Defendant retained Mercedes D'Antona to sit in on
5 the trial and assist it with cross examination, even though the Court had already
6 approved Rosa Manriquez to assist Mr. Bernal. Plaintiff immediately filed his
7 motion to exclude Ms. D'Antona from the proceedings, as a result of Ms. D'Antona
8 having been part of Plaintiffs initial pre-trial preparations. The Court reviewed, on
9 the record, on November 30, 2009, at 9:05 a.m., issues with respect to
10 interpreters. *(See Exhibit 4 attached, Transcript of Proceedings)*. The Court clearly
11 had qualified Rosa Manriquez to act as the interpreter pursuant to RCW 2.43.030
12 "Appointment of Interpreter" *(Copy attached as Exhibit 3)*. The Court observed that
13 Mr. Bernal's grasp of the English language was sufficient to allow Ms. Manriquez to
14 assist him if there was a word he didn't understand. This Court determined it was
15 not necessary to have a certified Court Interpreter. *(See Exhibit 4, P.7)*. In addition,
16 the Court also observed that a retained interpreter ". . . has loyalty to one party in
17 a case. And if so, they interpret for that party, they don't interpret for the other
18 party in the same case. . ." *(Transcript at P. 7, Lns. 22-25)*. Ms. D'Antona clearly
19 had participated in confidential pretrial preparations with Plaintiff. Following
20 consideration of Plaintiff's motion documents, and the testimony of Ms D'Antona,
21 the Court determined that it would be best if ". . .if we just get another interpreter

1 here, then we don't have to get any further into this." (*Transcript at P. 19, Lns. 14-*
2 *15*). At that point, Ms. D'Antona departed and Defendant evidently made
3 arrangements for another interpreter. However, Defendant now not only seeks to
4 bill Plaintiff for Ms. D'Antona's in Court time, but for additional unspecified
5 "cancellation" time, evidently as a result of Ms. D'Antona having to leave the Court
6 room and reserved time for Defendant.

7 Defendant's sole basis for having its own interpreter was for purposes of its
8 cross examination and its own convenience. (*Transcript P. 9, Lns. 4-8*). This was a
9 truly voluntary move on Defendant's part and unnecessary. See again Transcript
10 P. 35, Lns. 13-15 ". . . I think it's appropriate to allow her [Ms. Manriquez] when all
11 she is doing is assisting Mr. Bernal when he has a word he does not understand
12 when he is actually testifying in English."

13 Defendant now outrageously bills Plaintiff not only for Ms. D'Antona for the
14 time in Court on November 30, but also bills "stand by and cancellation time" in
15 the amount of \$700.00 (*See item 8*). Two other interpreters were hired by
16 Defendant, Pablo Sepulveda and Sheila Harrington at \$292.50 and \$260.00
17 respectively. Again these interpreters were hired solely for the convenience of
18 Defendant and were unnecessary.

19 This Court is respectfully requested to strike "Interpreter Fees" in their
20 entirety as Plaintiff made, what the Court ultimately found, was a sufficient effort
21 to respond to non-English speaking issues with respect to Mr. Bernal.

1 **(B) RCW 4.84.010 “Scheduled Cost”**

2 RCW 4.84.010 “Cost Allowed to Prevailing Party” is very specific, it allows:

- 3 (1) Filing fees
- 4 (2) Fees for service of process
- 5 (3) Fees for service by publication
- 6 (4) Notary fees
- 7 (5) Reasonable expenses in obtaining reports and records admitted
8 at trial
- 9 (6) Statutory attorney & witness fees
- 10 (7) Use of the transcription of depositions used at trial.

11 Apply the above to Defendant’s specific request for costs, Plaintiff specifically
12 objections to the following requested costs:

- 13 (2d) Kathleen Roney – Witness Fee - \$30.72

14 Ms. Roney never testified at trial nor was her testimony ever necessary and in
15 addition it was completely unnecessary to Subpoena her. Plaintiff’s Counsel
16 contacted Defendant’s Counsel and specifically informed him that if he wished the
17 presence and testimony of Ms. Roney, over Plaintiff’s objections, Ms. Roney would
18 be at trial as Plaintiff’s Paralegal.

- 19 (3) ABC Legal Messenger Delivery Expense - \$923.55

20 Only *service of process* per RCW 4.84.010(2) is allowed as a recoverable cost.
21 The cost of delivering papers to another lawyer’s office is clearly not incorporated
 into RCW 4.84.010(2). Each subpart of (2) refers to “fees for the *service of*

1 *process.*” Process does not include normal delivery of copies of motion documents
2 or pleadings to the Court or Clerk, or opposing counsel. None of the requested
3 \$923.55 of process expenses should be allowed.

4 (4) Fees for Court Filings/Working copies (RCW 4.84.010(1)) - \$993.74

5 RCW 4.84.010(1) provides for “filing” fees. The documents listed in subpart
6 (4) again include impermissible non-service of process including claims for items
7 as “filing” fees. Defendant did not incur any “filing” fees. Having to file “working
8 copies” with the Court is not a “filing fee” and is clearly not taxable. Defendant
9 provides no case law or no credible legal basis for supporting its claim that legal
10 delivery expenses and expenses associated with giving a Court a working copy is a
11 “filing fee.” The expense should be denied in its entirety.

12 (6) Video Deposition of William Skilling - \$1,100.20

13 Defendant’s vocational expert, Williams Skilling was unavailable during trial
14 and for that reason Defendant asked if his testimony may be preserved for trial
15 and the parties agreed. (*See Declaration of Thomas C. Evans*). The sole basis for
16 having to preserve this deposition for trial was the lack of scheduling consideration
17 and unavailability of Defendant’s expert, William Skilling. Plaintiff should not have
18 to pay for Defendant’s inability to schedule its experts during trial. This deposition
19 was purely for the benefit of Defendant and Defendant’s scheduling problems. The
20 entire amount of \$1,100.20 should be excluded.

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SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

Miguel Bernal Hernandez)
)
Plaintiff/Petitioner)
)
vs.)
)
Glacier Fish Co., L.L.C.)
)
Defendant/Respondent)

NO. 08-2-12754-1 SEA
~~ORDER ON CIVIL MOTION~~
AWARDING COSTS

The above entitled court having heard a motion by defendant for award of costs, plaintiff's response and defendant's reply

IT IS HEREBY ORDERED that the court finds no authority for defendant's claim for legal messenger expense (\$ 223.55) or court filing fees for working copies (\$ 993.74) and does not consider Ms. d'Antona's fees appropriate since she was never used as an interpreter because she had a (\$ 700.00) conflict.

DATED: Dec, 24, 2009

Douglas A. North
Presented by: Therefore total costs awarded are \$3,076.89

HONORABLE DOUGLASS A. NORTH

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

MIGUEL BERNAL HERNANDEZ, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

No. 08-2-12754-1SEA
(formerly 08-2-18009-3SEA)

~~[proposed]~~ JUDGMENT

D.A.N.

JUDGMENT SUMMARY (THOMAS C. EVANS-JUDGMENT DEBTOR)

1. Judgment Creditor: Glacier Fish Company, L.L.C.
2. Judgment Debtor: Thomas C. Evans.
3. Principal Judgment Amount: \$5,000 individually plus \$1,500 owed jointly and severally with plaintiff Miguel Bernal Hernandez.

~~4. Additional Judgment Amount: \$1,000 (owed jointly and severally with plaintiff Miguel Bernal Hernandez) payable to King County Superior Court~~

D.A.N.

[proposed] JUDGMENT
(No. 08-2-12754-1SEA) – Page 1

1 5. Principal and Additional judgment amounts shall bear interest at 12% per annum
2 (said interest on \$5,000 portion began accruing on 14 August, 2009, interest on other
3 amounts begins accruing as of the date of this Judgment).

4 6. Attorneys for Judgment Creditor: David C. Bratz and Carey M. E. Gephart, LeGros
5 Buchanan & Paul, 701 Fifth Avenue, Suite 2500, Seattle, WA 98104-7051, (206) 623-49990.

6 7. Attorney for Judgment Debtor: Thomas C. Evans, 4705 16th Avenue Northeast
7 Seattle, WA 98105, (206) 527-8008.

8 **JUDGMENT SUMMARY (PLAINTIFF MIGUEL BERNAL HERNANDEZ-**
9 **JUDGMENT DEBTOR)**

10 1. Judgment Creditor: Glacier Fish Company, L.L.C.

11 2. Judgment Debtor: Miguel Bernal Hernandez

12 3. Principal Judgment Amount: \$1,500 (owed jointly and severally with plaintiff's
13 counsel, Thomas C, Evans)

14 ~~4. Additional Judgment Amount: \$1,000 owed jointly and severally with plaintiff's~~
15 ~~counsel Thomas C. Evans) payable to King county Superior Court,~~

16 5. Taxable Costs to which Judgment Creditor is entitled: ~~\$5,694.17~~ **\$3,076.88**

17 6. Taxable costs and Principal and Additional Judgment Amounts shall bear interest at
18 12% per annum (interest to begin accruing as of the date of this Judgment).

19 7. Attorneys for Judgment Creditor: David C. Bratz and Carey M. E. Gephart, LeGros
20 Buchanan & Paul, 701 Fifth Avenue, Suite 2500, Seattle, WA 98104-7051, (206) 623-49990.

21 8. Attorney for Judgment Debtor: Thomas C. Evans, 4705 16th Avenue Northeast
22 Seattle, WA 98105, (206) 527-8008.

1 In accordance with the verdict of the jury on December 4, 2009, it is ADJUDGED
2 THAT ALL OF PLAINTIFF'S CLAIMS ARE DISMISSED FOREVER WITH
3 PREJUDICE, THAT PLAINTIFF TAKE NOTHING BY THIS SUIT, AND THAT
4 JUDGMENT ON ALL OF PLAINTIFF'S CLAIMS IS ENTERED FOR
5 DEFENDANT.

6 Additionally, the Court ENTERS JUDGMENT AGAINST PLAINTIFF'S
7 COUNSEL, MR. THOMAS C. EVANS, PERSONALLY, AND IN FAVOR OF
8 DEFENDANT IN THE AMOUNT OF \$5,000 on the August 14, 2009 Substituted Order
9 Granting Motion to Company Rule 35 Examination (Rodriguez), Protective Order Excluding
10 Counsel from Rule 35 Examination (Rodriguez), and Sanctions (Plaintiffs Rodriguez and
11 Bernal), plus interest accrued at 12% per annum from the date of the order.

12 Additionally, the Court ENTERS JUDGMENT AGAINST PLAINTIFF AND HIS
13 COUNSEL, MR. EVANS, JOINTLY AND SEVERALLY, AND IN FAVOR OF THE
14 DEFENDANT THE AMOUNT OF \$500 pursuant to the Court's August 14, 2009, Order
15 Granting Civil Rule 11 and Inherent Power Sanctions Against Mr. Thomas Evans and
16 Plaintiff Bernal, plus interest accrued at 12% per annum from the date of the order.

17 Additionally, the Court ENTERS JUDGMENT AGAINST PLAINTIFF, AND IN
18 FAVOR OF THE DEFENDANT, IN THE AMOUNT OF ~~\$5,694.17~~ for Defendant's
19 recoverable statutory costs. #3076.88 D.A.N.

20 Finally, the Court ENTERS JUDGMENT AGAINST PLAINTIFF AND MR.
21 EVANS, JOINTLY AND SEVERALLY, IN THE AMOUNT OF ~~\$2,000~~ IN FAVOR
22 OF DEFENDANT (\$1,000) ~~AND THE COURT REGISTRY (\$1,000)~~. #1,000 D.A.N.

23 IT IS SO ORDERED, DECREED AND ADJUDGED.

1 DATED this 24th day of December, 2009.

2
3 Douglas A. North
HONORABLE DOUGLASS A. NORTH
King County Superior Court Judge

4 Presented By:

5 s/ David C. Bratz

Washington State Bar Number 15235

6 s/ Carey M.E. Gephart

Washington State Bar Number 37106

7 Attorney for Defendant Glacier Fish Company, LLC

8 LeGros, Buchanan & Paul

701 Fifth Avenue, Ste. 2500

Seattle, WA 98104

9 Telephone: (206) 623-4990

10 Fax: (206) 467-4828

Email: dbratz@legros.com

11
12 **CERTIFICATE OF SERVICE**

13 The undersigned certifies that on this day she caused to be served
14 in the manner noted below, a copy of the document to which this certificate is
attached, on the following counsel of record:

15 Thomas C. Evans
4705 16th Avenue NE
Seattle, WA 98105
16 Tel: (206) 527-5555
Fax: (206) 527-0725

- 17 Via Mail
 Via Facsimile
 Via Messenger

18 I certify under penalty of perjury under the laws of the State of
19 Washington that the foregoing is true and correct this 11th day of December,
20 2009.

21 Jenice Sweeney
Signed at Seattle, Washington

RECEIVED
10 JAN - 7 AM 10:51
LEGROS, BUCHANAN
& PAUL

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

MIGUEL BERNAL HERNANDEZ, a
seaman,

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation

Defendant.

AT LAW AND IN ADMIRALTY

CASE NO. 08-2-12754-1 SEA

NOTICE OF APPEAL

HEREBY TAKE NOTICE, the Undersigned attorney and Plaintiff above do hereby issue Notice of Appeal to the State of Washington Court of Appeals. Division 1, from the following described final Judgment and Orders of the above entitled Court: (1) Judgment dated December 24, 2009, entering final judgment in this matter on all of the parties claims with the exception of those portions of said Judgment imposing terms of \$500.00 pursuant to Court Order of August 14, 2009, and imposing \$1,000.00 terms pursuant to Order of December 23, 2009, both Orders having been satisfied and paid in full (2) Orders awarding costs, dated December 24, 2009, to the extent of an award of costs is made in the amount of

NOTICE OF APPEAL - 1

INJURY AT SEA - SEATTLE
4705 - 16TH AVENUE NE · SEATTLE, WASHINGTON 98105
TELEPHONE (206) 527-8008 · FAX (206) 527-0725
TOLL FREE 1-800-SEA-SALT

1 \$3,076.88; (3) Substituted Order granting Motion to Compel Rule 35 Examination
2 dated August 14, 2009; (4) Order denying Plaintiff's motion to strike jury Demand of
3 August 4, 2009. Copies of said final judgment and orders being attached hereto.

4 Notice submitted this 5th day of January, 2010.

5
6
7 /s Thomas C. Evans
8 THOMAS C. EVANS, WSBA #5122
9 Attorney for Plaintiff
10
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HONORABLE DOUGLASS A. NORTH

RECEIVED
JAN 19 2010
INJURY AT SEA

IN THE SUPERIOR COURT OF WASHINGTON FOR KING COUNTY
AT SEATTLE

ANCELMO RODRIGUEZ-GARCIA, a
seaman,

No. 08-2-12754-1SEA

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

MIGUEL BERNAL HERNANDEZ, a
seaman,

**DEFENDANT'S NOTICE OF
CROSS-APPEAL**

Plaintiff,

v.

GLACIER FISH COMPANY, LLC, a
Washington corporation,

Defendant.

//

//

1 Comes now Defendant, Glacier Fish Company, LLC (“Defendant”), by and through its
2 attorneys of record, pursuant to Rule of Appellate Procedure 5.2(f) files this Notice of Cross-
3 Appeal to the State of Washington Court of Appeals, Division 1, from the following
4 described actions and orders of the Superior Court of Washington for King County at Seattle
5 in the above-captioned matter (and companion matter *Rodriguez v. Glacier Fish Company,*
6 *LLC*, No. 08-2-12754-1SEA, with which *Bernal v. Glacier Fish Company, LLC* (No. 08-2-
7 18009-3SEA) was consolidated on July 17, 2009): (1) August 14, 2009 Substituted Order
8 Granting Motion to Compel Rule 35 Examination (Plaintiff Rodriguez); Protective Order
9 Excluding Counsel from Rule 35 Examination (Plaintiff Rodriguez); and Sanctions
10 (Plaintiffs Rodriguez and Bernal), to the extent awarding only \$5,000 in sanctions against
11 Mr. Evans personally; and (2) December 24, 2009 Judgment to the extent entering only
12 \$5,000 in sanctions against Mr. Evans pursuant to the August 14, 2009, Order previously
13 referenced.

14 Further, to the extent Mr. Bernal pursues appeal of the jury’s verdict in the matter of
15 *Bernal v. Glacier Fish Company, LLC* (No. 08-2-12754-1SEA, formerly No. 08-2-18009-
16 3SEA), Defendant appeals the Court’s Instructions to the Jury and Special Verdict Form in
17 the following regards: (a) misstatement of the law in Instruction No. 8; and (b) submission of
18 the question of future medical expenses to the jury (*i.e.*, Question No. 4 on the Special
19 Verdict Form).

20 Copies of all herein referenced orders, judgments, and instructions are attached hereto.

21 //

22 //

23 //

1 DATED this 19 day of January 2010

2 LE GROS, BUCHANAN & PAUL

3 By: 

4 DAVID C. BRATZ

5 Washington State Bar Number 15235

6 LeGros Buchanan & Paul, P.S.

7 701 Fifth Avenue, Suite 2500

8 Seattle, WA 98104-7051

9 Phone: 206.623.4990

10 Facsimile: 206.467.4828

11 Attorneys for Defendant

12 Glacier Fish Company, LLC

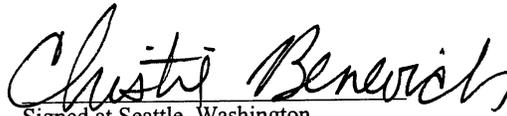
13 **CERTIFICATE OF SERVICE**

14 The undersigned certifies that on this day she caused to be served
15 in the manner noted below, a copy of the document to which this certificate is
16 attached, on the following counsel of record:

17 Thomas C. Evans
18 4705 16th Avenue NE
19 Seattle, WA 98105
20 Tel: (206) 527-5555
21 Fax: (206) 527-0725

- 22 Via Mail
23 Via Facsimile
 Via Messenger

I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct this 19th day of January,
2010.


Signed at Seattle, Washington

No. _____

In the Supreme Court of the United States

JUSTIN ENDICOTT,

Petitioner,

v.

ICICLE SEAFOODS,

Respondent.

**On Petition for Writ of Certiorari
to the Supreme Court
of the State of Washington**

PETITION FOR A WRIT OF CERTIORARI

Philip A. Talmadge
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Rafel Law Group PLLC
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Seattle, WA 98104

QUESTIONS PRESENTED

1. Is the plaintiff's right to elect a jury trial in state court Jones Act cases a substantive federal right, as this Court held is true for Federal Employees Liability Act ("FELA") cases in *Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359 (1952)?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Opinion Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
Reasons for Granting the Writ	2
A. Summary of Reasons	2
B. The Washington Supreme Court’s Decision Interprets an Important Issue of Federal Law That Conflicts With a Decision of This Court	3
1. <u>History of Jones Act and the Relevance of Dice to Jones Act Cases</u>	3
C. There Is a Split Among the Circuit Courts of Appeal and State Courts Regarding Whether Under the Jones Act the Right to Elect a Jury Trial Is Substantive	7
D. The Jones Act Election Right Is an Important Question of Federal Law	11
E. Conclusion	12

TABLE OF APPENDICES

	Page
Appendix A -- Opinion of the Supreme Court of Washington of The State of Washington filed January 7, 2010	1

TABLE OF CITED AUTHORITIES

	Page
United States Supreme Court Cases:	
<i>Aguilar v. Standard Oil Co.</i> , 318 U.S. 724 (1943)	5
<i>American Dredging Co v. Miller</i> , 510 U.S. 443 (1994)	10
<i>Chelentis v. Luckenbach S.S. Co.</i> , 247 U.S. 372 (1918).....	4
<i>Dice v. Akron, C. & Y. R.R. Co.</i> , 342 U.S. 359 (1952)	<i>passim</i>
<i>Duncan v. State of Louisiana</i> , 391 U.S. 145 (1968)	12
<i>Garrett v. Moore-McCormack Co.</i> , 317 U.S. 239 (1942).....	5
<i>Isbrandtsen Co. v. Johnson</i> , 343 U.S. 779 (1952)	5
<i>Kernan v. American Dredging Co.</i> , 355 U.S. 426 (1958)	4
<i>Offshore Logistics, Inc. v. Tallentire</i> , 477 U.S. 207 (1986).....	9
<i>Panama R. Co. v. Johnson</i> , 264 U.S. 375 (1924)	11
<i>Singer v. U.S.</i> , 380 U.S. 24 (1965).....	11
<i>Southern Pacific Co. v. Jensen</i> , 244 U.S. 205 (1917).....	10
<i>The Osceola</i> , 189 U.S. 158 (1902).....	4
<i>U. S. v. Goodwin</i> , 457 U.S. 368 (1982)	11
<i>Waring v. Clarke</i> , 46 U.S. (5 How.) 441 (1847).....	3, 8
Federal Cases:	
<i>Craig v. Atl. Richfield Co.</i> , 19 F.3d 472 (9th Cir. 1994), <i>cert. denied</i> , 513 U.S. 875 (1994).....	7, 8, 10, 12
<i>Davis v. Bender Shipbuilding & Repair Co., Inc.</i> , 27 F.3d 426, <i>cert. denied</i> , 513 U.S. 1000 (9th Cir. 1994).....	5
<i>Evich v. Connelly</i> , 759 F.2d 1432 (9 th Cir. 1985)	4

<i>Fuszek v. Royal King Fisheries, Inc.</i> , 98 F.3d 514 (9 th Cir. 1996), <i>cert. denied</i> , 520 U.S. 1155 (1996).....	4
<i>Tex. Menhaden Co. v. Palermo</i> , 329 F.2d 579 (5th Cir. 1964)	8
<i>Williams v. Tide Water Associated Oil Co.</i> , 227 F.2d 791 (9th Cir. 1955), <i>cert. denied</i> , 350 U.S. 960 (1956).....	5
<i>Wingerter v. Chester Quarry Co.</i> , 185 F.3d 657 (7th Cir. 1998).....	8

State Cases:

<i>Endicott v. Icicle Seafoods</i> , 167 Wash.2d 873, 224 P.3d 761 (2010).....	2, 9
<i>Hoddevik v. Arctic Alaska Fisheries Corp.</i> , 970 P.2d 828, <i>review denied</i> , 989 P.2d 1140 (1999), <i>cert. denied</i> , 528 U.S. 1155 (2000).....	9, 10
<i>More v. Dep't of Ret. Sys.</i> , 137 P.3d 73 (2006)	4, 5
<i>Stanton v. Bayliner Marine Corp.</i> , 866 P.2d 15 (1993), <i>cert. denied</i> , 513 U.S. 819 (1994).....	9

Other Cases:

<i>Allen v. Norman Bros., Inc.</i> , 678 N.E.2d 317 (1997).....	10
<i>Bowman v. American River Transportation Co.</i> , 838 N.E.2d 949 (2005), <i>cert. denied</i> , 547 U.S. 1040 (2006).....	9, 10, 12
<i>Hahn v. Nabors Offshore Corp.</i> , 820 So.2d 1283 (La. App. 2002).....	9
<i>Hutton v. Consol. Grain & Barge Co.</i> , 795 N.E.2d 303 (2003)	10
<i>Lavergne v. W. Co. of N. Am., Inc.</i> , 371 So.2d 807 (La. 1979)	9
<i>Peters v. City & County of San Francisco</i> , No. A061042, 1994 WL 782237, 1995 A.M.C. 788 (Cal. App. Mar. 14, 1994).....	8

Federal Statutes:

28 U.S.C. § 1257(a)	1
28 U.S.C. § 1333	1

33 U.S.C. § 901-504

46 U.S.C. § 301041, 4, 5

State Statutes:

Wash. Rev. Code § 51.12.100(1).....4

Rules and Regulations:

CR 10(b)3

CR 10(c)3

OPINIONS BELOW

The opinion of the Supreme Court of Washington is reported at 224 P.3d 761. It is reprinted at Appendix A.

JURISDICTION

The Supreme Court of Washington rendered its opinion in this case on January 7, 2010. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions

None applicable.

Statutory Provisions

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.

46 U.S.C. § 30104 (2006).

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

28 U.S.C. § 1333 (2006).

STATEMENT OF THE CASE

Justin Endicott worked aboard Icicle Seafoods' ("Icicle") ship the *Bering Star*. On May 1, 2003, Endicott and a co-worker, Jason Jenkins, were pushing a 1,500 pound fish cart through the ship's freezer along an overhead guide rail. The cart slipped off the rail, causing Endicott to trip and catch his arm on a pole. Jenkins did not hear Endicott's cries to stop and kept pushing the cart, crushing Endicott's arm against the pole. The

injury required two surgeries and a lengthy recuperation. Icicle's safety manager completed an accident report on May 3, 2003. Attached to the report was a May 9, 2003, statement by Jenkins that generally corroborated the report's account of the accident.

Endicott sued Icicle in King County Superior Court, seeking compensation under the Jones Act for Icicle's negligence and under the general maritime doctrine of unseaworthiness. Icicle demanded a jury trial, but Endicott successfully moved to strike the demand, electing to have his case heard by a judge. Finding for Endicott on the negligence and unseaworthiness claims, the court awarded Endicott damages for medical costs and lost wages, general damages, and prejudgment interest in the amount of \$218,257.24. Icicle timely appealed. Icicle sought to vacate the judgment and remand for a new trial by jury. The Court of Appeals certified the case to the Washington Supreme Court for direct review, which it accepted. The Washington Supreme Court issued its opinion on January 7, 2010, holding that the jury election was procedural, not substantive, therefore Washington's procedures on jury trial applied. *Endicott v. Icicle Seafoods*, 167 Wash.2d 873, 224 P.3d 761 (2010). Thus, the Court held, Icicle's jury demand was valid and the case was remanded for a jury trial at Icicle's election.

REASONS FOR GRANTING THE WRIT

A. Summary of Reasons

A growing and irreconcilable split has developed among the federal Circuit Courts of Appeal, as well in the state courts, regarding whether the right to elect a jury trial in state court Jones Act cases is substantive and solely the seaman's decision, or whether the jury right question is procedural and subject to state court procedures. The Washington Supreme Court's final ruling on the matter departed from Ninth Circuit

authority on the issue, and also failed to reconcile one of this Court's leading cases on the question of whether the jury right under the Jones Act is substantive or procedural.

Under Supreme Court Rule 10(b) and (c), this Court has jurisdiction and discretion to review a case if "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals," or if "a state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

This case meets the tests of Rules 10(b) and (c). The Washington Supreme Court's opinion conflicts with this Court's own precedent in *Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359 (1952). There is also a split between the federal Circuit Courts of Appeal on the issue raised here. Finally, the Washington Supreme Court's decision conflicts with the decision of the Ninth Circuit Court of Appeals – the federal circuit within which Washington State is located – on an important federal question regarding jury rights under the Jones Act. This Court should grant the petition to finally resolve a question of federal law that has confounded lower federal and state courts for decades.

B. The Washington Supreme Court's Decision Interprets an Important Issue of Federal Law That Conflicts With a Decision of This Court

1. History of Jones Act and the Relevance of *Dice* to Jones Act Cases

Prior to 1920, claims by seamen against shipowners for injuries sustained on the job were addressed under federal admiralty jurisdiction. The jury trial right guaranteed by the Seventh Amendment to the United States Constitution was inapplicable to suits invoking federal admiralty jurisdiction. *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460

(1847). More specifically, prior to 1920, an injured seaman did not have a cause of action in negligence against the shipowner employer. *The Osceola*, 189 U.S. 158, 172 (1902). This was confirmed again in *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918).

In 1908, Congress passed what came to be known as the Federal Employees Liability Act (“FELA”). This legislation removed significant barriers for workers seeking to recover damages for injuries sustained in the work place. No longer would assumption of risk, fellow servant doctrine and contributory negligence bar recovery by workers employed by the railroads.

In 1920, Congress passed the Jones Act, 46 U.S.C. § 30104, which adopted FELA by reference for seamen, expressly granting to seamen the rights and remedies available to railroad workers under FELA. *Kernan v. American Dredging Co.*, 355 U.S. 426, 439 (1958); *Fuszek v. Royal King Fisheries, Inc.*, 98 F.3d 514, 516 (9th Cir. 1996), *cert. denied*, 520 U.S. 1155 (1997); *Evich v. Connelly*, 759 F.2d 1432, 1433 (9th Cir. 1985). As a consequence of this legislation, a seaman who is injured on the job may sue the shipowner for personal injury damages.

It is well established that the Jones Act is remedial in nature and must be construed liberally in favor of the seaman employee. This is because injured sea personnel do not enjoy the same on-the-job protections enjoyed by their land-based counterparts. For example, seamen do not have the benefit of no-fault worker compensation systems. *See e.g.*, Wash. Rev. Code § 51.12.100(1); *More v. Dep’t of Ret. Sys.*, 137 P.3d 73, 76 (2006). They do not have the benefit of the Longshore and Harbor Workers Compensation Act, 33 U.S.C. § 901-50 (2009). The Jones Act is their only

relief for on-the-job injuries. *More*, 137 P.3d at 74 n.1. This Court in *Isbrandtsen Co. v. Johnson* held with respect to the Jones Act claim:

Whenever congressional legislation in aid of seamen has been considered here since 1872, this Court has emphasized that such legislation is largely remedial and calls for liberal interpretation in favor of the seamen. The history and scope of the legislation is reviewed in *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 727-35, and notes. “Our historic national policy, both legislative and judicial, points the other way [from burdening seamen]. Congress has generally sought to safeguard seamen’s rights.” *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 246. “[T]he maritime law by inveterate tradition has made the ordinary seamen a member of a favored class. He is a ‘ward of the admiralty,’ often ignorant and helpless, and so in need of protection against himself as well as others.

343 U.S. 779, 782 (1952).

The Ninth Circuit, in which Washington State is located, follows this Court’s tradition of liberal construction in dealing with injury claims by a seaman. *See, e.g., Davis v. Bender Shipbuilding & Repair Co., Inc.*, 27 F.3d 426, 429, *cert. denied*, 513 U.S. 1000 (9th Cir. 1994); *Williams v. Tide Water Associated Oil Co.*, 227 F.2d 791, 794 (9th Cir. 1955), *cert. denied*, 350 U.S. 960 (1956).

The Jones Act language at issue here indicates that a seaman has a right of election in proceeding with a negligence claim:

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply....

46 U.S.C. § 30104 (2006).

Given the Jones Act’s adoption by reference of FELA’s rights and remedies for rail workers, 46 U.S.C. § 30104 FELA cases are particularly important to any Jones Act analysis. In *Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359 (1952), this Court specifically

held that the right to elect a jury is a federal substantive right and is not a procedural matter to be left to the states. 342 U.S. at 363. In *Dice*, an injured rail worker sued in negligence in state court under FELA. The employer defended by arguing that the worker had signed a release of claims, but the worker responded that the release had been obtained by fraud. Ohio state procedural rules required that trial judges, not juries, would decide certain types of fraud claims. The Ohio Supreme Court concluded that the state's procedural rules applied, and denied the worker a jury trial on the issue. This Court reversed the Ohio Supreme Court, ruling that Ohio could not apply its procedural rule that the fraud issue was to be decided by the judge:

We have previously held that [t]he right to trial by jury is a basic and fundamental feature of our system of federal jurisprudence and that it is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence is to take away a goodly portion of the relief which Congress has afforded them. *It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used.*

Id. at 363 (citations and internal quotation marks omitted, emphasis added). *Dice* makes clear that the jury trial right is a *substantive federal remedy afforded to workers*, and is not a matter of state procedural law. *Id.*

The Washington Court did not distinguish this Court's holding in *Dice* despite acknowledging Congress' clearly expressed intention to incorporate FELA rights and remedies into the Jones Act. 221 P.3d at 766. As the leading FELA decision on the jury trial right, *Dice* held that this jury-election right is substantive. If the plaintiff's right to elect the mode of trial is substantive rather than procedural, it binds state courts when they adjudicate Jones Act claims.

Instead, the Washington Court ignored *Dice* and relied on language from Jones Act cases, none of which holds that the right to elect is purely jurisdictional. *Id.* The Washington Court also rejected controlling Ninth Circuit Court of Appeals precedent and adopted the reasoning of Illinois state courts on the subject. Then, the Court applied the Washington Constitution and concluded that Icicle had the right under Washington law to elect a jury trial.

The Washington Court's clear split with *Dice* and with the Ninth Circuit Court of Appeals demonstrates the urgent need for resolution by this Court. Because the jury right is substantive, not procedural, federal substantive law should control over state procedural law on this issue. There is no court remaining to address the issue except this Court.

C. There Is a Split Among the Circuit Courts of Appeal and State Courts Regarding Whether Under the Jones Act the Right to Elect a Jury Trial Is Substantive

The Washington Supreme Court is not the only court to ignore or misread *Dice* in deciding this issue. The question of whether the Jones Act jury right is substantive federal law or subject to state procedures has been the subject of conflicting opinions in the fifty years since *Dice* was decided. The Washington Supreme Court acknowledged in its opinion that there is a direct conflict between the Circuit Courts, and between various states, regarding the jury trial election right in state court Jones Act claims. 224 P.3d at 765.

The Ninth Circuit has interpreted the Jones Act and FELA to provide a seaman the substantive federal right to elect the mode of trial (jury vs. nonjury). *Craig v. Atl. Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994), *cert. denied*, 513 U.S. 875 (1994). The

Ninth Circuit explained that “The plain language of the Jones Act gives a *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant.” The *Craig* court looked first at the Seventh Amendment, which preserved a party's right to a jury trial as it existed at common law. *Id.* at 475. Since there was no common law right to a jury trial in admiralty cases at the time of the Seventh Amendment’s adoption, the Seventh Amendment did not apply to suits that invoke only a federal court's admiralty jurisdiction. *Waring*, 46 U.S. at 460. Because the Jones Act provided a seaman with a benefit not available at common law, the *Craig* court reasoned that the right was substantive, not procedural. *Id.* The *Craig* court also used *exclusio alterius* reasoning to conclude that the seaman’s right of election included the right to elect a jury trial. *Id.* at 475-76. California has agreed with the Ninth Circuit’s interpretation. *Peters v. City & County of San Francisco*, No. A061042, 1994 WL 782237, 1995 A.M.C. 788 (Cal. App. Mar. 14, 1994). *Peters* permitted the plaintiff to elect the mode of trial in a Jones Act and general maritime suit filed in state court under the saving to suitors clause. *Id.* at *3-4.

The Fifth and Seventh Circuit Courts of Appeal, Illinois, and Louisiana have taken a so-called “jurisdictional” position: seamen under the Jones Act may only elect the jurisdictional basis of trial (in admiralty vs. at law) and do not have the right to choose a jury or a bench trial. *Tex. Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir. 1964) (per curiam) (“The Jones Act merely affords the injured seaman the choice between a suit in admiralty without a jury and a suit on the civil side of the docket with a jury.”); *Wingerter v. Chester Quarry Co.*, 185 F.3d 657, 665-68 & n. 5 (7th Cir. 1998) (treating the Jones Act election as pertaining to jurisdiction, with procedural

consequences as incidents); *Bowman v. American River Transportation Co.*, 838 N.E.2d 949 (2005), *cert. denied*, 547 U.S. 1040 (2006); *Lavergne v. W. Co. of N. Am., Inc.*, 371 So.2d 807 (La. 1979); *Hahn v. Nabors Offshore Corp.*, 820 So.2d 1283, 1284 (La. App. 2002). According to these courts, state procedural law, not substantive federal law, applies to provide both seamen and employers the right to elect a jury trial in Jones Act cases tried in state court. Although subsequent Fifth Circuit authority seems to contradict *Palermo*, the Washington Supreme Court dismissed this conflict as illusory. *Endicott*, 224 P.3d at 766 n. 1.

The conflict on this subject has even extended to intrastate decisions. The decision here seems to conflict with other Washington authority on the subject. For example, the Washington Court of Appeals in *Hoddevik v. Arctic Alaska Fisheries Corp.*, 970 P.2d 828, 830, *review denied*, 989 P.2d 1140 (1999), *cert. denied*, 528 U.S. 1155 (2000) held that the State may not make changes in “substantive maritime law” when a case is brought in state court.

For cases that can be brought in state court under the “saving the suitors” clause, a state may ‘adopt such remedies, and . . . attach to them such incidents, as it seems fit’ so long as it does not attempt to make changes in the ‘substantive maritime law.’

Id. at 830 (*citing American Dredging Co.*). The *Hoddevik* court went on to state that “state courts must follow substantive maritime law in such cases.” *Id.*, *citing Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 222-23 (1986). Likewise, the Washington Supreme Court has held that substantive maritime law applies when the events giving rise to the lawsuit occur on navigable waters and the activity has the potential to affect maritime commerce. *Stanton v. Bayliner Marine Corp.*, 866 P.2d 15, 25 (1993), *cert. denied*, 513 U.S. 819 (1994). The federal interest in uniform substantive maritime law

preempts any conflicting state law. Thus, the *Hoddevik* court held that a state court may not provide a remedy which “works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.” *Id.* at 830, citing *American Dredging Co v. Miller*, 510 U.S. 443, 447 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917) (remaining citation omitted)).

Illinois presents another example of an intrastate conflict created by this issue. The Illinois Supreme Court’s *Bowman* decision was necessitated by a lower court split. One decision had followed *Craig’s* statutory interpretation and concluded the jury right was substantive. *Allen v. Norman Bros., Inc.*, 678 N.E.2d 317, 319-20 (1997). Another explored the historical meaning of the Jones Act and adopted a jurisdictional interpretation. *Hutton v. Consol. Grain & Barge Co.*, 795 N.E.2d 303, 306-09 (2003). The Illinois Supreme Court in *Bowman* agreed with the *Hutton* court and concluded that the right to elect was jurisdictional. However, the *Bowman* court 1) failed to apply federal substantive maritime law, as state courts are required to do in a Jones Act case; 2) incorrectly determined that it need not follow the rule set forth in *Dice* that the right to a jury trial in a FELA case is substantive, and not procedural, and 3) incorrectly employed the last antecedent doctrine never used in federal cases that addressed the question of a plaintiff having the sole right to demand a jury. Had the *Bowman* court applied substantive federal maritime law as required by *Craig*, and followed the Supreme Court’s holding in *Dice*, the Illinois court could not have reached its holding that “the availability of a jury trial in Jones Act cases is a question that is properly controlled by the normal laws of the forum.” *Bowman*, 838 N.E.2d at 959.

State and federal courts on both sides of this question have looked to this Court's precedent to support their conclusions. Courts that concluded the jury election right is substantive have followed this Court's holding in *Dice*. Courts that have held the jury issue merely procedural, and the Jones Act election "jurisdictional," have relied on language in *Panama R. Co. v. Johnson*, 264 U.S. 375, 390-91 (1924): "[T]he injured seaman is permitted, but not required, to proceed on the common law side of the court with a trial by jury as an incident."

This conflict has existed for decades and Congress has not acted to resolve it by clarifying or amending the language of the Jones Act. The dispute can only be finally resolved if this Court grants this petition for a writ of certiorari.

D. The Jones Act Election Right Is an Important Question of Federal Law

This case directly raises an important question of federal law: the right to elect either a judge or a jury trial in a Jones Act case. The right to elect a jury or a judge can be granted by statute, although it is not enshrined in the Constitution. *Singer v. U.S.*, 380 U.S. 24, 36 (1965) ("Thus, there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton*, in some instances waive his right to a trial by jury"). This Court has acknowledged that the difference between a jury trial and a bench trial is not merely academic:

To be sure, a jury trial is more burdensome than a bench trial. The defendant may challenge the selection of the venire; the jury itself must be impaneled; witnesses and arguments must be prepared more carefully to avoid the danger of a mistrial.

U. S. v. Goodwin, 457 U.S. 368, 383 (1982).

However, the fact is that in most places more trials for serious crimes are to juries than to a court alone; a great many defendants prefer the judgment of a jury to that of a court. Even where defendants are satisfied

with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely.

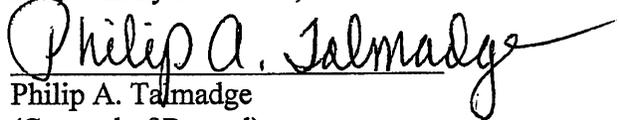
Duncan v. State of Louisiana, 391 U.S. 145,158 (1968).

This Court is confronted here with the unusual circumstance of a state court having rejected the controlling holding of the federal circuit court in which it is located on a question of federal law. The Washington Supreme Court's decision relied heavily on Illinois' *Bowman* opinion in rejecting *Craig* and *Dice*. This strange circumstance reflects the larger confusion surrounding this issue, and amply demonstrates the need for this Court's resolution.

E. Conclusion

The time has come for this Court to resolve the disputes that have arisen in federal and state courts interpreting the Jones Act. This case involves an important issue of federal law that should be decided by this Court to resolve the existing conflict. This Court should grant Endicott's petition for a writ of certiorari, reverse the Washington Supreme Court, and reinstate the trial court's judgment.

Respectfully submitted,



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APPENDIX A

C

Supreme Court of Washington,
 En Banc.
 Justin ENDICOTT, an individual, Respondent,
 v.
 ICICLE SEAFOODS, INC., an Alaska Corporation,
 Appellant.
 No. 82635-8.
 Jan. 7, 2010.

Background: Seaman, whose arm was crushed by a fish cart while he was working in the freezer on one of his employer's ships, sued employer, seeking compensation under the Jones Act and under the general maritime doctrine of unseaworthiness. Seaman successfully struck employer's jury trial demand. After a bench trial, the Superior Court, King County, Douglas D. McBroom, J., ruled for seaman on both the negligence and unseaworthiness claims and awarded seaman damages and prejudgment interest. Employer appealed, and the Court of Appeals certified the case to the Supreme Court for direct review.

Holdings: The Supreme Court, En Banc, Stephens, J., held that:

- (1) the Jones Act entitles the plaintiff to elect the jurisdictional basis for the suit (in admiralty vs. at law), not the mode of trial (jury vs. nonjury);
- (2) defendant was entitled to demand a jury trial on seaman's claims; and
- (3) an award of prejudgment interest is appropriate in a mixed Jones Act and general maritime suit.

Vacated and remanded.

West Headnotes

[1] Admiralty 16  2

16 Admiralty
 16I Jurisdiction
 16k2 k. Saving of common-law remedy.

Most Cited Cases

Courts 106  489(1)

106 Courts
 106VII Concurrent and Conflicting Jurisdiction
 106VII(B) State Courts and United States
 Courts
 106k489 Exclusive or Concurrent Jurisdiction
 106k489(1) k. In general. Most Cited
 Cases

The "saving to suitors" clause of federal law giving federal courts exclusive jurisdiction over all cases of admiralty or maritime jurisdiction gives plaintiffs the right to sue on maritime actions in state court provided that the state court proceeds in personam and not in rem. 28 U.S.C.A. § 1333(1).

[2] Admiralty 16  1.20(1)

16 Admiralty
 16I Jurisdiction
 16k1.10 What Law Governs
 16k1.20 Effect of State Laws
 16k1.20(1) k. In general. Most Cited
 Cases

Maritime suits in state court are governed by substantive federal maritime law.

[3] Federal Courts 170B  284

170B Federal Courts
 170BIV Citizenship, Residence or Character of Parties, Jurisdiction Dependent on
 170BIV(B) Controversies Between Citizens of Different States
 170Bk284 k. Particular actions. Most
 Cited Cases

Federal Courts 170B  340.1

170B Federal Courts
 170BV Amount or Value in Controversy Affecting Jurisdiction

170Bk340 Particular Cases, Claim or Value
170Bk340.1 k. In general. Most Cited
Cases
Maritime plaintiffs may sue at law in federal court if they meet the diversity of citizenship and amount in controversy requirements.

[4] Federal Courts 170B ↪194

170B Federal Courts
170BIII Federal Question Jurisdiction
170BIII(C) Cases Arising Under Laws of the United States
170Bk194 k. Navigable waters, laws relating to, maritime laws and law of nations. Most Cited Cases
General maritime law does not confer federal question jurisdiction.

[5] Seamen 348 ↪29(1)

348 Seamen
348k29 Personal Injuries
348k29(1) k. In general. Most Cited Cases
Federal Employers' Liability Act (FELA) cases are persuasive authority when interpreting the meaning of the Jones Act unless some aspect of the Jones Act or maritime law makes FELA's application unreasonable in a particular context. Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51; 46 U.S.C.(2006 Ed.) § 30104(a).

[6] Seamen 348 ↪29(5.1)

348 Seamen
348k29 Personal Injuries
348k29(5.1) k. Nature and form of remedy. Most Cited Cases
Jones Act allows seamen to sue at law, but not in admiralty, to recover for their employers' negligence. 46 U.S.C.(2006 Ed.) § 30104(a).

[7] Appeal and Error 30 ↪893(1)

30 Appeal and Error
30XVI Review
30XVI(F) Trial De Novo

30k892 Trial De Novo
30k893 Cases Triable in Appellate
Court
30k893(1) k. In general. Most Cited
Cases

Whether plaintiff-seaman's power, under the Jones Act, to elect between different forms of action was a statutory right to elect the mode of trial, i.e., jury vs. nonjury, or whether it was the right to select the jurisdictional basis of trial, i.e., at law vs. in admiralty, was issue of law subject to de novo review. 46 U.S.C.(2006 Ed.) § 30104(a).

[8] Admiralty 16 ↪80

16 Admiralty
16VIII Hearing or Trial
16k80 k. Trial by jury. Most Cited Cases

Seamen 348 ↪29(5.1)

348 Seamen
348k29 Personal Injuries
348k29(5.1) k. Nature and form of remedy. Most Cited Cases
The Jones Act does not provide the plaintiff a substantive federal right to determine the mode (jury/nonjury) of trial; rather, the Act entitles the plaintiff to elect only the jurisdictional basis for the suit (at law/in admiralty). 46 U.S.C.(2006 Ed.) § 30104(a).

[9] Seamen 348 ↪29(5.2)

348 Seamen
348k29 Personal Injuries
348k29(5.2) k. What law governs. Most Cited Cases
Once a Jones Act plaintiff has chosen a suit at law in state court, state procedural law determines whether the parties may demand a jury trial. 46 U.S.C.(2006 Ed.) § 30104(a).

[10] Jury 230 ↪12(1)

230 Jury
230II Right to Trial by Jury

230k12 Nature of Cause of Action or Issue in General

230k12(1) k. In general. Most Cited Cases To determine whether the State Constitution confers a right to a jury trial in a particular cause of action, a two-step approach is followed: the first step is to determine the scope of the jury trial right as it existed at the State Constitution's adoption, and the second step is to determine the causes of action to which the right attaches. West's RCWA Const. Art. 1, § 21.

[11] Jury 230 ↪12(1)

230 Jury

230II Right to Trial by Jury

230k12 Nature of Cause of Action or Issue in General

230k12(1) k. In general. Most Cited Cases For purposes of determining whether State Constitution confers a right to a jury trial in a particular cause of action, the inquiry is not whether the specific cause of action existed at the Constitution's adoption, but rather whether the type of action is analogous to one available at that time. West's RCWA Const. Art. 1, § 21.

[12] Jury 230 ↪14(1)

230 Jury

230II Right to Trial by Jury

230k14 Particular Actions and Proceedings

230k14(1) k. In general. Most Cited Cases

An action centered on negligence is analogous to the basic tort theories that existed when the State Constitution was adopted, and the constitutional jury trial right applies. West's RCWA Const. Art. 1, § 21.

[13] Jury 230 ↪14(1)

230 Jury

230II Right to Trial by Jury

230k14 Particular Actions and Proceedings

230k14(1) k. In general. Most Cited Cases

State constitutional right to a jury trial attaches in a

Jones Act claim, with the result that either a plaintiff or a defendant may demand a jury trial on such a claim. West's RCWA Const. Art. 1, § 21; 46 U.S.C.(2006 Ed.) § 30104(a).

[14] Appeal and Error 30 ↪984(1)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k984 Costs and Allowances

30k984(1) k. In general. Most Cited

Cases

Appellate court reviews a prejudgment interest award for abuse of discretion.

[15] Appeal and Error 30 ↪946

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k944 Power to Review

30k946 k. Abuse of discretion. Most

Cited Cases

A ruling based on an erroneous legal interpretation is necessarily an abuse of discretion.

[16] Admiralty 16 ↪1.20(4)

16 Admiralty

16I Jurisdiction

16k1.10 What Law Governs

16k1.20 Effect of State Laws

16k1.20(4) k. Remedies and proced-

ure. Most Cited Cases

Prejudgment interest in maritime cases is substantive and so is controlled by federal law.

[17] Interest 219 ↪39(2.25)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in

General

219k39(2.5) Prejudgment Interest in Gen-

eral

219k39(2.25) k. Admiralty and mari-

time matters. Most Cited Cases
Trial court had discretion to award prejudgment interest to injured seaman on his unseaworthiness claim and on his Jones Act claim which was tried to the bench. 46 U.S.C.(2006 Ed.) § 30104(a).

[18] Seamen 348 ↪1

348 Seamen

348k1 k. Power to regulate and protect. Most Cited Cases

Because seamen are deemed wards of the court, maritime law is generally construed in seamen's favor.

[19] Interest 219 ↪39(2.25)

219 Interest

219III Time and Computation

219k39 Time from Which Interest Runs in General

219k39(2.5) Prejudgment Interest in General

219k39(2.25) k. Admiralty and maritime matters. Most Cited Cases

In a mixed Jones Act and general maritime suit, prejudgment interest is available on any damages awarded under the general maritime claim, even if unapportioned between the Jones Act claims and the maritime claims. 46 U.S.C.(2006 Ed.) § 30104 (a).

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Robert M. Kraft, Richard John Davies, Kraft Palmer Davies, PLLC, Seattle, WA, for Inlandboatmen's Union of the Pacific, amicus curiae.

STEPHENS, J.

*876 ¶ 1 This case requires us to decide whether the defendant in a Jones Act (46 U.S.C. § 30104) and general maritime suit filed in state court has a right to a jury trial and whether prejudgment interest is available in such a case. A fish cart crushed Justin Endicott's arm while he was working in the freezer on one of Icicle Seafoods' ships. Endicott sued in King County Superior Court, seeking compensation under the Jones Act and under the general maritime doctrine of unseaworthiness. Endicott successfully struck Icicle's jury trial demand. After a bench trial, the judge ruled for Endicott on both the negligence and unseaworthiness claims and awarded Endicott damages and prejudgment interest. Icicle appealed the verdict and the interest award. The Court of Appeals certified the case to this court for direct review. We hold that Icicle had a right to a trial by jury and, therefore, vacate the judgment below and remand for new trial. We *877 also hold that prejudgment interest is available in mixed maritime cases.

FACTS AND PROCEDURAL HISTORY

¶ 2 Endicott worked aboard Icicle's ship the *Bering Star*. On May 1, 2003, Endicott and a co-worker, Jason Jenkins, were pushing a 1,500 pound fish cart through the ship's freezer along an overhead guide rail. The cart slipped off the rail, causing Endicott to trip and catch his arm on a pole. Jenkins did not hear Endicott's cries to stop and kept pushing the cart, which crushed Endicott's arm against the pole. The injury required two surgeries and a lengthy recuperation.

¶ 3 Icicle's safety manager completed an accident report on May 3, 2003. Attached to the report was a May 9, 2003, statement by Jenkins describing the accident in terms very similar to the report. The statement was addressed "To Whom It May Concern" and bore a formal printed name, signature, and date. Pl. Ex. 48, at ICI 0014.

¶ 4 Endicott sued Icicle in King County Superior Court, seeking compensation under the Jones Act

for Icicle's negligence and under the general maritime doctrine of unseaworthiness. Icicle demanded a jury trial, but **Endicott** successfully moved to strike the demand. At the bench trial, the court admitted Jenkins' statement as an admission by a party opponent under Evidence Rule 801(d)(2)(iv). Icicle sought to introduce evidence of **Endicott's** drug use and mental health problems, arguing that they established an alternative cause for some of **Endicott's** lost wages. The court allowed most of this evidence but refused a portion of it, including one social worker's deposition and some proposed exhibits. Finding for **Endicott** on the negligence and unseaworthiness claims, the court awarded **Endicott** damages **764 for medical costs and lost wages, general damages, and prejudgment interest. Icicle timely appealed.

¶ 5 Icicle seeks to vacate the judgment and remand for a new trial by jury. The Court of Appeals certified the case to *878 this court for direct review, which we accepted. Ruling Accepting Certification (Jan. 28, 2009).

ANALYSIS

¶ 6 Icicle challenges the judgment below on four grounds. First, Icicle contends that it had a right to a jury trial of **Endicott's** claim. Second, it claims that, as a matter of federal law, the trial court did not have the discretion to award **Endicott** prejudgment interest. Third, Icicle maintains that the trial judge abused his discretion when he admitted Jenkins' statement as an admission by a party opponent. Finally, Icicle argues that the trial judge abused his discretion when he excluded some of the evidence of **Endicott's** drug use and mental health history. We address the first two contentions but do not reach the third and fourth.

1. Jury Trial

¶ 7 Icicle maintains that it had a right to demand a jury trial of **Endicott's** claims. **Endicott** counters that the Jones Act provides him a substantive right

to determine whether the case is heard by a judge or a jury. We agree with Icicle. **Endicott** has no substantive right to a nonjury trial because, for Jones Act cases tried in state court, state law grants both parties a right to demand a jury.

A. Background

[1][2][3][4] ¶ 8 The United States Constitution extends the judicial power of the federal courts "to all cases of admiralty and maritime jurisdiction," preserving the general maritime law as a species of federal common law. U.S. Const. art. III, § 2. Congress has given federal courts exclusive jurisdiction over all cases of "admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1) (emphasis added). The "saving to suitors" clause gives plaintiffs the right to sue on maritime actions in state court *879 provided that the state court proceeds *in personam* (here, "at law") and not *in rem* (here, "in admiralty"). *Madruga v. Superior Court*, 346 U.S. 556, 560-61, 74 S.Ct. 298, 98 L.Ed. 290 (1954). Such suits are governed by substantive federal maritime law. *Pope & Talbot, Inc. v. Hawk*, 346 U.S. 406, 409-10, 74 S.Ct. 202, 98 L.Ed. 143 (1953). Maritime plaintiffs may also sue at law in federal court if they meet the diversity of citizenship and amount in controversy requirements. *E.g., Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1117 (5th Cir.1995) (predicating jurisdiction both in admiralty and on diversity). However, general maritime law does not confer federal question jurisdiction. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 378, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959).

[5] ¶ 9 In 1903, the United States Supreme Court interpreted the general maritime law to preclude seamen's suits against their employers for negligence. *The Osceola*, 189 U.S. 158, 175, 23 S.Ct. 483, 47 L.Ed. 760 (1903). Congress overturned the result in the *Osceola* by passing the Jones Act, which now provides in relevant part:

A seaman injured in the course of employment ... may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to ... a railway employee apply to an action under this section.

46 U.S.C. § 30104(a). The railway-employee law referred to is the Federal Employers' Liability Act (FELA), 45 U.S.C. §§ 51-60, which allows recovery for negligence. FELA cases are persuasive authority when interpreting the meaning of the Jones Act unless some aspect of the Jones Act or maritime law makes FELA's application unreasonable in a particular context. *See, e.g., The Arizona v. Anelich*, 298 U.S. 110, 119-23, 56 S.Ct. 707, 80 L.Ed. 1075 (1936) (declining to apply FELA's assumption of the risk rules to Jones Act claims).

[6] ¶ 10 By its terms, the Jones Act allows seamen to sue at law, but not in admiralty, to recover for their employers' *880 negligence. In an early case, the United States **765 Supreme Court adopted a fictitious reading of the act in order to save it from constitutional challenge. *See Pan. R.R. Co. v. Johnson*, 264 U.S. 375, 44 S.Ct. 391, 68 L.Ed. 748 (1924). The litigant argued that the Jones Act was unconstitutional for two reasons. First, it impermissibly carved out a personal-injury piece of admiralty jurisdiction and transferred it to the courts' common law jurisdiction. *Id.* at 385-87, 44 S.Ct. 391. Second, the Jones Act violated due process by allowing the plaintiff-seaman to "elect between varying measures of redress and between different forms of action" without according equal rights to the defendant-employer. *Id.* at 392, 44 S.Ct. 391. The Court avoided the first issue by interpreting the act to allow negligence suits *both* in admiralty and at law. An admiralty suit would yield a bench trial, while a suit at common law would yield a jury trial. *Id.* at 390-91, 44 S.Ct. 391. The Court dispatched the second contention by concluding that "[t]here are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement." *Id.* at

392, 44 S.Ct. 391.

[7] ¶ 11 *Johnson* left ambiguous whether the plaintiff's power to "elect between ... different forms of action" is a statutory right to elect the mode of trial (jury vs. nonjury) or whether it is the right to select the jurisdictional basis of trial (at law vs. in admiralty). If the latter, the jury trial right flows procedurally from the choice of jurisdiction. This question is what the parties here contest. We review this issue of law de novo. *State v. Womac*, 160 Wash.2d 643, 649, 160 P.3d 40 (2007).

B. Extent of the Jones Act Election

¶ 12 There is a split among federal and state courts as to which interpretation of *Johnson* is correct, with the Ninth Circuit and California on one side and the Fifth Circuit, Seventh Circuit, Louisiana, and Illinois on the other.

¶ 13 *Endicott* argues for the Ninth Circuit's "statutory" interpretation, claiming that he has a substantive federal *881 right to elect the mode of trial (jury vs. nonjury) under the Jones Act. Br. of Resp't at 6-8. For support he cites *Craig v. Atl. Richfield Co.*, 19 F.3d 472, 476 (9th Cir. 1994) ("The plain language of the Jones Act gives a *plaintiff* the option of maintaining an action at law with the accompanying right to a jury trial. The Act makes no mention of a defendant."). The *Craig* opinion uses *exclusio alterius* reasoning to conclude that the defendant in a nondiversity Jones Act suit filed in federal court has no right to demand a jury trial. *Id.* at 475-76. *Endicott* also relies on *Peters v. City & County of San Francisco*, No. A061042, 1994 WL 782237, 1995 A.M.C. 788 (Cal.App. Mar. 14, 1994) (unpublished). *Peters* adopts reasoning like *Craig's* in the state-court context, denying the defendant a jury trial right in a Jones Act and general maritime suit filed in state court under the saving to suitors clause. *Id.* at *3-4. Finally, *Endicott* argues based on FELA decisions that this jury-election right is substantive. *See Dice v. Akron, C. & Y. R.R. Co.*, 342 U.S. 359, 363, 72 S.Ct. 312, 96

L.Ed. 398 (1952) (“[T]he right to trial by jury is too substantial a part of the rights accorded by [FELA] to permit it to be classified as a mere ‘local rule of procedure’....”). If the plaintiff’s right to elect the mode of trial is substantive, it binds state courts when they adjudicate Jones Act claims.

¶ 14 Icicle argues for the Fifth and Seventh Circuits’ “jurisdictional” position that *Endicott*’s Jones Act election is limited to choosing the jurisdictional basis of trial (in admiralty vs. at law) and that jury trial rights flow from this election as procedural incidents. *See, e.g., Johnson*, 264 U.S. at 391, 44 S.Ct. 391 (“[T]he injured seaman is permitted, but not required, to proceed on the common law side of the court *with a trial by jury as an incident.*” (emphasis added)). This means that state procedural law, not substantive federal law, governs the defendant’s right to a jury trial in state court. To the extent that *Craig* suggests that *Endicott* has a substantive right to determine the mode of trial, Icicle argues, it is wrong.

¶ 15 Federal case law interpreting the Jones Act convinces us that the jurisdictional interpretation is correct, *882 i.e., the plaintiff’s election exists solely as to the jurisdiction on **766 which trial is predicated. In contrast, the Ninth Circuit’s statutory interpretation arises from a misreading of two Fifth Circuit cases.^{FN1}

FN1. The first case held that the plaintiff in a nondiversity Jones Act suit at law may redesignate his suit as one in admiralty (eliminating jury trial) without the defendant’s consent. *Rachal v. Ingram Corp.*, 795 F.2d 1210, 1215-17 (5th Cir.1986). The other held that state procedure governs jury trial rights when a plaintiff brings maritime claims in a suit at law in state court. *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1487-88 (5th Cir.1992). These holdings are in fact consistent with the jurisdictional interpretation of the Jones Act, as confirmed recently. *See Becker v. Tidewater, Inc.*, 405 F.3d

257, 259 (5th Cir.2005) (basing jury trial rights on jurisdiction, not on the Jones Act). It is true that *Rachal* and *Linton* contain broad language suggesting that the Jones Act confers a statutory right to a jury trial. The Ninth Circuit uncritically adopted this language without acknowledging that this reading erroneously divorced the jury trial right from its historical ties to jurisdiction. *See Craig*, 19 F.3d at 475-76; *see also* David W. Robertson & Michael F. Sturley, *The Right to a Jury Trial in Jones Act Cases: Choosing the Forum Versus Choosing the Procedure*, 30 J. Mar. L. & Com. 649 (1999) (tracing the mistake).

¶ 16 Only two years after *Johnson*, the United States Supreme Court decided *Panama Railroad Co. v. Vasquez*, 271 U.S. 557, 46 S.Ct. 596, 70 L.Ed. 1085 (1926). The issue was whether a Jones Act plaintiff is required to sue in federal court. The Court concluded that *Johnson* interpreted the Jones Act to allow plaintiffs to sue “either in actions *in personam* against the employers in courts administering common-law remedies, with a right of trial by jury, or in suits in admiralty in courts administering remedies in admiralty, without trial by jury.” *Id.* at 560, 46 S.Ct. 596. The *in personam* (at law) suits for negligence could be brought in either federal or state courts under the saving to suitors clause. *Id.* at 560-61, 46 S.Ct. 596. *Vasquez* is consistent with the jurisdictional interpretation of the Jones Act: the Court treats the statute as referring to suits at law versus suits in admiralty and discusses the jury trial right as an incident following from this distinction.

¶ 17 The progression of federal cases reinforces this interpretation. *See McCarthy v. Am. E. Corp.*, 175 F.2d 724, 726 (3d Cir.1949) (“[T]he election to which the Jones Act refers is an election of remedies as between a suit in admiralty and a civil action.”); *883 *Williams v. Tide Water Associated Oil Co.*, 227 F.2d 791, 793-94 (9th Cir.1955) (holding that the jury could hear both the maritime and Jones

Act claims because they were brought at law under the saving to suitors clause, not in admiralty); *McAfoos v. Can. Pac. S.S., Ltd.*, 243 F.2d 270, 272, 274 (2d Cir.1957) (requiring the trial court to treat the plaintiff's suits as an election to bring her in personam claims on the law side in front of a jury); *Tex. Menhaden Co. v. Palermo*, 329 F.2d 579, 580 (5th Cir.1964) (per curiam) ("The Jones Act merely affords the *injured seaman* the choice between a suit in admiralty without a jury and a suit on the civil side of the docket with a jury."); *Wingert v. Chester Quarry Co.*, 185 F.3d 657, 665-68 & n. 5 (7th Cir.1998) (treating the Jones Act election as pertaining to jurisdiction, with procedural consequences as incidents).

¶ 18 Louisiana was one of the first states to recognize the federal trend and employ a jurisdictional analysis when determining jury trial rights in state-court Jones Act suits. See *Lavergne v. W. Co. of N. Am., Inc.*, 371 So.2d 807 (La.1979); *Hahn v. Nabors Offshore Corp.*, 820 So.2d 1283, 1284 (La.App.2002). The *Lavergne* plaintiff sued in state court under the Jones Act and general maritime law. His demand for a jury trial was rebuffed. *Lavergne*, 371 So.2d at 808. On appeal, the Louisiana Supreme Court concluded that, in maritime suits brought at law in state court, state procedural law governs the availability of a jury trial. *Id.* at 809-10. The case was remanded because Louisiana procedural law afforded the plaintiff the right to a jury trial. *Id.*

¶ 19 Illinois recently resolved a split among its own intermediate appellate courts to side with Louisiana. See *Bowman v. Am. River Transp. Co.*, 217 Ill.2d 75, 298 Ill.Dec. 56, 838 N.E.2d 949 (2005). One appellate decision had followed *Craig's* statutory interpretation. *Allen v. Norman Bros., Inc.*, 286 Ill.App.3d 1091, 222 Ill.Dec. 705, 678 N.E.2d 317, 319-20 (1997). Another explored the historical meaning of the Jones Act and adopted a jurisdictional interpretation. *884**767 *Hutton v. Consol. Grain & Barge Co.*, 341 Ill.App.3d 401, 276 Ill.Dec. 950, 795 N.E.2d 303, 306-09 (2003). In a

thorough opinion, the Illinois Supreme Court disapproved of *Allen* and adopted *Hutton* as the proper statement of the law. *Bowman*, 298 Ill.Dec. 56, 838 N.E.2d at 957-59. It then interpreted state procedural law to grant the defendant a right to trial by jury in the case. *Id.* 298 Ill.Dec. 56, 838 N.E.2d at 959-61.

[8][9] ¶ 20 We find the analysis in *Bowman* persuasive. The Jones Act affords the plaintiff the right to elect only the jurisdictional basis for his suit. Once the plaintiff makes his choice of jurisdiction, procedural rights flow as normal incidents of the suit. This means that there is no substantive federal right to elect the mode of trial directly. Rather, state procedural law determines whether the parties have a right to a jury trial. The question then becomes whether Washington law, namely the Washington Constitution, gives the defendant in a Jones Act suit a right to trial by jury.

C. Jury Trial Right in Jones Act Cases under the Washington Constitution

[10][11][12] ¶ 21 To determine whether the Washington Constitution confers a right to a jury trial in a particular cause of action, this Court follows a two-step approach. Wash. Const. art. I, § 21; *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 645, 771 P.2d 711; 780 P.2d 260 (1989). The first step is to determine the scope of the jury trial right as it existed at the State constitution's adoption in 1889. The second step is to determine the causes of action to which the right attaches. *Id.* As to the former, *Sofie* held that the determination of damages in an action at law was within the jury's province in 1889. *Id.* at 645-48, 771 P.2d 711. As to the latter, the inquiry is not whether the specific cause of action existed in 1889, but rather whether the type of action is analogous to one available at that time. *Id.* at 648-49, 771 P.2d 711 (applying modern "tort theories by analogy to the [1889] common law tort actions"). An action "centered on negligence" is analogous to the "basic tort theories" that existed when the constitution was *885 adopted, and the constitutional

jury trial right applies. *Id.* at 649-50, 771 P.2d 711.

[13] ¶ 22 *Sofie* supports finding a jury trial right in a Jones Act suit. First, the fact finding function of the jury in a Jones Act case is to determine damages for negligence. This is exactly what *Sofie* held to be within the scope of the 1889 jury trial right. Second, although admiralty did not permit seamen to sue their employers for negligence in 1889, see *The Osceola*, 189 U.S. at 175, 23 S.Ct. 483, the negligence remedy conferred by the Jones Act is the same “basic cause of action” available at common law against nonmaritime employers. See *Sofie*, 112 Wash.2d at 650, 771 P.2d 711 (citing employer negligence cases from 1888). Indeed, reported Washington case law reveals in personam negligence claims by seamen against shipmasters in 1899, and there is no indication that similar claims would not have been tried to a jury 10 years earlier. FN2 See *Keating v. Pac. Steam Whaling Co.*, 21 Wash. 415, 419, 58 P. 224 (1899) (noting the effect of evidence on the jury in a seaman's personal injury case). We therefore conclude that the Washington constitutional right to a jury trial attaches in a Jones Act claim, with the result that either a plaintiff or a defendant may demand a jury trial on such a claim.

FN2. “The Supreme Court's decision in *The Osceola*, which temporarily halted suits by seamen based on negligence, does not alter the fact that such suits were indeed tried to juries” before that time. *Bowman*, 298 Ill.Dec. 56, 838 N.E.2d at 961.

¶ 23 In sum, the Jones Act does not provide the plaintiff a substantive federal right to determine the mode (jury/nonjury) of trial. The act entitles the plaintiff to elect only the jurisdictional basis for the suit. Once the plaintiff has chosen a suit at law in state court, state procedural law determines whether the parties may demand a jury trial. The Washington Constitution affords Jones Act litigants a jury trial right because the Jones Act is rooted in negligence and so fits within the jury trial right's 1889 purview. *886 Therefore, we vacate the judgment

below and remand for a jury trial. FN3

FN3. Both parties assume that, if *Icicle* has a jury trial right on *Endicott's* Jones Act claim, the right necessarily extends to *Endicott's* unseaworthiness claim. Cf. *Fitzgerald v. U.S. Lines Co.*, 374 U.S. 16, 21, 83 S.Ct. 1646, 10 L.Ed.2d 720 (1963) (adopting this approach in federal court). This point is not self-evident under our law. Jury trial rights for the Jones Act and general maritime claims do not necessarily arise together. Nevertheless, the parties' briefs do not address the jury trial right in general maritime cases or what effect it may have on this case, a “mixed” action in which general maritime and Jones Act claims are joined in one suit. Because the issue is not disputed, we simply assume without deciding that the jury will resolve both claims on remand.

**768 2. Prejudgment Interest

[14][15] ¶ 24 *Icicle* argues that, as a matter of federal law, the trial court could not award prejudgment interest on *Endicott's* claims. FN4 We review a prejudgment interest award for abuse of discretion. *Scoccolo Constr., Inc. v. City of Renton*, 158 Wash.2d 506, 519, 145 P.3d 371 (2006). However, a ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash.2d 299, 339, 858 P.2d 1054 (1993).

FN4. *Icicle* also states that prejudgment interest may not be awarded on future damages. This is a nonissue because the trial judge awarded interest only on past damages. Clerk's Papers at 117-18.

[16] ¶ 25 Prejudgment interest in maritime cases is substantive and so is controlled by federal law. See, e.g., *Militello v. Ann & Grace, Inc.*, 411 Mass. 22, 576 N.E.2d 675, 678 (1991) (collecting cases). The

parties agree that prejudgment interest may be awarded in general maritime claims. *Magee v. U.S. Lines, Inc.*, 976 F.2d 821, 822-23 (2d Cir.1992).

¶ 26 Icicle argues that prejudgment interest is unavailable under FELA and so is unavailable under the Jones Act. See Jones Act, 46 U.S.C. § 30104(a) (incorporating FELA by reference); *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 336-39, 108 S.Ct. 1837, 100 L.Ed.2d 349 (1988) (holding that FELA does not allow for recovery of prejudgment*887 interest). This deduction is far from obvious.^{FN5} As a compromise, many federal courts have held prejudgment interest to be unavailable in Jones Act suits brought at law but available in suits in admiralty. See, e.g., *Doucet v. Wheless Drilling Co.*, 467 F.2d 336, 340 (5th Cir.1972); *Williamson v. W. Pac. Dredging Corp.*, 441 F.2d 65, 67 (9th Cir.1971). But see *Martin v. Harris*, 560 F.3d 210, 219-21 (4th Cir.2009) (never allowing prejudgment interest awards under the Jones Act); *Cleveland Tankers, Inc. v. Tierney*, 169 F.2d 622, 626 (6th Cir.1948) (same). State courts, which hear such suits only at law, have interpreted this dichotomy to mean the following: if the trial is to the jury, the case is analogous to a federal suit at law and prejudgment interest is unavailable. If tried to the bench, the case is analogous to a federal suit in admiralty and prejudgment interest may be awarded. See, e.g., *Marine Solution Servs., Inc. v. Horton*, 70 P.3d 393, 412 & n. 88 (Alaska 2003); *Milstead v. Diamond M. Offshore, Inc.*, 676 So.2d 89, 96-97 (La.1996).

FN5. *Monessen* based its decision on the fact that prejudgment interest was unavailable in common law negligence suits when FELA was passed. 486 U.S. at 337-38, 108 S.Ct. 1837. This reasoning does not readily apply to the Jones Act because of the long tradition of awarding prejudgment interest in admiralty cases. See, e.g., *Great Lakes S.S. Co. v. Geiger*, 261 F. 275, 279 (6th Cir.1919) (awarding prejudgment interest on a maritime claim for personal injury).

[17] ¶ 27 By this logic, the trial court did not abuse its discretion in awarding prejudgment interest to **Endicott**. Prejudgment interest was available on **Endicott's** unseaworthiness claim, and it was available on **Endicott's** Jones Act claim because he tried it to the bench. Thus, the trial judge had discretion to award prejudgment interest as a matter of law.

¶ 28 On remand, however, the defendant will demand a jury trial and prejudgment interest will not be available under the Jones Act. See *Marine Solution Servs.*, 70 P.3d at 412 & n. 88. Thus, the question is whether prejudgment interest is available in a mixed jury trial that includes general maritime claims (allowing prejudgment interest) and Jones Act claims (disallowing it).

*888 ¶ 29 The federal circuit courts are split on the issue. Because a judge has no authority to award prejudgment interest under the Jones Act in jury trial cases, the majority **769 rule disallows an award unless the verdict specifies the damages are apportioned solely to general maritime claims. See, e.g., *Wyatt v. Penrod Drilling Co.*, 735 F.2d 951, 956 (5th Cir.1984). The Second Circuit disagrees. By analogy to other situations in which only one of the plaintiff's claims allows recovery of prejudgment interest, the Second Circuit holds that the unavailability of prejudgment interest under the Jones Act should not limit the plaintiff's recovery on his maritime claim. *Magee*, 976 F.2d at 822-23.

¶ 30 The two relevant Washington cases do not resolve the question. One case adopted the majority rule in dicta but explicitly rested its holding on unrelated grounds. *Foster v. Dep't of Transp.*, 128 Wash.App. 275, 277, 279-80, 115 P.3d 1029 (2005) (basing its holding on sovereign immunity). The other case held that federal maritime law allowing recovery of prejudgment interest preempts Washington law not allowing for the same recovery. *Paul v. All Alaskan Seafoods, Inc.*, 106 Wash.App. 406, 427, 24 P.3d 447 (2001). *Paul* is inapposite because, in that case, preemption analysis provided a rule of decision for choosing between federal and state legal rules. Here there is no such rule of de-

cision.

[18] ¶ 31 We conclude that the minority rule of *Magee* employs the better reasoning. Because seamen are deemed wards of the court, maritime law is generally construed in seamen's favor. Moreover, *Magee* makes common sense. When a seaman prevails on his maritime claim of unseaworthiness, he is entitled to recover his damages plus prejudgment interest. It would be unjust if the employer's violation of *another* of the seaman's rights-protection from negligence under the Jones Act-deprived the seaman of part of the recovery due on his first claim.

[19] ¶ 32 We therefore hold that, in a mixed Jones Act and general maritime suit, prejudgment interest is available on any damages awarded under the general maritime claim, *889 even if unapportioned between the Jones Act claims and the maritime claims. If *Icicle* is concerned that it may pay interest on damages arising solely out of the Jones Act claim, it can ask for a special verdict form apportioning damages.

3. Evidentiary Issues

¶ 33 As noted, *Icicle* raises additional evidentiary issues as a basis to reverse the verdict in *Endicott's* favor. Because of our disposition of this case, it is not necessary to address these contentions.

CONCLUSION

¶ 34 *Icicle* is entitled to demand a jury trial of *Endicott's* claims. We therefore vacate the judgment below and remand for a new trial. We also hold that an award of prejudgment interest is appropriate in a mixed Jones Act and general maritime suit.

WE CONCUR: ALEXANDER, C.J., C. JOHNSON, MADSEN, SANDERS, CHAMBERS, OWENS, FAIRHURST and J.M. JOHNSON, JJ.
Wash.,2010.
Endicott v. Icicle Seafoods, Inc.

167 Wash.2d 873, 224 P.3d 761

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DECLARATION OF SERVICE

On this day said forth below, I emailed and deposited with the U.S. Postal Service a true and accurate copy of: Motion for Seaman's Leave to Proceed Under Rule 39, Petition for a Writ of Certiorari in U.S. Supreme Court Cause No. _____ to the following parties:

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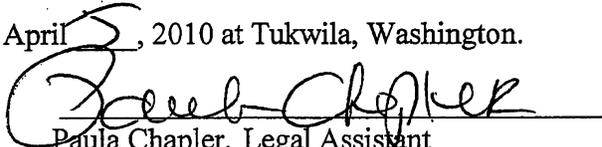
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: April 5, 2010 at Tukwila, Washington.


Paula Chapler, Legal Assistant
Talmadge/Fitzpatrick

DECLARATION