

NO. 71593-3-I

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION I

WINSLOW LAW GROUP, PLLC,

Appellants,

v.

FIFE PORTAL 140, LLC; GEORGE HUMPHREY and JANE DOE
HUMPHREY; and MICHAEL NEWTON, and KATHERINE NEWTON,

Respondents.

BRIEF OF APPELLANT WINSLOW LAW GROUP, PLLC

Roger L. Hillman, WSBA #18643
Tyler W. Arnold, WSBA #43129
GARVEY SCHUBERT BARER
Attorneys for Appellant
Winslow Law Group, PLLC

Eighteenth Floor
1191 Second Avenue
Seattle, Washington 98101-2939
206.464.3939

COURT OF APPEALS
 STATE OF WASHINGTON
 DIVISION I
 FILED
 2021 OCT 13 PM 1:30

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR.....	6
III. STATEMENT OF THE CASE.....	7
A. Enterprises Pledges the Note and Guarantees as Part of a Global Debt Modification Plan.....	8
B. Winslow Sues Respondents to Collect on the Note and Respondents Demand in Discovery That Winslow Produce Documents From 13 Non-Party Banks Regarding the Banks' Relationships With Enterprises.....	10
C. The Trial Court Erroneously Grants Respondents' Motion to Compel	12
D. Winslow Attempts to Comply with the Court's Discovery Order.....	13
E. Respondents File a Motion for Contempt Against Winslow for Failing to Produce Documents and Information from the Banks.....	14
F. Winslow is Forced to Issue Third-Party Subpoenas to Obtain the Documents it was Ordered to Produce.....	16
IV. ARGUMENT	17
A. The Trial Court Erred When It Held Winslow In Contempt for Failing to Produce Documents and Information Over Which Winslow Lacked Possession, Custody, or Control	19
B. The Trial Court Erred When It Held That Winslow—a Limited Agent—Controlled 13 Non- Party Banks—its Principals	22
V. CONCLUSION.....	24

TABLE OF AUTHORITIES

	Page
Cases	
<i>Ago v. Begg, Inc.</i> , 705 F. Supp. 613 (D.D.C. 1988)	23
<i>Britannia Holdings Ltd. v. Greer</i> , 127 Wn. App. 926, 113 P.3d 1041 (2005).....	18
<i>Clark v. Vega Wholesale Inc.</i> , 181 F.R.D. 470 (D. Nev. 1998).....	19
<i>Diaz v. Washington State Migrant Council</i> , 165 Wn. App. 59, 265 P.3d 956 (2011).....	18, 20, 21, 22
<i>Golden Trade S.r.L. v. Lee Apparel Co.</i> , 143 F.R.D. 514 n.7 (S.D.N.Y. 1992).....	20
<i>La Chemise Lacoste v. The Alligator Co., Inc.</i> , 60 F.R.D. 164 (D. Del. 1973)	19
<i>Magana v. Hyundai Motor America</i> , 167 Wn.2d 570 (2009).....	12
<i>Searock v. Stripling</i> , 736 F.2d 650 (11th Cir. 1984).....	18
<i>United States v. Columbia Steel Co.</i> , 7 F.R.D. 183 (D. Del. 1947)	19
<i>United States v. Int’l Union of Petroleum and Indus. Workers</i> , 870 F.2d 1450 (9th Cir. 1989).....	20
<i>Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	17
<i>Weiss v. Lonnquist</i> , 173 Wn. App. 344, 293 P.3d 1264 (2013).....	17

Statutes

RCW 7.21.010 18

Rules

Civil Rule 26(g) 19

Civil Rule 33 6

Civil Rule 33(a)..... 19

Civil Rule 34 6

Civil Rule 34(a)(1)..... 18, 21, 24

Civil Rule 37(b)(2)..... 18

Civil Rule 45 16

Other

Matt Mihlon, *Magana Redux: The Return of Clear and Specific Objections to Discovery*, King County Bar Association Bar Bulletin, October 2010, available at <http://www.kcba.org/newsevents/barbulletin/> 12

Restatement (Third) of Agency § 5.03 cmt. g (2006)..... 23

I. INTRODUCTION

Appellant Winslow Law Group, PLLC, brings this appeal based on it having been held in contempt for failing to produce documents and information that were not within its possession, custody, or control. In an order filed on January 27, 2014, the King County Superior Court held Winslow in contempt for failing to produce documents and information belonging to thirteen different banks, none of which are parties to this litigation.

Winslow assigns two key errors to this ruling, both of which are premised on the fact that a party cannot be held in contempt of an order when it lacks the ability to comply with that order. First, the trial court erred because it ordered Winslow to produce documents and information outside Winslow's possession, custody, or control. In doing so, the court failed to recognize that Respondents bore the burden of demonstrating that Winslow had control over the documents and information at issue, and failed to recognize that Winslow had clearly shown it lacked control over the documents and information. Second, the Court erred because it transposed the law on agency, holding that Winslow, as an agent, controlled 13 different banks, its principals, and all documents and information those banks may possess.

Winslow commenced the underlying litigation in this case to collect on a promissory note and guarantees Respondents Fife Portal 140, LLC, George Humphrey, Michael Newton, and Katherine Newton executed but did not pay back. The promissory note was originally executed in favor of Michael J. Goldfarb Enterprises, LLC (“Enterprises”). In September 2010, Enterprises entered into a pledge agreement with 13 of its lender banks for a global modification of Enterprises’ outstanding unsecured debts. As part of that pledge agreement, Enterprises pledged the note and a number of other assets to those 13 banks in exchange for a modified repayment schedule for Enterprises’ debts. These pledged assets, including the promissory note, were placed into a “collateral pool” in which the 13 banks were each given a pro rata share.

Winslow had no involvement in the creation or negotiation of this pledge agreement. Its involvement instead came about several months later. To manage the collateral pool pledged under the pledge agreement, the banks appointed a “collateral agent.” This collateral agent—originally U.S. Bank—was given a very limited role: to perfect any security interests Enterprises granted through the pledge agreement (meaning the collateral agent would file UCC-1 financing statements); to act as gratuitous bailee and hold any collateral for which possession was needed to perfect any security interests; to collect the value of that collateral in its own name, if

instructed to do so; and to distribute any funds realized from the collateral according to a specific set of instructions. Winslow stepped into this role as collateral agent, replacing U.S. Bank, in June 2011.

The agreement creating the collateral agent gave Winslow no control over the banks' records, including Enterprises' loan agreements with the 13 banks or any underlying documents. Nor did it give Winslow any right to participate in how the banks applied any proceeds realized from the collateral. Winslow's role was instead exclusively limited to holding the collateral Enterprises had pledged, including the promissory note here, and collecting the value of that collateral if instructed to do so.

It was based on this limited role that Winslow commenced the present litigation. After Enterprises defaulted on its modified debt obligations under the pledge agreement, it assigned the note and guarantees to Winslow as the collateral agent. Winslow was then instructed to collect on the value of the note and guarantees. Winslow therefore filed suit against the Respondents for breach of the note and guarantees.

During the underlying proceedings, Respondents issued discovery requests to Winslow asking for information and documents the 13 banks possessed regarding their loan relationships with Enterprises and their negotiation of the pledge agreement. In response, Winslow produced

everything in its possession on these topics. But given its very limited role as collateral agent, Winslow did not possess or have access to documents or information the 13 banks may have held relating to Enterprises' individual loans with those banks. And since Winslow was not involved in the creation or negotiation of the pledge agreement, it did not control or possess information or documents related to that agreement.

Upon receiving Winslow's responses to their discovery requests, Respondents demanded that Winslow produce any responsive documents or information the 13 banks possessed, claiming that Winslow, as the agent for these non-parties, had the ability and obligation to produce their records. When Winslow explained that it had no control over the requested documents or information, Respondents filed a motion to compel. In their motion to compel, the Respondents demanded that Winslow produce all documents and information the 13 banks may have that would be responsive to their discovery requests, and demanded that Winslow respond to requests for which it had already given complete responses.

On November 27, 2013, the King County Superior Court granted the Respondents' motion to compel based on the erroneous reasoning that since Winslow was an agent for the 13 banks, it was required to produce the documents requested.

Winslow attempted to comply, sending a letter to each of the banks asking them to provide the information and documents requested. But only one of the banks provided any documents, leaving Winslow with no reasonable way to produce the remaining banks' documents or information, as required under the court's November 27 order to compel.

Despite knowing this fact, Respondents filed a motion for contempt, alleging that Winslow had violated its discovery obligations by failing to produce the 13 banks' documents and information. Winslow again pointed out to the court that it did not possess or control the documents and information requested, particularly in light of the banks' refusal to provide anything in response to Winslow's letter. Nonetheless, in a letter and order filed January 27, 2014, the King County Superior Court held Winslow in contempt for failure to produce the documents and information referenced in the November 27 order. The Court essentially stated that the issues had already been decided in the November 27 order and would not be overruled or reconsidered, ignoring the evidence that Winslow could not comply with that order. The Court then gave Winslow approximately three business days to comply, after which sanctions would be imposed at \$500 per day.

Left with no options, Winslow took the unprecedented step of issuing third-party subpoenas to the 13 banks in an effort to obtain the

documents and information necessary to respond to the Respondents' discovery requests, a step Respondents could have taken initially. Winslow worked as fast as possible, pressing the banks for responses and then providing that information to the Respondents within three weeks of the Court's order of contempt. Winslow incurred significant expense in doing so, but was nonetheless ordered to pay the Respondents \$7,500 in sanctions for the time it took to produce the third-party banks' documents.

In holding Winslow in contempt, the King County Superior Court ignored the rules of discovery and basic tenets of agency law. The court erroneously required Winslow to produce documents and information over which Winslow lacked possession, custody, or control. This directly contradicts Civil Rules 33 and 34, and thus could not form the basis for the court's order of contempt. Furthermore, the court mistakenly held that an agent (Winslow) controls its principals (the 13 banks) when in fact the inverse is true. Winslow had no control over the documents requested, as it clearly showed based on the fact that it had to issue subpoenas to get those documents. The King County Superior Court's order of contempt against Winslow must therefore be reversed.

II. ASSIGNMENTS OF ERROR

1. Under Civil Rules 33 and 34, a party can only be required to produce documents and information within its possession, custody, or

control. The party seeking discovery bears the burden of demonstrating that the party from whom discovery is sought controls the documents at issue. Respondents made no showing that Winslow controlled the documents relevant here. Winslow in fact showed that it did **not** possess or control those documents. Did the Court err in holding Winslow in contempt for failing to produce documents and information not within Winslow's possession, custody, or control?

2. A party cannot be held in contempt of an order if it lacks the ability to comply with that order. Under Washington law, an agent lacks control of its principal. The documents and information the court ordered Winslow to produce were exclusively controlled by Winslow's principals, over which Winslow had no control. Did the Court err in holding Winslow in contempt when it did not control the documents or information ordered to be produced and thus had no ability to comply with the court's discovery order?

III. STATEMENT OF THE CASE

Appellant Winslow Law Group, PLLC commenced this litigation on January 14, 2013, to collect on an unpaid promissory note (the "Note") and two related personal guarantees (the "Guarantees").¹ The Note had been executed by Respondent Fife Portal 140, LLC in favor of Michael J.

¹ CP 5-9.

Goldfarb Enterprises, LLC (“Enterprises”), in the amount of \$3.8 million, or so much as was advanced under the Note.² The two Guarantees were executed by Respondent George Humphrey and Respondents Michael and Katherine Newton to ensure Fife Portal’s repayment of the Note.³

A. Enterprises Pledges the Note and Guarantees as Part of a Global Debt Modification Plan

Enterprises later assigned the Note and Guarantees at issue here to Winslow as part of a global agreement Enterprises had entered into to modify its unsecured debts with 13 different banks.⁴ On September 17, 2010, Enterprises entered into a Membership Interest Pledge and Security Agreement (the “Pledge Agreement”) with 13 of its lenders (the “Banks”)⁵ for a global modification of Enterprises’ outstanding unsecured debts.⁶ Under the terms of the Pledge Agreement, the Banks would each agree to modify the repayment terms on each of their individuals loans with Enterprises.⁷ In exchange, Enterprises pledged approximately 120 assets, including the Note, to secure those modified repayment obligations.⁸

² CP 3.

³ CP 3-4.

⁴ See CP 182, 425-41.

⁵ Those lenders were Banner Bank Citi Private Bank, Commencement Bank, The Commerce Bank of Washington, First Sound Bank, Fortune Bank, Pacific Continental Bank, Puget Sound Bank, Regal Financial Bank, Sterling Bank, Thurston First Bank, U.S. Bank, and Wells Fargo Bank. See CP 143-46, 223.

⁶ See CP 425-41.

⁷ See CP 425, 431.

⁸ See CP 427, 439-40.

These pledged assets, including the Note, were then placed into a “collateral pool” in which the Lenders were each given a share.⁹

At the same time the Pledge Agreement was created, the Banks also created a “Collateral Agency Agreement,” creating the role of a limited agent to hold the collateral Enterprises had pledged.¹⁰ This collateral agent was given a very narrow role: to perfect any security interests Enterprises granted through the pledge agreement (meaning the collateral agent would file UCC-1 financing statements)¹¹; to act as gratuitous bailee and hold any collateral for which possession was needed to perfect any security interests¹²; to collect the value of that collateral in its own name, if instructed to do so¹³; and to distribute any funds realized from the collateral according to a specific set of instructions.¹⁴

The Collateral Agency Agreement did not give the collateral agent any control over the Banks’ records, nor did it give the collateral agent any right to participate in how the Banks applied any proceeds realized from the collateral. Instead, the collateral agent’s role was strictly limited to holding the collateral Enterprises had pledged, collecting the value of that

⁹ CP 426-27.

¹⁰ CP 863.

¹¹ *Id.*

¹² CP 865.

¹³ CP 874-75.

¹⁴ CP 875.

collateral if instructed to do so, and distributing the funds collected based on the terms of the Collateral Agency Agreement.

Winslow was not involved in the creation or negotiation of the Pledge Agreement or Collateral Agency Agreement. Instead, Winslow became involved in June 2011, taking over as collateral agent after U.S. Bank stepped down from the role.¹⁵

Enterprises ultimately defaulted on its obligations under the Pledge Agreement after its main member, Michael J. Goldfarb, died. Pursuant to the Pledge Agreement, Enterprises assigned the Note to Winslow for collection.¹⁶

B. Winslow Sues Respondents to Collect on the Note and Respondents Demand in Discovery That Winslow Produce Documents From 13 Non-Party Banks Regarding the Banks' Relationships With Enterprises

In its limited role as collateral agent, and as the assignee from Enterprises, Winslow commenced the present litigation to collect on the Note and Guarantees.¹⁷ On July 2, 2013, Defendants Fife Portal and Michael Newton served their First Interrogatories and Requests for

¹⁵ CP 850.

¹⁶ *Id.*

¹⁷ *See* CP 1-9.

Production on Winslow.¹⁸ Winslow timely replied, serving answers, objections, and responsive documents on August 1, 2013.¹⁹

In a subsequent discovery conference, Respondents claimed that, rather than subpoenaing the Banks themselves, Winslow should have to produce documents from the 13 Banks.²⁰ Winslow lacked possession, custody, or control over the Lenders' records, and thus disagreed with Respondents' position.²¹

Six business days after the parties' discussion, Respondents filed a motion to compel, asking the Court to overrule all of Winslow's objections to the underlying discovery requests (including those based on attorney-client privilege), order Winslow to produce the banks' records, supplement certain interrogatory answers (without explaining what was lacking), and make the Note available for inspection (something Winslow had done back in August).²² But Winslow had already produced all non-privileged, responsive documents by the time that motion was to be heard.²³

¹⁸ CP 89.

¹⁹ CP 89-90, 95-127.

²⁰ CP 135-40.

²¹ CP 137-38.

²² CP 28-39.

²³ See CP 95-127, 135-54. A chart showing each of the Respondents' requests, as well as Winslow's responses and the documents produced, appears at CP 195-203. This chart was submitted with Winslow's motion for reconsideration of the trial court's order granting Respondents' motion to compel.

C. The Trial Court Erroneously Grants Respondents' Motion to Compel

On November 27, 2013, the trial court entered an order granting the Respondents' motion to compel (the "Discovery Order").²⁴ In the Discovery Order, the court (a) overruled all of Winslow's objections, including those based on attorney-client privilege, with no explanation²⁵; (b) ordered over \$3,000 in sanctions in the erroneous belief that by failing to seek a protective order, Winslow had failed to respond to Defendants' requests (even though Winslow had timely served answers, responses, and objections to those requests²⁶); and (c) ordered Winslow to produce documents from the Lenders.²⁷ In ordering Winslow to produce documents from the Lenders, the court erroneously reasoned, "[i]f [plaintiff] is an agent of the banks [and] is presenting this action on their behalf, the [court] will require [plaintiffs] to produce the documents requested."²⁸ Ignoring the fact that Winslow had not withheld any documents in its possession (and ignoring the Washington Supreme Court's ruling in *Magana v. Hyundai Motor America*²⁹), the court further

²⁴ CP 177-79.

²⁵ CP 177.

²⁶ See CP 95-127, 135-54, 195-203.

²⁷ CP 178.

²⁸ *Id.*

²⁹ 167 Wn.2d 570, 584 (2009); See Matt Mihlon, *Magana Redux: The Return of Clear and Specific Objections to Discovery*, King County Bar Association Bar Bulletin, October 2010, available at <http://www.kcba.org/newsevents/barbulletin/BBPrintView.aspx?AID=article3 &Year=2010&month=10>.

stated that “[plaintiffs] cannot just withhold production of documents without first seeking an order of protection from the [court].”³⁰

Winslow promptly moved for reconsideration of the Discovery Order, pointing out its multiple errors.³¹ But, on December 19, 2013, the trial court once again summarily dismissed Winslow’s arguments.³² The only explanation offered was this: “the [court] is not persuaded that the agent does not have access to the requested information and the unique circumstances of this case put the agent in a better position to facilitate Dx [discovery?] of such.”³³

D. Winslow Attempts to Comply with the Court’s Discovery Order

On December 20, 2013, the day after receiving the court’s order denying its motion for reconsideration, Winslow wrote to each of the Banks asking them to provide any documents responsive to the Respondents’ discovery requests.³⁴ Given the upcoming holidays (and the fact that Winslow had no power under the Collateral Agency Agreement to force the Banks to do anything), Winslow asked the Banks to respond by January 7, 2014.³⁵ Winslow also explained to Respondents this

³⁰ CP 178.

³¹ See CP 180-203.

³² See CP 251-52.

³³ CP 252.

³⁴ CP 356-57, 360-61. Winslow sent an identical letter to each of the Banks.

³⁵ CP 361.

timeframe in which it hoped to get responses so they could know when to reasonably expect information.³⁶ But Respondents ultimately ignored this explanation and moved for contempt before any documents could be received from the Banks.

Only three of the Banks responded, and only one of them provided Winslow with any documents.³⁷ Winslow nonetheless sent Respondents everything these Banks had provided.³⁸

E. Respondents File a Motion for Contempt Against Winslow for Failing to Produce Documents and Information from the Banks

On January 2, 2014, Respondents filed a motion for contempt,³⁹ focusing on the fact that Winslow had not produced documents and information from the Banks.⁴⁰ Respondents made no showing whatsoever that Winslow controlled the Banks or their documents, and cited no authority for that proposition.⁴¹ Instead, they simply maintained that Winslow was required to produce the Banks' documents and information because it was their agent.⁴²

³⁶ See CP 263.

³⁷ See CP 371-501.

³⁸ CP 371.

³⁹ CP 253-57. Respondents' motion also included a request to retain the original judge, who had recently rotated off the case. That request was denied.

⁴⁰ See CP 254.

⁴¹ See CP 253-57.

⁴² See CP 254.

In response, Winslow presented to the court everything it had produced and made clear that it had not withheld any documents other than privileged communications with its attorneys.⁴³ Winslow also submitted to the court the Banks' responses to Winslow's letter asking them for responsive documents, clearly demonstrating that Winslow had no control over these non-parties.⁴⁴

Regardless, on January 27, 2014, the court issued an order holding Winslow in contempt (the "Contempt Order") and an accompanying letter explaining its ruling.⁴⁵ In its Contempt Order, the court commanded Winslow to produce the Banks' documents as indicated under the earlier Discovery Order, and imposed sanctions at the rate of \$500 per day until all such documents were produced.⁴⁶ But the court did not analyze whether Winslow actually had possession or control of the documents it was being sanctioned for failing to produce.⁴⁷ The court thus made no determination as to whether Winslow had the present ability to purge the contempt being imposed. In fact, the court stated that it had not

⁴³ See CP 278, 283-315, 330-341, 371-501.

⁴⁴ See CP 371-501.

⁴⁵ CP 503-06. The Contempt Order appears to be dated January 24, 2014. However, that appears to have been an error, as Judge Dubuque's accompanying letter is dated January 27, 2014, and the Contempt Order is stamped as filed on January 27, 2014.

⁴⁶ CP 505-06.

⁴⁷ See *id.*

considered evidence Winslow submitted demonstrating quite clearly that Winslow did not control the Banks or their documents.⁴⁸

F. Winslow is Forced to Issue Third-Party Subpoenas to Obtain the Documents it was Ordered to Produce

Winslow timely filed its notice of appeal of the Contempt Order. But, faced with \$500 per day in sanctions, Winslow took the unprecedented step of issuing its own third-party subpoenas to the Banks requesting documents and information responsive to the Respondents' discovery requests in an attempt to purge the contempt.⁴⁹ (By forcing Winslow to issue these subpoenas, the court also had, perhaps unintentionally, wiped out any protections the Banks may have had as non-parties under Civil Rule 45.)

Because the Contempt Order also required Winslow to produce information from the 13 Banks, Winslow sent each bank a request asking them to answer those of Respondents' interrogatories relevant to the Banks.⁵⁰

Given the incredibly short timeframe the court provided Winslow to comply, Winslow produced documents and information on a rolling basis as soon as it was received from the Banks.⁵¹ By February 19, 2014,

⁴⁸ See CP 502.

⁴⁹ See CP 543-607.

⁵⁰ CP 544.

⁵¹ CP 544-46, 609-69.

Winslow had managed to serve all responsive documents (7,734 pages worth), having received responses to the 13 subpoenas to the Banks and then having served them on Respondents as responses to their discovery requests.⁵² Winslow then promptly filed a motion to purge the contempt, hoping to limit the damage done by the court's erroneous Contempt Order.⁵³

In an order dated March 6, 2014, the court entered an order granting Winslow's motion to purge the contempt.⁵⁴ But the court still imposed sanctions on Winslow, ordering it to pay Respondents \$7,500 in sanctions.⁵⁵

IV. ARGUMENT

The King County Superior Court's Contempt Order must be reversed because it contradicts Washington law. Contempt orders are reviewed for an abuse of discretion.⁵⁶ "A trial court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."⁵⁷

⁵² *See id.*

⁵³ *See* CP 534-41.

⁵⁴ CP 889-90.

⁵⁵ CP 890. The court's original order imposed sanctions of \$3,500. After receiving an email from Respondents' counsel, though, the court issued an "order correcting math error" increasing the sanctions to \$7,500. *See* CP 892.

⁵⁶ *Weiss v. Lonquist*, 173 Wn. App. 344, 363, 293 P.3d 1264 (2013).

⁵⁷ *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

The King County Superior Court abused its discretion here because it held Winslow in contempt for failing to do something it was neither legally obligated nor able to do. Under Civil Rule 37(b)(2), a party may only be held in contempt if it “fails to obey an order to provide or permit discovery.” Before a court can hold a party in contempt, it must determine that a party has intentionally chosen not to comply with a court’s order.⁵⁸ “[E]xercise of the contempt power is appropriate only when ‘the court finds that the person has failed or refused to perform an act that **is yet within the person's power to perform.**’ Thus, a threshold requirement is a finding of **current** ability to perform the act previously ordered.”⁵⁹

This appeal turns entirely on the question of control. Under Civil Rule 34(a)(1), a party responding to requests for production need only produce documents “in the responding party’s possession, custody, or control.” Absent possession, this issue turns on whether the responding party has “control” of the documents at issue, defined as “the legal right to obtain the documents requested upon demand.”⁶⁰ In other words, this “requires that a party have exclusive control of the documents before the

⁵⁸ See RCW 7.21.010.

⁵⁹ *Britannia Holdings Ltd. v. Greer*, 127 Wn. App. 926, 933–34, 113 P.3d 1041 (2005) (internal citations omitted) (emphasis in original).

⁶⁰ *Diaz v. Washington State Migrant Council*, 165 Wn. App. 59, 78, 265 P.3d 956 (2011) (quoting *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984)).

Court orders production. This special relationship [between the party and the person actually possessing documents] exists when a party is able to command release of the documents by the person or entity in actual possession”⁶¹

Similarly, under Civil Rule 33(a) a party responding to interrogatories need only conduct a reasonable inquiry⁶² and “furnish such information as is available to the party.” If information is not within the responding party’s control, “it should not be required to enter upon extensive independent research in order to acquire such information.”⁶³

A. The Trial Court Erred When It Held Winslow In Contempt for Failing to Produce Documents and Information Over Which Winslow Lacked Possession, Custody, or Control

As an initial matter, the trial court abused its discretion when it held Winslow in contempt because it misapplied the burden of showing that Winslow had control of the information and documents at issue. “The burden of demonstrating that the party from whom discovery is sought has the practical ability to obtain the documents at issue lies with the party

⁶¹ *Clark v. Vega Wholesale Inc.*, 181 F.R.D. 470,472 (D. Nev. 1998) (internal citations omitted).

⁶² Civil Rule 26(g).

⁶³ *La Chemise Lacoste v. The Alligator Co., Inc.*, 60 F.R.D. 164, 171 (D. Del. 1973) (citing *United States v. Columbia Steel Co.*, 7 F.R.D. 183, 184 (D. Del. 1947)).

seeking discovery.”⁶⁴ In *Diaz*, a former director, Carlos Diaz, sought to compel a corporation, the Washington State Migrant Council, to produce the personal citizenship and immigration documents for all of its current directors.⁶⁵ The trial court subsequently imposed contempt sanctions when the Migrant Council failed to produce these documents.⁶⁶

Reversing the finding of contempt, the Court of Appeals pointed out that “Mr. Diaz has not shown that the Migrant Council had the legal or practical ability to secure any responsive personal records belonging to the [Migrant Council’s current] directors.”⁶⁷ As he had the burden on that issue, the trial court had no basis for finding the Migrant Council in contempt.

The trial court here made the same mistake as the trial court in *Diaz*: it held Winslow in contempt despite the fact that Respondents did not show that Winslow had the practical or legal ability to obtain the information and documents requested. The trial court in fact reversed the burden, ordering Winslow to produce the documents at issue because it

⁶⁴ *Diaz*, 165 Wn. App. at 78 (citing *Golden Trade S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 n.7 (S.D.N.Y. 1992)); accord *United States v. Int’l Union of Petroleum and Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989) (“The party seeking production of the documents . . . bears the burden of proving that the opposing party has such control.”) (internal citations omitted).

⁶⁵ *Diaz*, 165 Wn. App. at 66-67.

⁶⁶ *Id.* at 68.

⁶⁷ *Id.* at 78.

was “not persuaded that the agent [Winslow] does not have access to the requested information”⁶⁸

Furthermore, in making this determination, the trial court ignored the fact that Winslow proved it did not have control over the information and documents at issue. Again, a party cannot be compelled to produce documents it does not control.⁶⁹ Winslow tried to get the information and documents from the Banks voluntarily, but the Banks declined to respond.⁷⁰ Ultimately, the only way Winslow could get the information and documents Respondents wanted was to issue third-party subpoenas to the Banks.⁷¹ Certainly the obligation to conduct a “reasonable inquiry” cannot include an obligation to issue one’s own discovery in order to answer an opponent’s discovery requests. And if the ability to obtain documents through subpoenas constitutes control, then a party essentially has limitless obligations in responding to discovery. Fortunately, it does not, and the trial court erred in holding Winslow in contempt for failing to produce information and documents it could only get through third-party subpoenas.

⁶⁸ CP 252.

⁶⁹ See Civil Rule 34(a)(1); *Diaz*, 165 Wn. App. at 78.

⁷⁰ See CP 356-63.

⁷¹ See CP 542-669.

B. The Trial Court Erred When It Held That Winslow—a Limited Agent—Controlled 13 Non-Party Banks—its Principals

The second flaw in the Contempt Order comes from the trial court’s misapplication of agency law. In the Contempt Order (and the Discovery Order on which it was based), the court essentially short-circuited the control issue, mistakenly holding that Winslow—as an agent—necessarily had “control” of the Banks—Winslow’s principals—and their documents. In doing so, the court held Winslow in contempt of an order for which Winslow had no legal ability to comply.

Again, the question of control turns on whether a party has the legal right to demand and obtain the documents requested.⁷² In the present context, this question turns on Winslow’s limited agency relationship with the Banks. Under general agency law, where a principal is involved in litigation, any knowledge its agents have will be imputed to the principal and the principal will be deemed to have control over the agent’s documents.⁷³ But the inverse does not hold true: when an agent is involved in litigation, the knowledge of its principals will not be imputed to the agent: “Notice of facts that a principal knows or has reason to know **is not imputed downward to an agent**. A principal does not owe a duty of disclosure to an agent that is a full counterpart of the duty owed by an

⁷² *Diaz*, 165 Wn. App. at 78.

⁷³ *See id.* at 80.

agent to relay material facts”⁷⁴ And, similarly, the agent will not be deemed to have control over the principal’s documents.

As a strictly legal matter, then, Winslow could not be said to control the Banks or their documents. Winslow is undisputedly the agent in relation to the Banks. It could no more order the Banks to produce documents than an individual employee of one of the Banks could.

As a contractual matter, Winslow’s agency role was also too limited to allow it access to the documents Respondents sought. The Collateral Agency Agreement only gave Winslow the authority to hold collateral, such as the Note and Guarantees at issue here; to reduce the collateral to its monetary value if directed to do so; and to distribute the funds recovered from any collateral based on a strict set of instructions. The Collateral Agency Agreement did not give Winslow any control over the Banks or access to their records.

Accordingly, the King County Superior Court abused its discretion when it held that Winslow—as an agent—had control over documents in the exclusive possession of the Banks—Winslow’s principals. The Contempt Order must therefore be reversed and the sanctions paid to Respondents must be returned.

⁷⁴ Restatement (Third) of Agency § 5.03 cmt. g (2006); *see also* *Ago v. Begg, Inc.*, 705 F. Supp. 613, 617-18 (D.D.C. 1988) (“While the law of agency often holds a principal responsible for knowledge known by his agent . . . it sensibly does not hold agents responsible for knowledge known only by the principal.”) (internal citations omitted).

V. CONCLUSION

Appellant Winslow Law Group, PLLC, respectfully requests that the Court reverse the King County Superior Court's order of contempt. The trial court abused its discretion because it held Winslow in contempt of an order that it had no present legal ability to comply with. The court erred when it (a) ordered Winslow to produce documents that were not within its possession, custody, or control, violating Civil Rule 34(a)(1); and (b) failed to hold Respondents to their burden of demonstrating that Winslow controlled the documents requested (which it did not), violating prior Washington case law. The trial court further abused its discretion because it reversed agency law, incorrectly holding that Winslow, as an agent, controlled the 13 non-party banks, its principals. As a matter of law, Winslow did not control those banks, and could not be held in contempt for failing to produce the banks' documents. Therefore, the order of contempt should be reversed and all sanctions Winslow was forced to pay should be returned.

DATED this 15th day of May, 2014.

GARVEY SCHUBERT BARER

By



Roger Hillman, WSBA #18643
Tyler W. Arnold, WSBA #43129
Attorneys for Plaintiff Winslow
Law Group, PLLC, as Collateral
Agent

CERTIFICATE OF SERVICE

I, Greta Nelson, certify under penalty of perjury under the laws of the State of Washington that, on May 15, 2014, I caused the foregoing document to be served on the person(s) listed below:

Bradley S. Wolf	<input type="checkbox"/>	United States Mail, First Class
Law Offices of Bradley S. Wolf	<input checked="" type="checkbox"/>	By Legal Messenger
600 First Avenue, Suite 600	<input type="checkbox"/>	By Facsimile
Seattle, WA 98104	<input type="checkbox"/>	By Federal Express
	<input type="checkbox"/>	By Email

Kyle D. Netterfield	<input type="checkbox"/>	United States Mail, First Class
Ellis Li & McKinstry, PLLC	<input checked="" type="checkbox"/>	By Legal Messenger
Market Place Tower	<input type="checkbox"/>	By Facsimile
2025 First Avenue, Penthouse A	<input type="checkbox"/>	By Federal Express
Seattle, WA 98121	<input type="checkbox"/>	By Email

DATED this 15th day of May, 2014.



 Greta Nelson, Legal Assistant
 GARVEY SCHUBERT BARER
 1191 Second Avenue, 18th Floor
 Seattle, WA 98101-2939
 Phone: (206) 464-3939
 Fax: (206) 464-0125
 Email: gnelson@gsblaw.com

FILED
 COURT OF APPEALS DIV I
 STATE OF WASHINGTON
 2014 MAY 15 PM 4:30