

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

MICHAEL DURAND, )  
PLAINTIFF/APPELLEE )  
VS. )  
HIMC CORPORATION; )  
ITI INTERNET SERVICES, INC )  
JUDY JOHNSTON; and )  
JERRY CORNWELL, and )  
THE MARITAL COMMUNITY OF )  
JERRY CORNWELL AND JANE DOE )  
CORNWELL; )  
DEFENDANTS/APPELLANTS )

CASE NO. 37088-3-II

**ORIGINAL**

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DIVISION II  
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APPELLANTS' JOINT OPENING BRIEF ON APPEAL  
AS CORRECTED

Submitted this 13<sup>nd</sup> day of JUNE, 2008

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Appellants, WSBA # 16585

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## JURISDICTIONAL STATEMENT

Two separate judgments were entered by the Pierce County Superior Court, per Hon. Rosanne Buckner, on **November 21, 2007** against the two corporate defendants and the two individual defendant officers, for differing amounts. CP 743 and CP 746. See **Appendix**, pp. **65;68** (hereinafter **APP**-page #). The First Judgment, against the two individual defendants together with the two corporate defendants, is a subset of the Second and larger Judgment entered against just the two corporate Defendants. A consolidated Notice of Appeal was timely filed by all four defendants appealing from both judgments.

## STANDARD OF REVIEW

Where the trial is to the Court, appellate review is a two-step process limited to determining: 1) whether the findings of fact are supported by substantial evidence; AND 2) whether those findings of fact support the trial court's conclusions of law and the judgment issued. Perry v Costco Wholesale, 123 Wn. App. 783 at 792 (2004); Tacoma v State, 117 Wn.2d 348 at 361 (1991); Ridgeview Properties v Starbuck, 96 Wn.2d 716 (1982) at 719. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise. Ridgeview Properties v Starbuck, 96 Wn.2d at 719.

Where the findings are based on an erroneous interpretation of statutory law, the appellate review is **de novo**.

ASSIGNMENTS OF ERROR

1. The Superior Court erred in imposing an **ex parte** Expedited Trial Scheduling Order, and in the subsequent Denial of Defendants' Rule 56(f) Motion for Supplemental Discovery to unfairly limit Defendants' opportunity to engage in Discovery.

2. The Trial Court erred in using settlement discussions to determine liability and the amount of damages under RCW 49.52.070.

3. The Trial Court erred in relying upon Schilling v Radio Holdings, Inc. to deny a defense under RCW 49.52.050 based on inability to pay a wage claim, and in imposing liability under RCW 49.52.070 for not doing that which other applicable Washington law, RCW 9A.56.060, prohibited them from doing.

4. The Trial Court erred in imposing damages of **\$300,000.00** under RCW 49.52.070 upon individual Officers of the publicly traded corporate employer which lacked sufficient money to pay the wage claim.

5. The Trial Court erred in imposing damages of **\$692,798.26** under RCW 49.48.010 based on its erroneous interpretation of a 2<sup>nd</sup> employment contract between Plaintiff and the Defendant corporations.

6. The Trial Court erred in Awarding Attorney's fees of **\$130,815.00** and in failing to segregate unsuccessful work from the award.

7. The Trial Court erred in using a Multiplier of 1.5 in its Lodestar

calculation of reasonable attorney's fees to create an hourly rate of **\$450.00** per hour.

8. The Trial Court erred in imposing joint and several liability for payment of attorney's fees upon individual Defendants deemed liable for a failure to pay only a portion of a wage claim under RCW 49.52.070.

9. The Trial Court erred in its calculation of damages under RCW 49.52.070 against individual Defendant Officers who were not liable for payment of wages under RCW 49.48.010 et. seq.

10. The Trial Court erred in imposing liability upon the marital community of a corporate officer for conduct taken in the course of his agency duties for a corporate employer.

ISSUES ON APPEAL:

1. Whether the Court's granting of an **ex parte** request by Plaintiff for an expedited trial schedule with minimal time for discovery and identification of witnesses denied Defendants due process and adequate time to prepare for trial.
2. Whether the Expedited Trial Schedule is sufficient justification for the Court's Order denying a CR Rule 56(f) Motion for Additional Time to depose witnesses and whether the Order was an abuse of discretion and denied Defendants adequate time to prepare for trial.
3. Whether the Court's reliance upon settlement discussions under

Evid. Rule 408 to make an evidentiary finding of what portion of a wage claim was not subject to a bona fide dispute under RCW 49.52.070 violated Evid. Rule 408, was an abuse of discretion and created legal conclusions with no basis in admissible evidence.

4. Whether there was sufficient evidence of a violation of RCW 49.52.050, and whether the absence of a bona fide dispute in defense of a claim under RCW 49.52.070 is **ipso facto** sufficient affirmative evidence of a criminal intent to willfully withhold wages in violation of RCW 49.52.050(1) or (2).
5. Whether Schilling v Radio Holdings, Inc., 136 Wn.2d 152 (1998) forecloses assertion of a defense under RCW 49.52.050 by Officers and Directors based on the financial inability of the corporate employer to pay a wage claim; whether Schilling bars assertion of a defense based on Washington laws, RCW 9A.56.060, which make unlawful the issuance of a wage payment that cannot be paid due to insufficient funds; and whether Schilling bars assertion of a defense of lack of criminal intent under RCW 49.52.050 based on a fiduciary duty under RCW 23B.08.420 to challenge excessive wage claim demands.
6. Whether the Trial Court's Judgment of a violation of RCW 49.52.070 is supported by substantial evidence, and whether the failure to pay a wage claim due to insufficient funds is conclusive

evidence of an intent to willfully withhold a wage payment contrary to RCW 49.52.050.

7. Whether a claim under RCW 49.52.070 against a corporate officer requires proof sufficient to pierce the corporate veil.
8. Whether the duty to obey Washington state criminal laws overrides or is subservient to civil laws which punish the failure to do that which the criminal law prohibits doing, and whether a corporate officer can be held civilly liable under RCW 49.52.070 for not doing that which RCW 9A.56.060 makes unlawful to do.
9. Whether the Trial Court erred in disregarding the original employment contract when interpreting a subsequent related employment contract; whether there was substantial evidence to support the Trial Court's award of \$692,708.00 as damages due for breach of contract.
10. Whether the Trial Court erred in its award of attorney's fees of \$130,815.00, in its determination of the Lodestar, in its failure to segregate unsuccessful work, and its granting of a 1.5 multiplier.
11. Whether the Trial Court erred in imposing liability of \$300,000.00 upon the two individual defendant officers under RCW 49.52.070 for a \$150,000.00 wage claim for which **only** the corporate employer was deemed liable under RCW 49.48.030.
12. Whether the Trial Court erred in imposing joint and several

liability and not apportioning attorney's fees based on the limited liability under RCW 49.52.070 of the individual defendants vs. the liability under RCW 49.48.010 of the corporate defendants.

13. Whether individual corporate officers deemed liable in part under RCW 49.52.070 can be deemed liable for prejudgment interest on a wage claim asserted under RCW 49.48.010 against the corporate employer;
14. Whether a judgment under RCW 49.52070 based on an alleged criminal violation of RCW 49.52.050 can be imposed upon the marital community of the corporate officer.

#### INTRODUCTORY OVERVIEW OF APPEAL:

The individual Defendants, Jerry Cornwell and Judy Johnston, contend that the judgment against them under RCW 49.52.070 was the result of an erroneous interpretation of the statute and an erroneous understanding of what the Supreme Court did and, more importantly, **did not decide** in its decisions in Schilling v Radio Holdings, 136 Wn.2d 152 (1998) and Ellerman v Centerport Freepress, Inc., 143 Wn.2d 514 (2001). Based on that fundamental and dominating misunderstanding, the Trial Court refused to consider any affirmative defenses asserted by Defendants in their Answers. Further, based on that original misunderstanding, the Trial Court lowered the necessary standard of proof to a virtual presumption of liability, i.e. guilt under a criminal statute, and disregarded

the usual statutory, procedural and legal obligations of a Trial Judge to interpret all of the relevant statutory law, to make necessary findings of fact, and to require the Plaintiff to prove each claim by sufficient evidence. The result was the issuance of a judgment and other Orders which reflect an arbitrary and capricious decision-making pattern and for which the facts were not proven by substantial evidence.

Willfulness under RCW 49.52.050(1) and /or (2) cannot be proven by a presumption. See RCW 49.52.080. The Trial Court erred in adopting Plaintiff's theory that under the decision in Schilling v Radio Holdings, Inc., 136 Wn.2d 152 (1998), the failure to pay based on a financial inability to pay a wage claim under RCW 49.48.030 is presumptive evidence of a criminal intent to willfully and knowingly deprive an employee of wages in violation of RCW 49.52.050, subject only to a Defendant's proof of a bona fide dispute.

The two corporate Defendants, HIMC Corp. and ITI Internet Services, Inc., join in the foregoing overview of the case. Further, they contend that the Court resolved the factual and legal issues of contract interpretation in a biased manner. Conflicting evidence was resolved against the Defendants because the Court had prejudged the legal issues and was already committed to imposing liability on the alleged "wage" claim under RCW 49.48.030, regardless of ambiguities in the two contracts of employment. The Defendants contend that the Trial Court

denied Defendants a fair trial by its manifest pattern of denying them time for discovery, and by disregarding efforts by Defendants to develop affirmative defenses which the Court had wrongly decided were irrelevant and immaterial as a matter of law. See Defendants' Answers, **CP 28-32; 276-289; 283-289** and **APP- 23, 33, and 40**. The Trial Court gave too much money as contract wages under RCW 49.48.030 based on its erroneous reading of two inter-related contracts.

All Defendants contend that the Findings of Fact were not supported by substantial evidence.

#### STATEMENT OF THE CASE

Plaintiff was an employee of HIMC Corp., a publicly traded company, and/or ITI Internet Services, Inc., a wholly owned subsidiary of HIMC Corp. On **March 24, 2005** he was employed under a written five-year contract with HIMC Corp. which included a severance package clause authorizing severance pay of one month for each month worked, up to a maximum severance package of twelve (12) months. See **Exhibit # 2. See also: Appendix, p. 71**. The start date was fixed as **April 18, 2005**, or about three weeks (25 days) later. The consideration for this employment contract was the promise of an annual base salary of \$150,000.00, a signing bonus of 25,000 shares of HIMC stock, and a job title and description as "Head of Sales" with the goal of creating a "profitable sales organization for the corporation." **id.** The terms of the

severance package had been inserted in the March 24, 2005 employment contract at the specific request of and insistence by Michael Durand as the protection he wanted as a precondition to giving notice to his then employer and committing to coming to HIMC Corp. as an employee. **RP 324-325.** In reliance upon the **March 24, 2005** contract of hire, Plaintiff gave notice to his then employer, Brach's Confectionary. He prepared to relocate his family to the Tacoma, Washington area. **RP 311-312; 325.**

On **April 18, 2005** Plaintiff reported for work. On that same day, ITI Internet Services, Inc presented Plaintiff with another, yet differently worded, employment agreement. See **Exhibit 3A, APP-74.** This 2<sup>nd</sup> Agreement was between Michael Durand and ITI Internet Services, Inc. HIMC Corp. is not identified in the new contract as an "employer".

The Complaint alleged that it was in reliance upon the **April 18, 2005 Contract** and its terms and conditions that Plaintiff left his former employment and began working for ITI Internet Services, Inc and HIMC Corp. See Complaint, ¶ 2.8, et.seq.. This claim was shown to be not accurate and was rebutted if not disavowed by Plaintiff himself during the trial when he testified on cross-examination that it was actually the 1<sup>st</sup> contract of March 24, 2008 that he relied upon to give notice and quit his then employment to transfer to HIMC Corp. **RP 311-312.**

The **April 18, 2005** contract differs in various wording from the wording of the **March 24, 2005** contract. The earlier contract expressed a

specific , limited and measurable amount for severance pay following termination. The later contract replaced specificity with unlimited ambiguity in dealing with the same subject.

MARCH 24, 2005:

**Severance Package:** 6-12 months, 1 month of Severance for Every Month employed to a Maximum of 12 months.  
Minimum guarantee is 6 Months of Severance

APRIL 18, 2005:

¶ 4.6 TERMINATION: In the event the Company or any of its successors shall terminate this agreement early, Durand shall receive compensation from the remaining contract term upon termination. Any and all stock options not vested will be fully vested at the time of early termination.

The Amended Complaint had alleged that the 2<sup>nd</sup> Contract was a “fully integrated express employment contract”. See Complaint, ¶ 2.4. However, according to Plaintiff, the two contracts are intertwined, and must be read together in order to understand the meaning of the language used to describe the terms and conditions of the 2<sup>nd</sup> contract. The Trial Court’s Judgments on the wage claim disregard the intent of the parties and the rational conclusion that the 2<sup>nd</sup> contract was not intended to overrule or supplant and replace the first, original, contract of employment. **RP 364-365; 390-391; 405; 482; 594.**

Initially, Plaintiff was paid \$12,500.00 per month as per the terms of his two contracts. See **Exhibit 2 and 3A**; APP-71; 74. In September, 2005 Plaintiff was approached by Ron Ehli, the President of ITI Internet Services, Inc. and its self-described “founder”, and urged to accept a

temporary pay cut necessitated by the dire financial condition of ITI Internet Services, Inc. **RP 265-267;369-370; 566.** That financial condition was attributed to various factors. **RP 357-358.** Plaintiff did not insist that he continue to be paid his contractual salary of \$12,500.00 per month. Instead he agreed with Mr. Ehli's request that he accept only about 56% of his salary, with the promise that he would receive the full amount of his compensation including back-pay once the companies financial position improved. **RP 357-360.** The reduced salary level continued until Plaintiff was terminated on **February 21, 2006** by Pamela Ehli, a then Director of HIMC Corp., **RP 341-342; 514; 517,** either because she was in a bitter divorce with her husband, Ron Ehli, and felt that her husband and Plaintiff were too close, or because ITI Internet Services, Inc did not have enough money to continue paying Plaintiff \$12,500.00 per month. **RP 825.** Others also took a pay cut. **RP 372.**

There was no testimony from Plaintiff or anyone else that during the five months of reduced salary Plaintiff ever demanded payment of what he called at trial his deferred salary while he continued to be employed by HIMC Corp. There was no evidence that he threatened to sue his employer and/or Pamela Ehli and Ron Ehli under RCW 49.48.030 and RCW 49.52.070 for underpayment or for what was in fact a more easily identifiable violation of RCW 49.52.050(2). Plaintiff accepted the assurances of Ron Ehli that he would be paid at some time in the future

once things got better. **RP 265-266**. Given the lengthy time during which Plaintiff quietly acquiesced in the withholding of a portion of his agreed salary, the exclusionary rule of RCW 49.52.070 came into play. That statute precludes a civil suit under RCW 49.52.070 where the employee has “knowingly submitted to such violations” [of RCW 49.52.050(1) or (2)] .

On **March 7, 2006** HIMC and ITI Internet Services went through a court ordered special shareholder meeting and management change, at which time a new board of directors was elected by the shareholders. Mr. Durand was also a shareholder at that time, having received his signing bonus of 25,000 shares as per both his March 24, 2005 and April 18, 2005, ¶ 4.4, contracts. Compare: **Exhibit 2 and 3A**. This special election had been ordered on **January 6, 2006** by the Pierce County Superior Court, Hon. Thomas Felnagle, as a result of a shareholder suit in which Judge Felnagle determined that the Board of Directors which had hired and fired Plaintiff had been elected unlawfully as a result of fraud and self-dealings. Johnston et.al. vs. HIMC Corp., Ronald Ehli, Pamela Ehli and Virgil Llapitan, Cause # 05-2-10424-0. **Exhibit 63**. Ron Ehli, the man the Court found to be at the center of the fraud, then became Plaintiff Durand’s chief witness against HIMC Corp. and ITI Internet Services, Inc.

Plaintiff was employed for only ten months. The persons responsible for Plaintiff’s termination were replaced by Judy Johnston,

Attorney Dean Kalivas, and Henry Gurley. **RP 950-951. Exhibit 7.** These same three were then selected to be the new Directors for ITI Internet Services, Inc. Judy Johnston then became the secretary for the corporation(s), and Jerry Cornwell became CEO. Prior to the **March 7, 2006** special shareholder election none of the new members of the Board of Directors of HIMC Corp. had had any management, agency, employment, or decision-making role in or authority over any action taken by ITI Internet Services, Inc. During the period of Plaintiff's employment, HIMC Corp. was a publicly traded company with approximately 234 shareholders located around the United States. See **RP. 990; 998-999; 1002-1003; 1014;1015; 1096.** Of the Directors and Officers, check writing authority was held by Judy Johnston and Jerry Cornwell only. **Exhibit 7; RP 951-952.** However, Jerry Cornwell never wrote a check on behalf of HIMC or ITI Internet Services, Inc., but served as a back-up in case Mrs. Johnston became unavailable or unable to function. **RP 973; 1072.** Neither person had any involvement in any decision concerning the hiring or firing of Plaintiff. Neither was paid a single dollar as compensation for their time, effort, experience, expertise, dedication or, as is now apparent, their personal financial risk in becoming associated with a company located in the State of Washington. **RP 1083.** See also: Declarations of Johnston and Cornwell in Support of Rule 12(b)(6) Motion for Dismissal, **CP 68-80; 81-86.** Upon taking office and

assuming control over the corporations, the Board of Directors found that the corporations were involved in numerous lawsuits, and that they were operating at a loss. As Ms. Johnston testified, for the period of June, 2006 through November, 2006 the corporations had a net loss of **\$20,028.00**; and for 2007 had a projected net profit of only **\$44,679.00**. **RP 1104-1111; Exhibit 70**. This financial situation of an inability to pay the wage claim of Michael Durand was not caused by or created by or used for the personal benefit of either Jerry Cornwell or Judy Johnston, or even HIMC and ITI Internet Services, Inc. See contra: Schilling.

Plaintiff contacted Jerry Cornwell on about **July 7, 2006** to request re-employment. **TR 973-983**. Thereafter he demanded payment of his deferred wages and severance package as per the **April 18, 2005** contract. Mr. Cornwell asked to see the contract which he had never seen before, which Plaintiff **did not produce** to him. **RP 975-978**. Thereafter, Plaintiff, by counsel, made various demands for payment of **\$692,708.34** as “wages” owed under the **April 18, 2005** contract. **Exhibit 15**. The wage payment demand included the deferred wages and payment of the entire remaining four years and 1.5 months of the five year term of employment allegedly created by the **April 18, 2005** contract. **Exhibit 15**. Plaintiff was not told that the contract would be disregarded. **TR 973-983; 1112-1115**. He was later informed that there was a dispute over the meaning of the terms in the **April 18, 2005** contract and that the terms of the severance

package set forth in the **March 24, 2005** contract had to be considered in interpreting the meaning and intent of the Termination clause in the April 18<sup>th</sup> contract, ¶ 4.6. **TR 1115-1118; Exhibit 17**. Plaintiff was also informed that the status of the wage deferral as permanent vs. temporary was also in dispute. **See Exhibits 17, 20 and 22**. While the amount of the reduction in wage payments (the “deferral”) was clear and subject to mathematical calculation, its status as temporary vs. permanent affected the calculation of the amount of money owed for ten months of employment under the Severance Package in the March 24, 2005 contract, viz: **\$125,000.00** (if temporary) vs. **\$54,166.80** (if permanent). See **Exhibit 2** and **Exhibit 39**.

At the time when Plaintiff made his demand for compensation under his contract(s) of employment, the financial situation of HIMC Corp. and ITI Internet Services, Inc had not improved from that of February, 2006 when Plaintiff was still voluntarily accepting a reduced wage payment under his earlier agreement with Ron Ehli and HIMC to wait until the financial situation had improved. **RP 1099-1103;1136**.

The parties disagreed about how much was owed to Plaintiff under the combined or the isolated terms of the two contracts of employment. Ambiguities in the language used in the two contracts when read together as a continuous whole were discussed. Plaintiff insisted that only the later contract be considered and his initial demand was silent even as to the

existence of the prior employment agreement of March 24, 2005. See **Exhibit 15; Complaint.** Plaintiff threatened to sue the Board of Directors and CEO if the full \$692,708.26 was not paid. **Exhibits 61, 23 and 25.**<sup>1</sup>

In order to effect a settlement and avoid litigation directed at HIMC and its innocent Directors, HIMC Corp. and ITI Internet Services, Inc offered to pay Plaintiff \$125,000.00 via a Promissory Note. **Exhibit 20.** Cash was not offered because HIMC/ITI did not have sufficient money to pay Plaintiff the \$125,000.00 offer in cash. HIMC/ITI also did not have \$692,708.26 with which to pay Plaintiff the entirety of his wage claim. The \$125,000.00 offer was transmitted via letter and was clearly marked as a settlement offer pursuant to Evid Rule 408. **Exhibits 408.** The offer was rejected by Plaintiff because it was not large enough. **Exhibit 21.**

It has never been disputed that the corporate employers, since **March 7, 2006** did not have the financial ability to pay Plaintiff's wage claim of **\$692,708.00** consisting of a 1) termination claim of \$618,750.00 (4 years and 1.5 months), plus 2) \$20,000.00 (alleged relocation bonus), plus 3)\$15,000.00 (alleged annual bonus), plus 4) \$38,958.00 (deferred salary). See Amended Complaint. It has never been alleged that either of the individual defendants did anything to create that financial distress and

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<sup>1</sup>As Plaintiff's counsel explained, Cornwell and Johnston were sued because they "made extraordinary efforts to grab control of the subject companies and are trying to make a go of it...They are the ones responsible for the corporations' debts. They should pay them." **Exhibit 25.**

consequent inability to pay the wage claim. It has never been alleged that either corporate employer is a closely held corporation or is an **alter ego** of either of the individual Defendant Officers, which are necessary and essential facts to prove in a claim against officers and directors under RCW 49.52.070. It has never been alleged that the decision refusing issuance of a wage check for the amount demanded by Mr. Durand was a decision not made in good faith by Officers Cornwell and Johnston based on the surrounding circumstances of two inconsistent employment agreements and a financial inability to pay the wage claim.<sup>2</sup> It was never alleged, nor were any factual determinations made by the Trial Court that a basis existed upon which to pierce the corporate veil and hold Defendants Johnston and Cornwell liable for corporate debts based on their being shareholders or elected officers and Directors of HIMC Corp. See Ellerman v Centerpoint Prepress, 143 Wn.2d 514 at 521-522 (2001); Dickens v Alliance Analytical Laboratories, LLC, 127 Wn. App. 433 at 440 (2001).

#### PROCEDURAL BACKGROUND

On **November 22, 2006** Plaintiff filed his Complaint in Pierce

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<sup>2</sup> "Good faith" and the factual issue of "bona fide dispute" are in some respects siblings. However, Good Faith when applied to corporate officers and directors is a statutory term with well-recognized meaning and standards of proof. RCW 23B.08.300(1)(a) and RCW 23B.08.420(1)(a). A Bona Fide Dispute is an affirmative defense which may be used to justify violations of the wage statute, RCW 49.48.010, to avoid double damages under RCW 49.52.070. See Schilling. The inability to pay a wage claim may create the necessity to rely upon the bona fide dispute defense. It does not constitute proof of an intent to willfully violate the criminal anti-kickback statute, RCW 49.52.050.

County Superior Court. At the time of filing, Plaintiff, by counsel, obtained on an **ex parte** basis an expedited case schedule pursuant to Pierce County Local Rule 1(h)(2). Pierce County is believed to be the only county in the State of Washington which employs this kind of diminished trial schedule to move potentially uncomplicated complaints to trial. The Complaint itself named five parties to the Complaint, and the allegations within the Complaint identified an additional five people as potential witnesses. In filing his Complaint and petitioning for the shortened trial schedule, Plaintiff certified that the case involved no more than four witnesses. See PCLR Rule 1(h)(2). The effects of the expedited trial schedule upon the Defendants' ability to prepare for trial were dramatic and reverberated throughout the truncated discovery time period and during the trial itself. The denial of due process began with the improper manipulation of the court's trial procedures to obtain the first of many unfair advantageous which prejudiced Defendants' rights to a fair and unbiased trial.

The First Amended Complaint alleged three causes of action: 1) Breach of Express Employment Contract; 2) Promissory Estoppel/Reliance; and 3) Wrongful withholding of wages in violation of RCW 49.8.030 and RCW 49.52 et. seq. According to the Complaint, ¶ 2.10, the persons who terminated Plaintiff were the prior Officers and Directors, Pamela Ehli, and Melissa Duthie (her daughter). According to the

Complaint, Plaintiff was employed by HIMC Corporation from **March 24, 2005** to **February 21, 2006**. He had been induced to first come work for HIMC Corp. in 2005 by Ron Ehli, “it’s founder, Chairman of the Board and CEO”. Complaint, ¶ 2.1. Plaintiff’s wage payments ceased as of **February 28, 2006**. Amended Complaint, **Exhibit 3, APP-8; Exhibit 39**. On **July 7, 2006** Plaintiff demanded payment of “amounts due and owing”. Complaint, ¶¶ 2.9 and 2.13. The Complaint sought “a joint and several judgment” against all named Defendants, but not Pamela Ehli and Melissa Duthie. Complaint, ¶ 4.5.

The individual Defendants filed a Rule 12(b)(6) Motion to Dismiss Claim 1 (Promissory Estoppel); Claim 2 (Breach of Contract) and the penalty portion of Claim 3 (RCW 49.52.070). This Motion was denied as to the Statutory claim, while Plaintiff conceded that there was no basis for the promissory estoppel and breach of contract claims against the individual defendants. An Order was entered. **CP 271-273; APP-28**. The Trial Court later denied a Motion to Certify the issue of whether new officers and directors are compelled by RCW 49.52.070 to personally guarantee and pay a corporate debt to a former employee. to the Court of Appeals. **CP 274-275**. Both Orders were signed and entered on **March 30, 2007**. Despite the Trial Court’s unwillingness to authorize and assist Defendants in obtaining an early appellate decision on the meaning of the Schilling v Radio Holdings, Inc., 136 Wn.2d 152 (1998) (hereinafter

“Schilling”) decision and the proper interpretation of RCW 49.52.050, 49.52.070, RCW 9A.56.060, and RCW23B.08.420, Defendants filed the Motion for Discretionary Review. Motion for Discretionary Review was denied.

On **August 27, 2007** in a Memorandum Decision, **CP 541-542; APP-50**, the Trial Court following a non-jury trial ruled that Plaintiff would be awarded **the full \$692,708.00** as claimed by Plaintiff based solely on the terms of the second employment contract-**April 18, 2005**. This determination of damages was reached as to Claim III of the Amended Complaint under RCW 49.48.010, **but applied only as against the two corporate defendants**. See Findings and Conclusions of Law, p. 12, ¶ 7, **CP 730-742; Judgment #1, CP 743-7454, APP-52**. The Court then ruled as a matter of law that all of the wage claim except \$150,000.00 was subject to a bona fide dispute. Ergo, under RCW 49.52.070 both the two corporate employers **and** the two individual offers defendants were subject to a doubling of damages or \$300,000.00. See Memorandum Decision, August 27, 2007; Findings and Conclusions of Law, November 21, 2007, p. 13, ¶9. This led to entry of a second Judgment against the individual Defendants. **CP 746-748; A-68**. The Court’s reasoning and its intended interpretation of the statutes at issue was not explained by the Court in its Memorandum Decision.

#### **ARGUMENT ON APPEAL**

**1. THE TRIAL COURT'S SCHEDULING ORDER WAS AN ABUSE OF DISCRETION WHICH VIOLATED DEFENDANTS' RIGHT TO DUE PROCESS AND PREJUDICED THE DEFENDANT'S ABILITY TO CONDUCT ADEQUATE DISCOVERY TO PREPARE FOR TRIAL**

The Complaint was initially filed by Plaintiff on **November 22, 2006**. CP 2-12. On that date, upon the **ex parte** request of the Plaintiff, Judge Rosanne Buckner, per Clerk of Court, issued a Case Scheduling Order setting the case on an Expedited schedule. See **CP 1, APP-6 and 6(a)**. Pursuant to the shortened scheduling Order, Discovery was terminated on **April 11, 2007**, only twenty (20) weeks after the initial filing date. A portion of that limited twenty weeks is and was lost while Plaintiff engaged in efforts to accomplish service of process on the Defendant parties. On **December 11, 2006** counsel for Defendants entered his appearance. Under the Civil Rules, more time is/was then lost from discovery as the Defendants considered how to Answer the Complaint within the twenty days allowed by CR Rule 12(a)(1) following service of process. Thus, the maximum amount of time for discovery available to the Defendants began no earlier than **December 11, 2006** and ended on **April 11, 2007**.

This scheduling of events is mandated by PCLR Rule 1(h)(1) and (2). Pursuant to Pierce County local rules, there are sanctions that may be imposed for violating those cut-off dates, and significant prejudice resulted from the impact of those dates upon the Defendants' ability to prepare a

defense, and to present their Rule 12(b)(6) motions challenging the legal validity of the claims. The expedited case scheduling Order differs substantially from the standard schedules authorized by PCLR Rule 1, viz: Standard Discovery is 45 weeks vs. Expedited Time of only 20 (or 16) weeks. In the standard case, Trial dates are set **52 weeks post-filing** vs. Expedited trial dates of 26 weeks post-filing. The Pierce County Expedited case handling rules are not replicated in other Washington State counties and are discordant with the overriding command of CR Rule 1 that justice is to be done to all parties in the resolution of civil disputes.

Given these unique procedural rules and the known impact they are intended to and will have, Expedited case handling is to be reserved for cases in which there will be no more than **“a total of four witnesses”** PCLR (1)(h)(1). In this case, Plaintiff Durand started out by naming himself as a party and naming two individuals and two corporations as the Defendants, or a total of five (5). His Complaint itself alleged wrongful conduct by three other persons not named as party defendants. The potential witnesses based on the plain language of the Complaint totaled seven (7). It was an abuse of discretion to designate this case for expedited handling.

The “expedited” trial eventually involved the testimony of five witnesses and seven (7) trial days. The Court, per Judge Buckner, also refused to allow the CEO for Defendant ITI Internet Services, Inc. to

testify because he had not been identified as a trial witness by **March 7, 2007**. It refused to allow Defendants to depose an out-of-state witness (A.J. McCann) because the unreasonably short discovery time had expired. See **May 4, 2007** Order Denying Defendants' Motion Requesting Supplemental Discovery, CP 418-419. The Trial Judge abused her discretion by denying their Rule 56(f) Motion to take additional discovery, including the deposition of the Plaintiff, in order to respond to Plaintiff's Rule 56 Motion for Summary Judgment. **RP 82-99**. The Trial Court used an arbitrary Scheduling Order to negate CR Rules 1 and 56(f). The Expedited Trial Schedule became a weapon used by Plaintiff to obstruct the pre-trial questioning of witnesses. The use of the Pierce County local rules in this case violated the Defendants' collective rights not to be deprived of their property rights without due process. See Washington Constitution, Art. 1, Section 3; CR Rule 1.

## **2. THE TRIAL COURT COMMITTED MANIFEST ERROR OF LAW BY FINDING A WILLFUL VIOLATION OF RCW 49.52.050 BASED ON SETTLEMENT NEGOTIATIONS**

The Court found that \$150,000.00 of the total wage claim awarded to Plaintiff had not been subject to a bona fide dispute. Under its reading of Schilling, this meant, automatically, that RCW 49.52.070 had been violated to that extent. The exact components of that \$150,000.00 are not explained in the Findings of Fact. Further, the Court did not find that as to the \$150,000.00 any dispute about the amount owed was not **bona fide**,

nor did it explain why it may have thought so. A dispute over the meaning of ambiguous contract terms is sufficient to make a dispute over a wage claim “bona fide”. See Schilling. Given the Court’s own explanation of how it arrived at the \$150,000.00 number, See **RP. 1261-1263**, the judgment for liquidated damages of \$150,000.00 under RCW 49.52.070 against all four defendants should be vacated.<sup>3</sup>

Under Evid. Rule 408 “liability”, i.e. an intent to withhold wages, cannot be inferred from an offer to settle for less than the full amount of a wage claim. The Court’s use of settlement discussions to determine the amount of undisputed wages violated Evid. Rule 408 and sets a principle which will discourage any good faith discussions in the future of that amount of wages which an employer is willing to acknowledge as being owed despite an inability to pay, and despite **bona fide** challenges as to even the amount offered as settlement. See ER Rule 408; **APP- 5**.

It is the policy of this State as declared in various cases that settlement negotiations are to be encouraged. Haller v Wallis, 89 Wn.2d 539, 545 (1978); Puget Sound Energy v Certain Underwriters at Lloyd’s, London, 134 Wn. app. 228 (2006). Consonant with this public policy, Evid Rule 408 recognizes that, during the course of negotiating, a

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<sup>3</sup> The Court derived this number from the settlement letters that were exchanged pre-litigation between respective counsel for the parties. RP 1261-1263. Those letters acknowledged that Plaintiff might be awarded \$125,000.00 as damages in accordance with the 1st Employment Agreement, while also contesting, and disputing Plaintiff’s entitlement to the additional amounts claimed by Plaintiff as unpaid wages

settlement or compromise less than the full amount of the claim may be offered to resolve the dispute. The making of an offer of compromise is therefore made inadmissible as evidence to prove an element of a claim. See Lacey Nursing Center, Inc. v State of Washington, 103 Wash. App. 169 (Div. II, 2000); Chadwick v Northwest Airlines, 33 Wn. App. 297 at 301 (1982).

There are many varied reasons for making an offer to settle beyond simply the substantive strength of the opposing claimant. Absent a binding settlement agreement entered into in accordance with the procedural requirements of **RCW 2.44.010** the offers of compromise and settlement have no contractually binding authority nor can they impute an intent to violate a statute or contract provision.

The offer of compromise with a payment of \$125,000.00 was made by and to attorney representatives in the context of the threat of litigation; it was **not made** in the course of an ongoing employer-employee relationship. The “claim” confronting HIMC/ITI was for \$692,708.00. Based on public policy and the exclusionary wording of Wash. E.R.408 it is incorrect that the making of an offer to compromise a claim is tantamount to violating the Washington wage laws, or acting with the criminal intent to deprive an employee of wages. The Court erred in picking a number out of the thin air of settlement negotiations, implicitly designating that number as not subject to a bona fide dispute, and then

failing to enter specific findings of fact that the \$150,000.00 was withheld with the specific intent to deprive Plaintiff of wages. Willfulness under RCW 49.52.070 may not be proven by evidence based on the offer of settlement.

Further RCW 23B.08.420(1) compels an Officer to exercise his fiduciary duties by objecting to claims that in good faith appear excessive. See **APP-4**. RCW 49.52.050 and 49.52.0070 do not amend **sub silentio** the long-standing rule that where there is a valid difference of identity between a corporation and its directors and officers, the officers must protect the assets of the corporation against unwarranted or exaggerated claims. The making of an offer to settle is one means of protecting those assets. The Court erred in denying a good faith duty defense based on RCW 23B.08.420(4).

The Court erred twice by imposing a judgment for \$300,000.00 against the two individual officer-Defendants (\$150,000.00 x 2). The Court found in effect that because the two officers were aware that the corporate employers did not have enough money to pay the claim, and believed they could not legally issue a corporate check to pay Plaintiff even the \$150,000.00 which the court found was not in dispute, then **ergo** the individual officers were engaged in criminal activity and became personally liable to have paid that portion of the total debt it determined was owed by the corporation **qua** employer under RCW 49.48.030.

However, the Plaintiff had previously dismissed the individual defendants from this contract claim on the grounds that neither Jerry Cornwell nor Judy Johnston had ever entered into an employment contract with Michael Durand. **March 30, 2007: Order Granting in part and Denying in Part Defendants' Motion to Dismiss Pursuant to CR Rule 12(b)(6). CP 271-273.** At the close of the case, the Court ruled that the individual defendants were not subject to liability under RCW 49.48.030. See Findings of Fact, page 11, ¶ 12. If any money was wrongfully withheld, then the liquidated damages provisions of RCW 49.52.070 obligate the defendants to share in payment of **the penalty portion only, i.e. \$150,000.00.** The duty to pay the “principal” wage of \$150,000.00 remains upon only the corporate employer defendants pursuant to Claims 2 and 3 and RCW 49.48.030.

The Court erred in imposing a back door liability upon the Officer Defendants after it had already ruled that an unlawful withholding of wages in violation of RCW 49.48.010 applies only to “**the Defendants HIMC Corp. and ITI Internet Services, Inc.**” See , Findings of Fact, page 11, ¶ 2: See also: page 12, ¶ 7: Judgment on claims pursuant to RCW 49.48 go only “**against defendant corporations**”. The judgment principal is twice too high; and, as a collateral result, the pro rata share of prejudgment interest of \$31,062.55 is erroneous, as is the joint and several assignment of all of the attorney’s fees for \$130,815.00 without

apportionment or segregation. See **infra**.

The judgment against the individual defendants should be vacated not simply because the Court's math is wrong, but because its disregard of Evid. Rule 408 and its understanding of RCW 49.52.070 are wrong. Those errors lead it to impose incorrect legal decisions and judgments. The Judgment for **\$463,658.30** against Jerry Cornwell and Judy Johnston should be vacated. See Judgment, APP-68.

**3. THE TRIAL COURT ERRED BY IMPOSING LIABILITY UNDER RCW 49.52.070 WITHOUT FINDING SUFFICIENT EVIDENCE OF AN INTENT TO WILLFULLY WITHHOLD WAGES CONTRARY TO RCW 49.52.050**

In its two judgments, the Trial Court imposed double damages of \$300,000.00 (\$150,000.00 x 2) against Jerry Cornwell and Judy Johnston, **qua** officers of HIMC Corp. and ITI Internet Services, Inc., and also double damages of \$300,000.00 against the two corporate employers under RCW 49.52.070. **CP 743-745 and CP 746-748**. In doing so, the Court misinterpreted the factual requirements of RCW 49.52.050, erroneously disregarded the applicability of various affirmative defenses asserted by Defendants, misinterpreted RCW 49.52.070, and misapplied the Supreme Court's decision in Schilling.

In its Findings of Fact and Conclusions of Law, the Trial Court concluded that \$150,000.00 of the total contract wages awarded to Plaintiff, under RCW 49.48.030 and Claim 3, had been withheld "willfully

and with intent to deprive” Findings, page. 11, ¶ 4. The Court found that this violation occurred on February 28, 2006 when he was paid a wage check which was less than the amount his employers, i.e. HIMC Corp. and ITI Internet Services, Inc., were obligated to pay. id. The Court then found that the withholding of \$150,000.00 from his last pay check was “without lawful justification and excuse”. Findings, page 12, ¶6.<sup>4</sup> The Court held the individual defendants liable for that failure to pay \$150,000.00, and under RCW 49.52.070 doubled that amount as liquidated damages. id. The Court found that all amounts greater than \$150,000.00 which it had found due and owing under the employment contract were the subject of a **bona fide** dispute, and accordingly declined to impose liquidated damages under RCW 49.52.070 against any of the four defendants for any amount more than \$150,000.00. Further the Court found that “at no time” did Plaintiff knowingly submit to a violation of RCW 49.52.070 et seq. id.<sup>5</sup>

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<sup>4</sup> This supposed Finding of Fact is actually a Conclusion of Law. There are no findings of fact which supports this legal Conclusion. RCW 49.52.050 (1) and (2) state the conditions under which a failure to pay, per se, may be deemed "without lawful justification or excuse".

<sup>5</sup> The Court’s legal conclusions are inconsistent with the actual trial testimony of Michael Durand, **RP. 357-358**, that he agreed to a deferral of a portion of his salary because of the poor financial condition of the company in **September, 2005**. This conclusion is also inconsistent with and contrary to the Court’s own finding of fact that Plaintiff had agreed to defer half his salary for the benefit of the company. See Findings, p. 7, & 18. The amount of deferred compensation was determined by the Court to total **\$38,958.26**.

If Plaintiff did agree to defer payment of this or any other portion of his agreed salary, presumably to assist the employer and thereby preserve a company that offered him employment, then **RCW 49.52.070** excludes such non-payment from the perimeter of **RCW 49.52.050** defining the crime of kickbacks and wrongful withholding, and **perforce** excludes the amount of the non-payment from the double damages impact of

There are no findings of fact that establish the necessary conditions to support a conclusion of law that any of the Defendants violated RCW 49.52.050(1) or (2). This implicit absence of proof warrants the conclusion that Plaintiff, the party with the burden of proof, failed to prove a violation of RCW 49.52.050. Ellerman v Centerpoint Prepress, 143 Wn.2d 514 (2001) at 524: “absence of a finding of fact ...in favor of the party with the burden of proof is the equivalent of a finding against that party on that issue.”

The Findings of Fact and Conclusions of Law are deafening in their silence. The Court did not find that the Defendants, be they acting as “employer, or officer, vice principal or agent”,

- 1) received a rebate from Michael Durand. RCW 49.52.050(1); or
- 2) paid Michael Durand a lower wage than the employer was obligated to pay by virtue of his contract. RCW 49.52.050(2); or
- 3) that the lower wage was paid willfully and with an intent to deprive Michael Durand of a part of his wages. RCW 49.52.050(2).

The Findings of Fact focused on the Ellerman issue of who can be classified as an officer, vice principal or agent of the employer under **RCW 49.52.070**, but not on the statutory issue of what kinds of conduct will be deemed a violation of **RCW 49.52.050**. See Findings of Fact, ¶ 20; and Conclusions of Law, ¶ 4.

In Schilling v Radio Holdings, Inc., 136 Wn.2d 152 (1998), the

Supreme Court addressed the issue of whether the Company President had justification for the non-payment of earned wages. An examination of the factual context of the case shows that the Schilling decision did not compel the Durand Court to impose liability upon these individual defendants. Schilling does not impose a presumption that because they were “officers” and because the corporation did not have sufficient funds to pay the claim, they had acted willfully and with an intent to deprive Plaintiff of wages by declining to issue a phony payment check. There is no answer for any corporate officer to the conundrum created by a Complaint based on the mere failure to make a payment, to wit: from what source is any lawful payment to be made?

In Schilling, the case was heard as an appeal from entry of a summary judgment against Radio Holdings and Robert Bingham, **its sole shareholder** and President. The unpaid wages were all back wages, which the Defendants **had agreed were withheld and were owed**. 136 Wn.2d at 154. Bingham had never disputed Schilling's right to be paid out of the proceeds of sale of Radio Holdings and had included in the contract of sale a provision guaranteeing Schilling his payment directly by the Buyer. The Supreme Court found that Radio Holding and Bingham had actually had the money to fully pay the wage claim but had **diverted the promised payment** to cover a separate and personal claim against Bingham involving sexual harassment and had done so willfully. id at 162.

The Court approved liability upon Bingham under RCW 49.52.070 and described the fundamental purposes of RCW 49.52.050 as protecting wages from diminution caused by a willful rebating, underpayment or a false showing of overpayment. 136 Wn.2d at 159. The Court, perhaps inadvertently, defined Willful “ only for purposes of RCW 49.52.070 as “ the result of a knowing and intentional action”,i.e. “**that the person knows what he is doing, intends to do what he is doing and is a free agent.**” id at 160. The Court, again interpreting RCW 49.52.070, addressed exceptions to a finding of liability under RCW 49.52.070, assuming that Bingham had violated RCW 49.52.050. For purposes of RCW 49.52.070, the Supreme Court ruled that only two exceptions had been recognized: 1) Inadvertence; and 2) existence of a bona fide dispute as to the amount owed or the legal duty to pay the wage claim. id p 160-162.

The Schilling Court went on to define “**bona fide**” as “a fairly debatable dispute over **whether all or a portion of the wages must be paid.**” id at 161 (emphasis added). **Bona fide** was recognized as the counter-weight to the element of willfulness under **RCW 49.52.070**. The Durand court erred in concluding that the dispute over “\$150,000.00” was not **bona fide**.

The Supreme Court did not decide what it means for an employer or officer under RCW 49.52.070 to be a “free agent” or whether evidence

that he was not a “free agent” would defeat a finding of Willfulness.

Conduct that subjects the person signing the check to criminal prosecution is financial inability to pay as a matter of law.

It is not a diversion of assets to personal use. By way of example, had the money in Schilling been subject to federal or state tax withholding, the decision to not pay Schilling would not have been “willful”.<sup>6</sup>

The Schilling decision is replete with examples of **bona fide** disputes. The bar is not set high for holding officers or vice-principals or employers to be protected from liability under RCW 49.52.070. However, the Supreme Court did not issue a blanket ruling that financial inability to pay is never a defense under any circumstances. To the contrary, it ruled that Bingham’s defense was negated by his own [mis]conduct and his inability to articulate “a clearly demarcated test for financial inability to pay”. 136 Wn.2d at 164. Therefore the Court ruled that his inability to pay was “anything but willful”. id at 164. This rather modest ruling does not establish a bright line bar for all situations. In Schilling, the financial inability to pay argument was rejected because the employer failed to articulate any standard for determining what is “financial inability” to pay. 136 Wn.2d at 164. **RCW 49.52.060**, together with **RCW 9A.56.060**,

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<sup>6</sup> In the Durand case there was no evidence of any diversion of corporate assets to the personal benefit of any Defendant; only the allegation of corporate “status” of being an officer.

establishes such a standard. **See Appendix, pp 1 and 2.** Moreover, Schilling is specifically limited to a liability claim under RCW 49.52.070 after the willful violation of RCW 49.52.050 has been proven. id at 165. There was no opinion as to defenses to the liability aspects of RCW 49.52.050. id at 165-166. The Supreme Court left unresolved what evidence is sufficient to establish the negative of “willfulness”, i.e. in what circumstances must a Court rule, as a matter of law, that an officer or employer is not a free agent, and therefore not acting willfully for purposes of RCW 49.52.050.

This is the legal issue created by the decision of the Trial Court and now presented for appellate review. There was no proof of a willful violation of RCW 49.52.050(1) or (2) as that term is defined by the Supreme Court, which are the only subsections which lead to RCW 49.52.070. The issue of willfulness was disputed by the individual and the corporate Defendants, and the Court incorrectly rejected any defense based on an inability to pay.

In Ellerman v Centerpoint Prepress, 143 Wn.2d 514 the Court focused on the statutory uncertainty created when agents lack the necessary control over the decision to pay:

The “agency contemplated by the statute requires **some power and/or authority** of the alleged agent **to make decisions** regarding wages, or the payment or withholding of wages **before the possibility of personal liability can attach.**” pp. 521-522. (emphasis added)

The power and/or authority contemplated by Ellerman does not

include the authority to violate state criminal laws. **RCW 9A.56.060** denies the individual defendants the “**power**” to have issued a bogus check. **RCW23B.08.420** denies the individual defendants the “**authority**” to have done so. A bridge between remedial corporate liability under RCW 49.52.070 and personal officer liability under RCW 49.52.050 may be created by piercing the corporate veil. The Durand Complaint does not seek so to do, nor allege any basis upon which to do so. The Court rejected any evidence that went to a defense based on a lack of free agency due to the operation of other Washington laws, both criminal and civil. By this erroneous interpretation of RCW 49.52.070 and the Schilling decision, the Trial Court created a presumption of “willfulness” and hence “guilt” under RCW 49.52.050 which made the eventual trial a virtual foregone conclusion of liability.<sup>7</sup>

A review of the trial record and the testimony of the witnesses called

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<sup>7</sup> The decision in Ellerman v Centerpoint Prepress, 143 Wn.2d 514 (2001) does not clarify this unresolved issue of statutory interpretation. Ellerman was again a case involving a small, one person corporation where the sole shareholder was the Board of Directors and President. There too the amount of unpaid wages related to past work for the employer and **the amount was not disputed**. The only issue presented was who is an officer, vice-principal or agent for purposes of liability under RCW 49.52.070 and whether or not the bookkeeper, who lacked check writing authority, could be tagged with the status of “agent or vice-principal” of the corporation. Inability to pay was not a defense presented by the bookkeeper.

Ellerman ruled that the legislative history of RCW 49.52.050 argued against imposing personal liability upon agents, managers or supervisors “who had no direct control over the payment of wages.” id at 522. In Ellerman no issue was presented of the superior duty to comply with state criminal laws penalizing the issuance of checks drawn on accounts lacking in sufficient funds; no issue of the duty under RCW 23B.08.420 to contest a questionable claim was presented..

Paying money to avoid a threat of personal litigation is not a fiduciary duty of a corporate officer/director. To do so is simply the misuse of corporate assets to pay litigation ransom for one's self-interest.

by Plaintiff shows that the Court erred in rejecting Defendants' motion(s) to dismiss at the close of the case, **RP 1224-1226**, and in rejecting Defendants' Objections to Proposed Findings of Fact and Conclusions of Law. See **RP 1296-1372**, *passim*.

Schilling held that a failure to pay is proper where "approved by statute". 136 Wn.2d at 157. RCW 49.52.060 (**HR 128, Subsection 2**) specifically neutralizes the force of RCW 49.52.050(1) and (2) where the decision to withhold payment of any portion of wages is "required" or the employer is "**empowered so to do by state or federal law**". *id.* RCW 9A.56.060 is a statute that mandates a non-payment by imposing felony penalties upon any individual who is foolish enough to knowingly issue a check in payment of a wage claim drawn on insufficient funds. The Trial Court used evidence of a financial inability to pay as proof of an intent to "withhold" payment, all without ever actually citing any portion of the Schilling decision that upholds that strained reading.

Despite this statute, which was enacted as part of HR 128, the Trial Court refused to acknowledge its existence and relevance. RCW 49.52.070 was treated as a stand alone statute with an inherent presumption of liability ("guilt") unless the Defendants could establish a bona fide dispute as to the amount it had determined was owed to the Plaintiff as "wages" under a preexisting contract. See Findings of Fact, **page 12, ¶ 6**. The Court made no findings that any money was withheld

with the intent to pay a lower wage than owed. That is an error of law for which this Court of Appeals should reverse on **de novo** review.

The uncontested testimony from the Defendants during trial was that ITI Internet Services, Inc., and HIMC Corp., did not have sufficient money with which to satisfy the Plaintiff's disputed wage payment demand of about **\$692,708.00**. See Testimony of Judy Johnston, **RP 1104-1109; Exhibit 70**. In that factual context, any attempt by ITI Internet Services, Inc or HIMC Corp. to have issued a payment check to Plaintiff would have been returned marked: "Insufficient Funds". Or, as Jerry Cornwell called it, a "Hot Check". **RP 992**.

The Court erred in denying the legal consequences of issuing a bad check and **perforce** refusing to acknowledge that those legal consequences are a valid defense that supplement the Supreme Court's **bona fide** dispute defense under RCW 49.52.070.

Plaintiff argued and the Court concurred that since inability to pay is not a valid defense to a claim for wages under RCW 49.52.070, then any non-payment of any amount that is not subject to a bona fide dispute is and must, **ipso facto**, be a knowing and willful violation of RCW 49.52.050. This violates the rule that a criminal violation of RCW 49.52.050 must be affirmatively proven by the Plaintiff. See Pope v Univ. of Washington, 121 Wn.2d 479 at 491, fn. 4 (1993). The Court accepted this flawed legal method of using a presumption of intent for applying

RCW 49.52.070. But see: **RCW 49.52.080**-No presumptions allowed.

It is a central tenet of law and legal interpretation that where two statutes conflict, and one imposes criminal penalties and the other authorizes a civil suit for damages, the duty of the individual citizen is to obey the criminal laws of the State of Washington and **not do that which is forbidden**. This rule conforms with the decisions in Schilling and Ellerman. In such circumstances the refusal to issue a check to satisfy a wage claim cannot constitute a knowing and willful violation of RCW 49.52.050(2).<sup>8</sup> Appellants contend that a failure to pay, **vel non**, that is the result of a lack of sufficient money to cover the check is **conduct mandated by RCW 9A.56.060** and therefore cannot be deemed a violation of the wage laws. Under the control test of Schilling and the willfulness requirement of RCW 49.52.050(2) it is a factual question whether an officer, agent or any other person with “check writing authority” is able to freely act when the action demanded is proscribed by affirmative criminal law. **The Court did not make this determination.** Its Findings must be read against the Plaintiff’s position. The Court failed in its duty to conform the various laws of the State of Washington so that a civil defendant is not facing **both** criminal liability if he does issue a bad

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<sup>8</sup> All of the witnesses, including Ronald Ehli, the Plaintiff’s own witness, testified that under no circumstances would they have issued a bad check in response to Michael Durand’s or any one else’s demand for payment of a wage claim. See **RP1070-1071**. See also testimony of Jerry Cornwell re: A hot check.. **RP. 992.**

check and civil/criminal liability if he does not. See RCW 9A.56.060,

**App p.3.**

The validity of a civil complaint under RCW 49.52.070 is dependent upon adequately pleading a violation of RCW 49.52.050(1) or (2).<sup>9</sup> Employee claims under **RCW 49.52.050**, which leads to RCW 49.52.070, are subject to the definition of employee in **RCW 49.12.005**. See **APP-2**.<sup>10</sup> The Court's findings and conclusions express the opinion that an intent to deprive someone of wages in violation of RCW 49.52.050 may be found based on the withholding of post-termination wages "without lawful justification or excuse" id.. The Court rejected the affirmative defenses that were asserted in the Answers to the Complaint, and the result of its logic was a ruling that the absence of a "lawful justification" means that the Defendants "knew what they were doing" and therefore had a criminal intent to violate RCW 49.52.050(2). id. That is a **non sequitur** that desecrates the intent of the statute, and the burden of

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<sup>9</sup> The Trial Court erred in denying Defendants' Rule 12(b)(6) Motion to Dismiss. From the beginning the Complaint and the Amended Complaint have been testaments to poor draftsmanship and the misapplication of the Schilling decision to punish as a crime the simple refusal to issue a check when there are insufficient funds to pay the check on presentation. The Court disregarded its duty to require the pleading of a lawful claim and to demand description of a criminal violation of the anti-kickback statute, RCW 49.52.050. A pleading is to be construed most strongly against the pleader. Standard Finance Co. v Townsend, 1 Wn.2d 274 (1939). All essential elements of the alleged crime must be included in the charging document. The Durand Complaint, & 2.14 and page 9, & 3, violates this rule of pleading by alleging only that he was owed money, the defendants willfully withheld payment, without a bona fide reason, and therefore RCW 49.52.070 establishes a basis for liability. RCW 49.52.050 is the hidden elephant in the living room.

<sup>10</sup> The deferred wages are earned wages within the meaning of RCW 49.46.010(2) and the decision in Dice v City of Montesano, 131 Wn. App. 675 (2006).

proof for a criminal law statute. The Court erred in ruling that **not doing** that which a specific law forbids you from doing may be deemed evidence of free will and the intentional violation of RCW 49.52.070. See Findings of Fact, ¶ 22. The Court’s focus on the **bona fide** dispute issue confused proof of an affirmative defense under RCW 49.52.070 with the Plaintiff’s duty to affirmatively prove a criminal violation under RCW 49.52.050. See Pope v Univ of Washington, *supra*.

### 3A. LEGISLATIVE HISTORY OF RCW 49.52.050 ET. SEQ.

Both RCW 49.52.050 and RCW 49.52.070 were passed in 1939 as different subsections in a single House Bill, **H.B. 128**. See **APP-107-108**. The statute was intended to criminalize and afford a civil remedy for “the rebating of wages, underpayment of agreed wages and certain deductions from wages” *id.* **Section 1** was codified as RCW 49.52.050. **Section 3** was codified as RCW 49.52.070. The statute as originally enacted specifically barred by exclusion the use of any presumptions of willfulness to establish a violation of RCW 49.52.050(1) or (2). H.B. 128 did include language at Section 4, codified as RCW 49.52.080 , establishing a “presumption” but limited the presumption to what is now codified as RCW 49.52.050(3)(4) and (5), thereby excluding RCW 49.52.050(1)(2) from any permissible use of any presumption to establish criminal conduct and hence the potential for civil liability. “*Inclusio unius est exclusio alterius*” is the applicable rule of statutory interpretation . The

presumption language was added as an amendment to the original bill by Representative Henry. See **APP-111**. A violation of Subsections (3),(4) and (5) can support a presumption of willfulness. A non-payment of wages contrary to any contractual duty to pay does not support such a presumption of a willful violation of Subsections (1) and (2) . RCW 49.52.050 requires the Plaintiff to affirmatively prove that the Defendant:

(1) collected or received a rebate of any part of wages theretofore paid to such employee;

or

(2) Willfully and with intent to deprive, paid the employee a lower wage than the wage the employer was obligated to pay by contract.

In this case, Plaintiff ceased working and ceased being entitled to receive a regular paycheck on or about **February 21, 2006**, ten days before either Jerry Cornwell or Judy Johnston were elected to the Board of Directors and became authorized by the shareholders to exercise any authority to pay bills, wages or any other claim against HIMC or ITI Internet Services, Inc. Plaintiff received no further wages after that date or any payment that could be deemed a partial wage payment within the meaning of RCW 49.52.050(2). That was no claim in the Complaint of any payment of a rebate. As the evidence showed, the first time the Defendants Cornwell and Johnston even saw the two employment contracts was in about July, 2006 after a demand for payment of the wage-termination claim and other fanciful wages were set forth by Plaintiff's

counsel.

Plaintiff did do work for which he was paid less than his contract required. From about **September 30, 2005 through February 21, 2006**. See Exhibit # 39, RP 205-267; 566; 637-638; 907: testimony of Michael Durand. The decision to pay him less than he was otherwise entitled to was a decision made by Ronald Ehli. id. However, any claim under RCW 49.52.070 for double damages for this action was affirmatively waived by Plaintiff when he voluntarily agreed to defer, albeit temporarily, the payment of this portion of his agreed wages, and declined to name Ronald Ehli as a Defendant. See RCW 49.52.070. See **Exhibit 71**: Plaintiff informing his attorney not to name Ron Ehli as a Defendant.<sup>11</sup>

Plaintiff agreed to defer wages so long as the corporate employers' were in financial distress. **RP 358-359**. Given the Plaintiff's agreement to defer, those past due wages cannot be the subject of a claim under RCW 49.52.070 against the Defendants Cornwell and Johnston. Plaintiff is estopped by his own actions from suing the corporate defendants and/or these individual officer-defendants under RCW 49.52.070 for a wrongful

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<sup>11</sup> The Trial Court denied Defendants Rule 12(b)(7) Motion to have Ron Ehli declared an essential party under CR Rule 19(a) without whom complete relief cannot be given. See Order CP 271-273. Its reason is unclear. Perhaps it felt influenced by the Expedited Trial Schedule to not allow anything that might "complicate" the trial. However, the Court also declined to formally dismiss the promissory estoppel claim Plaintiff filed based on the conduct of Ron Ehli, a non-party, yet which claim was barred as a claim for relief by the signing of the March 24, 2005 Employment contract. See Klinke v Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 261, fn. 4 (1980); Spectrum Glass v PUD of Snohomish, 129 Wn.App. 303, 317 (2005): "The doctrine of promissory estoppel does not apply where a contract governs."

failure to pay that which he agreed to defer. He may still sue for that payment under **RCW 49.48.010, et.seq.** as an employment contract claim.

**3B. THE INDIVIDUAL DEFENDANTS WERE NOT EMPLOYERS FOR PURPOSES OF RCW 49.52.070**

An officer or director cannot be held liable under RCW 49.52.050 and RCW 49.52.070 simply for being an officer or director. The Complaint fails to allege any conduct by Defendants Johnston or Cornwell that brings them within the scope of the term “Employer” as used in **RCW 49.52.050** or **.070**. The definition for employer is taken from **RCW 49.48.082(5) and RCW 49.12.005(3)(b)**. The definition requires that, to be an “employer”, one must first “employ one or more employees”. *id.* Neither Johnston or Cornwell satisfied that definition. Neither individual had employed Michael Durand, who was terminated prior to the Defendants taking up their positions as President and Secretary of the two corporate employers. This definition of “employer” accompanies the definition for employee set forth in RCW 49.12.005(4): “Employee” means an employee who **is employed** in the business of the employee’s employer...’. Under these two statutory definitions, Michael Durand was not an employee of either Jerry Cornwell or Judy Johnston. See **Appendix, p 2.**

The foregoing statutory definition, which limits the scope of RCW 49.52.050 by excluding agent liability, conforms with the decision in

Dickens v Alliance Analytical Lab., 127 Wn. App. 433 (2005) that in order to hold an agent liable under RCW 49.52.070, the Plaintiff must first pierce the corporate veil, or establish an alter ego identity between the corporate employer and the officer of the corporation, as in Schilling. HIMC had a three person Board of Directors elected pursuant to Court Order to remove the previous tainted election which the Superior Court, per Hon. Thomas Felnagle, had ruled was the product of fraudulent activities by Ronald Ehli and Pamela Ehli.

Based on the case law, and the specific language in RCW 23B.08.300(4) and 23B.08.420(4) the officers and directors of HIMC and ITI Internet Services, Inc. should have been deemed immune from personal liability unless they had breached a fiduciary duty or unless they functioned as the alter-ego of the corporations. Plaintiff did not allege in his Complaint either of these factors. Plaintiff offered no evidence and the Court made no findings that the corporate veil should be pieMorgan v Burks, 93 Wn.2d 580 (1980); Dickens v Alliance Analytical Laboratories, 127 Wn. App. 433 (2005); Meisel v M&N Modern Hydraulic Press Co., 97 Wn.2d 403 (1982); Norhawk Invest. v Subway Sandwich Shops, Inc., 61 Wn. App. 395 (1991). The corporate identity shield cannot be disregarded unless “the corporation has been intentionally used to violate or evade a duty owed to another”. Morgan v Burks, 93 Wn. 2d at 585-587. This rule requires proof of two elements: 1) intentional use of the

corporate form to violate or evade a duty; and 2) disregard must be necessary and required to prevent unjustified loss to the injured party. Meisel v M&N Mod. Hydraulic, 97 Wn.2d at 410-411. The Complaint fails to allege that either Defendant 1) intentionally used the corporate form to violate or evade a duty; or 2) that piercing the corporate veil is necessary to prevent an unjustified loss to the Plaintiff. See Complaint, **passim**. There was no proof of this at trial, either.

Harm alone, and the fact that the corporate employers lacked sufficient financial assets to pay the wage claim **does not** establish a basis for finding an unjustified loss and hence disregarding the corporate veil to go after individual officers and directors. See Morgan v Burks, supra, at 589; Norhawk Investments, supra, at 400; Meisel, supra at 410-411.<sup>12</sup>

The Court erred in summarily disregarding and dismissing the relevance of the Defendants' Affirmative Defenses which raised these statutory issues.

As stated in Krendl: Piercing the Corporate Veil: Focusing the Inquiry, 55 Denver L.J.. 1 (1978):

A fundamental tenet of Anglo-American law is the concept that a corporation will ordinarily be treated as a legal entity separate

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<sup>12</sup>The Krendl article was cited with approval by the Supreme Court in Meisel v M&N Modern Hydraulic Press, 97 Wn.2d 403,410 (1982). There is a contradiction between the Supreme Court's decision in Meisel that the lack of sufficient money to pay a corporate debt is not a sufficient reason to pierce the corporate veil in order to hold individual officers or shareholders liable for the debt and the Trial Court's ruling that insufficient funds is, per se, sufficient proof of a criminal intent to deprive an employee of his wages to hold individual officers liable for the debt.

from its shareholders. The shareholders can thus confidently commit limited capital to the corporation with the assurance that they will have no personal liability for the corporation's debts. ... [i]t is based on the economic policy that shareholders should be encouraged to commit limited amounts of capital to an endeavor which might be too risky for direct individual involvement. Corporate limited liability is fundamental to the law of every jurisdiction in the United States. 55 Denver L.J. at 1-2.

RCW 49.52.050 however is a criminal statute, not a civil liability statute **per se**. A separate statute or subsection creates civil liability. See RCW 49.52.070. Under the statute, the failure or inability of a corporation to pay wages is not **ipso facto** a criminal act that can then be imputed to a corporation's officers and directors and for which civil liability may be imposed. RCW 49.52.050 (1) or (2) do not create liability based on agency status or company title, **per se**. Dickens v Alliance Analytical Laboratories, LLC, 127 Wn.App. 433 (2005) ("An agent is not liable for acts he has taken in his representative capacity".) Otherwise, the corporation stands as an impenetrable barrier or shield against such a claim. See **Meisel supra**. Dickens v Alliance Analytical Laboratories, LLC, 127 W. App. 433 at 440. This is especially true where the corporation is a publicly traded legal entity with hundreds of share holders. As stated in Dickens v Alliance Analytical Laboratories, LLC: "Therefore in order to reach Mr. Lukehart personally, the employees **must pierce the corporate veil....**"

There was no evidence of a criminal violation of the anti-kickback

statute, RCW 49.52.050. The judgment for damages under RCW 49.52.070, together with attorney's fees and interest, should be vacated and dismissed.

**4. THE TRIAL COURT ERRED IN AWARDING DAMAGES UNDER THE APRIL 18, 2005 CONTRACT; THE JUDGMENT AWARD AGAINST THE CORPORATE DEFENDANTS FOR BREACH OF CONTRACT SHOULD BE VACATED**

The Trial Court concluded as a matter of fact that only the terms of the April 18, 2005 2<sup>nd</sup> Employment contract should be enforced and which should serve as the basis for determining damages for termination and breach of contract. This conclusion was against the substantial weight of the evidence and is contrary to the intent of the Plaintiff himself. The judgment award is the result of misreading and an improper reformulation of the contract terms, and the Court's improper effort to resolve ambiguities between the two employment agreements by disregarding the agreements in the 1<sup>st</sup> contract of March 24, 2005, and the intent of the Plaintiff to be bound by and benefit from the terms of the 1<sup>st</sup> contract.

The Court found that the March 24, 2005 contract between HIMC and Plaintiff was a "job offer". See Findings, ¶ 2. See **Exhibit 2**. That finding is not supported by and is contradicted by the testimony of the Plaintiff, Michael Durand. Durand had insisted on certain terms in his employment agreement. On March 24, 2005 he got what he wanted in the form of Exhibit 2. That intent was disregarded by the Trial Court and its

effort to lean in favor of awarding Plaintiff, **qua** employee, the largest sum possible under any reasoning that was suggested by Plaintiff in his post-termination revisionary history of the two employment contracts. There are ambiguities caused by the different wording used, and the sloppy construction by Virgil Llapitan who used an older, computer stored, employment agreement to formalize the terms originally set forth in the March 24, 2005 Agreement. See testimony of Virgil Llapitan, **TR. 879**.

Contrary to the Court's findings of fact about the efficacy and purpose of the **April 18, 2005** Agreement, Michael Durand as late as **November 18, 2005** considered the terms of the 1<sup>st</sup> Agreement dated **March 24, 2005** to be controlling. See **Exhibit 3C**: Durand memo to Melissa Duthie, CEO for ITI Internet Services, Inc. **APP-77**. There Plaintiff refers to his "original employment agreement" signed March 24, 2005 and the "more professional agreement" signed April 18, 2005. Mr. Durand own words support the conclusion that the later agreement was understood by Plaintiff as continuing but not changing the terms of the original agreement. In his **November 18, 2005** memo, Plaintiff still refers to himself as an employee of HIMC Corp. This contradicts the Court's Findings of Fact, p 3. ¶4, that Plaintiff was hired only by ITI Internet Services, Inc. Plaintiff even testified about the importance of [pretend] appearances to promote his work for HIMC Corp. **TR 1038-1039**. This further comports with Plaintiff's description of the results of his work for

HIMC/ITI when he falsely sought to portray a growth of business under his leadership. **TR 261-262; 461; 471-475**. The Court accepted this biased and self-serving rendition of events relating to the issue of contract interpretation to justify its incorrect favoritism for the 2<sup>nd</sup> employment agreement. The Court erred in accepting **post-hoc** rationalizations by the Plaintiff to revise the two contracts and to enforce in an unreasonable manner the terms of the 2<sup>nd</sup> contractual agreement.

1. The lawsuit was generated by the signing of two contractual documents, and the ambiguities which that engendered. The Court erred in ruling against two interacting contracts, in which the 2<sup>nd</sup> contract should have been interpreted as an expression of the 1<sup>st</sup> employment contract. The Court incorrectly found that although two contracts were signed, it was **the intent of the parties** that Plaintiff be an employee of ITI Internet Services, Inc., and **not HIMC Corp.** Findings of Fact, page 3, ¶ 4.

2. The Court found that Plaintiff voluntarily agreed to a temporarily reduced salary payment in September, 2005, which reduction continued until Plaintiff's termination on February 21, 2006. id ¶ 7. Based on Exhibit 3C, the Court should also have found that the relocation assistance of \$20,000.00 which the Court deemed a "bonus" was also deferred. Therefore the \$20,000.00 cannot be the subject of a RCW 49.52.070 penalty for non-payment.

3. The Court found that Plaintiff was entitled to certain benefits arising

from the April 18, 2005 employment contract with ITI Internet Services, Inc. Findings at ¶ 9. The Court erased the March 24, 2005 from the employment relationship and any duty to reconcile the ambiguities in the two agreements by referencing the 1<sup>st</sup> contract and considering the intent of the parties as expressed in that original contract. See Berg v Hudesman, 115 Wn.2d 657 (1990). This approach of the Trial Court then led it to find that the purpose of the 2<sup>nd</sup> Agreement dated April 18, 2005 was to finalize the terms of employment, thereby replacing any now inconsistent terms contained within the 1<sup>st</sup> Contract, upon which Mr. Durand had relied in terminating his prior employment and moving to Tacoma, Washington. Findings ¶15. The Court disregarded the substantial contradictory evidence from both Virgil Llapitan and Plaintiff Durand that as late as November 18, 2005 Plaintiff still considered the March 24<sup>th</sup> Contract to be the operative Agreement.

4. The Court found that the terms of Mr. Durand's 2<sup>nd</sup> contract were intended to make his employment terms consistent with those of other upper management personnel, specifically, Ron Ehli and Virgil Llapitan. Findings ¶ 15. The Court did not identify wherein lies such consistency, and the documents themselves contradict and expose the fallacy of such a conclusion. **Compare: Exhibits 3A, 14, and 62.** The lack of support for so many of the Court's findings and conclusions leads to an assessment that the Findings of Fact and Conclusions of Law are a capricious product of an

arbitrary bias against the employer entities.

5. The Court further found that under ¶ 4.6 of the 2<sup>nd</sup> Contract, Plaintiff was to receive all remaining compensation due under a five year contract (\$618,750.00). This meant that the contract was interpreted to obligate ITI Internet Services, Inc to pay the employee immediately for the entire remainder of his five year contract (\$12,500.00 x 49.5) whom it had terminated because it lacked sufficient assets to continue to employ him for the remainder of his five (5) year term, paying him at only the monthly rate of \$12,500.00.

6. The Court further found that under the terms of the 2<sup>nd</sup> contract, Plaintiff was entitled to receive a 10% bonus of \$15,000.00. id ¶ [17]. Its ruling altered the language of the contract and the common understanding of the term “bonus”. See **TR 1049-1051**

7. The Court further found that under the terms of the 2<sup>nd</sup> contract, Plaintiff was entitled to receive \$20,000.00 for relocation assistance or as a “signing bonus”. id 17.

8. The Court further found that upon termination, Plaintiff was entitled to receive his deferred salary totaling \$38,958.26. id ¶ 18. Defendants do not appeal from this aspect of the decision under RCW 49.48.030.

The Court’s findings of fact are not supported by a substantial or even reasonable quantum of evidence. The findings directly disregard the stated intent of the parties to the 2<sup>nd</sup> contract of employment that both

contracts must be read and interpreted together. See Durand's testimony, **RP 364-365; 390-391; 405; 482; 594**. The Trial Court made ineffective applicable terms of the 1<sup>st</sup> Contract, contrary to the wording of the Agreements and the agreement of the parties. Bogomolov v Lake VillasCondo Ass'n, 131 Wn. App. 353 (2006). The Findings disregard the conduct of the Plaintiff who began to perform his employment duties under the terms of the 1<sup>st</sup> contract only. As Michael Durand and Virgil Llapitan testified, it was their understanding that the 2<sup>nd</sup> contract would effectuate the terms of the 1<sup>st</sup> contract. **RP 850**. The Court's findings and conclusions erase the 1<sup>st</sup> contract, and disregard any ambiguities in the 2<sup>nd</sup> contract that would be resolved by applying the terms of the 1<sup>st</sup> contract and the stated intent of the parties.

The Court violated the basic rule of contract interpretation by modifying the explicit language of the 2<sup>nd</sup> contract to import terms that were not part of the written contract(s) nor evidenced by the objective manifestations of the parties. Wells Trust by Horning v Grand Cent. Sauna & Hot Tub, 62 Wn.App. 593 (1991). The result was the creation of an unreasonable contract lacking in rationality and based on judicial modification by exclusion or negation of relevant terms. See e.g. Warner v Design & Build Homes Inc. 128 Wn. App. 34 (2005). The Court below erred by recognizing a meaning and resolving the ambiguities to produce a result that does not fulfill the purpose of the employment agreement, and

leads to an absurd conclusion. See Washington Practice Series, Vol 25: Contract Law, Sec. 5.5, text and fn. 14, citing Forest Marketing Enterprises v State Dept. fo Natural Resources, 125 Wn. App. 126 (2005). According to Plaintiff's trial testimony under the **April 18, 2005** contract he had the guaranteed right under his negotiated contract to receive five years of payment, less amounts already paid, **regardless of the date of his early termination**. The Trial Court found in effect that if Plaintiff had been terminated one day or one hour after beginning work on April 18, 2005 he would have been entitled to the remainder of the five years of payment allegedly guaranteed in his contract regardless of what he was doing or what he had done to perform work or render any service to HIMC Corp. or ITI Internet Services.

Plaintiff himself had insisted that he receive a severance package that would coordinate with the number of months of his actual employment, up to a maximum of ten months of severance pay. **RP 326; 586-587**. This was specifically negotiated with HIMC Corp. and Virgil Llapitan. **RP. 844-851**. Plaintiff wanted that protection in his new agreement with HIMC before he would give notice and terminate his then employment with Brach's Confectionary. **RP. 323-324**. The meaning and effect of this specific language dictated by Plaintiff was muddled up by the vague and ambiguous language used in the 2<sup>nd</sup> Agreement, ¶ 4.2.

In a further misreading of the 2<sup>nd</sup> Contract, the new language does

not state that all of the remaining term will be paid upon termination. That would mean that if Plaintiff worked for one week or even one day, and was then terminated for poor performance, or insufficient revenues to pay him at the agree upon rate, he would then be able to demand full payment **for five years of non-work**. That is not an employment contract in which work is exchanged for payment, it is a corporate give-away to an insider. It is an unreasonable interpretation of the contract language. Instead, the Court should have interpreted ¶ 4.6 as the language provides. Upon termination “Durand shall receive **compensation from** the remaining contract term upon termination.” “**Compensation from**” is different from “compensation of” which is the new language imported into the Agreement by the Trial Court. In the context of the just concluded March 23, 2005 contract, the actual language means that the month for month severance package will be paid out of the remainder of the contract up to the maximum of ten months.

In Dice v City of Montesano, 131 Wn.App. 675 (2006) the Court of Appeals defined “wages” under **RCW 49.48.030** by referring to the definition at **RCW 49.46.010**: “Wage” means compensation due to an employee **by reason of employment**. 131 Wn. App. 675 at 689 Severance pay was defined as “remuneration for **the service rendered** during the period covered by the agreement.” and includes any type of compensation due “by reason of employment”. id. In Dice the Court declined to construe

the employment agreement in a manner that would create “an absurd result”, 131 Wn. App. at 687. <sup>13</sup> Because the termination payments were tied to both **actual work performed** and the **salary level** at the time of termination, the Court deemed the termination clause a “wage” benefit within the meaning of RCW 49.46.010(2). In the instant case, the Trial Court rejected a contract interpretation that tied severance payments to work performed and replaced it with an interpretation that created a severance benefit based **on the number of months remaining in the contract during which no work is performed** (2<sup>nd</sup> Contract according to Plaintiff, and the Court).

The Court further erred by modifying the terms of the 2<sup>nd</sup> Agreement to characterize the \$20,000.00 “Relocation Assistance” as a signing bonus. There is no factual support for that conclusion. It disregards the plain wording of both contracts. The April 18, 2005 agreement does have a signing bonus section, ¶ 4.4. Plaintiff testified that he did in fact receive this signing bonus of stock, not money. The distinction in the two

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<sup>13</sup> The Court was informed that if a check had been issued for about the \$692,708.00 demanded as “wages” by Plaintiff and the check had bounced due to insufficient funds, then both Cornwell and Johnston would have faced the following personal liabilities created now by their own affirmative misconduct: 1) criminal prosecution under RCW 9A.56.060; 2) civil suit by Michael Durand for fraud and misrepresentation; 3) civil suit under RCW 23B.08.300 for breach of fiduciary duties by Michael Durand as an HIMC shareholder and by any other shareholder, such as Pamela Ehli, for having knowingly issued a bad check and thereby damaged the reputation of HIMC/ITI and exposed the corporations to criminal prosecution under RCW 9A.56.060. **TR 991-992; 1098-1101.** See also Defendants' Rule 12(b)(6) Motion to Dismiss.

This meets the definition of an “absurd result”.

paragraphs is inconsistent with the Court's arbitrary and careless merging of the two distinct provisions. ¶ 4.5 specifically states that the moving costs of up to \$20,000.00 is for a specific purpose, i.e. relocation assistance. The 1<sup>st</sup> contract did contain language about a \$20,000.00 signing bonus, but that was tied to the issuance of a Private Placement Memorandum (APPM') which never occurred. As Plaintiff testified, unless the PPM was issued, he was not entitled to a \$20,000.00 signing bonus. **RP 330.**

The Court disregarded the terms of the contract and the testimony of Virgil Llapitan that Plaintiff never submitted any receipts to support his claim that he had incurred any expenses in relocating. **RP 349-350.**

Plaintiff testified that there are no receipts because he never submitted any. Mr. Llapitan testified that he understood this paragraph in its normal business usage. That is, if you incur moving expenses up to \$20,000.00, then account for them and submit a claim for reimbursement. **RP.841-842.** This conduct, and the language itself show that the Court's conclusion of law that under the April 18, 2005 Contract Plaintiff was entitled to a relocation/signing bonus of \$20,000.00 is against the substantial weight of the evidence and should be vacated. The judgment should be reduced accordingly.

The Court further erred by modifying the term of the 2<sup>nd</sup> Agreement to create a right to a 10% annual bonus where no such right was agreed to by the parties. ¶ 4.2 uses confusing language about a 10% minimum

guaranteed bonus for 2005, followed by language that states the bonus “shall be determined in the discretion of the Board of Directors”. The Board never voted to approve a 10% bonus for Michael Durand. Instead the Court found or concluded that this clause of the 2<sup>nd</sup> Agreement should be read as granting a mandatory bonus regardless of any decision to the contrary by the Board of Directors. The Court further abused its authority by arbitrarily pegging the bonus at 10%. There is no explanation or finding of fact to support selecting a 10% bonus vs. a larger bonus up to the “Maximum 25%” ceiling created by ¶ 4.2. Once the authority of the Board of Directors is nullified, there is no rationale for choosing any particular bonus, and the Court exhibits an arbitrary and capricious decision-making capacity by blithely agreeing to Plaintiff’s post-termination effort to obtain more than he was entitled to under this paragraph in his 2<sup>nd</sup> Agreement.<sup>14</sup>

The Judgment awarding Plaintiff a \$15,000.00 annual bonus should be vacated and reduced accordingly.

**5. THE TRIAL COURT ABUSED ITS DISCRETION IN ITS AWARD OF ATTORNEY’S FEES AND FAILED TO SEGREGATE OUT WORK DONE ON UNSUCCESSFUL CLAIMS AND**

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<sup>14</sup> Under the Court’s inconsistent reasoning and contract modification, the 10% bonus is not even moored to Plaintiff’s actual salary, since his employment began on April 18, 2005 and he worked during that first year a total of only 8.5 months. His actual wage payment was only \$106,250.00 for FY 2005, not \$150,000.00 (\$12,500.00/mo. x 10.5 months). Even if the Court’s interpretation of the contract had been accurate, its mathematical calculations were flawed. The Court granted a bonus that is determined at year’s end based on a fictitious employment term of twelve months. The Court’s disregard of the contract language affected each of the contract issues presented in this case, and establishes a pattern of disregard leading to flawed factual decision making and flawed contract interpretation as a matter of law.

## THEORIES

The Trial Court erred in awarding Plaintiff attorney's fees for 290.7 hours of work, and in granting Plaintiff a 1.5 multiplier for all work performed. The Court failed to segregate out work done on unsuccessful claims and theories. Both decisions were an abuse of discretion and in contradiction of the lodestar methodology. The total number of hours awarded failed to segregate for unsuccessful claims, and incorrectly awarded time for the unsuccessful effort to obtain double damages under RCW 49.52.070. An inability to collect post-judgment is not a proper basis upon which to award a multiplier for the earlier work done to secure the judgment.

Plaintiff was successful in obtaining an award, albeit flawed, against the two corporate defendants, HIMC corp. and ITI Internet Services, Inc. under Claim 3 of his Amended Complaint, which encompassed all that he had sought in his Claim. It totaled \$692,708.00. and was comprised of four distinct elements. See **supra**. Plaintiff was, however, unsuccessful in several aspects of this broad litigation effort. The unsuccessful included his initial filing of improper and legally baseless claims against the two individual defendants, the unsuccessful effort to obtain a grand doubling of all of his \$692,708.00 wage claim demand against all four of the Defendants pursuant to RCW 49.52.070. Further, Plaintiff had filed his three claims against all of the four named

defendants, for which he had sought joint and several liability, as well as against the spouses of the two individual defendants. All claims against the spouse of Jerry Cornwell were dismissed. Judy Johnston's spouse was deceased. In response to Defendants' Motion for summary Judgment and Dismissal of claims, the Court ordered the dismissal against all Defendants of Claim #2 for Promissory Estoppel. The Court ordered the dismissal of the Claim #1 for Breach of contract against the two individual Defendants-Cornwell and Johnston, and their Spouses, and the marital communities. The Complaint, on its face, was derelict in having filed these two claims. At the close of the case, the Court denied judgment against the wife of Defendant Cornwell on the sole remaining claim against Jerry Cornwell for intentional withholding of wages in violation of RCW 49.52.050. All three claims against her were thus dismissed. Further, at the close of the case the Court denied any claim for liability and damages against the two individual defendants under RCW 49.48.030 which represented the first part of the two-part Claim #3, and the ultimate bulk of the damages award (\$692,708.00 vs. \$150,000.00 x 2).<sup>[15]</sup> Finally,

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<sup>15</sup> Claim #3 is a statutory wage withholding claim. Given the Court's ruling, the claim is either an example of poor draftsmanship which merged what should have been two distinct claims under two distinct statutes, viz: RCW 49.48.030 and RCW 49.52.070; or if the claims are interrelated such that a violation of the former is a necessary legal precondition to liability under the later, the Court erred in imposing liability and double damages against the two individual defendants qua officers after concluding that they were not liable as "employers" with any legal duty to personally pay Plaintiff under RCW 49.48.030. The Court appears to have accepted their agency status as a valid defense to a claim under RCW 49.48.030 and then wrongfully rejected that same agency defense to a claim under RCW 49.52.070. See Meisel and Dice decisions.

the Court denied Plaintiff's claim against the two individual defendants for double damages totaling \$1,385,416.00 (\$692,708.00 x 2). It then also ruled that the individual defendants and the corporate defendants had had a **bona fide** dispute and had acted correctly in contesting Plaintiff's claim for a 10% bonus of \$15,000.00; relocation payments of \$20,000.00; and severance payments for anything more than the 10 months, or \$125,000.00, guaranteed under the **March 24, 2005** 1<sup>st</sup> Employment Agreement (\$493,750.00 or approximately 39.5 months x \$12,500 per month)

In this litigation environment the lodestar method used by the Trial Court was 290.7 hours x \$450.00 per hour. The Court erroneously awarded Plaintiff \$130,815.00 for attorney's fees, **jointly and severally**, covering all work done on all claims against all defendants. See **November 21, 2007 Judgment Against HIMC Corp., ITI Internet Services, Inc., Judy Morton Johnston, Jerry Cornwell, and his Marital Community. CP 746-748**; See also **November 21, 2007 Judgment against HIMC Corp. and ITI Internet Services, Inc., CP 743-745**.<sup>[16]</sup> It further granted Plaintiff a 1.5 multiplier on the fee claim, which erroneously

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<sup>16</sup>The Court did deduct 21.5 hours of time spent prior to November 20, 2006, the date identified in the billing records as the date of preparation and filing of the original Complaint, from its lodestar calculation as time spent pre-litigation and therefore not authorized under the terms of RCW 49.48.030. See Dice v City of Monsanto, 131 Wn.App. 675, 691-692 (Div. II, 2006). This victory was made somewhat pyrrhic by the Court's decision to then grant a 1.5 multiplier to the remaining hours it allowed for compensation.

increased the hourly rate of compensation. This increased the fee award by \$43,605.00 from \$87,210 to \$130,815.00 and compounded its improper calculation of the reasonable hours. In doing so it disregarded its duties to segregate the successful claims from the unsuccessful. The Court disregarded the well-known and applicable rules for attorney fee claims by declining to remove from the lodestar formula that time which Plaintiff's counsel used to litigate the foregoing unsuccessful claims and to unsuccessfully draft and defend a defective Complaint and Amended Complaint which wrongfully asserted claims against innocent parties. See **supra**. It disregarded the accepted and oft-repeated cautionary language from the Supreme Court that a fee multiplier should be granted **sparingly** and only **in extraordinary circumstances**. Instead the Court adopted Plaintiff's fee claim theory that because the claims had been contested and because the Defendants did not have the money to pay the judgment, successful collection in the future would prove difficult. **Ergo**, Plaintiff was entitled to a greater hourly rate for the work it had already done to accomplish a successful result of a Judgment(s)

The judgment or award of attorney's fees should be vacated. Defendants contend that the total award should be no more than a maximum of **\$70,110.00** (not \$82,410.00), using a lodestar of \$300.00 per hour, but for only a maximum compensable total of **233.7 hours** (not 274.7 hrs.). See infra.

A successful litigant claiming statutory attorney's fees is obligated to allocate his fee claim to exclude time spent on unsuccessful litigation efforts. See Kastanis v Educ. Employees Credit Union, 122 Wn.2d 483, 501-502 (1993)(Plaintiff required to segregate its attorney's fees between successful and unsuccessful claims that allow for award of fees); **Accord:** Bowers v TransAmerica Title Ins., 100 Wn.2d 581, 600 (1983) (In calculating the fee, the court must discount any duplicated or wasted effort by the attorneys); Nordstrom v Tampourlos, 107 Wn.2d 735, 743 (1987); Hensley v Eckerhart, 461 U.S. 324 (1983). The Court erred in not segregating and awarding attorney's fees pursuant to RCW 49.48.030 for time spent obtaining this judgment for termination pay, **a non-wage contract benefit**, even assuming, **arguendo**, that the Court's contract interpretation was correct. see Dice v City of Montesano, 131 Wn. App. 675 at 690: Attorney had satisfied requirement that he segregate time spent on unsuccessful theories, including segregating time spent on double damages claim under RCW 49.52.070.

Based on the applicable statutes, any fee award should have been granted only under **RCW49.48.030**, not **RCW 49.52.070**, and then against only the corporate Defendants. **See infra**. On the later statute, the Defendants, collectively, were the substantially prevailing party(ies). Indeed, the \$150,000.00 awarded under **RCW 49.52.070** does not merit any award of fees or costs, since the Court found that that amount was

conceded early on based on its review of pre-litigation settlement offers from Defendants. Therefore it did not warrant any of the extensive amount of time spent by counsel for the Plaintiff during the litigation. Under **RCW 49.48.030** the only liable parties are the two corporate defendants, HIMC Corp. and ITI Internet Services. Therefore the Court further erred in awarding joint and several liability against all four defendants for work done against only the corporate defendants for the fee claim under RCW 49.48.030, and in failing to partition the fee award against the two individual defendants for whatever work was done against them to prove the claim under RCW 49.52.070.6.

**6. THE COURT ERRED IN IMPOSING JOINT AND SEVERAL LIABILITY AGAINST THE INDIVIDUAL DEFENDANTS FOR 100% OF THE ATTORNEY'S FEES**

The Trial Court abused its discretion and erred in imposing judgment for 100% of the attorney's fees upon the individual defendants, Jerry Cornwell and Judy Johnston, and violating the various decisional rules mandating an allocation of attorney's fees. **See RP 1320-1345; 1392-1393.**

With all due respect to the Trial Court, it acted in a biased and arbitrary fashion by first refusing to follow the lodestar rule of Bowers that time spent on unsuccessful efforts should be excised from the fee calculation formula. It then exacerbated its error by concurring with Plaintiff's argument that because it would be difficult to collect the

judgment from HIMC and/or ITI Internet Services, Inc., the individual Defendants should be deemed jointly and severally liable for the judgment. Such an argument is covered in self-interest, and violates the principle that attorney's fees are for obtaining a result, i.e. a judgment. Work done that does not contribute to that result may not be the subject of a statutory award of fees under RCW 49.52.070 or RCW 49.48.030.

The ratio that the Court should have applied to the total fee claim of \$130,815.00 in determining how much of the work is properly allocated to the individual defendants was 43.3 % of the total award ( $\$300,000/\$692,708 = 0.433$ ). Therefore, the judgment for attorney's fees as to the individual Defendants should have been no more than **\$56,642.90**.

However, this total is itself also excessive given the Court's erroneous and arbitrary imposition of judgment under RCW 49.52.070 for \$300,000.00 rather than \$150,000.00. See supra. If the damages under RCW 49.52.070 against the individual defendants are reduced to \$150,000.00, then the allocation for attorney's fees should be reduced to the total ( $\$130,815.00$ ) x 21.65%. The fees awarded against the individual defendants should have been no more than **\$28,326.86**. [17]

This appeal analysis is corroborated by the 21.65% allocation

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<sup>17</sup> This analysis is without wavier of Defendants' objection to the underlying grant of \$130,815.00 as the fee award based on the incorrect use of a 1.5 multiplier. See supra.

formula proposed by Plaintiff and accepted by the Court to determine what portion of prejudgment interest should be allocated to the individual defendants. See Judgment #2, APP-68. Thus the Corporate Judgment imposed a prejudgment interest amount of \$143,475.99 against the two corporate employers. **APP-66**. The second judgment against the individual defendants imposed only a “pro-rata share of prejudgment interest” totaling \$31,062.55. **APP-69**. That amount is exactly 21.65% of the total.

#### **7. THE COURT ERRED IN GRANTING A FEE MULTIPLIER OF 1.5**

The adoption of a fee multiplier was also an abuse of discretion which violated the rules stated in Bowers v Transamerica Title ins. Co., 100 Wn.2d 581 (1983) and Mahler v Szucs, 111 Wn.2d 1235 (1998). Multipliers are not favored under Washington law and should be allowed only in rare circumstances. “Rare Circumstances” is a conclusion of law based on two factors: 1) the contingent nature of success; and 2) in exceptional circumstances the exceptional nature of the work performed. However, simply successfully and competently litigating a case does not justify the award of a “quality multiplier”. Travis v Washington Horsebreeders Ass’n, 111 Wn.2d 396, 411 (1988). It is assumed without need for extensive argument that the Trial Court will exercise its judicial role to make specific findings of fact that would support any decision to award a multiplier. As pointed out in the Bowers decision, the risk factor

is an issue that is evaluated as of the time the litigation is commenced. If a risk factor is applicable then the Trial Court erred in not applying the standards set forth in Bowers and in cases such as Pham v City of Seattle, 151 Wn.2d 527 (2007). As was pointed out to the Trial Court, success on at least the RCW 49.48.030 claim was always assured given Defendants' claim that wages should be awarded under the specific and limiting provisions of the 1<sup>st</sup> Employment contract. The Trial Court's reasoning, if it was adopting the argument(s) offered by Plaintiff, departed from controlling case law. See, e.g. Bowers v Transamerica Ins. Co., 100 Wn.2d at 599: Multiplier warranted where Plaintiff had **exceptionally difficult task of overturning or limiting controlling legal authority**; Somsak v Criton Technologies/Health Tecna, 113 Wn. App. 84 (2002) at 98-99 (multiplier warranted given the significant risk of defeat)

The lodestar fee is normally presumed to adequately compensate the attorney for his work, in accordance with his fee agreement. Henningsen v Worldcom, Inc. 102 Wn. App. 828, 847 (2000). In this case Plaintiff declined to produce a copy of the Retainer Agreement or to claim that it was a contingency fee case. Therefore the Trial Court should have assumed it was an hourly fee case for which the factors warranting any kind of multiplier had to be established by Plaintiff. Plaintiff failed to do this, and the Court erred in granting a multiplier of 1.5. There was nothing "exceptional" about this wage claim case, either in the quality of work

performed or in the factual complexity of the claims. See Xieng v Peoples Nat'l Bank, 63 Wn. App. 572, 587 (1991). Plaintiff implicitly acknowledged this when he filed his lawsuit and requested an expedited discovery schedule.

In the instant case the Trial Court expressed a decision granting a multiplier without any findings that Plaintiff's counsel had confronted and surpassed the criteria that would justify a multiplier. An examination of the oral argument on the Motion for Award of Fees and Costs reveals that the factor that the Court apparently relied upon was the claim that it would be difficult to collect any judgment because the Defendants lacked sufficient money and because the Defendants had contested the allegations in the Complaint and would likely appeal the decision awarding judgment. See Plaintiff's Motion for Fees and Costs, CP 566-600. Under Bowers, 100 Wn.2d at 598-599, the multiplier adjustment based on a risk factor ends and **does not apply** to time spent in obtaining the fees themselves.

The Trial court erred in granting a multiplier and its willingness to do so despite the death of supporting facts **ala** Bowers and Mahler suggests the Court's propensity to make decisions without explanation and in an arbitrary and capricious manner.[18] The 1.5 multiplier and the

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<sup>18</sup> Arbitrary and capricious action is "willful and unreasonable action, without consideration and regard for facts or circumstances." Landmark Development Inc. v City of Roy, 138 Wn.2d 561 at 573 (1999).

entire fee award should be vacated and remanded for reconsideration by a new Superior Court Judge. Further, the award of fees and costs on a joint and several liability basis in the Judgment against the individual defendants and the corporate defendants should be vacated and the decision remanded with instructions directing the Superior Court Judge to allocate the fee award based on a detailed examination of the billing records to remove unsuccessful work on unsuccessful claims and further allocated to apportion the time between the Defendant parties in proportion to the relative judgment amounts entered against them. Any other methodology is an abuse of discretion.

**8. THE COURT ERRED IN AWARDING PREJUDGMENT INTEREST AGAINST THE INDIVIDUAL DEFENDANTS**

The Trial Court erred in awarding an allocated ratio of 21.65% of the total prejudgment interest of 143,475.99, or 31,062.55 against the individual Defendants. Compare: Judgment #1 vs. Judgment #2, APP-65 and 68. The error lies in the Court's sudden and arbitrary decision to disregard its decision not to impose damages against the individual Defendants under RCW 49.48.030 for withheld wages totaling \$692,708.00, and not to impose prejudgment interest of \$143,475.99 against the individual Defendants. See Findings and Conclusions of Law, page 12, ¶ ¶ 7 and 8. In contradiction of these two Conclusions of Law, the Court then imposed a portion of prejudgment interest of \$31,062.55 (A21.65% of \$143,475.99) in Conclusion of Law ¶ 9. Since the

prejudgment interest was awarded only for claims under RCW 49.48.030, but not the claim under RCW 49.52.070, its was an error of law to then award prejudgment interest on the RCW 49.52.070 penalty against the individual Defendants. Compare: Findings and Conclusions of Law, ¶¶ 7 and 8 vs. ¶ 9.

**9. THE COURT ERRED IN IMPOSING JUDGMENT AGAINST THE MARITAL COMMUNITY OF JERRY CORNWELL**

The trial court erred and its judgment against the marital community Jerry Cornwell and his wife for **\$463,658.30** should be vacated. **TR 1307-1320** The Court dismissed the spouse as a direct defendant. **TR 1315.** The claim against Jerry Cornwell was only under RCW 49.52.070 for his conduct as a corporate officer in not paying \$150,000.00. **TR 1331.** That claim rests upon an underlying violation RCW 49.52.050(2), **a criminal statute.** There was no evidence that Jerry Cornwell's conduct benefitted his marital estate or was intended to benefit the marital estate. Smith v Retallick, 48 Wn.2d 360 (1956). The Court further erred by imposing upon the Defendant a burden of proof that the marital estate was not benefitted, and ruling that RCW 26.16.030 creates a presumption of a marital debt for claims based on criminal conduct in corporate decision-making by an officer. **TR 1319.** See Defendants' Supp. Trial Memorandum re: 3) Non-Liability of Marital Community of Cornwell. CP 527-534

**CONCLUSION:**

Appellants ask for the following relief:

- 1) That the two Judgments against all four defendants be vacated for the reasons stated, and all claims against Jerry Cornwell and Judy Johnston be dismissed.
- 2) That liability upon Defendants Jerry Cornwell and Judy Johnston under RCW 49.52.070 for **\$300,000.00** be vacated entirely, together with the judgment against them for attorney's fees of **\$130,815.00**; and including the pro rata share of prejudgment interest of **\$31,062.55**, and costs of **\$1,780.75**.
- 3) That the total award of attorney's fees of **\$130,815.00** be vacated, and that the fee multiplier of 1.5 be vacated and the total attorney fee award be reduced accordingly and to a total fee award of no more than **\$70,110.00**, if the judgments are not vacated as per above.
- 4) That the judgment of **\$618,750.00** against the corporate defendants for withholding of wages under RCW 49.48.010 or breach of contract be vacated and remanded to a new judge with instructions to award Plaintiff a total severance pay of no more than **\$125,000.00** and no less than **\$54,166.80**, and denying Plaintiff relocation assistance of **\$20,000.00** and any annual bonus of **\$15,000.00**.
- 5) That any judgment against the Marital Community of Jerry Cornwell and Jane Doe Cornwell be vacated and barred.

6) That Jerry Cornwell and Judy Johnston and Mrs. "Jane Doe" Cornwell be awarded attorney's fees for this appeal, RAP Rule 18,1(a), as the prevailing parties under RCW 49.52.070; and pursuant to CR Rule 12(b)(6), See: Consumers Insurance Co. v Cimoch, 69 Wn. App. 313 (1993) ; and that HIMC Corp. and ITI Internet Services, Inc. be awarded their attorney's fees on remand as the substantially prevailing parties under RCW 49.52.070.

  
DAVID B. ADLER, Attorney for Appellants

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IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

MICHAEL DURAND	)	
et.al.	)	
Appellee	)	CASE # 37088-3-II
vs.	)	
HIMC CORPORATION;	)	
ITI INTERNET SERVICES	)	
JUDY MORTON JOHNSTON;	)	
and JERRY CORNWELL;	)	
Appellants	)	

CERTIFICATE OF SERVICE

I hereby certify that on **June 13, 2008** I served and sent for delivery true and correct copies of the following documents upon the following persons by the following means:

DOCUMENTS:

1. Appellants' Joint Opening Brief on Appeal as Corrected
2. Appendix to Opening Brief of Appellants as Corrected-Cover page only
3. Appellants' Motion for Leave to File Overlength Brief as Corrected and Affidavit of David B. Adler
4. Certificate of Service

PERSONS SERVED:

1. Paul Lindenmuth  
4303 Ruston Way  
Tacoma, Washington 98402  
Attorney for Michael Durand, Appellee

METHOD OF SERVICE

1. Opening Brief as Corrected: Via ABC Messenger

**DAVID B. ADLER, ESQ.**  
520 Pike Street, #1415  
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Telephone: (206) 343-5991  
Wash. Bar #16585

**ORIGINAL**

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

MICHAEL DURAND, et al

Respondent,  
vs.

HIMC CORPORATION,  
ITI INTERNET SERVICES, INC.,  
JUDY MORTON JOHNSTON,  
JERRY CORNWELL; AND  
JOHN DOES 1-10,

Appellants.

Case No. 37088-3-II

FILED  
COURT OF APPEALS  
DIVISION II  
08 JUN 13 PM 1:59  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

APPENDIX TO OPENING BRIEF OF APPELLANTS  
AS CORRECTED

Submitted this 13<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
David B. Adler  
Attorney for Appellants

**APPENDIX**

**(A) Statutes and Rules of Evidence:**

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RCW 49.48.082(5) .....2  
RCW 49.12.005(4) .....2  
RCW 9A.56.060 .....3  
RCW 23B.080.300 et seq .....4  
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**(B) Track Assignment Request .....6**

Supplemental Request for Inclusion of Clerk’s Papers

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RCW 49.52.050 states in pertinent part:

**Rebates of wages — False records — Penalty**

“Any employer or officer, vice-principal or agent of any employer ... who  
(1) Shall collect or receive from any employee a **rebate of any part of wages** theretofore paid by such employer to such employee; or  
(2) **Willfully and with intent to deprive the employee of any part of his wages**, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance or contract ...

**Shall be guilty of a misdemeanor**

RCW 49.52.060 states in pertinent part:

**Authorized withholding.**

The provisions of RCW 49.52.050 shall **not make it unlawful** for an employer to withhold or divert any portion of an employee's wages **when required or empowered so to do by state or federal law ...**

RCW 49.52.070 states in pertinent part:

**Civil liability for double damages.**

Any employer and **any officer, vice principal or agent** of any employer who **shall violate any of the provisions of subdivisions (1) and (2) of RCW 49.52.050** shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees. **HOWEVER**, that the benefits of this section shall not be available to any employee who has **knowingly submitted to such violations.**

RCW 49.52.080 states in pertinent part:

**PRESUMPTION AS TO INTENT.**

The violations by an employer or any officer, vice-principal, or agent of any employer **of any of the provisions of subdivisions (3), (4), and (5) of RCW 49.52.050** shall raise a **presumption** that any deduction from or **underpayment** of any employee's wages connected with **such violation was willful.**

(EMPHASIS ADDED)

**RCW 49.48.082(5)** states in pertinent part:

“Employee has the meaning provided in ... (b) **RCW 49.12.005** for purposes of a wage payment requirement set forth in RCW 49.48.010, **49.48.050** or 49.52.060. **(emphases added)**”

**RCW 49.12.005** provides in pertinent part:

“Employee” means an employee who **is employed** in the business of the employee’s employer ...” **(emphases added)**

RCW 9A.56.060 provides in pertinent part:

**Unlawful issuance of checks or drafts.**

(1) Any person who shall with intent to defraud, **make, or draw, or utter, or deliver to another person any check**, or draft, on a bank or other depository for the payment of money, **knowing at the time of such drawing, or delivery, that he has not sufficient funds in, or credit with said bank or other depository, to meet said check or draft, in full upon its presentation, shall be guilty of unlawful issuance of bank check.**

(2) Any person who shall with intent to defraud, **make, or draw, or utter, or deliver to another person any check**, or draft on a bank or other depository for the payment of money and who issues a stop-payment order directing the bank or depository on which the check is drawn not to honor said check, and who fails to make payment of money in the amount of the check or draft or otherwise arrange a settlement agreed upon by the holder of the check within twenty days of issuing said check or draft **shall be guilty of unlawful issuance of a bank check.**

(4) **Unlawful issuance of a bank check** in an amount greater than two hundred fifty dollars is a **class C felony.**

RCW 23B.08.300 states in pertinent part:

**General Standards for Directors**

(1) A director shall discharge the duties of a director including duties as member of a committee:

- (a) **In good faith;**
- (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (c) In a manner the director reasonably believes to be in the best interests of the corporation.

(2) In discharging the duties of a director, a director is entitled to rely on information, opinions, reports or statements, ... if prepared or presented by:

- (b) legal counsel ... as to matters the director reasonably believes are within the person's professional or expert competence

**(4) A director is not liable for any action taken as a director, or any failure to take any action, if the director performed the duties of the director's office in compliance with this section.**

**23B.08.420. Standards of Conduct for Officers**

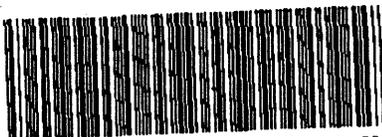
(1) An Officer with discretionary authority shall discharge the officer's duties under that authority:

- (a) **In good faith;**
- (b) With the care an ordinarily prudent person in a like position would exercise under similar circumstances; and
- (c) In a manner the officer reasonably believes to be in the best interests of the corporation.

(2) In discharging the officer's duties, a officer is entitled to rely on information, opinions, reports or statements, ... if prepared or presented by:

- (b) legal counsel ... as to matters the officer reasonably believes are within the person's professional or expert competence.

**(4) An officer is not liable for any action taken as an officer or any failure to take any action, if the officer performed the duties of the officer's office in compliance with this section.**



06-2-13326-4 28554180 RQACT 11-22-06

FILED  
IN COUNTY CLERK'S OFFICE  
A.M. NOV 22 2006 P.M.  
PIERCE COUNTY, WASHINGTON  
KEVIN STOCK, County Clerk  
BY [Signature] DEPUTY

**PIERCE COUNTY SUPERIOR COURT, STATE OF WASHINGTON**

Michael Durand, et. ux.

Plaintiff(s),

vs.

HIMC Corporation, et. al.

Defendant(s).

06 2 13326 4

Case No. \_\_\_\_\_

TRACK ASSIGNMENT REQUEST

NAME PAUL ALEXANDER LINDENMUTH PHONE (253) 752-4444 FAX \_\_\_\_\_

ADDRESS 4303 Ruston Way

TACOMA WA 98402-5313

JURY DEMAND ANTICIPATED  YES  NO  
CONSOLIDATION ANTICIPATED  YES  NO  
ESTIMATED LENGTH OF TRIAL 7 DAYS

TRACK ASSIGNMENT REQUESTED: SEE PCLR (g)(2)through(5)

EXPEDITED  COMPLEX

STANDARD  DISSOLUTION

TRACK REQUESTS THAT DEVIATE FROM THE PRESUMED TRACK (SEE PCLR1) MUST BE EXPLAINED ON THE SPACE PROVIDED BELOW, OR WILL BE REJECTED BY CLERK.

I HEREBY CERTIFY THAT I HAVE CONSIDERED THE GENERAL GUIDELINES FOR TRACK ASSIGNMENT AS CONTAINED HEREIN AND CERTIFY THAT MY REQUESTED TRACK IS IN COMPLIANCE THEREWITH.

DATED: 11/20/2006

SIGNED: [Signature]  
WSB#: 15817

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

November 22 2006 11:44 AM

KEVIN STOCK  
COUNTY CLERK

No. 06-2-13326-4

ORDER SETTING CASE SCHEDULE

Type of Case: COM  
Track Assignment: Expedited  
Assigned Department: 06 - Judge ROSANNE BUCKNER  
Docket Code: ORSCS

Confirmation of Service	12/06/06
Confirmation of Joinder of Parties, Claims and Defenses	01/17/07
Jury Demand	01/24/07
Obtain Settlement Conf Judge/Comm from Commissioners' Services (See PCLR 3(c) 2(b) & 94.04 (f))	Week Of 01/31/07
Status Conference (Contact Court for Specific Date)	Week Of 01/31/07
Plaintiff's Disclosure of Primary Witnesses	02/14/07
Defendant's Disclosure of Primary Witnesses	03/07/07
Disclosure of Rebuttal Witnesses	03/21/07
Deadline for Filing Motion to Adjust Trial Date	04/04/07
Discovery Cutoff	04/11/07
Exchange of Witness and Exhibit Lists and Documentary Exhibits	04/18/07
Deadline for Hearing Dispositive Pretrial Motions	04/25/07
Joint Statement of Evidence	04/25/07
Settlement Conference (Contact Court for Specific Date)	Week Of 05/02/07
Pretrial Conference (Contact Court for Specific Date)	Week Of 05/16/07
Trial	05/23/07 9:30

**Unless otherwise instructed, ALL Attorneys/Parties shall report to the trial court at 9:00 AM on the date of trial.**

**NOTICE TO PLAINTIFF/PETITIONER**

If the case has been filed, the plaintiff shall serve a copy of the Case Schedule on the defendant(s) with the summons and complaint/petition: Provided that in those cases where service is by publication the plaintiff shall serve the Case Schedule within five (5) court days of service of the defendant's first response/appearance. If the case has not been filed, but an initial pleading is served, the Case Schedule shall be served within five (5) court days of filing. See PCLR 1.

**NOTICE TO ALL PARTIES**

All attorneys and parties shall make themselves familiar with the Pierce County Local Rules, particularly those relating to case scheduling. Compliance with the scheduling rules is mandatory and failure to comply shall result in sanctions appropriate to the violation. If a statement of arbitrability is filed, PCLR 1 does not apply while the case is in arbitration.

DATED: November 22, 2006



Judge ROSANNE BUCKNER  
Department 06

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KEVIN STOCK  
COUNTY CLERK

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**

MICHAEL DURAND and NATASHA DURAND,  
both individually, and the marital community  
comprised thereof,

Plaintiffs,

vs.

HIMC CORPORATION, A.K.A., HEALTH  
GUARD INTERNATIONAL MARKETING  
CORPORATION, a corporation licensed and doing  
business within the State of Washington, and ITI,  
INTERNET SERVICES, INC., a corporation  
licensed and doing business within the State of  
Washington, JUDY MORTON JOHNSTON and  
"JOHN DOE" MORTON JOHNSTON, both  
individually, and the marital community comprised  
thereof ; JERRY CORNWELL and "JANE DOE"  
CORNWELL, both individually, and the marital  
community comprised thereof, and "JOHN AND  
JANE DOES" One through Ten, individually and the  
marital community;

Defendants.

NO. 06-2-13326-4

**AMENDED COMPLAINT FOR  
DAMAGES: BREACH OF  
CONTRACT; PROMISSORY  
ESTOPPEL, AND/OR  
RELIANCE; AND  
WRONGFUL WITHHOLDING  
OF WAGES PURSUANT TO  
RCW 49.48. ET. SEQ. AND RCW  
49.52 ET. SEQ.**

1  
2 such, jurisdiction lies with the Superior Court of the State of Washington and the  
3 appropriate venue is Pierce County, Washington.

4 1.5 Defendant Judy Morton Johnston's place of residence is currently unknown. She  
5 conducts relevant business interogatory Tacoma, pierce County, Washington. Based in  
6 information and belief it is alleged that during relevant time periods, she was an "officer,  
7 vice principle, or agent" of the one or both of the Defendant corporations who had stated  
8 and/or defacto authority over the payment, or non payment, of Plaintiff's wages.

9  
10 1.6 Defendant Jerry Cornwell's place of residence is currently unknown. He conducts  
11 relevant business interogatory Tacoma, pierce County, Washington. Based in  
12 information and belief it is alleged that during relevant time periods, she was an "officer,  
13 vice principle, or agent" of the one or both of the Defendant corporations who had stated  
14 and/or defacto authority over the payment or non payment of Plaintiff's wages.

15 1.7 Defendants "John and Jane Doe's", One through Ten's identities are currently unknown,  
16 and shall be named and identified upon discovering the identities. They are being sued  
17 for the actions as "officers, vice principles or agents" of one or both of the Defendant  
18 corporations, and/or defacto authority, and for their exercise of a stated and/or defacto  
19 authority that proximately resulted in the wrongful withholding of Plaintiff's wages.

20  
21 1.8 The marital community of all individual Defendants, if any, are also subject to suit, in that  
22 all acts of the individual Defendants were done for the benefit of their respective marital  
23 communities.

1  
2 2.8 In reliance on the terms of the employment contract tendered by Defendants, Mr. Durand  
3 left his former employment and commenced working for ITI Services and HIMC  
4 Corporation on April 18, 2005. It is specifically alleged that had Mr. Durand not been  
5 tendered an express employment contract under the terms set forth above, he would not  
6 have left his former employment and did so on reliance of the representations of the  
7 Defendant corporations which were made by and through their authorized agents.

8  
9 2.9 Due to the financial condition of the company and a desire to help it be successful, Mr.  
10 Durand deferred a substantial amount of his promised salary and deferred receipt of the  
11 \$20,000.00 in relocation allowance as set forth under the terms of the contract. He also  
12 continued to work into the year 2006 even though he did not receive his promised annual  
13 bonus of approximately \$15,000.00 for the year 2005.

14 2.10 On or about November 18, 2005, Mr. Durand and Melissa Duthie as CEO of ITI Internet  
15 Services entered into a clarifying memorandum regarding his employment agreement  
16 wherein it was made clear that Mr. Durand was in fact both an employee of HIMC  
17 Corporation and ITI Internet Services, Inc.

18  
19 2.11 Unfortunately, on February 21, 2006, Plaintiff was terminated without warning from his  
20 employment with ITI Internet Services and HIMC Corporation by Melissa Duthie and  
21 Pam Ehli, whose role with the corporation at that time is unknown. Such termination was  
22 memorialized by emails between Michael Durand Melissa Duthie, a.k.a. Rae which is  
23 attached hereto as Exhibit No. 3.

1  
2 2.12 It is specifically alleged that the termination of Mr. Durand's employment contract which  
3 was for a five year term, well short of the expiration of said term, was a clear and  
4 unequivocal material breach of the terms of his employment agreement which is attached  
5 hereto as Exhibit No. 1. Further, under the terms of said employment agreement as  
6 expressed in paragraph 4.6, upon such improper termination, all amounts due under the  
7 terms of the subject employment contract have become due and owing.

8  
9 2.13 By way of a letter dated July 7, 2006, Plaintiff through counsel has demanded that the  
10 subject express employment contract be honored and that amounts due and owing be paid.  
11 Although a reasonable amount of time has been provided, full payment of the amounts  
12 due and owing (following the above referenced demand) no funds have been tendered.

13 2.14 Since Plaintiffs' demands for payment of the wages due and owing under his contract,  
14 the Defendant corporations and the individually named Defendants have willfully  
15 withheld payment, without valid justification or excuse or a bona fide reason for doing so.  
16

17  
18 **III. CAUSES OF ACTION**

19 3.1 Plaintiff hereby reincorporates paragraph 2.1 through 2.14 as it fully set forth herein and  
20 brings the following causes of action:

21 **1. Breach of Express Employment Contract;**  
22  
23

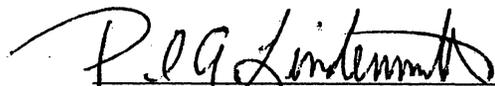
1  
2 Defendants are liable under RCW 49.52.070 for the willful withholding of  
3 Plaintiffs' wages.

4  
5 **IV. RELIEF**

6 WHEREFORE, Plaintiff prays for judgment against the above-named Defendants for  
7 relief as follows:

- 8 4.1 For past and future economic and other special damages proximately caused by  
9 Defendants' breach of the express terms of Plaintiff's written employment contract and/or  
10 other consequential damages, and all general damages (if any) available under the law;  
11 4.2 For double damages for the willful and unjustified withholding of wages and other  
12 remunerations of employment pursuant to RCW 49.52.070;  
13 4.3 For costs and attorney's fees pursuant to RCW 49.48.030 and RCW 49.52.070;  
14 4.4 For prejudgment interest on all liquidated amounts;  
15 4.5 For a joint and several judgment against all liable Defendants;  
16 4.6 For such other and further relief as the Court deems just and equitable; and  
17 4.7 That these pleadings be deemed conformed to the proof presented at time of trial.

18 DATED THIS 29 day of November, 2006.  
19

20 

21 Paul A. Lindenmuth, WSBA # 15817  
22 Of Attorneys For Plaintiff  
23

## EMPLOYMENT AGREEMENT

### ITI Internet Services, inc. /Durand

This Agreement is made this 18th day of April by and between ITI Internet Services, Inc. a Washington corporations ("Company") and Michael R. Durand ("Durand"). This Agreement is an employment contract.

1. **Employment** The Company wishes to enter an employment agreement with Durand as Vice President of Sales and Durand hereby accepts that employment upon the terms and conditions hereinafter set forth.
2. **Duties and Responsibilities.** Durand shall undertake and assume the responsibility of performing for and on behalf of Employer the duties of Vice President of sales.
3. **Term.** The term of this Agreement shall begin on April 18, 2005 and shall continue for a period of five (5) years until April 18, 2010. This agreement shall be renewed automatically thereafter for up to one (1) successive terms of 5(five) years each unless either the Company or Durand shall issue written notice on or before the 60<sup>th</sup> day prior to the anniversary date of this Agreement of an intent not to renew this Agreement for the next successive additional term.
4. **Compensation.** For all services rendered by Durand under this Agreement, the Company shall provide compensation to Durand as follows:
  - 4.1 **Salary.** Salary at the rate of \$12,500 per month or more payable semi-monthly, payable in cash.
  - 4.2 **Annual Bonus.** 10% minimum guaranteed for 2005. Maximum 25% Yearly bonus shall be determined in the discretion of the Board of Directors.
  - 4.3 **Other Benefits.** The Company shall pay the monthly premium cost for medical, dental, disability insurance, and parking and monthly auto allowance.
  - 4.4 **Acceptance Bonus.** For acceptance of this agreement, Durand shall be paid 25,000 shares of HIMC restricted stock issued upon signing with an additional 25,000 shares of HIMC restricted stock issued on the 6 month of employment.(Oct. 28, 2005).
  - 4.5 **Relocation Assistance.** Durand will receive \$20,000.00 as relocation expenses for relocation to the Tacoma area.
  - 4.6 **Termination.** In the event that the Company or any of its successors shall terminate this agreement early, Durand shall receive compensation from the

Mike,

HIMC Corporation is declaring a formal interest to employ Michel R. Durand effective April 18, 2005

HIMC Corporation is offering Mr. Durand a position in the Corporation as Head of Sales.

His duties will be to develop and to create a profitable sales organization for the corporation.

**Date:** April 18, 2005

**Position:** Head of Sales

**Annual Base Salary:** \$150,000

**Annual Bonus Opportunity:** (10% Minimum Guaranteed for 2005, Maximum 25%)

**Stock Grant:**

**Time of Hire:** 25,000 Shares

**6 Month Later:** 25,000 Shares

**Stock Options:** Eligible for employee stock option plan.

**Severance Package:** 6-12 Months  
1 Month of Severance for Every Month Employed to a Maximum of 12 Months  
Minimum Guarantee is 6 Months of Severance

**Vehicle:**

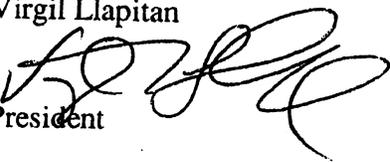
**Max. Lease Amount (includes tax)** Max. car allowance \$800.00

**Benefits:** Coverage from date of hire for spouse and child.

**Hire Date:** April 18, 2005

Virgil Llapitan

President



3/24/05

Accepted:

Michael R. Durand.



3/24/05

Exhibit No. 2  
25

000020

**Michael Durand**

**From:** Melissa Rae [melissa@itinternet.net]  
**Sent:** Wednesday, February 22, 2006 3:56 PM  
**To:** Michael Durand  
**Subject:** Re: Termination

Hi Mike,

Sorry for the delay.

Numbers 1-3 look correct. In regards to number four neither Pam nor myself could meet with Ann today. As soon as I find out any information I will be sure to contact you. Thanks!

Melissa Duthie  
TI Internet Services  
Phone: 253-284-0320  
Fax: 253-284-0324

On Tue, 21 Feb 2006 21:30:32 -0800, Michael Durand wrote:  
Melissa,

I need in writing that I was terminated by you and Pam at 4:30 PM today. I have recapped below what was conveyed to me as the termination process. Please let me know if you feel anything is incorrect.

1. I have been terminated effective 2/21/2006
2. I will be paid one more regular pay check on 2/28/2006 via direct deposit to my bank account as normal.
3. I will be paid one more Car Allowance payment 2/28/2006 via direct deposit to my bank account or by paper check. I know Ann has experienced problems getting this done via direct deposit.
4. You or Pam will look into getting my back pay (relocation, bonus, wages owed) to me and will know more about this by the end of the day 2/23/2006 after you meet with Ann White. I appreciate you working to get this done.

I can be reached at 253.948.8144. Please confirm my termination.

Thanks,  
Mike Durand

EXHIBIT No. 3

2/22/2006

CEP  
ITF



← back pay

- 1 1.5 DENIED.
- 2 1.6 DENIED
- 3 1.7 No allegations to which a response is needed are alleged. Therefore the paragraph is DENIED.
- 4 1.8 DENIED
- 5 2.1 DENIED. Defendant HIMC Corporation lacks sufficient information to either Admit or Deny  
6 and therefore Denies.
- 7 2.2 ADMITTED.
- 8 2.3 Exhibit 2 is a legal document which speaks for itself. To the extent the numerous allegations  
9 in this paragraph conform to the language and affirmations of Exhibit 2 the allegations are  
10 ADMITTED except for any legal conclusions asserted by Plaintiff.
- 11 2.4 DENIED IN PART and ADMITTED IN PART: Exhibit 1 speaks for itself. Defendant admits  
12 the authenticity of the signatures thereon. Defendant lacks sufficient information to understand  
13 what Plaintiff means by "a fully integrated express employment contract" and therefore  
14 DENIES.. To the extent that the allegations are inconsistent with or modify the actual language  
15 of Exhibit 1, or seek to import terms not found within the language of Exhibit 1, they are  
16 DENIED. Further the paragraph alleges a legal conclusion as to the significance of Exhibit 1  
17 and no responsive answer is required and which conclusions are Denied.
- 18 2.5 DENIED.
- 19 2.6 DENIED in part; ADMITTED in part. To the extent the allegations simply quote, without  
20 supplementation or deletion or modification, the express language of Exhibit 1, they are  
21 admitted as being the contents of the document except for any legal conclusions asserted by  
22 Plaintiff. Defendant DENIES that Exhibit 1 is an "express employment contract" or that  
23 Exhibit 1 is the complete employment contract. Defendant DENIES that Plaintiff was  
24 employed by ITI Internet Services. Plaintiff was employed by HIMC Corporation, as per  
25 Exhibits 1 and 2. To the Complaint.
- 26

ANSWER BY HIMC CORP.

1 2.7 DENIED in part. Defendant denies that Exhibit 1 is the total employment agreement and  
2 therefore denies that Exhibit 1 represents "the express terms of the employment contract".

3 2.8 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

4 2.9 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

5 2.10 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

6 2.11 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

7 2.12 DENIED.

8 2.13 DENIED. Plaintiff has demanded payment of far more than is "due and owing" under the  
9 terms of his March 24, 2005 employment agreement with HIMC Corporation. Plaintiff will not  
10 admit that the amount that is "due and owing" is no more than \$125,000.00 despite having  
11 been given numerous opportunities and requests to do so.

12 2.14 DENIED. Neither HIMC nor any officer or agent of HIMC has willfully withheld payment  
13 from Plaintiff. Neither HIMC nor any officer or agent of HIMC is obligated to pay Plaintiff  
14 more than what is due and owing under the terms of his March 24, 2005 employment  
15 agreement. Through various letters exchanged between counsel for Plaintiff and counsel for  
16 HIMC Corporation, valid justification for refusing to pay Plaintiff what is approximately six  
17 (6) times what is "due and owing" and more than what is due under his employment contract  
18 has been given to Plaintiff. Through various letters exchanged between counsel for Plaintiff  
19 and counsel for HIMC Corp. Plaintiff has been informed of various bona fide reasons and  
20 legally justified reasons for not paying Plaintiff the amount of money he now demands and  
21 which he incorrectly characterizes as withheld "wages".

22 CAUSES OF ACTION

23 3.1 The prior answers to paragraphs 2.1 through 2.14 are incorporated herein in Answer to  
24 paragraph 3.1

25 **1. Breach of Express Employment Contract:**

26 ANSWER BY HIMC CORP.

1 Defendant HIMC Corp. Denies breaching the employment contract as has been alleged by  
2 Plaintiff.

3 **2. Promissory estoppel/Reliance**

4 This is not a legal claim and sets forth no demand for relief. The "Claim" is DENIED

5 **3. Wrongful Withholding of Wages Pursuant to RCW 48.48 et. Seq. And RCW  
6 49.52 et. seq.**

7 This claim is DENIED.

8 RELIEF

9 4.1 - 4.7: No Answer is required for a prayer for Relief. CR Rule 8(d). To the extent necessary,  
10 Defendant Denies that Plaintiff is entitled to anything more than ten times his monthly salary as per  
11 his March 24, 2005 Employment Agreement, Exhibit 2, ¶7, titled "SEVERANCE PACKAGE".

12 There is no "joint and several" liability. No officer or director or CEO is liable for the  
13 corporation's refusal to pay the money demanded by Plaintiff; or for his or her failure to act as an  
14 involuntary guarantor of corporate debts; nor may he or she legally be compelled to involuntarily make  
15 a capital contribution to HIMC Corporation to fund expenses for contract or wage claims from former  
16 employees; nor may he or she be held liable for a failure to do so.

17 WHEREFORE, having fully answered the Complaint, Defendant HIMC Corporation prays that  
18 it be dismissed in whole or in part and that it be awarded reasonable costs and attorney's fees incurred  
19 in defending against the three claims..

20 AFFIRMATIVE DEFENSES

21 Pursuant to CR Rule 8(c), Defendant HIMC Corporation asserts the following affirmative  
22 defenses, and further reserves the right to supplement, pursuant to Court Rules, with such additional  
23 affirmative defenses as may be identified during discovery.

24 1. Failure of consideration for the purported April 18, 2005 employment contract as a separate  
25 agreement;

26 ANSWER BY HIMC CORP.

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

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RCW 9A.56.060: Statutory Bar to civil liability of double damages and other penalties for non-payment based on the superior duty to comply with state criminal law.

RCW 9A.56.060: Immunity from civil suit for double damages and other penalties based on the overriding obligation to comply with Washington criminal law.

Fiduciary and Good Faith Duty to Shareholders and the Corporation: Prohibiting payment of money not legally owed or for which the amount of the claimed debt has not been proven.

Failure to state a claim upon which relief can be granted;

Impossibility of performance..

Consolidation and Integration re: the March 24, 2005 and the April 18, 2005 Employment contracts;

Waiver;

Release;

Estoppel;

Voluntary and mutual rescission and/or modification of the wage terms in both the separate and in the consolidated employment contract;

Failure to join a necessary party(ies), to wit: Ronald Ehli, Pamela Ehli and Melissa Duthie, a/k/a Melissa Rae, f/k/a Melissa Ehli, the persons identified by Plaintiff as being responsible for his alleged termination from employment;

Offset due to income earned through other post-termination employment;

Bad Faith.

ANSWER dated this 12<sup>th</sup> day of December, 2006.

  
DAVID B. ADLER, Attorney for  
HIMC CORPORATION.

ANSWER BY HIMC CORP.

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-3991  
Wash. Bar #16585

LAW OFFICE OF  
B. ADLER

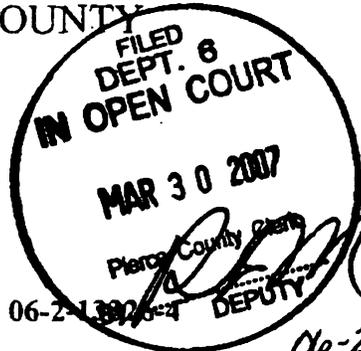
23 2007

EIVED



The Honorable Rosanne Buckner

SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY



MICHAEL DURAND and NATASHA  
DURAND, individually, and marital  
community comprised thereof,

Plaintiff,

vs.

HIMC CORPORATION, et al;

Defendants.

NO. 06-2-13326-4

06-2-13326-4

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANTS'  
MOTION TO DISMISS PURSUANT TO  
CR 12(b)(6)/ MOTION FOR SUMMARY  
JUDGMENT

*OS* THIS MATTER, having come before the Court on Defendants' Motion for Dismissal pursuant  
to CR 12(b)(6), and *treated by the Court as one* for Summary Judgment pursuant to CR 56, and the Court having considered

the following materials:

1. Defendants' Motion to Dismiss;
2. Declaration of David Adler;
3. Declaration of Judy Johnston;
4. Declaration of Jerry Cornwell;
5. Plaintiffs' Memorandum of Authorities and Opposition;

000028

Law Offices Of Ben F. Barcus  
& Associates, P.L.L.C.  
4303 Ruston Way,  
Tacoma, Washington 98402  
(253) 752-4444 • FAX 752-1035

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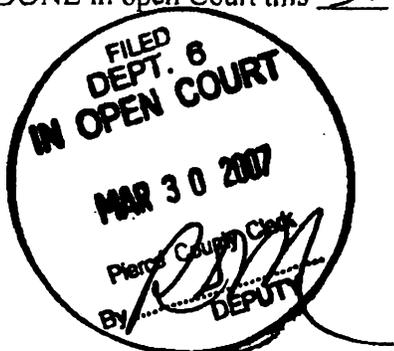
- 6. Declaration of Michael Durand; and
- 7. Declaration of Paul Lindenmuth Re: Exhibits;
- 8. Reply Memorandum From Defendants; and
- 9. Second Declaration of Jerry Cornwell.

The Court having further considered the argument of counsel which occurred on or about March 2, 2007,

HEREBY, ORDERS, ADJUDGES AND DECREES, that:

- 1. Defendants' Motion to Dismiss the Claim of Breach of Contract and Promissory Estoppel against the individually-named Defendants Cornwell and Johnston have not been opposed by Plaintiffs who stipulates that these two (2) claims can be dismissed as to the individual named Defendants, *only*, with these claims remaining still in force and effect against the corporate, therefore, Defendants' Cornwell and Johnston on these two (2) claims is granted; and
- 2. Defendants Cornwell and Johnston's Motion to Dismiss <sup>*which the Court treated as one for*</sup> Summary Judgment *DAJ* with respect to Plaintiffs' claims pursuant to RCW 49.48 et al, and RCW 49.52 *X* et al, is hereby denied.

DONE in open Court this 30 day of March, 2007.



*[Signature]*  
\_\_\_\_\_  
Judge Rosanne Buckner

000029

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Tacoma, Washington 98402  
(253) 752-4444 • FAX 752-1035

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Presented by:

*Paul Lindenmuth*  
Paul Lindenmuth, WSBA #15817  
Attorney for Plaintiffs

Notice of Presentation waived:

*Agreed to as to Form*

*David B. Adler*  
David Adler, WSBA #16585  
Attorney for Defendants

000030

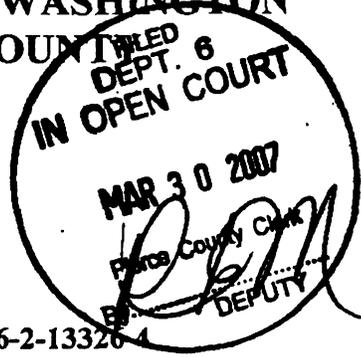


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THE HONORABLE ROSANNE BUCKNER

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**



MICHAEL DURAND and NATASHA  
DURAND, individually, and marital  
community comprised thereof,

Plaintiff,

vs.

HIMC CORPORATION, et al;

Defendants.

NO. 06-2-13326-4

**ORDER DENYING DEFENDANTS'  
PETITION TO CERTIFY FOR APPEAL  
THE DECISION DENYING DEFENDANTS  
12(b)(6) MOTION TO DISMISS**

THIS MATTER, having come on before the Court on Defendants' Petition to Certify for Appeal the Order Denying Defendants' Motion for Dismissal pursuant to CR 12(b)(6) and/or Summary Judgment, and the Court having considered the files and records herein, and having heard argument from counsel of record, the Court

HEREBY, ORDERS, ADJUDGES AND DECREES, that:

1. Defendants' Petition to Certify for Appeal the Decision Denying Defendants' 12(b)(6) Motion is denied.

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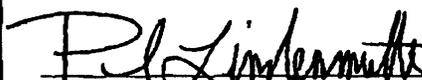
**ORIGINAL** Law Offices Of Ben F. Barcus & Associates, P.L.L.C.  
4303 Ruston Way,  
Tacoma, Washington 98402  
(253) 752-4444 • FAX 752-1035

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DONE in open Court this 30 day of March, 2007.

  
\_\_\_\_\_  
Judge Rosanne Buckner

Presented by:

  
\_\_\_\_\_  
Paul Lindenmuth, WSBA #15817  
Attorney for Plaintiffs

FILED  
DEPT. 6  
IN OPEN COURT  
MAR 30 2007  
Pierce County Clerk  
BY:  DEPUTY

Notice of Presentation waived: *Agreed to*  
*As to Form only.*

  
\_\_\_\_\_  
David Adler, WSBA #16585  
Attorney for Defendants

Law Offices Of Ben F. Barcus  
& Associates, P.L.L.C.  
4303 Ruston Way,  
Tacoma, Washington 98402  
(253) 752-4444 • FAX 752-1035

April 23 2007 11:43 AM

KEVIN STOCK  
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HON. ROSANNE BUCKNER

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

MICHAEL DURAND  
et.al.

Plaintiffs,

vs.

HIMC CORPORATION,  
ITI INTERNET SERVICES, INC.,  
JUDY MORTON JOHNSTON;  
JERRY CORNWELL; AND  
JOHN DOES 1-10,  
Defendants.

CAUSE # 06-2-13326-4

DEFENDANT ITI INTERNET SERVICES .  
ANSWER TO AMENDED COMPLAINT

ITI INTERNET SERVICES , by its undersigned counsel, Answers the allegations against it  
as follows:

- 1.1 ADMITTED
- 1.2 ADMITTED in part; DENIED in part. The name of the corporation is HIMC Corporation.  
It is not an a/k/a Health Guard International Marketing Corporation.
- 1.3 ADMITTED in part; DENIED in part: Plaintiff was employed by HIMC Corporation.
- 1.4 ADMITTED as to Jurisdiction
- 1.5 DENIED.
- 1.6 DENIED

ANSWER BY ITI INTERNET SERVICES .

Page 1

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

1 1.7 No allegations to which a response is needed are alleged. Therefore the paragraph is  
2 DENIED.

3 1.8 DENIED

4 2.1 DENIED. Defendant ITI Internet Services lacks sufficient information to either Admit or  
5 Deny and therefore Denies.

6 2.2 ADMITTED.

7 2.3 Exhibit 2 is a legal document which speaks for itself. To the extent the numerous factual  
8 allegations in this paragraph conform to the language and affirmations of Exhibit 2 the  
9 allegations are ADMITTED except for any legal conclusions asserted by Plaintiff.

10 2.4 DENIED IN PART and ADMITTED IN PART: Exhibit 1 speaks for itself. Defendant admits  
11 the authenticity of the signatures thereon. Defendant lacks sufficient information to  
12 understand what Plaintiff means by "a fully integrated express employment contract" and  
13 therefore DENIES.. To the extent that the allegations are inconsistent with or modify the  
14 actual language of Exhibit 1, or seek to import terms not found within the language of Exhibit  
15 1, they are DENIED. Further the paragraph alleges a legal conclusion as to the significance  
16 of Exhibit 1 and such conclusions are Denied.

17 2.5 DENIED in part. Defendant lacks sufficient information to affirm or deny and therefore  
18 Denies. Defendant does not understand what kind of "contracts" and what section of the By-  
19 laws of HIMC Corp. are referenced in this allegation. Any authority granted by the By-laws  
20 calls for a legal conclusion..

21 2.6 DENIED in part; ADMITTED in part. To the extent the allegations simply quote, without  
22 supplementation or deletion or modification, the express language of Exhibit 1, they are  
23 admitted as being the contents of the document except for any legal conclusions asserted by  
24 Plaintiff. Defendant DENIES that Exhibit 1 is an "express employment contract" or that  
25 Exhibit 1 is the complete employment contract. Defendant DENIES that Plaintiff was  
26

ANSWER BY ITI INTERNET SERVICES .

Page 2

*DAVID B. ADLER, ESQ.*  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

1 employed by ITI Internet Services. Plaintiff was employed by HIMC Corporation, as per  
2 Exhibit 2 to the Complaint.

3 2.7 DENIED.

4 2.8 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

5 2.9 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

6 2.10 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

7 2.11 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

8 2.12 DENIED.

9 2.13 DENIED. Plaintiff has demanded payment of far more than is "due and owing" under the  
10 terms of his March 24, 2005 employment agreement with HIMC Corporation. Plaintiff will  
11 not admit that the amount that is "due and owing" is no more than \$125,000.00 despite  
12 having been given numerous opportunities and requests to do so.

13 2.14 DENIED. Neither ITI Internet Services nor any officer or agent of ITI Internet Services has  
14 willfully withheld payment from Plaintiff. Neither ITI Internet Services nor any officer or  
15 agent of ITI Internet Services is obligated to pay Plaintiff more than what is due and owing  
16 under the terms of his March 24, 2005 employment agreement. Through various letters  
17 exchanged between counsel for Plaintiff and counsel for HIMC Corporation/ITI, valid  
18 justification for refusing to pay Plaintiff what is approximately six (6) times what is "due and  
19 owing" and more than what is due under his employment contract has been given to Plaintiff.  
20 Through various letters exchanged between counsel for Plaintiff and counsel for HIMC  
21 Corp./ITI Plaintiff has been informed of various bona fide reasons and legally justified  
22 reasons for not paying Plaintiff the amount of money he now demands and which he  
23 incorrectly characterizes as withheld "wages".  
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ANSWER BY ITI INTERNET SERVICES .

Page 3

*DAVID B. ADLER, ESQ.*  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

1 CAUSES OF ACTION

2 3.1 The prior answers to paragraphs 2.1 through 2.14 are incorporated herein in Answer to  
3 paragraph 3.1

4 **1. Breach of Express Employment Contract:**

5 Defendant ITI Internet Services Denies breaching the employment contract as has been  
6 alleged by Plaintiff.

7 **2. Promissory estoppel/Reliance**

8 This is not a legal claim and sets forth no demand for relief. The "Claim" is DENIED

9 **3. Wrongful Withholding of Wages Pursuant to RCW 48.48 et. Seq. And RCW  
10 49.52 et. seq.**

11 This claim is DENIED.

12 RELIEF

13 4.1 - 4.7: No Answer is required for a prayer for Relief. CR Rule 8(d). To the extent necessary,  
14 Defendant Denies that Plaintiff is entitled to anything more than ten times his monthly salary as per  
15 his March 24, 2005 Employment Agreement, Exhibit 2, ¶7, titled "SEVERANCE PACKAGE".

16 There is no "joint and several" liability. No officer or director or CEO is liable for  
17 the corporation's refusal to pay the money demanded by Plaintiff; or for his or her failure to act as  
18 an involuntary guarantor of corporate debts; nor may he or she legally be compelled to involuntarily  
19 make a capital contribution to HIMC Corporation or ITI Internet Services to fund expenses for  
20 contract or wage claims from former employees; nor may he or she be held liable for a failure to do  
21 so.

22 WHEREFORE, having fully answered the Amended Complaint, Defendant ITI Internet  
23 Services prays that it be dismissed in whole or in part and that it be awarded reasonable costs and  
24 attorney's fees incurred in defending against the three claims.

25  
26 ANSWER BY ITI INTERNET SERVICES .

Page 4

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

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HON. ROSANNE BUCKNER

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

MICHAEL DURAND )  
et.al. )  
Plaintiffs, )  
vs. )  
HIMC CORPORATION, et.al. )  
Defendants. )

CAUSE # 06-2-13326-4

CERTIFICATE OF SERVICE

I hereby certify that on **APRIL 23, 2007** I sent for service a true copy of the following documents upon the following persons:

DOCUMENTS:

- 1. Defendant JERRY CORNWELL'S and JUDY JOHNSTON'S Answer
- 2. Certificate of Service

PERSONS SERVED:

- 1. Paul Lindenmuth  
4303 Ruston Way  
Tacoma, Washington 98402  
Attorney for Michael Durand, Plaintiff  
Via ABC Messenger Service; and  
Via Facsimile

  
David B. Adler, WSBA #16585  
Attorney for Defendants

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

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HON. ROSANNE BUCKNER

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

MICHAEL DURAND  
et.al. Plaintiffs,

CAUSE # 06-2-13326-4

vs.

HIMC CORPORATION,  
ITI INTERNET SERVICES, INC.,  
JUDY MORTON JOHNSTON;  
JERRY CORNWELL; AND  
JOHN DOES 1-10,  
Defendants.

ANSWER TO AMENDED COMPLAINT  
by: JUDY M. JOHNSTON  
JERRY CORNWELL

JUDY M. JOHNSTON and JERRY CORNWELL, by their undersigned counsel, Answer the allegations against each of them as follows:

- 1.1 ADMITTED
- 1.2 ADMITTED in part; DENIED in part. The name of the corporation is HIMC Corporation. It is not an a/k/a Health Guard International Marketing Corporation.
- 1.3 ADMITTED in part; DENIED in part: Plaintiff was employed by HIMC Corporation as per Exhibit 2 to the Amended Complaint
- 1.4 ADMITTED as to Jurisdiction
- 1.5 DENIED.

ANSWER BY JERRY CORNWELL  
AND JUDY JOHNSTON

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

1 1.6 DENIED  
2 1.7 No allegations to which a response is needed are alleged. Therefore the paragraph is  
3 DENIED.  
4 1.8 DENIED  
5 2.1 DENIED. Defendants Johnston and Cornwell lack sufficient information to either Admit or  
6 Deny and therefore Deny.  
7 2.2 ADMITTED in part. Defendants deny that the March 24, 2005 agreement, Exhibit 2, is  
8 correctly described as a "preliminary compensation offer".  
9 2.3 Exhibit 2 is a legal document which speaks for itself. To the extent the numerous allegations  
10 in this paragraph conform to the language and affirmations of Exhibit 2 the allegations are  
11 ADMITTED except for any legal conclusions arising therefrom.  
12 2.4 DENIED IN PART and ADMITTED IN PART: Exhibit 1 speaks for itself as to the  
13 affirmations in the document. Defendant Denies that it constitutes an employment contract  
14 between ITI Internet Services and Michael Durand. Defendant lacks sufficient information  
15 to understand what Plaintiff means by "a fully integrated express employment contract" and  
16 therefore DENIES that description. To the extent that the allegations are inconsistent with or  
17 modify the actual language of Exhibit 1, or seek to import terms not found within the  
18 language of Exhibit 1, they are DENIED. Further, Defendants deny any legal conclusions  
19 arising therefrom as asserted by Plaintiff.  
20 2.5 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.  
21 Defendants do not understand what kind of "contracts" and what section of the By-Laws are  
22 referenced in this allegation, and therefore the allegation is DENIED. Any authority granted  
23 by the By-Laws calls for a legal conclusion  
24 2.6 DENIED in part; ADMITTED in part. Denied that Exhibit 1 is a "express employment  
25 contract". To the extent the allegations simply quote, without supplementation or deletion  
26

ANSWER BY JERRY CORNWELL  
AND JUDY JOHNSTON

Page 2

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

1 or modification, the express language of Exhibit 1, they are admitted as being the contents  
2 of the document except for any legal conclusions asserted by Plaintiff. Defendants DENY  
3 that Exhibit 1 is the complete employment contract. Defendant DENIES that Plaintiff was  
4 employed by ITI Internet Services. Plaintiff was employed by HIMC Corporation, as per  
5 Exhibits 2. to the Complaint.

6 2.7 DENIED in part. Defendant denies that Exhibit 1 is a valid employment contract with ITI  
7 Internet Services and therefore denies that Exhibit 1 represents "the express terms of the  
8 employment contract". To the extent the allegations simply quote, without supplementation  
9 or deletion or modification, the express language of Exhibit 1, they are admitted as being the  
10 contents of the document except for any legal conclusions asserted by Plaintiff

11 2.8 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

12 2.9 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

13 2.10 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

14 2.11 DENIED. Defendant lacks sufficient information to affirm or deny and therefore denies.

15 2.12 DENIED.

16 2.13 DENIED in part; ADMITTED in part. Plaintiff has demanded payment of far more than is  
17 "due and owing" under the terms of his March 24, 2005 employment agreement with HIMC  
18 Corporation. Plaintiff will not admit that the amount that is "due and owing" is no more than  
19 \$125,000.00 despite having been given numerous opportunities and requests to do so. It is  
20 admitted that no "funds" have been tendered in the amounts demanded by Plaintiff.

21 2.14 DENIED. Neither HIMC nor any officer or agent of HIMC has willfully withheld payment  
22 from Plaintiff. Neither HIMC nor any officer or agent of HIMC is obligated to pay Plaintiff  
23 more than what is due and owing under the terms of his March 24, 2005 employment  
24 agreement, Exhibit 2. Through various letters exchanged between counsel for Plaintiff and  
25 counsel for HIMC Corporation, valid justification for refusing to pay Plaintiff what is  
26

ANSWER BY JERRY CORNWELL  
AND JUDY JOHNSTON

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

1 approximately six (6) times what is "due and owing" and more than what is due under his  
2 employment contract has been given to Plaintiff. Through various letters exchanged between  
3 counsel for Plaintiff and counsel for HIMC Corp. Plaintiff has been informed of various bona  
4 fide reasons and legally justified reasons for not paying Plaintiff the amount of money he now  
5 demands and which he incorrectly characterizes as withheld "wages".

6 **CAUSES OF ACTION**

7 3.1 The prior answers to paragraphs 2.1 through 2.14 are incorporated herein in Answer to  
8 paragraph 3.1

9 **1. Breach of Express Employment Contract:**

10 This claim was dismissed by Order of the Court.

11 **2. Promissory estoppel/Reliance**

12 This claim was dismissed by Order of the Court.

13 **3. Wrongful Withholding of Wages Pursuant to RCW 48.48 et. Seq. And RCW  
14 49.52 et. seq.**

15 This claim is DENIED.

16 **RELIEF**

17 4.1 - 4.7: No Answer is required for a prayer for Relief. CR Rule 8(d). To the extent necessary,  
18 Defendant Denies that Plaintiff is entitled to anything more than ten times his monthly salary as per  
19 his March 24, 2005 Employment Agreement, Exhibit 2, ¶7, titled "SEVERANCE PACKAGE".

20 There is no "joint and several" liability. No current officer or director or CEO is  
21 liable for the corporation's refusal to pay the money demanded by Plaintiff; or for his or her failure  
22 to act as an involuntary guarantor of corporate debts; nor may he or she legally be compelled to  
23 involuntarily make a capital contribution to HIMC Corporation to fund expenses for contract or wage  
24 claims from former employees; nor may he or she be held liable for a failure to do so.  
25  
26

ANSWER BY JERRY CORNWELL  
AND JUDY JOHNSTON

*DAVID B. ADLER, ESQ.*  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

1 WHEREFORE, having fully answered the Amended Complaint, Defendants Jerry Cornwell  
2 and Judy Johnston pray that they each be dismissed and that they each be awarded reasonable costs  
3 and attorney's fees incurred in defending against the three claims.

4  
5 **AFFIRMATIVE DEFENSES**

6 Pursuant to CR Rule 8(c), Defendants Jerry Cornwell and Judy Johnston assert the following  
7 affirmative defenses, and further reserves the right to supplement, pursuant to Court Rules, with such  
8 additional affirmative defenses as may be identified during discovery.

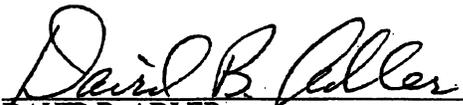
- 9 1. Failure of consideration for the purported April 18, 2005 employment contract as a separate  
10 agreement;
- 11 2. Lack of authority of Virgil Llapitan to represent ITI Internet Services and sign the April 18,  
12 2005 document as an officer of ITI Internet Services;
- 13 3. **RCW 23B.08.300(4):** Statutory Bar and Immunity from suit;
- 14 4. **RCW 9A.56.060:** Statutory Bar to civil liability of double damages and other penalties for  
15 non-payment based on the superior duty to comply with state criminal law.
- 16 5. **RCW 9A.56.060:** Immunity from civil suit for double damages and other penalties based  
17 on the overriding obligation to comply with Washington criminal law;
- 18 6. Fiduciary and Good Faith Duty to Shareholders and the Corporation: Prohibiting payment of  
19 money not legally owed or for which the amount of the claimed debt has not been proven.
- 20 7. Failure to state a claim upon which relief can be granted;
- 21 8. Impossibility of performance..
- 22 9. Consolidation and Integration re: the March 24, 2005 and the April 18, 2005 Employment  
23 contracts;
- 24 10. Waiver;
- 25 11. Release;
- 26

ANSWER BY JERRY CORNWELL  
AND JUDY JOHNSTON

- 1 12. Estoppel;
- 2 13. Voluntary and mutual rescission and/or modification of the wage terms in both the separate
- 3 and in the consolidated employment contract;
- 4 14. Failure to join a necessary party(ies), to wit: Ronald Ehli, Pamela Ehli and Melissa Duthie,
- 5 a/k/a Melissa Rae, f/k/a Melissa Ehli, the persons identified by Plaintiff as being responsible
- 6 for his alleged termination from employment;
- 7 15. Offset due to income earned through other post-termination employment;
- 8 16. Bad Faith.

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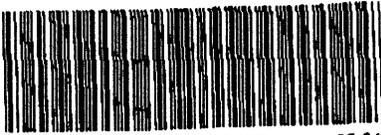
ANSWERS dated this 23<sup>rd</sup> day of April, 2007

  
DAVID B. ADLER,

  
KEN KIEFFER,  
Attorneys for Jerry Cornwell and Judy Johnston

ANSWER BY JERRY CORNWELL  
AND JUDY JOHNSTON

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

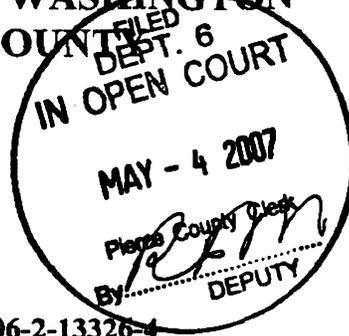


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THE HONORABLE ROSANNE BUCKNER

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**



MICHAEL DURAND and NATASHA  
DURAND, individually, and marital  
community comprised thereof,

Plaintiff,

vs.

HIMC CORPORATION, et al;

Defendants.

NO. 06-2-13326-4

**ORDER GRANTING PLAINTIFF'S  
MOTION TO SHORTEN TIME** *Re: Rbjm*  
~~FOR SUMMARY JUDGMENT~~

THIS MATTER, having come on before the Court on Plaintiffs' Motion to Shorten Time for Summary Judgment Motion, and the Court having considered the files and records herein, and having heard argument from counsel of record, the Court

HEREBY, ORDERS, ADJUDGES AND DECREES, that:

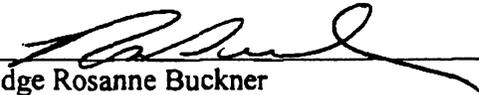
*Modify schedule for*  
Plaintiff's Motion to Shorten Time for Summary Judgment Motion is granted and said

Motion will be heard *June 8, 2007, Δ's response will be due*  
*" July 29, 2007 at 11 AM on June 7, 2007.*  
*"*

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DONE in open Court this 4th day of May, 2007.

  
\_\_\_\_\_  
Judge Rosanne Buckner

Presented by:

  
\_\_\_\_\_  
Paul Lindenmuth, WSBA #15817  
Attorney for Plaintiffs

Notice of Presentation waived:  
*Agreed to ask for.*

  
\_\_\_\_\_  
David Adler, WSBA #16585  
Attorney for Defendants



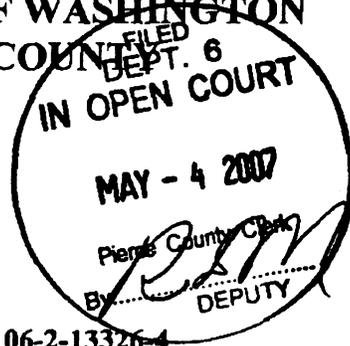


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THE HONORABLE ROSANNE BUCKNER

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**



MICHAEL DURAND and NATASHA  
DURAND, individually, and marital  
community comprised thereof,

Plaintiff,

NO. 06-2-13326-4

vs.

**ORDER DENYING DEFENDANT'S  
MOTION REQUESTING  
SUPPLEMENTAL DISCOVERY**

HIMC CORPORATION, et al;

Defendants.

THIS MATTER, having come on before the Court on Defendants' Motion Requesting Supplemental Discovery, and the Court having considered the files and records herein, and having heard argument from counsel of record, the Court

HEREBY, ORDERS, ADJUDGES AND DECREES, that:

*USA*

Defendants' Motion Requesting Supplemental Discovery *is denied.*  
*under Rule 56 (f) is Denied. P*  
DONE in open Court this 4th day of May, 2007.

\_\_\_\_\_  
Judge Rosanne Buckner

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Presented by:

*Paul Lindenmuth*

Paul Lindenmuth, WSBA #15817  
Attorney for Plaintiffs

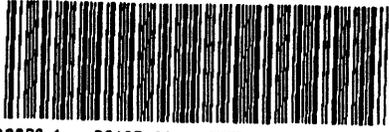
Notice of Presentation waived:

*Agreed to as to Form only.*

*David B. Adler*

David Adler, WSBA #16585  
Attorney for Defendants

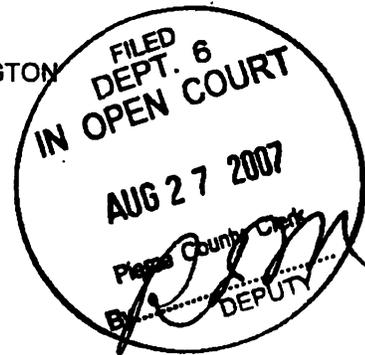
Law Offices Of Ben F. Barcus  
& Associates, P.L.L.C.  
4303 Ruston Way,  
Tacoma, Washington 98402  
(253) 752-4444 • FAX 752-1035



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SUPERIOR COURT OF WASHINGTON  
COUNTY OF PIERCE



MICHAEL DURAND AND NATASHA DURAND,  
Plaintiffs,

Vs.

NO. 06-2-13326-4

MEMORANDUM DECISION

HIMC CORP., et al:

Defendants

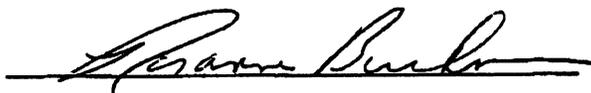
This matter having come on regularly for trial, the Court now makes the following DECISION:

The Plaintiffs shall be awarded the following sums under the terms of Michael Durand's employment contracts with the defendants: \$618,750 base salary for the remaining 4 years and 2 months after termination in February 2006; \$38,958.26 for deferred salary; \$15,000 annual bonus for 2005; and \$20,000 relocation assistance.

1 This Court finds that a bona fide dispute existed with respect to an amount owing over \$150,000 under  
2 the terms of the contracts which were not negotiated by the individual defendants. However, the  
3 defendants withheld the undisputed amount of \$150,000 and this amount should be doubled as an award  
4 to plaintiff in addition to an award of reasonable attorney fees and costs by later order of the Court.

5 Plaintiffs' counsel is directed to prepare findings of fact, conclusions of law and a judgment to  
6 conform to this decision and supplemented as appropriate. Presentation shall be made on the Court's  
7 motion docket for argument if necessary.

8 Dated this 27 day of August, 2007

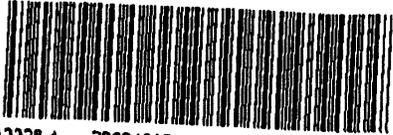
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11 Judge Rosanne Buckner

12  
13 Memorandum Decision faxed to the parties' attorneys on Aug 27, 2007 by  
14 



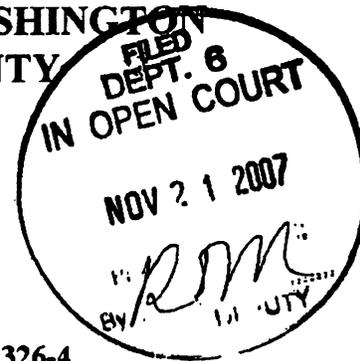
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THE HONORABLE ROSANNE BUCKNER

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**



MICHAEL DURAND and NATASHA  
DURAND, individually, and marital  
community comprised thereof,

Plaintiff,

vs.

HIMC CORPORATION, et al;

Defendants.

NO. 06-2-13326-4

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

THE COURT having called this case on June 15, 2007, and having heard evidence from June 21<sup>st</sup> through June 29<sup>th</sup>, 2007, and having concluded the testimony and argument in the case on August 17, 2007, and the Court having heard the evidence and argument in the above-entitled cause, and having examined the exhibits submitted by the parties, makes the following Findings of Fact and Conclusions of Law based upon a preponderance of the evidence presented at time of trial.

1  
2 him that his employment contract, in order to be consistent with that of other officers within the corporation  
3 had to contain additional terms than those originally set forth in the job offer. At that time, Mr. Durand  
4 and Mr. Llapitan entered into a "Employment Agreement" which was before the Court as Plaintiff's  
5 Exhibit #3A. The Employment Agreement, which is incorporated by this referenced, by its terms purports  
6 that the agreement is between ITI Internet Services, Inc., a Washington corporation, and Michael R.  
7 Durand. It is also noted that the Employment Agreement is signed by Virgil Llapitan as President of HIMC  
8 Corporation. The Court finds that it was the intent of the parties that Mr. Durand be an employee of ITI  
9 Internet Services, Inc., and not HIMC Corporation. The basis for this finding is the fact that HIMC  
10 Corporation is solely a holding company that has no paid employees. In addition, it is clear from the  
11 records presented at time of trial that Mr. Durand was paid by checks issued from an ITI Internet Services  
12 account and was kept on ITI Internet Services books as an employee in the position of Vice President of  
13 Sales. See, Plaintiff's Exhibit #5.

14  
15 5. At the time the April 18, 2005 contract was entered into, Mr. Llapitan had either direct, or  
16 authority delegated by Ron Ehli, to enter into a contract of employment with Mr. Durand, which the Court  
17 finds to be the full and final agreement between the parties, and which was intended to be a fully integrated  
18 agreement.

19  
20 6. Following entry into the April 18, 2005 agreement, Mr. Durand fully performed under the  
21 terms of his employment agreement and began trying to develop a sales department for the services  
22 provided by ITI Internet Services, which is an internet check processing company. Unfortunately, the  
23 second round of investor funding that was anticipated at the time of Mr. Durand's hire never materialized.  
24 As a result, Mr. Durand was not provided the resources that were initially anticipated for the development  
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2 of the sales department, and was losing the resources he initially had because he had to lay off sales staff  
3 due to the financial condition of the company.

4         7. In approximately September of 2005, Mr. Ehli, who was still in control of the companies,  
5 as well as other management personnel, including Virgil Llapitan, were approached by Mr. Ehli who  
6 indicated that they would all have to take temporary salary reductions due to the financial condition of the  
7 companies. It was understood at this time that the salary reductions would only be temporary and the  
8 amount deferred ultimately would be paid. Mr. Durand continued his employment with ITI Internet  
9 Services at the reduced salary rate until he was terminated on February 21, 2006.  
10

11         8. In the interim ,and prior to Mr. Durand's termination on February 21, 2006, Mr. Ehli and  
12 his wife Pam Ehli were in divorce proceedings which resulted in Mrs. Ehli and their daughter Melissa  
13 Duthie acquiring day-to-day control of the corporations. In addition, a stockholders' lawsuit was filed  
14 under the name of Johnston v. HIMC Corporation, under Pierce County Superior Court Cause No. 05-2-  
15 01424-0. As a result of this lawsuit, by March of 2006 a stockholders' meeting was held pursuant to court  
16 order and a new board of directors for HIMC Corporation was installed. The new board of directors  
17 included Henry Gurley, Judy Morton Johnston and Dean Kalivas. The newly elected board of directors  
18 for HIMC Corporation appointed themselves as the directors of ITI Internet Services, Inc. and installed  
19 Defendant Jerry Cornwell as the CEO of ITI Internet Services, Inc. Under a resolution dated March 8,  
20 2006, all check writing and bill paying authority was removed from Virgil Llapitan, Ronald Ehli, Pamela  
21 Ehli, Melissa Duthie and Anne White, and placed into the hands of Judy Morton Johnston and Jerry  
22 Cornwell, collectively and indiuidally. See, Plaintiff's Exhibit #7.  
23

24         9. As previously mentioned, on February 21, 2006 Michael Durand's employment with HIMC  
25 Corporation and ITI Internet Services, Inc. was terminated by Pamela Ehli and Melissa Duthie, who then

1  
2 had control of the corporations. The grounds for Mr. Durand's termination is that Pam Ehli and Melissa  
3 Duthie believed that Mr. Durand was too close to Mr. Ehli. At that time, Mr. and Mrs. Ehli were in the  
4 middle of contentious divorce proceedings. Almost immediately upon his termination, Mr. Durand  
5 demanded payment of "back pay," which was inclusive of a relocation/signing bonus, 2005 annual bonus  
6 of 10%, and his deferred salary. Under the terms of the April 18, 2005 Employment Agreement, Mr.  
7 Durand was entitled to a minimum annual bonus of 10% of his annual salary for the year 2005, i.e.  
8 \$15,000.00. In addition, he was promised a relocation assistance/signing bonus of \$20,000.00 for his  
9 agreement to relocate from the Vancouver to Tacoma area. Neither the \$15,000.00 annual bonus for the  
10 year 2005, nor the relocation assistance had been paid to Mr. Durand prior to his February 21, 2006  
11 termination. Despite Mr. Durand's immediate demand for payment upon his termination of his contracted  
12 for bonus, relocation assistance and deferred salary, no payment was forthcoming.  
13

14 10. Shortly after the March 8, 2006 meeting, which installed a new board of directors for HIMC  
15 Corporation and ITI Internet Services, Inc., Mr. Durand met Ms. Johnston at the company offices and  
16 discussed with her the possibility of employment with the company and explained to her that he had a  
17 contract of employment with the company which had been terminated by Mrs. Ehli. Ms. Johnston  
18 referred Mr. Durand to Mr. Cornwell, who Mr. Durand called within the next few days. At that time, Mr.  
19 Cornwell told Mr. Durand that the new board of directors would not honor any of the contracts approved  
20 by the old board of directors.  
21

22 11. Over the course of the next few months, Mr. Durand sought out and retained legal counsel  
23 for the purposes of enforcing his contract of employment, which had been breached by his February 21,  
24 2006 termination. Under the terms of Mr. Durand's employment contract, which was for a term of five  
25

1  
2 years and subject to renewal thereafter, if it was prematurely terminated short of the five-year term, all  
3 amounts due and owing under the terms of the contract became immediately due.

4 12. On or about July 7, 2006, counsel for Mr. Durand, Paul A. Lindenmuth, sent to David B.  
5 Adler, counsel for HIMC and ITI Internet Services, a letter demanding payment under the terms of Mr.  
6 Durand's April 18, 2005 employment contract and inviting negotiation.

7 13. After the initial July 7, 2006 correspondence from counsel for Durand to David Adler, Mr.  
8 Adler through correspondence engaged in substantial pre-trial negotiation on behalf of HIMC and ITI  
9 Internet Services. Such correspondence was offered by the Defendant in this case and although potentially  
10 covered by ER 408 as settlement discussions, such correspondence were admitted for other purposes  
11 including establishment of whether or not there was a "bona fide dispute" or a partial bona fide dispute as  
12 to the amounts due and owing under the terms of Mr. Durand's employment contract. See Exhibit #15-20,  
13 22, 23, 25-27.

14 14. During the course of settlement negotiations, ITI Internet Services and HIMC Corporation  
15 through Mr. Adler acknowledged at a minimum that Mr. Durand was owed roughly \$150,000.00 based on  
16 the initial employment offer document, which was before this Court as Plaintiff's Exhibit #2. Despite such  
17 acknowledgment, no payment was forthcoming to Mr. Durand save for a offer of a promissory note with  
18 indefinite terms and schedule for repayment. Ultimately, the negotiations between the parties, despite such  
19 acknowledgment, broke down, no payment was forthcoming to Mr. Durand and this lawsuit was filed.  
20

21 15. The Court finds credible Mr. Durand's position that the purpose of the April 18, 2005  
22 contract was to finalize the terms of his employment and to make the terms of his employment agreement  
23 more or less consistent with the employment agreements held by other upper management members of the  
24 defendant corporations, specifically, Ron Ehli and Virgil Llapitan.  
25

1  
2           16.    The Court finds that to the extent that the April 18, 2005 agreement may contain some  
3 ambiguity, such ambiguity must be construed against its drafter, which was Virgil Llapitan acting as an  
4 agent for both HIMC Corporation and ITI Internet Services, Inc. It is clear from the face of the contract  
5 that the term of the contract was for a five year time period, commencing April 18, 2005 and concluding  
6 April 18, 2010, with potential for an automatic renewal for an additional five-year term. In addition, under  
7 paragraph 4.6 of the employment agreement between the parties, upon early termination of the agreement,  
8 Mr. Durand is entitled to receive all compensation remaining from the terms of the contract, including  
9 payment of his salary at a rate of \$12,500.00 per month payable in cash.  
10

11           17.    Further, the Court finds that under the terms of the employment agreement, it was the intent  
12 of the parties that Mr. Durand was to receive compensation at a rate of \$12,500.00 per month, or  
13 \$150,000.00 per year and from that base \$150,000.00 per year figure, he was being promised a 10%  
14 minimum guaranteed bonus for the year 2005, or an annual bonus for the year 2005 of \$15,000.00. In  
15 addition, he was promised a relocation assistance/signing bonus in the amount of \$20,000.00. The payment  
16 of this \$20,000.00 was not contingent on actual moving expenses, but was to be a flat bonus of \$20,000.00.  
17 The Court also finds that the \$15,000.00 annual bonus was not paid, nor was the relocation  
18 assistance/signing bonus paid due to the financial stresses suffered by these companies due to failed efforts  
19 to receive the additional promised financing. However, at no time did Mr. Durand waive an entitlement  
20 to his annual bonus, nor the \$20,000.00 relocation expenses. There is simply no evidence presented by  
21 either party that would indicate that such a waiver occurred. It is noted that upon his termination, Mr.  
22 Durand immediately requested payment of the deferred bonuses and salary.  
23

24           18.    The Court also finds that Mr. Durand did not intend to take a permanent wage reduction  
25 and that in good faith he agreed to defer half of his salary for the benefit of the company. The amount of

1  
2 money deferred by Mr. Durand totaled \$38,958.26, which reflects a deferral period from September 16,  
3 2005 until the payment of his final paycheck on February 28, 2006.

4 19. The Court finds that pursuant to RCW 49.48 et seq, Mr. Durand should have been paid all  
5 amounts due and owing under the terms of his contract of employment, including, the termination pay  
6 under paragraph 4.6 of the employment agreement, his deferred salary, his annual bonus for 2005, and his  
7 promised \$20,000.00 relocation assistant/signing bonus, at the next regular pay period, or at least a  
8 reasonable time thereafter. The undisputed evidence established that no such payments were made.

9  
10 20. In addition, the undisputed evidence established that the individuals who made the  
11 determination not to pay Mr. Durand once the demand for payment under the terms of the contract were  
12 made were Judy Johnston and Jerry Cornwell, who were acting in their capacities as officers and directors  
13 of HIMC and ITI Internet Services, Inc. It is undisputed that at the operative times in question, i.e. after  
14 demand was made and during the pendency of this case, Mr. Cornwell and Mr. Johnston held all check  
15 writing authority and payment decision making within the subject defendant corporations. The Court  
16 further finds that pursuant to RCW 49.52.050 and RCW 49.52.070, both Ms. Johnston and Mr. Cornwell  
17 are individuals who can be subject to liability for the willful and wrongful withholding of Mr. Durand's  
18 wages because they were operating as "officers," "principles" or "agents," of the employer when they  
19 made the decision not to pay Mr. Durand the amounts due and owing.

20  
21 21. The Court specifically finds that under the terms of Mr. Durand's contract of employment  
22 with ITI Internet Services, Inc., he is entitled to payment of \$618,750.00 in base salary for the remaining  
23 four years, two months of his contract, which was prematurely terminated in February, 2006. In addition,  
24 he is entitled to \$38,958.26 for deferred salary, \$15,000.00 annual bonus for the year 2005, and \$20,000.00  
25 in relocation assistance.

1  
2           22.     In addition, the Court specifically finds that a bona fide dispute existed with respect to any  
3 amounts owing over \$150,000.00 under the terms of the contract which were not negotiated by the  
4 individual Defendants. However, the Defendants withheld an undisputed amount of \$150,000.00 and this  
5 amount should be doubled as an award to Plaintiff under the terms of RCW 49.52 et seq because such an  
6 amount was willfully and wrongfully withheld.

7           23.     In addition, under the terms of both RCW 49.48.030 and RCW 49.52.070, Plaintiff is  
8 entitled to an award of reasonable costs and attorney's fees. In considering Plaintiff's request for an award  
9 of attorney's fees, the Court must first arrive at the "lodestar amount", which is a reasonable hourly rate  
10 multiplied by the amount of work reasonably performed on the claims allowing for fee shifting. In this  
11 case, the Court finds that all claims either were subject to the fee shifting statute, or are so intertwined as  
12 to not be subject to any form of meaningful segregation.

13           24.     It is undisputed that the reasonable hourly rate for Mr. Lindenmuth's time is at a rate of  
14 \$300.00 per hour. In addition, in reviewing the declarations on file herein and the factors set forth in the  
15 opinion of Bowers v. TransAmerican Title Insurance Co., 100 Wn. 2d 581, 595-96, 675 P.2d 193 (1983),  
16 the Court finds that the rate of \$300.00 per hour for Mr. Lindenmuth's time is reasonable and consistent  
17 with the market for similar skills and services within our local community.

18           25.     As of September 28, 2007, Mr. Lindenmuth is requesting compensation for 274.7 hours.  
19 Having considered the argument of counsel and the guidance provided by the Court of Appeals in the case  
20 of Dice v. City of Montesano, 431 Wn. App. 675, 691-92, 528 P. 3d 1253 (2006), the Court 21 hours for  
21 pre-filing negotiations should be excluded from the lodestar amount. It is noted that Plaintiffs also seek  
22 a supplemental award of attorney's fees for post-trial motions. Plaintiff's counsel should be awarded an  
23 additional amount of compensation than those initially requested for work performed on post-trial motions  
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2 and the accrual of attorney's fees on this matter may be ongoing.

3         26. In addition, Plaintiff's counsel requests that his fees be awarded at a multiplier of 2.0, due  
4 to the high-risk nature of this litigation where the Defendants have formally defended on a contention that  
5 they have an inability to pay Mr. Durand the amounts due and owing under the terms of his contract. The  
6 Court finds that this case indeed presents an enormous amount of contingent risk given the position taken  
7 by the Defendants and their efforts to defend based on an inability to pay defense. As such, the Court finds  
8 it reasonable to award attorney's fees with a multiplier of .5, because this is a rare case where due to the  
9 high and exceptional degree of contingent risk, such a multiplier is warranted.

10  
11 *As 28.* Finally, Plaintiff's request an award of prejudgment interest on all amounts with the  
12 exception of the \$150,000.00 awarded as liquidated damages under RCW 49.52.070. The Court finds that  
13 this is a case where an award of prejudgment interest is appropriate, in that once the Court determined the  
14 duties and liabilities of the parties, the amount of damages could be ascertained with mathematical  
15 precision. It is also clear that such prejudgment interest should be awarded at a rate of 12%.

16         To the extent that the above Findings of Fact should be more properly treated as Conclusions of  
17 Law, and the below Conclusions of Law should be treated as Findings of Fact, it is the intent of the Court  
18 that they be treated as if appropriately designated within the pleading.

## 19 20                                   **II. CONCLUSIONS OF LAW**

21         1. Mr. Durand had a binding contract of employment with ITI Internet Services, Inc. and  
22 HMC Corporation. The contract of employment is inclusive of both what at time of trial was  
23 characterized as the job offer (Exhibit #2) and the employment agreement (Exhibit #3A), which was  
24 intended to be the full and final integrated agreement among the parties. These two contracts must be  
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1  
2 interpreted together and to the extent that they may contain inconsistent terms, the later contract in time  
3 will prevail, but the consistent remaining terms of the first contract are still subject to enforcement.

4           2.       The amounts due and owing under the terms of Mr. Durand's contracts of employment with  
5 the Defendant corporations, constitute "wages due him on account of his employment" within the meaning  
6 of RCW 49.48.010. Under the terms of RCW 49.48.010, the amounts due and owing under the terms of  
7 Mr. Durand's contract were due to him at the end of the established pay period, which would have been  
8 February 28, 2006. It is undisputed that no such payments were made, and as a result the Defendants  
9 unlawfully withheld Mr. Durand's wages in violation of RCW 49.48.010. AB HMC Corp  
AND ITI  
INTERNET  
SERVICES INC

10           3.       Pursuant to RCW 49.48.030, the Plaintiff has been successful in recovering a judgment for  
11 "wages or salary owed to him" and as such is entitled to an award of a reasonable attorney fee. The  
12 exception set forth in RCW 49.48.030 relating to a recovery of an amount less or equal to the amount  
13 admitted by the employer, does not apply because the Defendants in this case do not admit that the amount  
14 awarded by the Court was the amount due and owing.

15           4.       Defendants ITI Internet Services, Inc. and HMC Corporation were the employer of Michael  
16 Durand within the meaning of both RCW 49.48.010 and RCW 49.52.050. In addition, Defendants Judy  
17 Johnston and Jerry Cornwell were both "officers, vice principles or agents" of the employer. Under RCW  
18 49.52.050 (2), both the corporate employers as well as the individual defendants are liable because they  
19 willfully and with intent to deprive Mr. Durand of any part of his wages paid him at a lower wage than the  
20 wage they were obligated to pay under the terms of any contract. Here, it is undisputed that Mr. Durand  
21 was not paid all the amount of wages which were due and owing under the terms of his contract, and in fact  
22 his final paycheck on February 28, 2006 paid him substantially less wages than his employer was obligated  
23 to pay under the terms of his contract.  
24  
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1  
2 5. Clearly, under the terms of RCW 49.48.010 and RCW 49.52 et seq, the amounts due and  
3 owing under the terms of Mr. Durand's contract constitute wages for the purposes of statutory coverage.

4 6. Pursuant to RCW 49.52.070, the employer, and Judy Johnston and Jerry Cornwell,  
5 individually, as officers, vice-principles or agents of the employer are liable for the amount of wages which  
6 were wrongfully withheld without proper justification or excuse. In addition, they are liable for double the  
7 amount which was willfully and wrongfully withheld without lawful justification and excuse. As  
8 previously mentioned, the Court finds that amount to be \$150,000.00, and under RCW 49.52.070 and an  
9 additional amount of \$150,000.00 as liquidated damages pursuant to RCW 49.52.070 is awarded. The  
10 Court specifically finds that beyond the \$150,000.00 amount, there is a bona fide dispute as to what was  
11 owing. However, as to the \$150,000.00 willfully withheld, the Defendants clearly knew what they were  
12 doing and that they had no lawful justification for doing it. In addition, the Court finds that Mr. Durand  
13 at no time knowingly submitted to the violation of RCW 49.52 et seq.

14  
15 7. Having prevailed on claims pursuant to RCW 49.48 et seq and RCW 49.52 et seq, the  
16 Plaintiff is entitled to an award of costs and attorney's fees. In addition, under the circumstance of this case <sup>against defendant's corporation B</sup>  
17 and as discussed as above, Plaintiff's counsel is entitled to an award of attorney's fees with a multiplier <sup>against ALL</sup>  
18 of 0.5 reflective of the exceptionally high degree of contingent risk involved in this case. The Court finds <sup>defendants B</sup>  
19 that a full and final award of attorney's fees in the amount of \$ 130,815 is reasonable and  
20 appropriate.

21  
22 8. The Court finds that an award of costs pursuant to RCW 4.84 et seq is appropriate in the  
23 amount of \$ 1780.75. In addition, the Court concludes that an award of prejudgment interest on  
24 all liquidated amounts is appropriate <sup>against the corporate defendants B</sup> As of the date of entry of these Findings of Fact and Conclusions  
25 of Law, the amount of prejudgment interest at 12% is \$ 143,475.99

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9. All Defendants, including Judy Johnston and Jerry Cornwell and his marital community, are jointly and severally liable for wrongfully withheld wages of \$150,000.00 pursuant to RCW 49.52.070 and the \$150,000.00 in liquidated damages award under RCW 49.52.070. In addition, all Defendants are jointly and severally liable for Plaintiff's attorney fees of \$ 130,815 and costs of \$ 1780.75 and \$31,062.55 of prejudgment interest (21.65% of \$143,475.99).

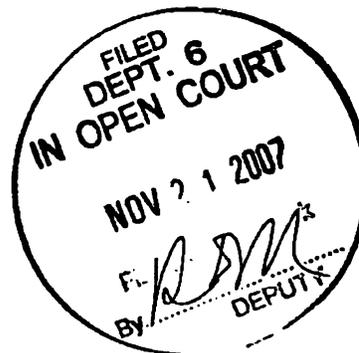
10. Defendants HIMC and ITI Internet Services are jointly and severally liable on all amounts awarded to the Plaintiffs.

DONE IN OPEN COURT this 21 day of November, 2007.

  
\_\_\_\_\_  
Judge Rosanne Buckner

Presented by:

  
\_\_\_\_\_  
Paul Lindenmuth, WSBA #15817  
Attorney for Plaintiffs



~~Notice of Presentation waived:~~ AB

  
\_\_\_\_\_  
David Adler, WSBA #16585  
Attorney for Defendants

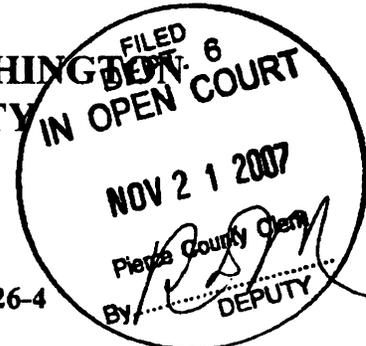
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THE HONORABLE ROSANNE BUCKNER

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**



MICHAEL DURAND and NATASHA  
DURAND, individually, and marital  
community comprised thereof,

NO. 06-2-13326-4

Plaintiff,

**JUDGMENT AGAINST  
HIMC CORPORATION AND  
ITI INTERNET SERVICES, INC.**

vs.

HIMC CORPORATION, et al;

Defendants.

**I. JUDGMENT SUMMARY**

- 1. Judgment Creditors: Michael Durand and Natasha Durand
- 2. Judgment Creditors' Attorney: Paul A. Lindenmuth
- 3. Judgement Debtors: HIMC Corporation and ITI Internet Services, Inc.
- 4. Judgment Debtors' Attorney: David Adler

## 5. Principal Judgment Amounts:

\$1,118,780.00

a. Termination Pay:	\$618,750.00
b. Deferred Salary:	\$ 38,958.26
c. Annual Bonus:	\$ 15,000.00
d. Relocation Assistance:	\$ 20,000.00
e. Prejudgment Interest at 12%	<u>\$143,475.99</u>
f. Attorney's Fees Pursuant to RCW 49.48.030 and RCW 49.52.070	<u>\$130,815.00</u>
g. Costs Pursuant to RCW 4.84 et seq	<u>\$1,780.75</u>
h. Liquidated Damages Pursuant to RCW 49.52.070	\$ 150,000.00

## TOTAL:

\$1,118,780.00

6. Postjudgment shall accrue at 12% per annum.

## II. JUDGMENT

THIS MATTER having come on before the Court for entry of Judgment following a bench trial in the above-entitled matter, the Court having found that Plaintiffs Michael and Natasha Durand are entitled to the following awards: (a) \$618,750.00 in termination pay; (b) \$38,958.26 for deferred salary; (c) \$15,000.00 for annual bonus for 2005; (d) \$20,000.00 in relocation assistance; and (e) \$150,000.00 as liquidated damages pursuant to RCW 49.52.070, and having further found that this matter is appropriate for an award of prejudgment interest (as 12% per annum) in the amount of \$143,475.99, and that Plaintiff is entitled to an award of attorney's fees pursuant to RCW 49.48.030 and RCW 49.52.070, and that such attorney's fees should be multiplied subject to a multiplier at .50, the Court awards judgment for attorney's fees in the amount of \$130,815.00, and that costs pursuant to RCW 4.84 et seq should be awarded in the amount of \$1,780.75 for a total judgment of \$1,118,780.00, therefore it is hereby

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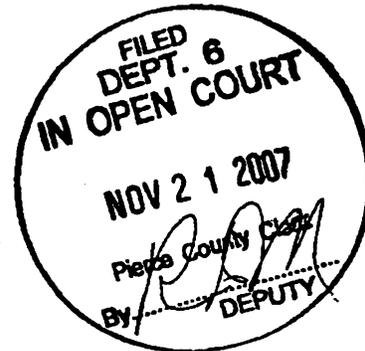
ORDERED, ADJUDGED AND DECREED that Plaintiffs shall be and are hereby awarded judgment against the Defendants (joint and severally) in the total amount of judgment of \$ 1,118,780.00.  
Postjudgment interest shall accrue at 12% per annum.

DONE IN OPEN COURT this 21 day of November, 2007.

  
\_\_\_\_\_  
Judge Rosanne Buckner

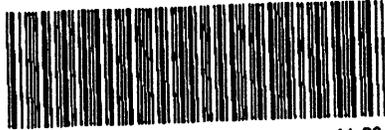
Presented by:

  
\_\_\_\_\_  
Paul Lindenmuth, WSBA #15817  
Attorney for Plaintiffs



~~Approved as to form and content;~~  
~~Notice of Presentation waived.~~

  
\_\_\_\_\_  
David Adler, WSBA #16585  
Attorney for Defendants



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THE HONORABLE ROSANNE BUCKNER

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**SUPERIOR COURT OF WASHINGTON  
FOR PIERCE COUNTY**



MICHAEL DURAND and NATASHA  
DURAND, individually, and marital  
community comprised thereof,

Plaintiff,

vs.

HIMC CORPORATION, et al;

Defendants.

NO. 06-2-13326-4

**JUDGMENT AGAINST HIMC  
CORPORATION AND ITI INTERNET  
SERVICES; JUDY MORTON JOHNSTON;  
JERRY CORNWELL AND HIS MARITAL  
COMMUNITY WITH "JANE DOE"  
CORNWELL (JOINT AND SEVERALLY)**

**I. JUDGMENT SUMMARY**

- 1. Judgment Creditors: Michael Durand and Natasha Durand
- 2. Judgment Creditors' Attorney: Paul A. Lindenmuth
- 3. Judgement Debtors: HIMC Corporation; ITI Internet Services, Inc.;  
Judy Morton Johnston; and Jerry and "~~Jane Doe~~"  
Cornwell (Jointly and severally).
- 4. Judgment Debtors' Attorney: David Adler with "~~Jane Doe~~ Cornwell;  
(and his marital community  
and not the separate property  
of Jane Doe Cornwell)

*P  
plus  
AB*

## 5. Principal Judgment Amounts:

\$463,658.30

- |  |                            |
|--|----------------------------|
| a. Wrongfully withheld wages awardable<br>Pursuant to RCW 49.52.070: | \$150,000.00               |
| b. Liquidated damages pursuant to<br>RCW 49.52.070:                  | \$150,000.00               |
| c. Pro-rata share of prejudgment interest at 12 %:                   | \$ 31,062.55               |
| d. Attorney's Fees Pursuant to RCW 49.48.030<br>and RCW 49.52.070    | \$130,815.00               |
| e. Costs Pursuant to RCW 4.84 et seq                                 | \$1,780.75                 |
| <b>TOTAL:</b>  | <b><u>\$463,658.30</u></b> |

## 6. Post-judgment interest shall accrue at 12% per annum.

## II. JUDGMENT

THIS MATTER having come on before the Court for entry of Judgment following a bench trial in the above-entitled matter, the Court having found that Plaintiffs Michael and Natasha Durand are entitled to judgment against the individually-named defendants: Judy Morton Johnston and Jerry Cornwell and the marital community comprised of Jerry Cornwell and "Jane Doe" Cornwell, and that they shall be jointly and severally liable with the corporate defendants of HIMC Corporation and ITI Internet Services, Inc., for the willful and wrongful withholding of Michael Durand's wages in the amount of \$150,000.00, and further finds that the amount of \$150,000.00 should be subject to doubling as a liquidated damage pursuant to RCW 49.52.070. The Court finds it appropriate to award judgment for those amounts.

Further, the Court having considered Plaintiff's Motion for an Award of Attorneys Fees pursuant to RCW 49.48.030 and RCW 49.52.070, the Court finds it appropriate to award judgment jointly and severally against the individual and corporate Defendants, for an award of attorney's fees in the amount of \$130,815.00, and that costs pursuant to RCW 4.84 et seq should be awarded jointly and severally against the individual and corporate Defendants in the amount of \$1,780.75.

The Court further awards judgment against the individual and corporate Defendants, joint and

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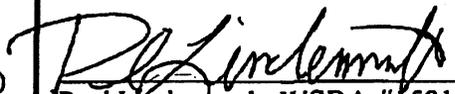
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severally, for a pro-rata share of prejudgment interest in the amount of \$31,062.55. Postjudgment interest in this matter shall accrue at 12% per annum.

DONE IN OPEN COURT this 21 day of November, 2007.

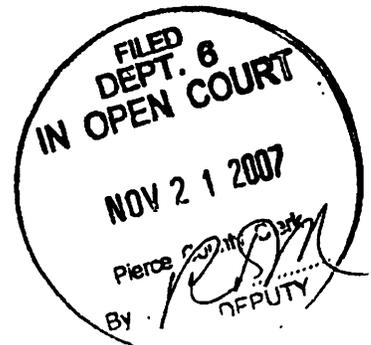
  
\_\_\_\_\_  
Judge Rosanne Buckner

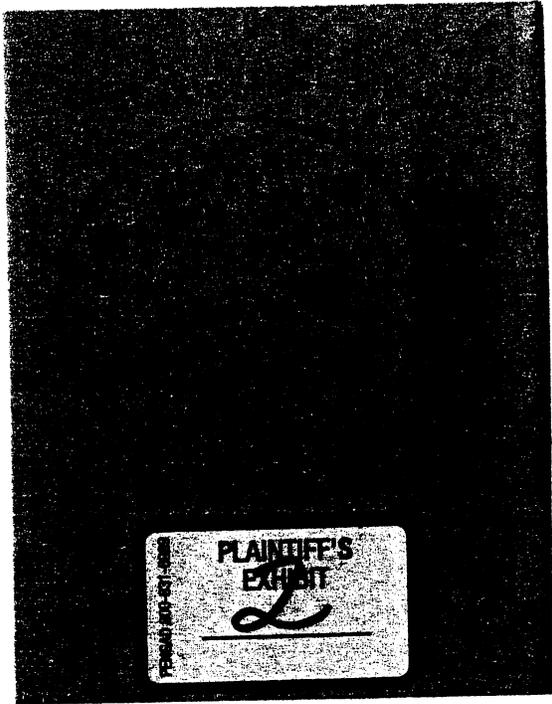
Presented by:

  
\_\_\_\_\_  
Paul Lindenmuth, WSBA #15817  
Attorney for Plaintiffs

~~Approved as to form and content;  
Notice of Presentation waived.~~

  
\_\_\_\_\_  
David Adler, WSBA #16585  
Attorney for Defendants





000071

Mike,

HIMC Corporation is declaring a formal interest to employ Michel R. Durand effective April 18, 2005

HIMC Corporation is offering Mr. Durand a position in the Corporation as Head of Sales.

His duties will be to develop and to create a profitable sales organization for the corporation.

**Date:** April 18, 2005

**Position:** Head of Sales

**Annual Base Salary:** \$150,000

**Annual Bonus Opportunity:** (10% Minimum Guaranteed for 2005, Maximum 25%)

**Stock Grant:**  
**Time of Hire:** 25,000 Shares  
**6 Month Later:** 25,000 Shares

**Stock Options:** Eligible for employee stock option plan.

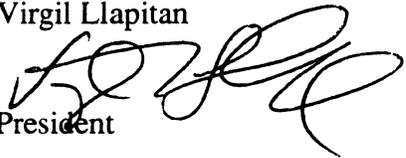
**Severance Package:** 6 -12 Months  
1 Month of Severance for Every Month Employed to a Maximum of 12 Months  
Minimum Guarantee is 6 Months of Severance

**Vehicle:**  
**Max. Lease Amount (includes tax)** Max. car allowance \$800.00

**Benefits:** Coverage from date of hire for spouse and child.

**Hire Date:** April 18, 2005

Virgil Llapitan

  
President

3/24/05

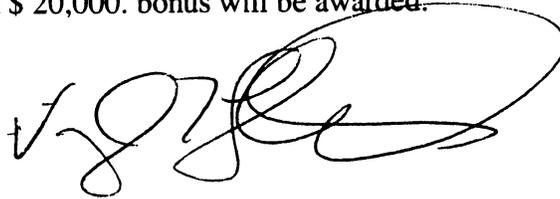
Accepted:

  
Michael R. Durand.

3/24/05

000072

Addendum: Upon completion of PPM or Funding, and acceptance of a senior level management position a \$ 20,000. bonus will be awarded.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke at the end.

## EMPLOYMENT AGREEMENT

### ITI Internet Services, inc. /Durand

This Agreement is made this 18th day of April by and between ITI Internet Services, Inc. a Washington corporations ("Company") and Michael R. Durand ("Durand"). This Agreement is an employment contract.

1. **Employment** The Company wishes to enter an employment agreement with Durand as Vice President of Sales and Durand hereby accepts that employment upon the terms and conditions hereinafter set forth.
2. **Duties and Responsibilities.** Durand shall undertake and assume the responsibility of performing for and on behalf of Employer the duties of Vice President of sales.
3. **Term.** The term of this Agreement shall begin on April 18, 2005 and shall continue for a period of five (5) years until April 18, 2010. This agreement shall be renewed automatically thereafter for up to one (1) successive terms of 5(five) years each unless either the Company or Durand shall issue written notice on or before the 60<sup>th</sup> day prior to the anniversary date of this Agreement of an intent not to renew this Agreement for the next successive additional term.
4. **Compensation.** For all services rendered by Durand under this Agreement, the Company shall provide compensation to Durand as follows:
  - 4.1 **Salary.** Salary at the rate of \$12,500 per month or more payable semi-monthly, payable in cash.
  - 4.2 **Annual Bonus.** 10% minimum guaranteed for 2005. Maximum 25% Yearly bonus shall be determined in the discretion of the Board of Directors.
  - 4.3 **Other Benefits.** The Company shall pay the monthly premium cost for medical, dental, disability insurance, and parking and monthly auto allowance.
  - 4.4 **Acceptance Bonus.** For acceptance of this agreement, Durand shall be paid 25,000 shares of HIMC restricted stock issued upon signing with an additional 25,000 shares of HIMC restricted stock issued on the 6 month of employment. (Oct. 28, 2005).
  - 4.5 **Relocation Assistance.** Durand will receive \$20,000.00 as relocation expenses for relocation to the Tacoma area.
  - 4.6 **Termination.** In the event that the Company or any of its successors shall terminate this agreement early, Durand shall receive compensation from the

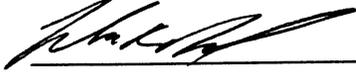
  
MMA

remaining contract term upon termination. Any and all stock or options not vested will be fully vested at the time of early termination

**HIMC Corporation**

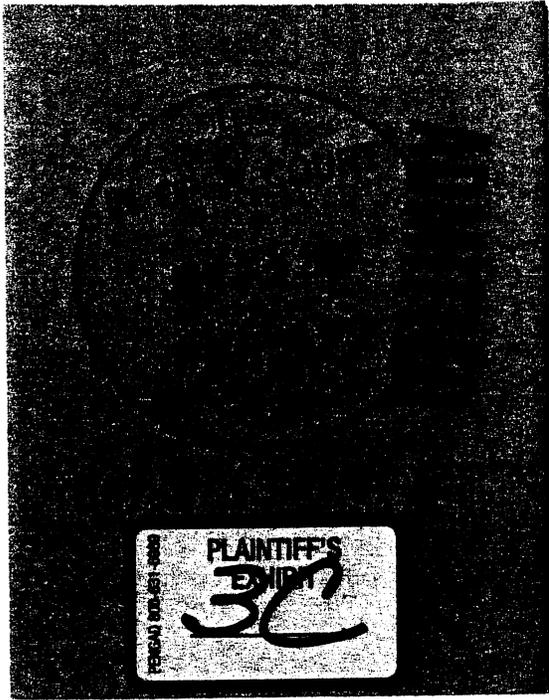
  
\_\_\_\_\_  
By: Virgil T. Llapitan  
Its: President  
Dated: April 18, 25

Accepted by:

  
\_\_\_\_\_

Michael R. Durand.

  
MMD



PERMANENT RECORD  
PLAINTIFF'S  
EXHIBIT  
30

000077

November 18, 2005

TO: Melissa Duthie  
CEO ITI Internet Services

Cc: Ronald W. Ehli  
CEO HIMC

FROM: Michael R. Durand

RE: EMPLOYMENT AGREEMENT

Melissa, you asked that I put in writing any part of the agreement during my hiring at HIMC which may not have been captured in the original employment agreement signed 3/24/05 or the more professional agreement signed 4/18/05. I appreciate you taking the lead to get this completed in writing.

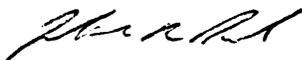
Honestly everything looks in order with the exception of number of allotted vacation days per year. It was agreed at 15 days (3 weeks) since this is what I was receiving at my prior company.

A point for clarification, I was hired as an officer of HIMC the public company. Being in sales it's a must that I use (leverage) a title from time to time. In dealing with clients they usually don't know about HIMC. Are you and Ron okay with me using the title of VP of Sales for HIMC and ITI Internet Services. There's a need to put ITI Internet Services when selling to clients. However, of course, I do not want to relinquish my standing directly with the public company HIMC.

So you know, I have received the stock shares per the contract, thank you to you and Ron. I have deferred the relocation assistance until the company is in a better position to complete this agreement. Ann is accruing for it per the conversation I had with her a couple weeks ago when she asked for a copy of the employment agreement.

I have included both copies of the employment agreement for your review. Ann also has a copy of both in her files. Please keep locked up or shred when you are done with them.

Thank you,



Michael R. Durand

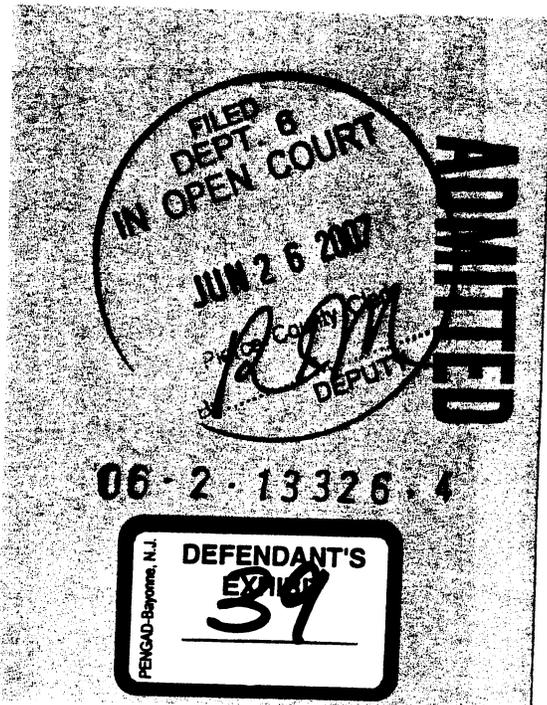
Melissa Duthie CEO  
11/18/05

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**PAYMENT HISTORY OF MICHAEL DURAND**

<b>Pay Period Ending</b>	<b>Gross Earning</b>	<b>Accumulated Total</b>
March 30, 2005	Payroll records are missing	
April 15, 2005	Payroll records are missing	
April 30, 2005	\$6,250.00	\$6,250.00
May 15, 2005	\$6,250.00	\$12,500.00
May 31, 2005	\$6,250.00	\$18,750.00
June 15, 2005	\$6,250.00	\$25,000.00
June 30, 2005	\$6,250.00	\$31,250.00
July 15, 2005	\$6,250.00	\$37,500.00
July 31, 2005	\$6,250.00	\$43,750.00
August 15, 2005	\$6,250.00	\$50,000.00
August 31, 2005	\$6,250.00	\$56,250.00
September 15, 2005	\$6,250.00	\$62,500.00
September 30, 2005	\$2,708.34	\$65,208.34
October 15, 2005	\$2,708.34	\$67,916.68
October 31, 2005	\$2,708.34	\$70,625.02
November 15, 2005	\$2,708.34	\$73,333.36
November 30, 2005	\$2,708.34	\$76,041.70
December 15, 2005	\$2,708.34	\$78,750.04
December 31, 2005	\$2,708.34	\$81,458.38
January 15, 2006	\$2,708.34	\$84,166.72
January 31, 2006	\$2,708.34	\$86,875.06
February 15, 2006	\$2,708.34	\$89,583.40
February 28, 2006	\$2,708.34	\$92,291.74
March 15, 2006	None	\$92,291.74



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OTHER CHANGES	Name	Department	Clock	Soc.Sec.	Data Was	Data Is	Difference	Pct.	Description
File	165 DURAND MICHAEL R	000100		XXX-XX-7914	NONE	04/24/2006			DATE 3

000080

EXHIBIT NO. D-2439

Personnel: Change Report  
 ITI INTERNET SERVICE  
 Company Code: 6FU  
 Batch : 0386-076  
 Period Ending : 03/15/2006  
 Pay Date : 03/15/2006  
 Week 10  
 Page 6

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PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local	V CHECK1	W CHECK2	
DURAND, MICHAEL	2,708.34		2,708.34		2,708.34	242.71 FIT 167.92 SS 39.27 MED		2183.44 V CHECK1	75.00 W CHECK2	080001
DUTHIE, MELISSA	2,208.36		2,208.36	499.98 P	2,708.34	442.14 FIT 167.92 SS 39.27 MED		559.01 V CHECK1 200.00 Y SAV1	1200.00 W CHECK2	080002
EHL, RONALD W.	2,708.34		2,708.34		2,708.34	283.96 FIT 167.92 SS 39.27 MED		2217.19 V CHECK1		080003
LLAPITAN, VIRGIL	2,083.00		2,083.00		2,083.00	148.91 FIT 129.14 SS 30.20 MED		1762.25 V CHECK1	12.50 F LIFINS	080004
WHITE, ANN E	2,708.34		2,708.34		2,708.34	325.20 FIT 167.92 SS 39.27 MED		2110.20 V CHECK1 15.75 F LIFINS	50.00 Y SAV1	080005
DEPT TOTAL	12,416.38 REG 499.98 O/T 12,916.36 GROSS		12,416.38 REG 499.98 O/T 12,916.36 GROSS		14,442.92 FIT 800.82 SS 187.28 MED		10,485.34 TOTAL DEDUCTIONS			5 Pays
REG										
HOURS ANALYSIS										
EARNINGS ANALYSIS										
VOLUNTARY DEDUCTIONS										
BARKER, IAN										
BURGESS, TIM R										

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**PERSONNEL**      **HOURS**      **EARNINGS**      **GROSS**      **STATUTORY DEDUCTIONS**      **VOLUNTARY DEDUCTIONS**      **NET PAY**

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File: 000110 Dept: 000100 Rate: 2708.34	75.67	0.00	2,458.35	249.99	2,708.34	242.71 FIT 167.92 SS 39.27 MED		2183.44 V CHECK1 75.00 W CHECK2	Voucher# 070001	
OUTHIE, MELISSA File: 000110 Dept: 000100 Rate: 2708.34	86.67	0.00	2,458.35	249.99	2,708.34	442.14 FIT 167.92 SS 39.27 MED		659.01 V CHECK1 200.00 Y SAV1	Voucher# 070002	
EHLI, RONALD W. File: 000110 Dept: 000100 Rate: 2708.34	86.67	0.00	2,708.34		2,708.34	283.96 FIT 167.92 SS 39.27 MED			Check# 20071340	
LLAPITAN, VIRGIL File: 000110 Dept: 000100 Rate: 2083.00	85.67	0.00	2,083.00		2,083.00	148.91 FIT 129.15 SS 30.20 MED		1762.24 V CHECK1 12.50 F LIFINS	Voucher# 070003	2,217.19
WHITE, ANN E File: 000110 Dept: 000100 Rate: 2708.34	86.67	0.00	2,708.34		2,708.34	325.20 FIT 167.92 SS 39.27 MED		2110.20 V CHECK1 15.75 F LIFINS	Voucher# 070004	
<b>DEPT TOTAL</b> 000100	417.35	0.00	12,416.38	0.00	12,416.38	1,442.92 FIT 800.83 SS 187.28 MED		8,268.14 TOTAL DEDUCTIONS	5 Pays 2,217.19	
<b>HOURS ANALYSIS</b> EARNINGS ANALYSIS	REG 16.00 O.T. 0.00 HOURS 3 16.00 HOURS 4 0.00	REG 16.00 O.T. 0.00 HOURS 3 16.00 HOURS 4 0.00	REG 12,416.38 EARNINGS 3 499.98 EARNINGS 5 12,916.36	REG 249.99 EARNINGS 3 249.99 EARNINGS 5 249.99	REG 12,416.38 EARNINGS 3 499.98 EARNINGS 5 12,916.36					
<b>VOLUNTARY DED. ANALYSIS</b> BARKER, JIAN	29.25	0.00	6,714.89		6,714.89			1,275.00 W CHECK2 250.00 Y SAV1		
BURGESS, TIM R File: 000110 Dept: 000200 Rate: 1040.00	79.67	16.00	848.01	191.99	1,040.00	43.87 FIT 48.36 SS 11.31 MED		854.45 V CHECK1 2.50 F LIFINS	Check# 20071341 Voucher# 070005	676.46

**REG**

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Payroll Register

ITI INTERNET SERVICE  
Company Code: 6FU

Batch: 4348-049    Period Ending: 02/15/2006    Week 07  
Pay Date: 02/15/2006    Page 1

REG

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File: 000130 Dept: 000130 Rate: 2708.34	36.57		2,708.34		2,708.34	242.71 FIT 167.91 SS 39.27 MED		2258.45 V CHECK1	Voucher# 040001	.00
DUTHIE, MELISSA File: 000117 Dept: 000130 Rate: 2708.34	36.57		2,708.34		2,708.34	442.14 FIT 167.91 SS 39.27 MED		659.02 V CHECK1 200.00 Y SAV1	Voucher# 040002	.00
EHLI, RONALD W. File: 000100 Dept: 000130 Rate: 2708.34	36.57		2,708.34		2,708.34	283.96 FIT 167.91 SS 39.27 MED			Check# 20069373	.00
LLAPITAN, VIRGIE File: 000135 Dept: 000130 Rate: 3083.00	36.57		2,083.00		2,083.00	148.91 FIT 129.14 SS 30.21 MED		1762.24 V CHECK1	Voucher# 040003	2,217.20
WHITE, ANN E File: 000135 Dept: 000130 Rate: 2708.34	36.57		2,708.34		2,708.34	325.20 FIT 167.91 SS 39.27 MED		2110.21 V CHECK1 15.75 F LIFINS	Voucher# 040004	.00
DEPT TOTAL 000100						1,442.92 FIT 800.78 SS 187.29 MED		8,268.17 TOTAL DEDUCTIONS	5 Pays	2,217.20
VOLUNTARY DED. 20069374										
BARKER, JIAN File: 000130 Dept: 000130 Rate: 780.00			6,789.92		6,789.92		1,200.00	W CHECK2	Check# 20069374	250.00
BURGESS, TIM R File: 000131 Dept: 000200 Rate: 1040.00			780.00		780.00	43.87 FIT 48.36 SS 11.31 MED				676.46
HENDERSON-SEMO, LEILANI P File: 000130 Dept: 000200 Rate: 910.00			1,040.00		1,040.00	103.49 FIT 64.48 SS 15.08 MED		854.45 V CHECK1	Voucher# 040005	2.50
			910.00		910.00	104.62 FIT 56.42 SS 13.19 MED		735.77 V CHECK1	Voucher# 040006	.00

ITI INTERNET SERVICE  
Company Code: 6FU

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Payroll Register

**PERSONNEL**      **HOURS**      **EARNINGS**      **GROSS**      **STATUTORY DEDUCTIONS**      **VOLUNTARY DEDUCTIONS**      **NET PAY**

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL S	2708.34		2,708.34		2,708.34	242.71 FIT 167.92 SS 39.27 MED		2258.44 V CHECK1		Voucher# 020001
DUTHIE, MELISSA	2708.34		2,708.34		2,708.34	442.14 FIT 167.92 SS 39.27 MED		659.01 V CHECK1 200.00 Y SAV1	1200.00 W CHECK2	Voucher# 020002
EHL, RONALD W.	2708.34		2,708.34		2,708.34	283.96 FIT 167.92 SS 39.27 MED				Check# 20067207
LLAPITAN, VIRGIL	2083.00		2,083.00		2,083.00	148.91 FIT 129.15 SS 30.20 MED		1762.24 V CHECK1	12.50 F LIFINS	Voucher# 020003
WHITE, ANN E	2708.34		2,708.34		2,708.34	325.20 FIT 167.92 SS 39.27 MED		2110.20 V CHECK1 15.75 F LIFINS	50.00 Y SAV1	Voucher# 020004
DEPT TOTAL	433.35 REG 7.00 O/T 300 HOURS J 36 HOURS J	12,916.36 REG 00 EARNINGS 3 00 EARNINGS 5	00 O/T 00 EARNINGS 4	12,916.36 GROSS	1,442.92 FIT 800.83 SS 187.28 MED	8,268.14 TOTAL DEDUCTIONS				5 Pays 2,217.19
VOLUNTARY DEC ANALYSIS	26.25 F LIFINS	6,789.89	V CHECK1	1,200.00 W CHECK2	250.00 Y SAV1					
BURGESS, TIM R	1040.00		1,040.00		1,040.00	103.49 FIT 64.48 SS 15.08 MED		854.45 V CHECK1	2.50 F LIFINS	Voucher# 020005
HENDERSON, SEMC	910.00		910.00		910.00	104.62 FIT 56.42 SS 13.20 MED		735.76 V CHECK1		Voucher# 020006
LAGASA, HEATHER N	1450.00		1,450.00		1,450.00	136.45 FIT 89.90 SS 21.03 MED		1151.12 V CHECK1 1.50 F LIFINS	50.00 Y SAV1	Voucher# 020007

**REG**

**000084**

**APP** Payroll Register

ITI INTERNET SERVICE  
Company Code: 6FU

Batch: 7835-049    Period Ending: 01/15/2006    Week 02  
Pay Date: 01/13/2006    Page 1

REG

PERSONNEL		HOURS		EARNINGS		GROSS		STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
File	Rate	Reg	O/T	Reg	O/T	Federal	State/Local	Federal	State/Local	Voucher#		
DURAND, MICHAEL R	2718.34	54.67	32.00	1,708.38	999.96	245.84	167.92	167.92	39.27	2255.31	V CHECK1	520001
DUTHIE, MELISSA	2708.34	45.97		2,708.34		447.72	167.92	167.92	39.27	653.43	V CHECK1	520002
EHL, RONALD W.	2065.086	45.97		2,708.34		285.84	39.27	285.84	39.27			2065086
LAPITAN, VIRGIL	2083.00	82.67	24.00	1,506.08	576.92	152.04	129.14	152.04	30.20	1759.12	V CHECK1	520003
WHITE, ANN E	2708.34	95.67		2,708.34		325.84	167.92	167.92	39.27	2109.56	V CHECK1	520004
<b>DEPT TOTAL</b>		317.45	30	11,339.48	00	1,457.28	632.90	1,457.28	187.28	8,255.67	TOTAL DEDUCTIONS	5 Pays
<b>EARNINGS ANALYSIS</b>		1,576.88	29.25	1,576.88	00	632.90	187.28	632.90	187.28	15.75	F LIFINS	2,383.23
<b>VOLUNTARY DED ANALYSIS</b>		28.25	00	28.25	00					15.75	F LIFINS	
<b>BURGESS, TIM R</b>	1040.00	53.67		1,040.00		104.54	64.48	104.54	15.08	853.40	V CHECK1	520005
<b>HENDERSON, SEIMC</b>	910.00	61.67		910.00		105.04	56.42	105.04	13.20	795.34	V CHECK1	520006

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**PERSONNEL**      **HOURS**      **EARNINGS**      **GROSS**      **STATUTORY DEDUCTIONS**      **VOLUNTARY DEDUCTIONS**      **NET PAY**

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL S File: 000117 Dept: 000100 Rate: 2708.34	15.00		2,708.34		2,708.34	245.84 FIT 167.91 SS 39.28 MED		2255.31 V CHECK1	Voucher# 500001	
OUTHIE, MELISSA File: 000117 Dept: 000100 Rate: 2708.34			2,708.34		2,708.34	447.72 FIT 167.91 SS 39.27 MED		653.44 V CHECK1 1200.00 W CHECK2 200.00 Y SAV1	Voucher# 500002	
EHLI, RONALD W. File: 000102 Dept: 000100 Rate: 2708.34			2,708.34		2,708.34	285.84 FIT 39.27 MED			Check# 20062533	
LLAPITAN, VIRGIL File: 000135 Dept: 000100 Rate: 2052.00	15.00 P		1,698.39	384.61 P	2,083.00	152.04 FIT 129.15 SS 30.21 MED		1759.10 V CHECK1 12.50 F LIFINS	Voucher# 500003	
WHITE, ANN E File: 000135 Dept: 000100 Rate: 2708.34			2,708.34		2,708.34	325.84 FIT 167.92 SS 39.27 MED		2109.56 V CHECK1 50.00 Y SAV1 15.75 F LIFINS	Voucher# 500004	
<b>DEPT TOTAL</b> 000100	117.35 REG 50 O/T 18.30 HOURS 3 30 HOURS 2	REG O/T	12,531.75 384.61	REG EARNINGS 3 EARNINGS 5	.00 .00 12,916.36	1,457.28 FIT 632.89 SS 187.30 MED		8,255.66 TOTAL DEDUCTIONS	5 Pays 2,383.23	
<b>HOURS ANALYSIS</b>										
EARNINGS ANALYSIS			15.00 P	PTO						
VOLUNTARY DEF			384.61 P	PTO						
BURGESS, TIM R			25.25 F	LIFINS	6,777.41			1,200.00 W CHECK2	250.00 Y SAV1	
File: 000100					1,040.00					
Dept: 000200					1,040.00	104.54 FIT 64.48 SS 15.08 MED		853.40 V CHECK1 2.50 F LIFINS	Voucher# 500005	
Rate: 1040.00										
HENDERSON, SEMC LEILANI P					910.00	105.04 FIT 56.42 SS 13.19 MED		735.35 V CHECK1	Voucher# 500006	
File: 000119										
Dept: 000200										
Rate: 910.00										

**REG**

**ADP** Payroll Register **000086**

**REG**

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File: 000105 Dept: 000100 Rate: 2708.34	82.57	24.00	1,958.37	749.97	2,708.34	245.84 FIT 167.92 SS 39.27 MED		2255.31 V CHECK1	Voucher# 480001	.00
DUTHIE, MELISSA File: 000117 Dept: 000100 Rate: 2708.34	85.67		2,708.34		2,708.34	447.72 FIT 167.92 SS 39.27 MED		653.43 V CHECK1 200.00 Y SAV1	Voucher# 480002	.00
EHLIRONALD, W. File: 000102 Dept: 000100 Rate: 2708.34	85.67		2,708.34		2,708.34	285.84 FIT 39.27 MED			Check# 20059565	.00
LLAPITAN, VIRGIL T File: 000100 Dept: 000100 Rate: 2708.34	85.67		2,083.00		2,083.00	152.04 FIT 129.15 SS 30.20 MED		1759.11 V CHECK1 12.50 F LIFINS	Voucher# 480003	2,383.23
WHITE, ANN E File: 000100 Dept: 000100 Rate: 2708.34	85.67		1,958.37	749.97	2,708.34	325.84 FIT 167.92 SS 39.27 MED		2109.56 V CHECK1 15.75 F LIFINS	Voucher# 480004	.00
<b>DEPT TOTAL</b> 000100	385.35 REG 30 O/T 48.00 HOURS 3 30 HOURS 4	REG O/T EARNINGS 3 EARNINGS 5	11,416.42 1,499.94 .00	.00 .00 12,916.36	.00 .00 GROSS	1,457.28 FIT 632.91 SS 187.28 MED		8,255.66 TOTAL DEDUCTIONS	5 Pays 2,383.23	.00
<b>HOURS ANALYSIS</b>										
EARNINGS ANALYSIS										
VOLUNTARY DED ANALYSIS										
BURGESS, TIM R File: 000111 Dept: 000200 Rate: 1040.00	36.07		1,040.00		1,040.00	104.54 FIT 64.48 SS 15.08 MED		853.40 V CHECK1 2.50 F LIFINS	Voucher# 480005	.00
HENDERSON, SEMO. LEILANI P File: 000115 Dept: 000200 Rate: 910.00	36.07		910.00		910.00	105.04 FIT 56.42 SS 13.20 MED		735.34 V CHECK1	Voucher# 480006	.00

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ITI INTERNET SERVICE

Company Code: 6FU

Batch: 0780-049

Period Ending: 11/30/2005

Week 48

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PERSONNEL		HOURS		EARNINGS		GROSS		STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
File	Rate	Reg	O/T	Reg	O/T	Reg	O/T	Federal	State/Local			
DURAND, MICHAEL R File: 000185 Dept: 000100 Rate: 2708.34	2708.34	95.57		2,708.34		2,708.34		245.84 FIT 167.92 SS 39.27 MED		2255.31 V CHECK1		450001 .00
DUTHIE, MELISSA File: 000111 Dept: 000100 Rate: 2708.34	2708.34	95.57		2,708.34		2,708.34		447.72 FIT 167.92 SS 39.27 MED		653.43 V CHECK1 200.00 Y SAV1		450002 .00
EHLL, RONALD W. File: 000102 Dept: 000100 Rate: 2708.34	2708.34	95.57		2,708.34		2,708.34		285.84 FIT 39.27 MED				20057039 2,383.23
LLAPITAN, VIRGIL File: 000135 Dept: 000100 Rate: 2083.24	2083.24	95.57		2,083.00		2,083.00		152.04 FIT 129.14 SS 30.20 MED		1759.12 V CHECK1 12.50 F LIFINS		450003 .00
WHITE, ANN E File: 000119 Dept: 000100 Rate: 2708.34	2708.34	95.57		2,708.34		2,708.34		325.84 FIT 167.91 SS 39.27 MED		2159.57 V CHECK1 15.75 F LIFINS		450004 .00
DEPT TOTAL 000100		432.35 REG 00 O/T 00 EARNINGS 3 00 HOURS 3 00 HOURS 4		12,916.36 REG 00 O/T 00 EARNINGS 4 12,916.36 GROSS				1,457.28 FIT 632.89 SS 187.28 MED		8,255.68 TOTAL DEDUCTIONS		5 Pays 2,383.23
VOLUNTARY DED. ANALYSIS		28.25	F LIFINS	6,827.43	V CHECK1	1,200.00	W CHECK2	200.00	Y SAV1			
BURGESS, TIM R File: 000143 Dept: 000200 Rate: 1040.00	1040.00	95.57		1,040.00		1,040.00		104.54 FIT 64.48 SS 15.08 MED		853.40 V CHECK1 2.50 F LIFINS		450005 .00
HENDERSON, SEMC LEILANI P File: 000110 Dept: 000200 Rate: 910.00	910.00	95.57		910.00		910.00		105.04 FIT 56.42 SS 13.19 MED		735.35 V CHECK1		450006 .00
LAGASA, HEATHER N File: 000131 Dept: 000200 Rate: 1450.00	1450.00	95.57		1,450.00		1,450.00		137.09 FIT 89.90 SS 21.02 MED		1150.49 V CHECK1 1.50 F LIFINS		450007 .00

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ITI INTERNET SERVICE  
Company Code: 6FU

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PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File 000114 Dept 2708 34 Rate 2708 34	86.97		2,708.34		2,708.34	245.84 FIT 167.92 SS 39.27 MED		2255.31 V CHECK1	Voucher# 430001	
EHL, MELISSA File 000114 Dept 2708 34 Rate 2708 34	96.57	P	2,708.33	P	2,708.34	447.72 FIT 167.92 SS 39.27 MED		653.43 V CHECK1 1200.00 W CHECK2 200.00 Y SAVI	Voucher# 430002	.00
EHL, RONALD W File 000114 Dept 2708 34 Rate 2708 34	96.57		2,708.34		2,708.34	285.84 FIT 39.28 MED			Check# 20055154	.00
LLAPITAN, VIRGIL File 000114 Dept 2083 10 Rate 2083 10	85.97		2,083.00		2,083.00	152.04 FIT 129.14 SS 30.21 MED		1759.11 V CHECK1 12.50 F LIFINS	Voucher# 430003	2,383.22
WHITE, ANN E File 000135 Dept 000100 Rate 2708 34	78.67	P	2,458.35	P	2,708.34	325.84 FIT 167.93 SS 39.27 MED		2159.55 V CHECK1 15.75 F LIFINS	Voucher# 430004	.00
DEPT TOTAL 000100	338.68	REG .00 O/T 94.67 HOURS 3 HOURS 4	9,958.04 2,958.32 .00 12,916.36	REG EARNINGS 3 EARNINGS 5 GROSS	.00 .00 12,916.36	1,457.28 FIT 632.91 SS 187.30 MED		8,255.65 TOTAL DEDUCTIONS	5 Pays 2,383.22	.00
HOURS ANALYSIS	94.67	P	PTO							
EARNINGS ANALYSIS	2,958.32	P	PTO							
VOLUNTARY DED. ANALYSIS	28.25	F	LIFINS							
BURGESS, TIM R File 000114 Dept 000200 Rate 1043 06	69.40		1,040.00		1,200.00	104.54 FIT 64.48 SS 15.08 MED		853.40 V CHECK1 2.50 F LIFINS	Voucher# 430005	.00
HENDERSON, SEMO File 000114 Dept 000200 Rate 910 00	70.07	P	742.01	P	910.00	105.04 FIT 56.42 SS 13.20 MED		735.34 V CHECK1	Voucher# 430006	.00

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Company Code: 6FU

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**REG**

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File: 000165 Dept: 000193 Rate: 2706.34	78.67	8.00	2,458.35	249.99	2,708.34	245.84 167.91 39.27	FIT SS MED	2255.32	V CHECK1 410001	410001
EHLI, MELISSA File: 000165 Dept: 000193 Rate: 2706.34	86.57		2,708.34		2,708.34	447.72 167.91 39.27	FIT SS MED	653.44 200.00	V CHECK1 Y SAV1 W CHECK2 410002	410002
EHLI, RONALD W. File: 000165 Dept: 000193 Rate: 2706.34	86.57		2,708.34		2,708.34	285.84 39.27	FIT MED			Adjustment Void PP 00101022
LLAPITAN, VIRGIL File: 000165 Dept: 000193 Rate: 2083.34	93.57		2,083.00		2,083.00	152.04 129.15 30.20	FIT SS MED	12.50	F LIFINS	Adjustment Void PP 00101023 1,759.11
WHITE ANN E File: 000165 Dept: 000193 Rate: 2706.34			2,708.34		2,708.34	325.84 167.91 39.27	FIT SS MED	15.75	F LIFINS	Adjustment Void PP 00101024
<b>DEPT TOTAL</b> 000100	425.35	16.00	12,666.37	249.99	12,916.36	1,457.28 632.88 187.28	FIT SS MED	4,337.01	TOTAL DEDUCTIONS	2 PAYS 6,301.91
<b>HOURS ANALYSIS</b>	8.00	P	PTO							
<b>EARNINGS ANALYSIS</b>	249.99	P	PTO							
<b>VOLUNTARY DED ANALYSIS</b>	28.25	F	LIFINS	2,908.76	V CHECK1	1,200.00	W CHECK2	200.00	Y SAV1	
BURGESS, TIM R File: 000165 Dept: 000200 Rate: 1040.00	86.57		1,040.00		1,040.00	104.54 64.48 15.08	FIT SS MED	653.40	V CHECK1 F LIFINS 410003	410003
HENDERSON-SEMO, LEILANI P File: 000165 Dept: 000200 Rate: 910.00	86.57		910.00		910.00	105.04 56.42 13.19	FIT SS MED	735.35	V CHECK1 410004	410004

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ITI INTERNET SERVICE  
Company Code: 6FU

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**PERSONNEL** **HOURS** **EARNINGS** **GROSS** **STATUTORY DEDUCTIONS** **VOLUNTARY DEDUCTIONS** **NET PAY**

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File 000105 Dept 000104 Rate 2708.34	8.67		2,458.35	249.99	2,708.34	245.84 FIT 167.92 SS 39.27 MED		2255.31 V CHECK1	Voucher# 390001	.00
EHLI, MELISSA File 000105 Dept 000104 Rate 2708.34			2,708.34		2,708.34	447.72 FIT 167.92 SS 39.27 MED		653.43 V CHECK1 200.00 Y SAV1	Voucher# 390002	.00
EHLI, RONALD W File 000102 Dept 000100 Rate 2708.34			2,708.34		2,708.34	285.84 FIT 39.27 MED			Check# 20050616	2,383.23
LLAPITAN, VIRGIE File 000135 Dept 000100 Rate 2083.00	8.67		2,083.00		2,083.00	152.04 FIT 129.15 SS 30.20 MED		1759.11 V CHECK1	Voucher# 390003	.00
WHITE, ANN E File 000136 Dept 000100 Rate 2708.34	8.00		2,458.35	249.99	2,708.34	325.84 FIT 167.91 SS 39.27 MED		2159.57 V CHECK1	Voucher# 390004	.00
<b>DEPT TOTAL</b> 000100	17.34	0.00	12,416.38	499.98	12,916.36	1,457.28 FIT 632.90 SS 187.28 MED		8,255.67 TOTAL DEDUCTIONS	5 Pays 2,383.23	.00
<b>HOURS ANALYSIS</b>										
EARNINGS ANALYSIS										
VOLUNTARY DED. ANALYSIS										
BURGESS, TIM R File 000105 Dept 000104 Rate 2708.34	15.00	16.00	848.01	191.99	1,040.00	104.54 FIT 64.48 SS 15.08 MED		853.40 V CHECK1	Voucher# 390005	.00
HENDERSON, SENCIO LEILANI P File 000105 Dept 000104 Rate 910.00			910.00		910.00	105.04 FIT 56.42 SS 13.20 MED		735.34 V CHECK1	Voucher# 390006	.00

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Company Code: 6FU

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PERSONNEL		HOURS		EARNINGS		GROSS		STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
File	Dept	Rate	Reg	O/T	Hours	Reg	O/T	Federal	State/Local	Federal	State/Local	
DURAND, MICHAEL P File: 000165 Dept: 000100 Rate: 6250.00			35.67		38.4	6,250.00		1,093.50 387.50 90.62	FIT SS MED	4678.38	V CHECK1	Voucher# 370001 .00
DUTHIE III, GILBERT A File: 000165 Dept: 000100 Rate: 12,000.00			28.50		342.00	342.00		.00 21.20 4.96	FIT SS MED	315.84	V CHECK1	Voucher# 370002 .00
EHLI, MELISSA File: 000165 Dept: 000100 Rate: 2975.00			28.50		2,975.00	2,975.00		514.39 184.45 43.14	FIT SS MED	833.02	V CHECK1 Y SAV1	1200.00 W CHECK2 Voucher# 370003 .00
EHL, RONALD W File: 000165 Dept: 000100 Rate: 5206.00			35.67		3,206.00	3,206.00		879.10 75.51	FIT MED			Check# 20048061 4,253.39
LLAPITAN, VIRGIL File: 000135 Dept: 000100 Rate: 2083.00			35.67		2,083.00	2,083.00		152.04 129.15 30.21	FIT SS MED	1759.10	V CHECK1 F LIFINS	Voucher# 370004 .00
WHITE, ANN E File: 000165 Dept: 000100 Rate: 3084.00			35.67		3,084.00	3,084.00		414.77 191.21 44.72	FIT SS MED	2417.55	V CHECK1 F LIFINS	Voucher# 370005 .00
DEPT TOTAL 000100			165.95	REG O/T	19,942.00 .00	19,942.00 .00		3,053.80 913.51 289.16	FIT SS MED	11,432.14	TOTAL DEDUCTIONS	6 Pays 4,253.39
JUNYARTY DED ANALYSIS			28.25	F LIFINS	10,003.89	10,003.89				1,200.00	W CHECK2	200.00 Y SAV1
BURGESS, TIM R File: 000165 Dept: 000200 Rate: 1040.00			35.67		1,040.00	1,040.00		104.54 64.48 15.08	FIT SS MED	853.40	V CHECK1 F LIFINS	Voucher# 370006 .00
HENDERSON, SEMC LEILANI P File: 000165 Dept: 000100 Rate: 910.00			35.67		910.00	910.00		105.04 56.42 13.19	FIT SS MED	735.35	V CHECK1	Voucher# 370007 .00

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ADP Payroll Register

ITI INTERNET SERVICE  
Company Code: 6FU  
Batch: 2766-049  
Period Ending: 09/15/2005  
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**PERSONNEL**

DURAND, MICHAEL R  
 File: 060103  
 Dept: 060103  
 Rate: 6250.00

**HOURS**  
 Reg: 85.67  
 O/T: 0.00  
 Hours 3&4: 0.00

**EARNINGS**  
 Reg: 6,250.00  
 O/T: 0.00  
 Earnings 3&4: 0.00  
 Earnings 5: 0.00

**GROSS**  
 6,250.00

**STATUTORY DEDUCTIONS**  
 Federal: 1,093.50 FIT  
 387.50 SS  
 90.63 MED

**VOLUNTARY DEDUCTIONS**  
 4678.37 V CHECK1

**NET PAY**  
 Voucher# 350001

0.00

DUTHIE III, GILBERT  
 A  
 File: 060103  
 Dept: 060103  
 Rate: 12,000.00

**HOURS**  
 Reg: 19.50  
 O/T: 0.00  
 Hours 3&4: 0.00

**EARNINGS**  
 Reg: 234.00  
 O/T: 0.00  
 Earnings 3&4: 0.00  
 Earnings 5: 0.00

**GROSS**  
 234.00

**STATUTORY DEDUCTIONS**  
 Federal: .00 FIT  
 14.51 SS  
 3.40 MED

**VOLUNTARY DEDUCTIONS**  
 216.09 V CHECK1

**NET PAY**  
 Voucher# 350002

0.00

EHL, MELISSA  
 File: 060103  
 Dept: 060103  
 Rate: 2,975.00

**HOURS**  
 Reg: 39.67  
 O/T: 0.00  
 Hours 3&4: 0.00

**EARNINGS**  
 Reg: 2,975.00  
 O/T: 0.00  
 Earnings 3&4: 0.00  
 Earnings 5: 0.00

**GROSS**  
 2,975.00

**STATUTORY DEDUCTIONS**  
 Federal: 514.39 FIT  
 184.45 SS  
 43.14 MED

**VOLUNTARY DEDUCTIONS**  
 833.02 V CHECK1  
 200.00 Y SAV1  
 1200.00 W CHECK2

**NET PAY**  
 Voucher# 350003

0.00

EHL, RONALD W.  
 File: 060103  
 Dept: 060103  
 Rate: 7,292.00

**HOURS**  
 Reg: 85.67  
 O/T: 0.00  
 Hours 3&4: 0.00

**EARNINGS**  
 Reg: 7,292.00  
 O/T: 0.00  
 Earnings 3&4: 0.00  
 Earnings 5: 0.00

**GROSS**  
 7,292.00

**STATUTORY DEDUCTIONS**  
 Federal: 1,459.93 FIT  
 105.74 MED

**VOLUNTARY DEDUCTIONS**  
 2004.5663

**NET PAY**  
 Check# 2004.5663

5,726.33

REG

LLAPITAN, VIRGIL T.  
 File: 060103  
 Dept: 060103  
 Rate: 2,083.00

**HOURS**  
 Reg: 78.67  
 O/T: 8.00  
 Hours 3&4: 192.31  
 Hours 5: P

**EARNINGS**  
 Reg: 1,890.69  
 O/T: 192.31  
 Earnings 3: 0.00  
 Earnings 4: 0.00  
 Earnings 5: 21,918.00  
 Gross: 2,083.00

**GROSS**  
 2,083.00

**STATUTORY DEDUCTIONS**  
 Federal: 152.04 FIT  
 129.14 SS  
 30.20 MED

**VOLUNTARY DEDUCTIONS**  
 1759.12 V CHECK1  
 12.50 F LIFINS

**NET PAY**  
 Voucher# 350004

0.00

WHITE, ANN E  
 File: 060103  
 Dept: 060103  
 Rate: 3,084.00

**HOURS**  
 Reg: 55.67  
 O/T: 0.00  
 Hours 3&4: 0.00

**EARNINGS**  
 Reg: 3,084.00  
 O/T: 0.00  
 Earnings 3: 0.00  
 Earnings 4: 0.00  
 Earnings 5: 21,918.00  
 Gross: 3,084.00

**GROSS**  
 3,084.00

**STATUTORY DEDUCTIONS**  
 Federal: 414.77 FIT  
 191.21 SS  
 44.72 MED

**VOLUNTARY DEDUCTIONS**  
 2417.55 V CHECK1  
 15.75 F LIFINS

**NET PAY**  
 Voucher# 350005

0.00

DEPT TOTAL  
 000100  
 REG: 21,725.69  
 O/T: 0.00  
 EARNINGS 3: 192.31  
 EARNINGS 4: 0.00  
 EARNINGS 5: 21,918.00  
 GROSS: 21,918.00

**JURS ANALYSIS**  
 8.00 P PTO  
 192.31 P PTO  
 28.25 F LIFINS

**EARNINGS ANALYSIS**  
 9,904.15 V CHECK1

**VOLUNTARY DEC ANALYSIS**  
 1,200.00 W CHECK2  
 200.00 Y SAV1

BURGESS, TIM R  
 File: 060103  
 Dept: 060103  
 Rate: 10,000.00

**HOURS**  
 Reg: 95.67  
 O/T: 0.00  
 Hours 3&4: 0.00

**EARNINGS**  
 Reg: 1,040.00  
 O/T: 0.00  
 Earnings 3: 0.00  
 Earnings 4: 0.00  
 Earnings 5: 21,918.00  
 Gross: 1,040.00

**GROSS**  
 1,040.00

**STATUTORY DEDUCTIONS**  
 Federal: 104.54 FIT  
 64.48 SS  
 15.08 MED

**VOLUNTARY DEDUCTIONS**  
 853.40 V CHECK1  
 2.50 F LIFINS

**NET PAY**  
 Voucher# 350006

0.00

**ADP** Payroll Register 000093  
 ITI INTERNET SERVICE  
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 Batch: 2420-049  
 Period Ending: 08/31/2005  
 Week 35  
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**PERSONNEL**      **HOURS**      **EARNINGS**      **GROSS**      **STATUTORY DEDUCTIONS**      **VOLUNTARY DEDUCTIONS**      **NET PAY**

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File: 000110 Dept: 000100 Rate: 12.0000	86.67		6,250.00		6,250.00	1,093.50 FIT 387.50 SS 90.62 MED		4678.38 V CHECK1	Voucher# 320001	.00
DUTHIE III, GILBERT A File: 000110 Dept: 000100 Rate: 12.0000	485.00		485.00		485.00	10.89 FIT 30.13 SS 7.04 MED		437.94 V CHECK1	Voucher# 320002	.00
EHLI, MELISSA File: 000110 Dept: 000100 Rate: 2975.00	2,975.00		2,975.00		2,975.00	514.39 FIT 184.45 SS 43.13 MED		833.03 V CHECK1 200.00 Y SAV1	W CHECK2 Voucher# 320003	.00
EHLI, RONALD W File: 000110 Dept: 000100 Rate: 5,208.00	5,208.00		5,208.00		5,208.00	879.10 FIT 75.51 MED			Check# 20043129	.00
LLAPITAN, VIRGIL File: 000135 Dept: 000100 Rate: 2,083.00	2,083.00		2,083.00		2,083.00	152.04 FIT 129.15 SS 30.21 MED		1759.10 V CHECK1	12.50 F LIFINS Voucher# 320004	4,253.39
WHITE, ANN E File: 000135 Dept: 000100 Rate: 3,084.00	8.00 P 284.67 P		2,799.33	284.67 P	3,084.00	414.77 FIT 191.21 SS 44.72 MED		2417.55 V CHECK1	15.75 F LIFINS Voucher# 320005	.00
DEPT TOTAL 000100	465.85 REG 0.00 O/T 0.00 HOURS 3 0.00 HOURS 4	19,801.33 REG 284.67 EARNINGS 3 0.00 EARNINGS 5	.00 O/T .00 EARNINGS 4 20,086.00 GROSS			3,064.69 FIT 922.44 SS 291.23 MED		11,554.25 TOTAL DEDUCTIONS	6 Pays 4,253.39	.00
COURS, ANA, YSIL EARNINGS ANALYSIS	8.00 P PTO 284.67 P PTO									
VOLUNTARY DEC ANA, YSIL	28.25 F LIFINS		10,126.00					1,200.00 W CHECK2	200.00 Y SAV1	
BURGESS, TIM R File: 000134 Dept: 000200 Rate: 1040.00	1,040.00		1,040.00		1,040.00	104.54 FIT 64.48 SS 15.08 MED		853.40 V CHECK1	2.50 F LIFINS Voucher# 320006	.00

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ITI INTERNET SERVICE

Company Code: 6FU

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PERSONNEL		HOURS		EARNINGS		GROSS		STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY	
File	Dept	Rate	Reg	O/T	Hours 3&4	Reg	O/T	Earnings 3&4	Federal	State/Local	Federal	State/Local	Voucher#
DURAND, MICHAEL R	000155	56.97	56.97		38.4	6,250.00			1,093.50 FIT 387.50 SS 90.63 MED		4678.37 V CHECK1		300001
DUTHIE III, GILBERT	000155	294.00	294.00			294.00			.00 FIT 18.23 SS 4.27 MED		271.50 V CHECK1		300002
EHL, MELISSA	000155	2,975.00	2,975.00			2,975.00			514.39 FIT 184.45 SS 43.14 MED		1133.02 V CHECK1 300.00 Y SAV1	800.00 W CHECK2	300003
EHL, RONALD W.	000102	5,208.00	5,208.00			5,208.00			879.09 FIT 75.52 MED				Adjustment Void PP 00100833
LLAPITAN, VIRGIL	000135	2,083.00	2,083.00			2,083.00			879.10 FIT 75.51 MED				Check# 20040922 Pay 2 4,253.39
WHITE, ANN E	000100	3,084.00	3,084.00			3,084.00			152.04 FIT 129.15 SS 30.20 MED				Adjustment Void PP 00100834
DEPT TOTAL	000100	27,185.00	27,185.00	REG		27,185.00			414.77 FIT 191.21 SS 44.72 MED		1759.12 V CHECK1 12.50 F LIFINS	15.75 F LIFINS	300004 Pay 2 1,771.61
VOLUNTARY DEDUCTIONS													6 Pays 10,278.39

Batch : 6051-049 Period Ending : 07/31/2005 Week 30  
Pay Date : 07/29/2005 Page 1

ITI INTERNET SERVICE  
Company Code: 6FU



Payroll Register

000095

PERSONNEL	HOURS		EARNINGS		GROSS	STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
	Reg	O/T	Reg	O/T		Federal	State/Local			
DURAND, MICHAEL R File: 000105 Dept: 000100 Rate: 6250.00	26.67		6,250.00		6,250.00	1,093.50 FIT 387.50 SS 90.62 MED		4678.38 V CHECK1	Voucher# 280001	
OUTHIE III, GILBERT A File: 000103 Dept: 000100 Rate: 12,000.00	504.00		504.00		504.00	12.89 FIT 31.25 SS 7.30 MED		452.76 V CHECK1	Voucher# 280002	
EHLI, MELISSA File: 000117 Dept: 000100 Rate: 2975.00	85.67		2,975.00		2,975.00	514.39 FIT 184.45 SS 43.14 MED		1133.02 V CHECK1 300.00 Y SAV1	Voucher# 280003	
EHLI, RONALD W File: 000102 Dept: 000100 Rate: 3210.00	85.67					.00 FIT			Voucher# 280004	
LLAPITAN, VIRGIL T File: 000100 Dept: 000100 Rate: 5765.00						.00 FIT			Voucher# 280005	
MCCANN, AARON File: 000151 Dept: 000100 Rate: 9375.00	94.67		10,240.35		10,240.35	.00 FIT 634.90 SS 148.49 MED			Adjustment Void PP 00100818	
WHITE, ANN E File: 000130 Dept: 000100 Rate: 3064.00	95.67		3,084.00		3,084.00	.00 FIT 447.11-SS			Check# 20038609 Pay 2 447.11	
DEPT TOTAL 000100	370.02 REG 30 HOURS 3 30 HOURS 4	15.75 REG 00 O/T 00 HOURS 3 00 HOURS 4	23,053.35 REG 00 EARNINGS 3 00 EARNINGS 5	.00 O/T .00 EARNINGS 4 23,053.35 GROSS	3,084.00	414.77 FIT 191.20 SS 44.71 MED		2417.57 V CHECK1 15.75 F LIFINS	Voucher# 280006	.00 7 Pays 9,904.07
VOLUNTARY DEDUCTIONS ANALYSIS: 8,661.73 F LIFINS 300.00 W CHECK2 800.00 Y SAV1 9,904.07										

REG



Payroll Register  
000096

ITI INTERNET SERVICE  
Company Code: 6FU

Batch: 4851-049 Period Ending: 07/15/2005 Week 28  
Pay Date: 07/15/2005 Page 1

**PERSONNEL**

DURAND, MICHAEL R  
 File: 000185  
 Dept: 000100  
 Rate: 6250.00

DUTHIE III, GILBERT  
 A  
 File: 000185  
 Dept: 000100  
 Rate: 12,000.00

EHLI, MELISSA  
 File: 000117  
 Dept: 000100  
 Rate: 2975.00

EHLI, RONALD W.  
 File: 000102  
 Dept: 000100  
 Rate: 13210.00

JONES, DARLENE M  
 File: 000145  
 Dept: 000100  
 Rate: 14,000.00

LLAPITAN, VIRGIL T.  
 File: 000135  
 Dept: 000100  
 Rate: 5705.00

WHITE, ANN E  
 File: 000136  
 Dept: 000100  
 Rate: 3084.00

DEPT TOTAL  
 000100

VOLUNTARY DEDUCTIONS  
 ANDERSEN, PATRICIA L  
 File: 000100  
 Dept: 000200  
 Rate: 1250.00

**HOURS**  
 Reg: 95.67  
 O/T: Hours 3&4  
 Reg: 6,250.00  
 O/T: Earnings 3&4 Earnings 5

6,250.00

546.00

2,975.00

261.53

3,084.00

13,116.53 REG  
 .00 O/T  
 .00 EARNINGS 3  
 .00 EARNINGS 5  
 13,116.53 GROSS

19.50 F LIFINS  
 8,809.05 V CHECK1

1,501.24

**GROSS**  
 Federal  
 State/Local

1,093.50 FIT  
 387.50 SS  
 90.63 MED

16.89 FIT  
 33.85 SS  
 7.92 MED

514.39 FIT  
 184.45 SS  
 43.14 MED

.00 FIT

.00 FIT

.00 FIT  
 16.22 SS  
 3.79 MED

414.77 FIT  
 191.21 SS  
 44.72 MED

2,039.55 FIT  
 813.23 SS  
 190.20 MED

124.78 FIT  
 93.07 SS  
 21.76 MED

**STATUTORY DEDUCTIONS**  
 Federal  
 State/Local

4678.37 V CHECK1

487.34 V CHECK1

1133.02 V CHECK1 800.00 W CHECK2  
 300.00 Y SAV1

.00 FIT

.00 FIT

92.77 V CHECK1 145.00 Y SAV1  
 3.75 F LIFINS

2417.55 V CHECK1 15.75 F LIFINS

10,073.55 TOTAL DEDUCTIONS

1259.23 V CHECK1 2.40 F LIFINS

**VOLUNTARY DEDUCTIONS**

4678.37 V CHECK1

487.34 V CHECK1

1133.02 V CHECK1 800.00 W CHECK2  
 300.00 Y SAV1

.00 FIT

.00 FIT

92.77 V CHECK1 145.00 Y SAV1  
 3.75 F LIFINS

2417.55 V CHECK1 15.75 F LIFINS

10,073.55 TOTAL DEDUCTIONS

1259.23 V CHECK1 2.40 F LIFINS

**NET PAY**

Voucher# 260001

Voucher# 260002

Voucher# 260003

Voucher# 260004

Voucher# 260005

Voucher# 260006

Voucher# 260007

7 Pays

Voucher# 260008

**REG**

000097



Payroll Register

ITI INTERNET SERVICE  
 Company Code: 6FU

Batch: 4206-049 Period Ending: 06/30/2005 Week 26  
 Pay Date: 06/30/2005 Page 1

**PERSONNEL**

DURANO, MICHAEL R  
 File: 960117  
 Dept: 000100  
 Rate: 62.50 P

DUTHE III, GILBERT  
 A  
 File: 060117  
 Dept: 000100  
 Rate: 12.0000

EHLI, MELISSA  
 File: 060117  
 Dept: 000100  
 Rate: 2975.00

EHLI, RONALD W  
 File: 060102  
 Dept: 000100  
 Rate: 13210.00

JONES, DARLENE M  
 File: 000115  
 Dept: 000100  
 Rate: 1416.67

LLAPITAN, VIRGIL  
 File: 000135  
 Dept: 000100  
 Rate: 5705.00

WHITE, ANN E  
 File: 000117  
 Dept: 000100  
 Rate: 3084.00

DEPT TOTAL  
 000100

HOURS ANALYSIS  
 EARNINGS ANALYSIS  
 VOLUNTARY DEDUCTIONS

**EARNINGS**

Reg 6,250.00  
 O/T Earnings 3&4

Reg 312.00  
 O/T Earnings 3&4

Reg 2,975.00  
 O/T Earnings 3&4

Reg 13,210.00  
 O/T Earnings 3&4

Reg 1,285.91  
 O/T Earnings 3&4

Reg 5,705.00  
 O/T Earnings 3&4

Reg 3,084.00  
 O/T Earnings 3&4

Reg 32,821.91  
 O/T Earnings 3&4

Reg 130.76  
 O/T Earnings 3&4

Reg 0.00  
 O/T Earnings 3&4

Reg 32,952.67  
 O/T Earnings 3&4

Reg 8.00  
 O/T Earnings 3&4

Reg 130.75  
 O/T Earnings 3&4

Reg 32.00  
 O/T Earnings 3&4

Reg 13,870.76  
 O/T Earnings 3&4

Reg 800.00  
 O/T Earnings 3&4

Reg 445.00  
 O/T Earnings 3&4

Reg 9,649.30  
 O/T Earnings 3&4

Reg 7 Pays  
 O/T Earnings 3&4

Reg 9,649.30  
 O/T Earnings 3&4

**GROSS**

6,250.00

312.00

2,975.00

13,210.00

1,285.91

5,705.00

3,084.00

32,821.91

130.76

0.00

32,952.67

8.00

130.75

32.00

13,870.76

800.00

445.00

9,649.30

7 Pays

9,649.30

**STATUTORY DEDUCTIONS**

Federal  
 1,093.50 FIT  
 387.50 SS  
 90.62 MED

State/Local  
 .00 FIT  
 19.35 SS  
 4.53 MED

Federal  
 514.39 FIT  
 184.45 SS  
 43.13 MED

Federal  
 3,369.15 FIT  
 191.55 MED

Federal  
 121.04 FIT  
 87.83 SS  
 20.54 MED

Federal  
 940.90 FIT  
 353.71 SS  
 82.72 MED

Federal  
 414.77 FIT  
 191.21 SS  
 44.72 MED

Federal  
 6,453.75 FIT  
 1,224.05 SS  
 477.81 MED

Federal  
 15,147.76 TOTAL DEDUCTIONS

Federal  
 800.00 W CHECK2

Federal  
 445.00 Y SAV1

Federal  
 9,649.30

Federal  
 7 Pays

Federal  
 9,649.30

**VOLUNTARY DEDUCTIONS**

4678.38 V CHECK1  
 Voucher# 240001

288.12 V CHECK1  
 Voucher# 240002

1133.03 V CHECK1 800.00 W CHECK2  
 300.00 Y SAV1  
 Voucher# 240003

Check# 20033588  
 9,649.30  
 Voucher# 240004

1038.51 V CHECK1 145.00 Y SAV1  
 3.75 F LIFINS  
 Voucher# 240005

4315.17 V CHECK1 12.50 F LIFINS  
 Voucher# 240006

2417.55 V CHECK1 15.75 F LIFINS  
 Voucher# 240006

15,147.76 TOTAL DEDUCTIONS

800.00 W CHECK2

445.00 Y SAV1

9,649.30

7 Pays

9,649.30

**REG**



Payroll Register

ITI INTERNET SERVICE  
 Company Code: 6FU

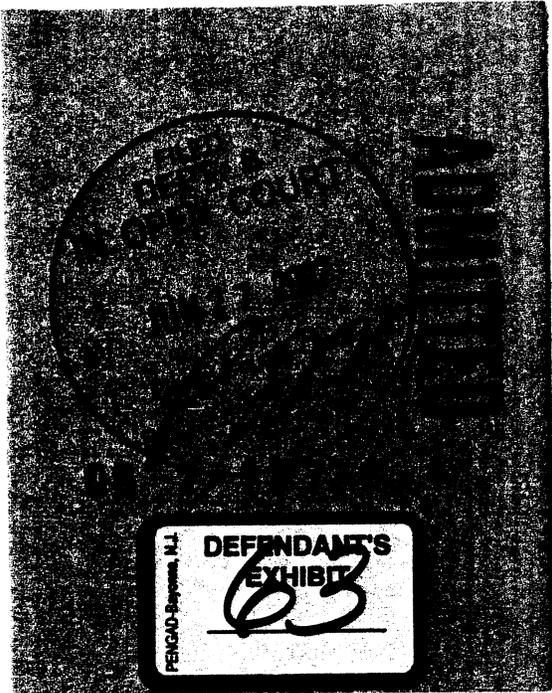
Batch : 2532-049 Period Ending : 06/15/2005 Week 24  
 Pay Date : 06/15/2005 Page 1

0000098

PERSONNEL		HOURS		EARNINGS		GROSS		STATUTORY DEDUCTIONS		VOLUNTARY DEDUCTIONS		NET PAY
File	Rate	Reg	O/T	Reg	O/T	Federal	State/Local	Federal	State/Local	Voucher#	Check#	
DURAND MICHAEL R File 000105 Dept 000100 Rate 6250.00	36.67	36.67		6,250.00		1,093.50 FIT 387.50 SS 90.63 MED		4678.37 V CHECK1		210001		
DUTHIE III, GILBERT A File 000105 Dept 000100 Rate 12.00	38.50	38.50		462.00		8.49 FIT 28.64 SS 6.69 MED		418.18 V CHECK1		210002		
EHLI, MELISSA File 000105 Dept 000100 Rate 2975.00	36.67	36.67		2,975.00		514.39 FIT 184.45 SS 43.14 MED		1133.02 V CHECK1 300.00 Y SAV1	800.00 W CHECK2	210003		
EHLI, RONALD W File 000105 Dept 000100 Rate 13210.00	36.67	36.67		13,210.00		3,369.15 FIT 191.54 MED				20030807		9,649.31
JONES, DARLENE M File 000105 Dept 000100 Rate 1416.67	36.67	36.67		1,416.67		121.04 FIT 87.83 SS 20.54 MED		1038.51 V CHECK1 3.75 F LIFINS	145.00 Y SAV1	210004		
LLAPITAN, VIRGIL T File 000105 Dept 000100 Rate 5705.00	36.67	36.67		5,705.00		940.90 FIT 353.71 SS 82.73 MED		4315.16 V CHECK1	12.50 F LIFINS	210005		
MCCANN, AARON J File 000105 Dept 000100 Rate 9375.00	36.67	36.67		9,375.00		.00 FIT 581.25 SS 135.94 MED		8664.31 V CHECK1	6.50 F LIFINS	210006		
WHITE, ANN E File 000105 Dept 000100 Rate 3084.00	36.67	36.67		3,084.00		414.77 FIT 191.21 SS 44.72 MED		2417.55 V CHECK1	15.75 F LIFINS	210007		
DEPT TOTAL 000100		365.19 REG 36.67 O/T 300.00 HOURS 3 300.00 HOURS 4		42,477.67 REG .00 EARNINGS 3 .00 EARNINGS 5 42,477.67 GROSS		6,462.24 FIT 1,814.59 SS 615.93 MED		23,935.60 TOTAL DEDUCTIONS		8 Pays 9,649.31		
VOLUNTARY		25.50 F LIFINS		22,865.10 V CHECK1		800.00 W CHECK2		445.00 Y SAV1				

REG

000099



FENICAD - Department, H.I.

DEFENDANT'S  
EXHIBIT

03

- 1. The Motion and Memorandum of Plaintiffs;
- 2. The Declaration of David B. Adler and attached exhibits;
- 3. The Declaration of Judy Johnston, and attached exhibits;
- 4. The Declaration of Henry (Jay) Gurley, and attached exhibits;
- 5. The Declaration of Jerry Cornwell, and attached exhibits;
- 6. The Complaint filed August 2, 2005

and also having considered

- 7. Defendants' Memorandum in Opposition to the Motion for Partial Summary Judgment
- 8. The Declaration of Tracy Shier
- 9. The Declaration of Pamela Ehli

and having further considered

- 10. The Plaintiffs' Reply in Support of Motion for Partial Summary Judgment
- 11. The Declaration of Ken Kieffer
- 12. The Declaration #2 of David B. Adler; AND
- 13. Plaintiff's Proposed Order (revised)

and having also considered the oral arguments of all counsel, ~~and the recommendations of the Special Master as set forth in his Final Report of November 15, 2005 submitted in compliance with this Court's Orders dated August 19, 2005 and September 9, 2005,~~ IT IS HEREBY ORDERED

*DBA*  
*MS*  
*28+*

THAT:

- 1. Plaintiffs' Rule 56 Motion is and shall be GRANTED.

The Court finds that RCW 23B.06.300 was violated by Defendants HIMC Corporation and the Board of Directors following and in conjunction with the unlawful issuance of 8,000,000 shares to Defendant RPE Family Trust; which the Court further finds was in violation of RCW 23B.08.<sup>300</sup> and the fiduciary duties owed to the shareholders by the Board of Directors and Defendants Pamela Ehli and Virgil Llapitan, And

*28+*  
*DBA*

- 2. The 8,000,000 shares issued to RPE Family Trust shall be rescinded by Defendants, and The Certificate for 8,000,000 shares is and shall be cancelled. Defendants shall so notify Fidelity Transfer Co. of this Order; And

*the Court rules as a matter of law that the by-laws cannot alter preemptive rights granted by the Articles of Incorporation and Washington law.*  
*28+*

ORDER, re SUMMARY JUDGMENT

DAVID B. ADLER, ESQ.  
520 Pike Street, #1415  
Seattle, Washington 98101  
Telephone: (206) 343-5991  
Wash. Bar #16585

*as soon as possible after*  
*USA*  
*JD*

3. A new shareholders' meeting shall be held ~~within 30-45 days~~ of the date of this Order ~~whichever is the earliest~~ in order to hold a new vote for Board of Directors. Appropriate Notice of the Shareholders' meeting shall be issued as soon as possible by HIMC and the Board of Directors. Such meeting shall be held under the direction of the Special Master; a new shareholders' list shall be prepared as per RCW 23B.07.200 that does not include the now cancelled 8,000,000 shares; the quorum shall be calculated without counting the 8,000,000 shares; and RPE Family Trust may vote such shares as it owns less the 8,000,000 shares.

4. ~~In order that the shareholders' meeting is held as soon as possible, the Court adopts and incorporates the attached time line suggested by Plaintiffs, provided that the Special Master may vary these dates as the exigencies demand, HIMC Corporation and the Board of Directors~~ <sup>are</sup> *Cooperate with the Special Master and* ~~is~~ ORDERED to perform all ministerial and administrative acts demanded by the Special Master so that there is no delay in notifying shareholders of the now Court Ordered special meeting and holding the said meeting as per this Order. The Special Master may hire any temporary staff for HIMC and prevent the termination of any existing staff of HIMC; and orders of the Special Master may and shall override any inconsistent directions of the officers and directors of HIMC.

*USA*  
*USA*  
*JD*

Entered in Open Court this 6 day of Jan. 6, 2006.

*Thomas Felnagle*  
HON. THOMAS FELNAGLE, Judge  
Pierce County Superior Court

FILED  
DEPT. 15  
IN OPEN COURT  
JAN 6 2006  
Pierce County Clerk  
By *[Signature]*  
Deputy

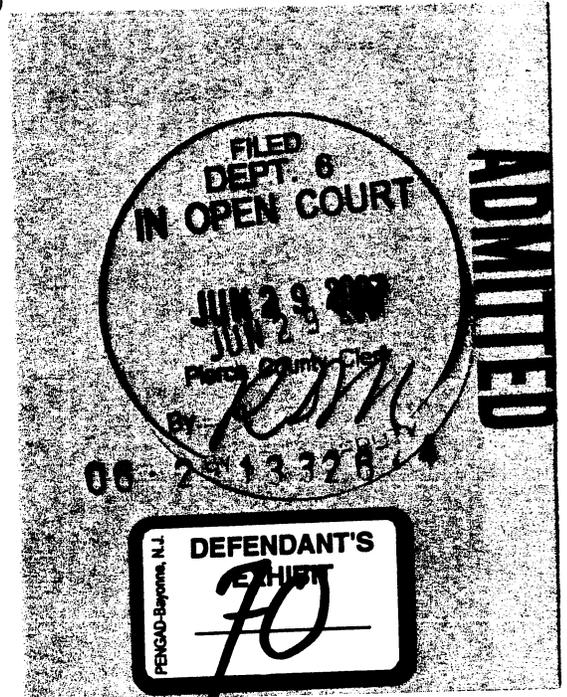
Presented by:

*David B. Adler*  
DAVID B. ADLER  
KENNETH KIEFFER, Attorneys for Plaintiffs

ORDER, re SUMMARY JUDGMENT

STATE OF WASHINGTON, County of Pierce  
ss: I, Kevin Stock, Clerk of the above  
entitled Court, do hereby certify that this  
foregoing instrument is a true and correct  
copy of the original now on file in my  
office: (206) 343-5991  
Bar #16585  
Page 3 of 3  
WITNESS WHEREOF, I hereunto set my  
hand and the Seal of said Court this  
day of JUN 27 2007, 20  
Kevin Stock, Clerk  
*[Signature]* Deputy

	3rd Qtr 2006	4th Qtr 2006	1st Qtr 2007
<b>Income</b>			
AP Processing Fees	\$ 57,574	\$ 95,896	\$ 48,588
Check Processing Fees	\$ 83,483	\$ 93,051	\$ 131,560
Hosting Fees	\$ 900	\$ 3,300	\$ 1,200
Monthly Service Fees	\$ 44,085	\$ 50,428	\$ 43,810
RCK Service Fees (LB)	\$ 21,591	\$ 16,391	\$ 14,334
Secondary Collections Revenues	\$ -	\$ 4,126	\$ 1,020
Sign-Up Fees	\$ 4,825	\$ 4,558	\$ 3,743
Sales Returns & Allowances	\$ (1,438)	\$ (1,016)	\$ (1,122)
<b>Total Income</b>	<b>\$ 211,019</b>	<b>\$ 266,734</b>	<b>\$ 243,133</b>
<b>Cost of Goods Sold</b>			
ACH Bank Fees	\$ 3,945	\$ 3,281	\$ 2,823
Postage	\$ 55,500	\$ 41,469	\$ 34,000
Supplies	\$ 9,291	\$ 1,213	\$ 9,500
Reseller Fees	\$ -	\$ 461	\$ 504
Verification	\$ 8,028	\$ 13,364	\$ 10,291
<b>Total Cost of Goods Sold</b>	<b>\$ 76,765</b>	<b>\$ 58,866</b>	<b>\$ 57,117</b>
<b>GROSS PROFIT</b>	<b>\$ 134,254</b>	<b>\$ 207,869</b>	<b>\$ 186,015</b>
<b>General Expenses</b>			
Meals & Entertainment	\$ -	\$ -	\$ 188
Travel	\$ 2,986	\$ 4,274	\$ 6,254
Advertising	\$ 276	\$ 684	\$ -
Investor/Public Relations	\$ 112	\$ 9,430	\$ -
Salaries & Wages	\$ 39,602	\$ 46,535	\$ 67,488
Bonus	\$ -	\$ 1,600	\$ -
Payroll Tax	\$ 8,552	\$ 9,367	\$ 14,376
Labor & Industry Insurance	\$ 262	\$ 203	\$ 231
Unemployment Insurance	\$ 1,582	\$ 1,845	\$ 1,113
Medical Insurance	\$ -	\$ -	\$ 4,533
Parking	\$ 3,383	\$ 2,537	\$ 2,537
Payroll Processing	\$ 12	\$ -	\$ -
Legal & Professional	\$ 47,040	\$ 46,834	\$ 24,750
Consulting Fees	\$ -	\$ -	\$ 11,945
Accounting	\$ 1,580	\$ 3,425	\$ 3,811
Rent	\$ 12,920	\$ 8,613	\$ 11,700
Telephone	\$ 3,356	\$ 3,311	\$ 2,597
Internet Service	\$ 9,143	\$ 11,531	\$ 8,163
Utilities	\$ 27	\$ -	\$ 54
Office Supplies	\$ 634	\$ 557	\$ 474
Shipping & Handling	\$ 648	\$ 929	\$ 952
Property/Liability Insurance	\$ 404	\$ 619	\$ 803
Building Maintenance	\$ 807	\$ 584	\$ 843
Software Purchases	\$ 5,065	\$ -	\$ -
Equip Purchases & Repairs	\$ 454	\$ 280	\$ 2,503
Equip Rent/Lease	\$ 7,273	\$ 5,376	\$ 7,536
Automobile Expense	\$ -	\$ -	\$ -
Depreciation Expense	\$ 4,467	\$ 28,249	\$ 2,668
Employee Relations	\$ -	\$ -	\$ -
Bank Service Charges	\$ 140	\$ 235	\$ 383
Dues & Subscriptions	\$ 25	\$ 50	\$ 2,509



CHAPTER 195.

[H. B. 128.]

REBATING OF WAGES.

AN ACT relating to labor; declaring the rebating of wages, underpayment of agreed wages and certain deductions from wages to be unlawful; providing penalties and providing a civil remedy.

Be it enacted by the Legislature of the State of Washington:

Unlawful acts.

SECTION 1. Any employer or officer, vice-principal or agent of any employer, whether said employer be in private business or an elected public official, who

(1) Shall collect or receive from any employee a rebate of any part of wages theretofore paid by such employee; or

(2) Wilfully and with intent to deprive the employee of any part of his wages, shall pay any employee a lower wage than the wage such employer is obligated to pay such employee by any statute, ordinance, or contract; or

(3) Shall wilfully make or cause another to make any false entry in any employer's books or records purporting to show the payment of more wages to an employee than such employee received; or

(4) Being an employer or a person charged with the duty of keeping any employer's books or records shall wilfully fail or cause another to fail to show openly and clearly in due course in such employer's books and records any rebate of or deduction from any employee's wages; or

(5) Shall wilfully receive or accept from any employee any false receipt for wages;

Penalty.

Shall be guilty of a misdemeanor. Any employee who shall accept or continue in the employment of any employer who is guilty of any of the above violations, with knowledge that such employer is guilty thereof, shall be guilty of a misdemeanor.

Sec. 2. The provisions of section 1 shall not make

it unlawful for an employer to withhold or divert any portion of an employee's wages when required or empowered so to do by state or federal law or when a deduction has been expressly authorized in writing in advance by the employee for a lawful purpose accruing to the benefit of such employee nor shall the provisions of section 1 make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation: *Provided*, That the employer derives no financial benefit from such deduction and the same is openly, clearly and in due course recorded in the employer's books. Authorized deductions.

SEC. 3. Any employer and any officer, vice-principal or agent of any employer who shall violate any of the provisions of subdivisions (1) and (2) of section 1 shall be liable in a civil action by the aggrieved employee or his assignee to judgment for twice the amount of the wages unlawfully rebated or withheld by way of exemplary damages, together with costs of suit and a reasonable sum for attorney's fees: *Provided, however*, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations. Civil action.

SEC. 4. The violations by an employer or any officer, vice-principal, or agent of any employer of any of the provisions of subdivisions (3), (4), and (5) of section 1 shall raise a presumption that any deduction from or underpayment of any employee's wages connected with such violation was wilful. Deduction presumed wilful.

SEC. 5. If any section, sub-section, sentence or clause of this act shall be adjudged unconstitutional, such adjudication shall not affect the validity of the act as a whole or of any section, sub-section, sentence or clause thereof not adjudged unconstitutional. Partial invalidity.

Passed the House March 8, 1939.

Passed the Senate March 7, 1939.

Approved by the Governor March 17, 1939.

# House Bill No. 128

STATE OF WASHINGTON, TWENTY-SIXTH REGULAR SESSION.

Read first time January 26, 1939, ordered printed and referred to  
Committee on Labor and Labor Statistics.

## AN ACT

Relating to labor; declaring the rebating of wages, under-payment of agreed wages and certain deductions from wages to be unlawful; providing penalties and providing a civil remedy.

*Be it enacted by the Legislature of the State of Washington:*

- 1 SECTION 1. Any employer or officer, vice-principal or agent of any employer who
- 2 (1) Shall collect or receive from any employee a rebate of any part of wages there-
- 3 tofore paid by such employer to such employee; or
- 4 (2) Wilfully and with intent to deprive the employee of any part of his wages, shall
- 5 pay any employee a lower wage than the wage such employer is obligated to pay such
- 6 employee by any statute, ordinance, agreement arrived at through collective bargaining,
- 7 or contract; or
- 8 (3) Shall wilfully make or cause another to make any false entry in any employer's
- 9 books or records purporting to show the payment of more wages to an employee than
- 10 such employee received; or
- 11 (4) Being an employer or a person charged with the duty of keeping any employer's
- 12 books or records shall wilfully fail or cause another to fail to show openly and clearly in
- 13 due course in such employer's books and records any rebate of or deduction from any
- 14 employee's wages; or
- 15 (5) Shall wilfully receive or accept from any employee any false receipt for wages;
- 16 Shall be guilty of a misdemeanor.
- 17 SEC. 2. The provisions of section 1 shall not make it unlawful for an employer to with-
- 18 hold or divert any portion of an employee's wages when required or empowered so to do
- 19 by state or federal law or when a deduction has been expressly authorized in writing
- 20 in advance by the employee for a lawful purpose accruing to the benefit of such employee:
- 21 *Provided*, That the employer derives no financial benefit from such deduction and the
- 22 same is openly, clearly and in due course recorded in the employer's books.
- 23 SEC. 3. Any employer and any officer, vice-principal or agent of any employer who
- 24 shall violate any of the provisions of subdivisions (1) and (2) of section 1 shall be liable
- 25 in a civil action by the aggrieved employee or his assignee to judgment for twice the

1 amount of the wages unlawfully rebated or withheld by way of exemplary damages,  
2 together with costs of suit and a reasonable sum for attorney's fees.

3 SEC. 4. The violation by any employer, or any officer, vice-principal or agent of any  
4 employer of any of the provisions of subdivisions (3), (4), and (5) of section 1 shall raise  
5 a presumption that any deduction from or underpayment of any employee's wages con-  
6 nected with such violation was wilful. In any action or prosecution under this act evi-  
7 dence of other violations of the act by the defendant within one year of the date of the of-  
8 fense charged shall be admissible to establish intent.

9 SEC. 5. If any section, subsection, sentence or clause of this act shall be adjudged un-  
10 constitutional, such adjudication shall not affect the validity of the act as a whole or of  
11 any section, subsection, sentence or clause thereof not adjudged unconstitutional.

IN THE HOUSE.

STATE OF

Read first

Relating to the protecti  
amending section 2  
utes; section 2581,

Be it enacted by the Le.

1 SECTION 1. Secti  
2 Statutes; section 25  
3 Section 2. Any  
4 trolled and without  
5 a public nuisance b  
6 ration \* \*  
7 required to control  
8 est officer, and if  
9 neglect or fail to d  
10 ing with his author  
11 thus constituted by  
12 ered from said  
13 \* \* at law a  
14 also constitute a lie  
15 forestry, or authori  
16 closed in the manne  
17 It shall be the duty  
18 \* \* \* or  
19 When a fire occu  
20 available employees  
21 the necessary crew  
22 authorized deputies  
23 left without such fi  
24 in writing by the su

House Amendment to House Bill No. 128  
By Representative Hurley, (Jos. E.)

Amend section 3, page 2, line 9 of the original bill, being page 2, line 2 of the printed bill, by adding thereto a new sentence to read as follows: "Provided, however, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations. Adopted 2/14/39

House Amendment to House Bill No. 128  
By Representative Woodall

Amend the bill - strike the whole of section 4. Adopted 2/14/39

SENATE AMENDMENT TO ENGROSSED HOUSE BILL NO. 128  
By Senator Kyle

Amend section 4 in the first line of the House Amendment to Sec. 4 by striking the word "employee" and inserting in lieu thereof the word "employer"

Adopted 2/14/39

House Amendment to House Bill No. 128  
By Representative Armstrong

SENATE AMENDMENT TO ENGROSSED HOUSE BILL NO. 128

Amend Section 1, sub-title 2, line 15 of the original bill, the same being Section 1, sub-title 2, line 6 of the printed bill after the word "ordinance" by striking the following words and comma: "agreement arrived at through collective bargaining,"

continue in the employment of any employer who guilty of any of the above violations, with

SENATE AMENDMENT TO ENGROSSED HOUSE BILL NO. 128  
By Senator Kerstetter

Amend Sec. 2, line 20, page 1 of the printed bill, after the word "employee" by adding the following:

nor shall the provisions of Section 1 make it unlawful for an employer to withhold deductions for medical, surgical, or hospital care or service, pursuant to any rule or regulation"

House Amendment to House Bill No. 128  
By Representative Hurley, (Jos. E.)

Amend section 3, page 2, line 9 of the original bill, being page 2, line 2 of the printed bill, adding thereto a new sentence to read as follows: "Provided, however, That the benefits of this section shall not be available to any employee who has knowingly submitted to such violations."  
Adopted 2/14/39

House Amendment to House Bill No. 128  
By Representative Woodall

Amend the bill - strike the whole of section 4.  
Adopted 2/14/39

House Amendment to House Bill No. 128  
By Representative Henry

Amend the bill by adding thereto a new section to be known as section 4 to read as follows:  
Sec. 4. The violations by an employee or any officer, vice-principal, or agent of any employer of any of the provisions of subdivisions (3), (4), and (5) of section 1 shall raise a presumption that any deduction from or underpayment of any employee's wages connected with such violation was wilful."  
Adopted 2/14/39

shall collect or receive from any employee a rebate of any part of wages there-

House Amendment to House Bill No. 128  
By Representative Armstrong

Amend section 1, page 1, line 2 of the original bill, being line 1 of the printed bill, after the word "employer" and before the word "who" insert a comma (,) and the following: ", whether said employer be in private business or an elected public official,".  
Adopted 2/14/39

his wages, shall  
be deducted to pay such  
costs of collective bargaining,

in any employer's  
wages more than

House Amendment to House Bill No. 128  
By Representative Hurley, (Jos. E.)

Amend section 1, subsection (5), page 1, line 25 of the original bill, being line 16 of the printed bill, by adding thereto a new sentence to read as follows: "Any employee who shall accept or continue in the employment of any employer who is guilty of any of the above violations, with knowledge that such employer is guilty thereof, shall be guilty of a misdemeanor."  
Adopted 2/14/39

in any employer's  
wages and clearly in  
writing from any

deduction for wages;

employer to with-  
hold so to do  
in writing  
of such employee:

- 21 Provided, That the employer derives no financial benefit from such deduction and the
- 22 same is openly, clearly and in due course recorded in the employer's books.
- 23 SEC. 3. Any employer and any officer, vice-principal or agent of any employer who
- 24 shall violate any of the provisions of subdivisions (1) and (2) of section 1 shall be liable
- 25 in a civil action by the aggrieved employee or his assignee to judgment for twice the