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WASHINGTON STATE  
SUPREME COURT

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No. 93056-2

SUPREME COURT  
OF THE STATE OF WASHINGTON

CERTIFICATION FROM UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
IN

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**MICHAEL ALLEN,**

**Appellant,**

**v.**

**ZECHARIAH CLIFTON DAMERON IV, and  
DANIEL STANDEN,**

**Respondents.**

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**OPENING BRIEF OF RESPONDENTS (*Defendants*)  
ZECHARIAH CLIFTON DAMERON IV AND DANIEL STANDEN**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
I. INTRODUCTION AND SUMMARY OF ARGUMENT .....	1
II. STATEMENT OF CASE .....	6
A. Factual Background .....	6
1. Key Players and Factual Background .....	6
2. Kalman Offers Allen Employment in the U.S. as Interim CFO of AIS .....	7
3. AIS Enters Default and Considers Winding Down Operations .....	9
4. AIS Prepares for and Implements AIS's Chapter 7 Bankruptcy Filings .....	13
5. Subsequent Developments .....	15
6. The AIS Vacation Payoff Provision on Which Allen Relies .....	15
B. Procedural Background .....	17
III. CERTIFIED QUESTIONS .....	18
IV. ARGUMENT .....	19
A. Standard of Review and Power to Reformulate Certified Questions .....	19
B. The Court Must Interpret RCW 49.52 in a Manner Consistent with the Legislature's Volitional Decision to Exclude Directors From the List of Individuals who can be held Liable .....	20
C. The Plain Language of the Statute, as Underscored by <i>Ellerman</i> and its Progeny, Control this Court's Answers to the Certified Questions .....	26
D. Public Policy Favors Respondents' Position and Helps to Foster an Orderly and Logical Transition to Bankruptcy .....	36
V. CONCLUSION .....	39

## TABLE OF AUTHORITIES

	Page(s)
<b>FEDERAL CASES</b>	
<i>Broad v. Mannesmann Anlagenbau AG</i> , 196 F.3d 1075 (9th Cir. 1999).....	19
<i>Coley v. Vannguard Urban Improvement Assoc., Inc.</i> , 2014 U.S. Dist. LEXIS 135608 (E.D.N.Y. Sept. 24, 2014) .....	25, 26
<i>DeWald v. Amsterdam Housing Auth.</i> , 823 F. Supp. 94 (N.D.N.Y. 1993).....	25
<i>Parents Involved in Community Schools v. Seattle School Dist, No. 1</i> , 294 F.3d 1085 (9th Cir. 2002).....	19
<b>STATE CASES</b>	
<i>Becerra Becerra v. Expert Janitorial, LLC</i> , 181 Wn.2d 186, 332 P.3d 415 (2014).....	25
<i>Brandt v. Impero</i> , 1 Wn. App. 678, 463 P.2d 197 (1969).....	3
<i>Carlsen v. Global Client Solutions, LLC</i> , 171 Wn.2d 486, 256 P.3d 321 (2011).....	19
<i>Champagne v. Thurston County</i> , 163 Wn.2d 69, 178 P.3d 936 .....	29
<i>Danny v. Laidlaw Transit Servs., Inc.</i> , 165 Wn.2d 200, 193 P.3d 128 (2008).....	19
<i>Davenport v. Washington Educational Association</i> , 147 Wn. App. 704, 197 P.3d 686 (2008).....	21
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 942 P.2d 351 (1997).....	20
<i>Ellerman v. Centerpoint Prepress, Inc.</i> , 143 Wn.2d 514, 22 P.3d 795 (2001).....	1, 3, 5, 20, 22, 23, 24, 26, 27 28, 29, 31, 32, 35, 36, 38, 39, 40

	<b>Page(s)</b>
<i>In re Dependency of M.H.P.</i> , 184 Wn.2d 741, 364 P.3d 94 (2015).....	21, 22
<i>In re Det. of Williams</i> , 147 Wn.2d 476, 55 P.3d 597 (2002).....	22
<i>Jumamil v. Lakeside Casino, LLC</i> , 179 Wn. App. 665, 319 P.3d 868 (2014).....	22
<i>LaCoursiere v. CamWest Dev., Inc.</i> , 181 Wn.2d 734, 339 P.3d 963 (2014).....	30
<i>McKown v. Simon Prop. Grp., Inc.</i> , 182 Wn.2d 752, 344 P.3d 661 (2015).....	19
<i>Morgan v. Kingen</i> , 166 Wn.2d 526, 210 P.3d 995 (2009).....	1, 2, 3, 22, 31, 32, 33, 34, 35, 36
<i>Rekhter v. Dep't of Soc. &amp; Health Servs.</i> , 180 Wn.2d 102, 323 P.3d 1036 (2014)....	1, 3, 23, 26, 28, 29, 31, 38, 40
<i>Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC</i> , 171 Wn.2d 736, 257 P.3d 586 (2011).....	20
<i>Saucedo v. John Hancock Life &amp; Health Ins. Co.</i> , 185 Wn.2d 171, 369 P.3d 150 (2016).....	19
<i>Schilling v. Radio Holdings, Inc.</i> , 136 Wn.2d 152, 961 P.2d 371 (1998).....	3, 29, 32, 33, 37
<i>Smith v. Safeco Ins. Co.</i> , 150 Wn.2d 478, 78 P.3d 1274 (2003).....	19
<i>Thornell v. Seattle Serv. Bureau, Inc.</i> , 184 Wn.2d 794, 363 P.3d 587 (2015).....	23
<i>Walker v. Windsor Court Homeowners Ass'n</i> , 35 A.D.3d 725, 827 N.Y.S.2d 214 (2d Dep't 2006).....	25

	<b>Page(s)</b>
<b>STATE STATUTES</b>	
RCW 23B.08.240 .....	26, 27
RCW 49.52 .....	1, 2, 3, 4, 5, 19, 20, 21, 22, 25, 26, 27, 28, 29, 30, 35, 36, 38, 39, 40
RCW 49.52.050 .....	17, 18, 28, 31, 39
RCW 49.52.050(1) .....	30
RCW 49.52.050(2) .....	28, 29
RCW 49.52.070 .....	4, 17, 18, 20, 28, 32
RCW 49.56.010 .....	37
RCW 49.56.020 .....	37
<b>REGULATIONS</b>	
WAC 296-126-023 .....	37
<b>OTHER AUTHORITIES</b>	
Oxford English Dictionary, 2nd ed., Oxford University Press, 1989.....	28
Restatement (Second) of Agency .....	23
Restatement 2d of Agency, § 14C (1958) .....	23, 27
Restatement 2d of Agency, § 14C, cmt. b. ....	23, 27

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Respondents Zechariah Clifton Dameron IV and Daniel Standen demonstrated they were entitled to summary judgment on Appellant Michael Allen's RCW 49.52 claims alleging unpaid wages, accrued but unused vacation time, and severance pay because they were non-officer Board of Directors members of employer Advanced Information Systems, Inc. ("AIS") who had resigned their positions before Allen's final wages were due and did not make any decision (much less a willful one) to withhold the wages Allen seeks.

In rendering its decision, the District Court correctly applied the controlling principles espoused by the Washington Supreme Court in *Ellerman v. Centerpoint Prepress, Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001) and its progeny, which clearly and unambiguously establish that "in order to prevail on a wage claim, the employee must show that the party withholding the wages was *both* an agent and had control over the payment of wages." *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 123, 323 P.3d 1036 (2014) (italics in original) (citing *Ellerman*, 143 Wn.2d at 522-23).

Unable to square his desired result with straightforward and long-standing principles of Washington law, Allen comes before the Court with near talismanic reliance on dicta from the case of *Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009)—a matter that can only be properly understood when considered within the specific factual context in which it arose. Specifically, *Morgan* is a case in which the defendants, Kingen and

Switzer, exercised their authority as officers of Funsters Grand Casino, Inc., and made specific, volitional decisions to withhold payment from employees whose wages were due and owing, and then continued to exert control over the company even after bankruptcy proceedings had been initiated.

While *Morgan* is inapposite and does not control the outcome of the present dispute, its background does underscore two key principles requiring consideration by this Court. The first, as expressly delineated in the District Court's framing of the certified questions, considers whether and to what extent an officer or other individual falling within the scope of RCW 49.52 can be liable for wages when his or her ability to exert control over payment is taken away prior to the time the wages become due and owing. The second principle, which is necessarily implied, but not expressly part of the framing of the certified questions, considers whether non-officer members of a Board of Directors, such as the Respondents herein, are part of the class of individuals falling within the scope of RCW 49.52, such that personal liability can attach.

With regard to the first principle, the District Court correctly found that the result in *Morgan* was grounded in the power bestowed upon and exercised by the defendants *prior to* the loss of authority attendant to the initiation of Chapter 7 bankruptcy proceedings, and that the Court did not meaningfully address the fact that Kingen and Switzer had lost the ability to pay some of the wages by the time they came due. The District Court properly resolved this analytic gap in *Morgan* by looking to

well-established tenets of law governing individual liability for wage claims, which have consistently required the actor to have “control over the payment of wages” and be a “free agent.” *Rekhter*, 180 Wn.2d at 123; *Schilling v. Radio Holdings, Inc.*, 136 Wn.2d 152, 159-60, 961 P.2d 371 (1998) (internal quotation marks omitted) (quoting *Brandt v. Impero*, 1 Wn. App. 678, 681, 463 P.2d 197 (1969)).

To the extent this Court finds any conflict between the actual holding of *Morgan*, on the one hand, and the holdings of *Ellerman* and its progeny, on the other, the expansive reading of *Morgan* advocated by Allen must be rejected, as it impermissibly conflates the concept of a *financial inability* to pay with the concept of the *power and authority* to pay. Presence of the former is firmly established as being insufficient to remove the actor from the realm of personal liability, whereas the latter is the very touchstone upon which personal liability is based and must be present in every case. Indeed, the *Morgan* Court expressly framed the matter before it as concerning a defendant’s financial status or ability to pay and *not* as a matter implicating the underlying, predicate requirement of power or authority. *Morgan*, 166 Wn.2d at 533.

The *Morgan* Court’s lack of focus on the predicate requirement of power and authority is not surprising, given the undisputed evidence showing that the individual defendant actors therein made volitional decisions to withhold wages at times when they were already due and owing, as well as the fact that the defendants were *officers* of the corporation, a class of individuals expressly falling within the scope of

RCW 49.52, with the actual authority and power to act individually and directly affect the employer's payment decisions. This latter consideration forms the basis of the second principle that must be given due regard herein, and provides an independent ground supporting the District Court's decision.

Indeed, a failure to consider the concept would render the questions before this Court wholly inapplicable to the actual dispute at hand, since they are framed entirely in terms of whether an individual "officer, vice principal, or agent" of an employer can be liable for wages when "his or her employment with the employer . . . was terminated before the wages came due and owing." In contrast, Respondents herein acted solely as members of the AIS Board of Directors, and were neither officers, vice principals, or agents of AIS, nor employees of AIS.

This Court must give effect to the Washington Legislature's deliberate decision to omit directors from the statute's list of individuals who can be personally liable when an employer fails to pay an employee's wages. RCW 49.52 extends personal liability *only* to an employer's "officer[s], vice principal[s] or agent[s]." The statute does not mention an employer's "directors" as a separate category of actors who can be held individually liable. *See* RCW 49.52.070.

The Washington Legislature is clearly aware that officers and directors play separate roles in corporate life. There are literally hundreds of Washington statutes that contain separate references to these two different types of actors. The conspicuous omission of "directors" from

RCW 49.52.070 clearly indicates that individual liability cannot be imposed based on an individual's conduct as a director. This notion is not only directly in line with the unambiguous indicia of legislative intent, it is grounded in good reason and established legal doctrine. As a matter of corporate law, a Board member is not empowered to act individually on behalf of an organization; rather, he or she can only vote in favor of the corporation taking action in circumstances where a required quorum is present; and Courts that have actually considered the issue have found personal liability for such action lacking.

In short, whether grounded in the judge-made holdings of *Ellerman* and its progeny, the specific language of the RCW 49.52 and any attendant indicia of legislative intent, or some combination thereof, the District Court correctly interpreted Washington law and achieved the appropriate result under the circumstances of the instant case. To hold otherwise would not only do violence to the foregoing legal principles, it would also allow Allen, who resumed working for an AIS subsidiary immediately upon his separation from AIS, to achieve a substantial windfall based on a purported technical violation of the parties' agreement and any statutes implicated thereby.

Finally, to the extent the Court is inclined to consider general notions of public policy in rendering its decision, the Legislature has already done much of the work for the Court. This is true not only with respect to the particular statutory constructs and related indicia of legislative intent referenced above, but also through its provision of a

preference for wage claims in bankruptcy, which has existed as a matter of statute for more than a century. Further, the position advocated by Respondents serves to encourage an employer's agents and associates to continue their relationship with an enterprise and assist it with an orderly and measured transition into bankruptcy. In contrast, Allen's position actively incentivizes such individuals to avoid making any kind of decision about how to address a corporation's financial distress for fear of liability attaching, leading to a leadership vacuum at a time when such guidance is needed most.

## II. STATEMENT OF CASE

### A. Factual Background

#### 1. Key Players and Factual Background

Steven Kalman, formerly the Third Party Defendant in the underlying action, became the President and CEO of AIS in late 2004.<sup>1</sup> He received a seat on the company's Board of Directors at that time.<sup>2</sup>

AIS developed, manufactured, and sold virtual reality products for various government agencies, including law enforcement, the military, and the Department of Homeland Security.<sup>3</sup> AIS was only profitable twice in the entire history of the company.<sup>4</sup>

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<sup>1</sup> See Deposition of Steven Kalman (July 30, 2015) taken in the matter of *Kalman v. Standen, et al.* case, No. 14-cv-01125 ("Kalman Dep. (*Kalman*)"), **Exhibit A** to the Declaration of Karen P. Kruse Dated September 8, 2015 ("Kruse Decl."), Dkt. No. 38, at 22:4-7, 23:22-25, 26:17-20. The Third-Party Complaint against Kalman was dismissed by the District Court upon stipulation of the parties on May 18, 2016.

<sup>2</sup> Kalman Dep. (*Kalman*) at 42:22-24.

<sup>3</sup> *Id.* at 24:23-26:16.

<sup>4</sup> *Id.* at 53:23-54:10.

Respondents Dameron and Standen, along with John Rigas, are individuals who were and are professionally affiliated with Sciens Capital Management LLC (“Sciens”), a private equity firm in New York City.<sup>5</sup> Sciens is in the business of investment management. Partnerships set up by Sciens-affiliated entities were investors in AIS.<sup>6</sup> The Respondents and Mr. Rigas were also on the AIS Board of Directors during at least some of the relevant times.<sup>7</sup>

Kayne Anderson Mezzanine Partners (“KAMP”) was AIS’s senior secured lender.<sup>8</sup> On November 9, 2010, KAMP, AIS, and Wells Fargo (AIS’s bank) entered into a Deposit Account Control Agreement by which the parties agreed, among other things, that KAMP could prevent AIS from accessing its Wells Fargo deposit accounts upon written notification from KAMP.<sup>9</sup>

## **2. Kalman Offers Allen Employment in the U.S. as Interim CFO of AIS**

AIS had various subsidiaries. One of those subsidiaries was Advanced Interactive Solutions, Ltd. (“AIS Limited” or “AIS Ltd.”), located in the United Kingdom.<sup>10</sup> Appellant Michael Allen began working

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<sup>5</sup> See Declaration of Daniel Standen (“Standen Decl.”), **Exhibit B** to Kruse Decl., at ¶ 6; Declaration of John Rigas (“Rigas Decl.”), **Exhibit B** to Kruse Decl., at ¶ 6; Declaration of Clif Dameron (“Dameron Decl.”), **Exhibit B** to Kruse Decl., at ¶ 6.

<sup>6</sup> See Deposition of Michael Allen (July 31, 2015) (“Allen Dep.”), **Exhibit C** to Kruse Decl., at 50:4-51:7.

<sup>7</sup> See Standen Decl. at ¶ 7; Rigas Decl. at ¶ 7; Dameron Decl. at ¶ 7. Mr. Rigas resigned from the AIS Board effective February 27, 2013, and thus was no longer a Board member when Allen terminated from AIS employment. See Rigas Decl. at ¶ 7 and Exhibit A thereto.

<sup>8</sup> Kalman Dep. (*Kalman*) at 53:15-22.

<sup>9</sup> See Kruse Decl. at ¶ 5 and **Exhibit D** (Deposit Account Control Agreement).

<sup>10</sup> Allen Dep. at 20:4-11.

for AIS Limited as a finance director in 2003.<sup>11</sup> Allen's title changed to Group Finance Director once AIS Limited had its own subsidiaries.<sup>12</sup>

In 2010, Allen came to AIS in the United States from Nitor Projects (Asia) Private, Limited, another subsidiary of AIS. Allen's assignment to AIS was on an interim, at-will basis.<sup>13</sup> After negotiations, on April 20, 2010, Allen signed an offer letter issued by Kalman.<sup>14</sup> The letter set out the following key terms: Allen's job at AIS was "interim Chief Financial Officer;" he would be paid \$200,000 per year, on a bi-weekly basis (\$150,000 of which was salary and the remainder an "allowance"); he would receive 20 days of paid leave per year;<sup>15</sup> and, in the event of Allen's "involuntary departure while in this interim role from AIS for other than Gross Misconduct," Allen would receive three months' pay "in lieu of notice as a conditioned [sic] for a complete release" from Allen.<sup>16</sup> Kalman did not discuss Allen's offer letter or interim employment terms with Dameron or Standen (or Rigas) before Kalman extended this interim employment offer to Allen.<sup>17</sup>

Allen's offer letter from Kalman clearly conveys the interim nature of Allen's assignment to AIS. Not only does it explicitly offer Allen an interim CFO assignment, the letter also refers to adjusting Allen's salary

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<sup>11</sup> *Id.* at 22:13-24:3.

<sup>12</sup> *Id.* at 24:4-10.

<sup>13</sup> *Id.* at 34:8-35:1, 41:17-42:9 and Exhibit 5 (Allen's offer letter).

<sup>14</sup> Allen Dep. at Exhibit 5.

<sup>15</sup> As explained below, because Allen came from an international subsidiary of AIS, he received more vacation time than other U.S. employees.

<sup>16</sup> Allen Dep. at Exhibit 5.

<sup>17</sup> See Deposition of Steven Kalman (August 1, 2015) ("Kalman Dep. (*Allen*)"), Exhibit E to Kruse Decl., at 115:3-9.

and benefits “[o]nce this assignment ends”<sup>18</sup> at which time it contemplates Allen’s “return to a Nitor or AIS Ltd. position.”<sup>19</sup> The letter also states, “We of course reserve the right to make whatever modifications in this package we believe are appropriate.”<sup>20</sup> Allen testified that his title never changed from interim CFO to “regular” CFO.<sup>21</sup>

Neither Standen nor Dameron was aware of Allen’s offer letter or its severance provision.<sup>22</sup> Dameron testified that he recalled himself and Standen being surprised to learn that Allen had a severance claim, and Dameron noted that the AIS Board of Directors did not approve Allen’s severance offer from Kalman.<sup>23</sup>

### **3. AIS Enters Default and Considers Winding Down Operations**

AIS had defaulted on several loan covenants to KAMP in the past.<sup>24</sup> Previously, KAMP had excused AIS’s defaults on its loan covenants by renewing KAMP’s agreements with AIS (such as through a forbearance agreement).<sup>25</sup>

However, on February 14, 2013, KAMP ceased forbearing, seized exclusive control of AIS’s Wells Fargo accounts, and instructed Wells

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<sup>18</sup> Allen Dep. at Exhibit 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> Allen Dep. at 42:13-16.

<sup>22</sup> See Deposition of Daniel Standen (“Standen Dep.”), **Exhibit F** to Kruse Decl., at 15:19-16:20, 124:14-125:16, 133:3-17, and Exhibit 4; Deposition of Clif Dameron (“Dameron Dep.”), **Exhibit G** to Kruse Decl., at 18:20-20:12, 22:25-23:13, 22:25-23:13, and Exhibit 4.

<sup>23</sup> Dameron Dep. at 19:10-20:12, 20:24-22:3.

<sup>24</sup> Kalman Dep. (*Kalman*) at 71:15-72:2; Allen Dep. at 70:23-72:1.

<sup>25</sup> Kalman Dep. (*Kalman*) at 72:4-8; Allen Dep. at 72:3-73:24.

Fargo to transfer all available funds to KAMP's account.<sup>26</sup> At an AIS Board meeting on February 15, 2013, "it was resolved to issue a letter to KAMP stating that payroll moneys must be released or the employees would have to be terminated."<sup>27</sup> The Board wrote to KAMP that same day, reminding it that AIS needed access to its accounts to pay its employees and warning KAMP that if AIS was not in a position to meet payroll on Monday morning, the Board will have no choice but to terminate AIS's employees.<sup>28</sup> As Kalman put it, "the termination of [AIS's] US employees would equate to the demise of the core of the business."<sup>29</sup>

On February 16, 2013, KAMP agreed to grant AIS access to \$316,061.25 so that it could pay its U.S. employees.<sup>30</sup> On February 17, 2013 (a Sunday), AIS's Board met again and authorized "Mr. Allen and [Chief Executive Officer David] McGrane to take such actions necessary to pay" those employees.<sup>31</sup>

On February 19, 2013, KAMP issued an Amended Access Termination Notice, instructing Wells Fargo to cease honoring the AIS's instructions with respect to AIS's U.S. bank accounts and to commence

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<sup>26</sup> Kruse Decl. at ¶ 9 and **Exhibit H** (Access Termination Notice).

<sup>27</sup> Kruse Decl. at ¶ 10 and **Exhibit I** (AIS Minutes of the Meeting of the Board of Directors, Dated February 15, 2013); Kalman Dep. (*Allen*) at 62:18-63:8.

<sup>28</sup> Kruse Decl. at ¶ 11 and **Exhibit J** (Letter from AIS Board of Directors to KAMP, Dated February 15, 2013).

<sup>29</sup> Kalman Dep. (*Allen*) at 64:16-22.

<sup>30</sup> Kruse Decl. at ¶ 12 and **Exhibit K** (Letter from KAMP to AIS, Dated February 16, 2013).

<sup>31</sup> Kruse Decl. at ¶ 13 and **Exhibit L** (AIS Minutes of the Meeting of the Board of Directors, Dated February 17, 2013). In May 2012, Mr. McGrane replaced Kalman as President and CEO of AIS. Kalman Dep. (*Kalman*) at 173:10-14.

honoring only KAMP's instructions.<sup>32</sup> The AIS Board met again that evening and resolved to write KAMP stating, among other things, that "unless the Board receives written confirmation from KAMP of [certain] funding, it will have no choice but to terminate its employees and to wind down its operations."<sup>33</sup>

The next few days saw a flurry of AIS Board meetings, correspondence, and amended and supplemental termination notices, while the Board tried to keep AIS afloat.<sup>34</sup> Ultimately, on February 22, 2013, KAMP released its exclusive control of AIS's Wells Fargo accounts and returned some of that power to AIS.<sup>35</sup> The AIS Board wrote to KAMP that "as a result of those discussions and reliance on the lender's seeming willingness to provide financing (on essentially the same terms as dictated), the Board decided to defer its earlier decision to terminate its US employees at the beginning of this week" (i.e., the workweek beginning February 18, 2013).<sup>36</sup>

Elaborating on these events during deposition, Kalman testified that KAMP displayed some willingness to provide debtor-in-possession

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<sup>32</sup> Kruse Decl. at ¶ 14 and **Exhibit M** (Amended Access Termination Notice).

<sup>33</sup> Kruse Decl. at ¶ 15 and **Exhibit N** (AIS Minutes of the Meeting of the Board of Directors, Dated February 19, 2013).

<sup>34</sup> Kruse Decl. at ¶ 16 and **Exhibit O** (Second Amended Access Termination Notice, First Supplemental Access Termination Notice, and Third Amended Access Termination Notice); Kruse Decl. at ¶ 17 and **Exhibit P** (AIS Minutes of the Meeting of the Board of Directors, Dated February 20, 2013); and Kruse Decl. at ¶ 18 and **Exhibit Q** (written correspondence dated February 20 and 21, 2013).

<sup>35</sup> Kruse Decl. at ¶ 19 and **Exhibit R** (Release of Access Termination, Dated February 22, 2013).

<sup>36</sup> Kruse Decl. at ¶ 20 and **Exhibit S** (Letter from KAMP to AIS, Dated February 22, 2013).

(“DIP”) financing.<sup>37</sup> Referring to the AIS Board, Kalman stated, “we relied on that information to stall the decision to terminate US employees.”<sup>38</sup> Kalman testified about the decision-making process before the AIS Board decided it had no alternative but bankruptcy:

This is in part where I was troubled, okay, because we labored over this, we planned around it, we examined it, looked at it, so multiple times every day, relative to, you know, could we reduce the number of people from all to some other type of numbers. So there were a number of things that we did very specifically.<sup>39</sup>

In the end, Kalman testified, AIS did not terminate its employees during the week of February 18, 2013 “because we said that we were not going to do that based on our understanding that [KAMP] w[as] willing to potentially provide us with financing.”<sup>40</sup> Allen testified that he, too, believed there might have been alternatives for AIS besides bankruptcy, such as further KAMP financing or a potential sale of AIS to one of the companies that was then considering purchasing it. Thus, Allen personally maintained some hope that AIS would be able to continue without going into bankruptcy until March 4, 2013, when AIS let its workforce go.<sup>41</sup>

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<sup>37</sup> Kalman Dep. (*Allen*) at 80:20-82:2 and Exhibit 12 at CD000407-410.

<sup>38</sup> Kalman Dep. (*Allen*) at 81:13-84:2.

<sup>39</sup> *Id.* at 84:3-19.

<sup>40</sup> *Id.*

<sup>41</sup> Allen Dep. at 73:25-77:21.

#### 4. AIS Prepares for and Implements AIS's Chapter 7 Bankruptcy Filings

On February 27, 2013, the AIS Board unanimously resolved that AIS should prepare a Chapter 7 bankruptcy filing.<sup>42</sup> AIS also wrote to KAMP that same day, asking for additional financing and outlining alternative, out-of-court strategies for maximizing AIS's value to its stakeholders.<sup>43</sup> However, on March 1, 2013, KAMP advised that it did not intend to provide AIS with additional financing.<sup>44</sup>

During the March 3, 2013 AIS Board meeting, the Board unanimously resolved to discontinue AIS's operations and terminate all employees except those employees necessary to prepare the Chapter 7 filings (the "retained employees").<sup>45</sup> McGrane participated in the March 3, 2013 Board meeting, but thereafter resigned from AIS.<sup>46</sup> From then on, in the absence of "an operational head," AIS decisions "first filtered" to the remaining members of the AIS Board, which had the power as a body—but not as individual actors—to made decisions for AIS.<sup>47</sup>

The AIS Board was now composed of only three members: Respondents Standen and Dameron, and Kalman. During a March 7, 2013

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<sup>42</sup> Kalman Dep. (*Allen*) at 85:1-86:25 and Exhibit 11 at CD000015-16.

<sup>43</sup> Kalman Dep. (*Allen*) at Exhibit 12 at CD451-452.

<sup>44</sup> Kruse Decl. at ¶ 21 and Exhibit T (Letter from KAMP to AIS, Dated March 1, 2013).

<sup>45</sup> Kalman Dep. (*Allen*) at 91:24-92:14 and Exhibit 11 at CD000018-19.

<sup>46</sup> See Deposition of David McGrane ("McGrane Dep."), Exhibit U to Kruse Decl., at 92:6-8, 121:17-122:6; see also, Kalman Dep. (*Allen*) at 93:93:17-94:8 and Exhibit 11 at CD000018, CD000020.

<sup>47</sup> Kalman Dep. (*Allen*) at 94:6-95:3.

AIS Board meeting, Allen reported about the progress made in preparing the Chapter 7 filing.<sup>48</sup> Work on this filing continued during the ensuing days, and the AIS Board received progress reports about this work during its daily meetings thereafter.<sup>49</sup>

On March 14, 2013, the AIS Board held its last meetings.<sup>50</sup> During its final meeting that day at 8:30 p.m. EDT, the Board was informed that the documents needed to commence AIS's Chapter 7 bankruptcy filing were substantially final, and the Directors engaged in detailed discussion.<sup>51</sup> The Board unanimously resolved to adopt the resolution contained in the form of Chapter 7 bankruptcy petition.<sup>52</sup>

AIS filed Chapter 7 bankruptcy on March 14, 2013.<sup>53</sup> Kalman, Dameron and Standen all resigned from the AIS Board effective March 14, 2013.<sup>54</sup> Allen remained an AIS employee through at least that date.<sup>55</sup> In fact, Allen continued to perform AIS tasks after AIS entered bankruptcy: for example, on behalf of the AIS "Clean-up Team," Allen sent Kalman (among others) an email providing him with information about final pay and various benefits matters.<sup>56</sup> Allen's March 16, 2013 email to Kalman stated that the bankruptcy trustee was now responsible

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<sup>48</sup> *Id.* at Exhibit 11 at CD000024.

<sup>49</sup> Kalman Dep. (*Kalman*) at Exhibit 30 at CD000024-35.

<sup>50</sup> *Id.* at Exhibit 30 at CD000033-35.

<sup>51</sup> *Id.* at Exhibit 30 at CD000034-35.

<sup>52</sup> *Id.* at Exhibit 30 at CD000035.

<sup>53</sup> Allen Dep. at 147:2-11.

<sup>54</sup> Kalman Dep. (*Kalman*) at 146:17-22 and Exhibit 21 (Kalman's resignation letter, "effective upon the filing of Chapter 7"); Standen Decl. at ¶ 7; Dameron Decl. at ¶ 7.

<sup>55</sup> Allen Dep. at 147:2-11.

<sup>56</sup> Dameron Dep. at 224:6-225:4 and Exhibit 73 (Allen's "Clean-up Team" email to Kalman).

for winding up AIS's affairs, "although Mike Allen has agreed to remain available to help."<sup>57</sup>

### **5. Subsequent Developments**

Even though AIS was in bankruptcy, AIS, Ltd. was still a viable business that continued to trade.<sup>58</sup> Allen resumed his employment with AIS Ltd. after leaving AIS; despite Allen's "Clean-up Team" activities and his assistance to the AIS bankruptcy trustee, Allen was already a member of AIS Ltd.'s Board of Directors by March 21, 2013.<sup>59</sup> Payroll records show that Allen received a full month's pay from AIS Ltd. for April 2013 and that he had continuity of employment thereafter.<sup>60</sup> More specifically, Allen worked for AIS Ltd. until it was acquired by Cubic Range Design Solutions, Limited in July 2013, and has worked for Cubic Range Design Solutions ever since.<sup>61</sup>

### **6. The AIS Vacation Payoff Provision on Which Allen Relies**

For his vacation pay claim, Allen relies on the AIS Employee Manual for U.S. employees, which contains a "Welcome" letter from

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<sup>57</sup> Dameron Dep. at Exhibit 73 at 1.

<sup>58</sup> Allen Dep. at 147:23-148:3.

<sup>59</sup> Kruse Decl. at ¶ 23 and **Exhibit V** (AIS, Ltd Minutes of the Meeting of the Board of Directors, Dated March 21, 2013).

<sup>60</sup> Kruse Decl. at **Exhibit W** (the Allen payroll records for AIS Ltd. and for Cubic Corporation, which acquired AIS Inc.'s assets out of bankruptcy, that were produced to Defendants by Cubic).

<sup>61</sup> Allen Dep. at 24:11-26:12.

Kalman.<sup>62</sup> This Manual includes a provision stating that, upon termination, unused vacation is paid “at your current pay rate.”<sup>63</sup>

Neither of the Respondents nor Mr. Rigas was involved in adopting or approving the AIS Employee Manual. They became aware of the vacation payoff provision only at some later time.<sup>64</sup> Kalman admits he did not vet the AIS Employee Manual with either of the Respondents or Mr. Rigas, and that—if any such vetting occurred—it would have been before Kalman’s hire as AIS’s CEO.<sup>65</sup>

During the AIS Board meetings preceding AIS’s bankruptcy, there were some references to vacation balances of AIS employees. However, the Board minutes show that the Board—including Kalman—never voted to approve any vacation balance payments to any AIS employees. To the contrary, Kalman himself corrected Allen for including such balances in a

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<sup>62</sup> See Kalman Dep. (*Kalman*) at 186:5-14, 187:11-192:16 and Exhibit 35 (excerpts from the introductory sections of an AIS Employee Manual, including the Welcome letter authorized by Kalman at page ii (per Kalman Dep. (*Kalman*) at 191:21-192:12)), Exhibit 36 (excerpts from a Benefits section of an AIS Employee Manual, containing policies on “Vacation” and “Holidays” at the pages Bates numbered CUBIC00053-54).

<sup>63</sup> *Id.* at the pages Bates numbered CUBIC00054.

<sup>64</sup> See Deposition of John Rigas (“Rigas Dep.”), **Exhibit X** to Kruse Decl., at 112:7-24 and Exhibit 3 at MA014004-14005 (testifying that he had never seen the AIS Employee Manual before his deposition; that he recalled no Board discussion of the Manual; and that establishing the employee manual and employee compensation was within the purview of the company’s executive management); Standen Dep. at 13:2-15 and Exhibit 3 (while Standen was on the AIS Board, he was not specifically aware of the AIS Employee Manual or its vacation policy as “no one had raised it with me”); Dameron Dep. at 139:16-34 (stating that the AIS Manual’s vacation provision predated his own involvement with AIS); *id.* at 13:24-16:23, 17:18-18:19, and Exhibit 3 (Dameron recalled receiving some of the AIS Employee Manual via email, but he could not pinpoint when, in responding to counsel’s questions about whether this occurred shortly before AIS’s Chapter 7 bankruptcy).

<sup>65</sup> Kalman Dep. (*Kalman*) at 187:11-25 (Kalman did not know whether the AIS Employee Manual was vetted with Sciens but he admits that he did not do so. “This was all prior to my time.”).

list Allen presented to the Board for the Board's consideration of authorizing payments to the lowest paid employees,<sup>66</sup> and the records Allen presented to the Board the day before bankruptcy showed that Allen himself did not claim he was owed any vacation or severance pay until the pay period ending March 24, 2013—a pay day that was not reached until 10 days after AIS entered bankruptcy.<sup>67</sup>

**B. Procedural Background**

Allen filed his Complaint in the United States District Court in and for the Western District of Washington on August 15, 2014, claiming that Dameron and Standen are liable to him for violations of RCW 49.52.050 and owe him “no less than \$84,739.24” in unpaid wages, unpaid vacation, and for his severance.<sup>68</sup> Allen also asserted that RCW 49.52.070 entitles him to double his damages.<sup>69</sup> Allen further sought to recover his attorneys’ fees and costs, as well as prejudgment interest.<sup>70</sup>

On September 28, 2015, the parties filed cross-motions for summary judgment. On March 3, 2016, the District Court decided the parties’ competing summary judgment motions adversely to Allen, by granting summary judgment of dismissal to Dameron and Standen and denying Allen’s competing summary judgment motion.<sup>71</sup> On

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<sup>66</sup> See Kalman Dep. (*Kalman*) at 107:10-108:24 and Exhibit 18.

<sup>67</sup> Dameron Dep. at Exhibits 36-37.

<sup>68</sup> See Dkt. No. 1 (“Complaint”) at ¶ 5.3.

<sup>69</sup> *Id.* at ¶ 5.4.

<sup>70</sup> *Id.* at § VI (“Request for Relief”).

<sup>71</sup> See Dkt. No. 68 (Order Granting Defendants’ Motion for Summary Judgment) (the “Allen SJ Order.”)

March 4, 2016, the Court dismissed this action with prejudice and final judgment was entered accordingly.<sup>72</sup>

On March 15, 2016, Allen asked the District Court to vacate the Final Judgement it entered on March 4, 2016, and to reconsider its order granting Dameron and Standen's motion for summary judgement.<sup>73</sup> On March 17, 2016, the District Court ordered Dameron and Standen to file a brief in response to Allen's motion for reconsideration.<sup>74</sup> Dameron and Standen filed their opposition on March 23, 2016, and Allen filed his reply on March 24, 2016.<sup>75</sup>

On April 22, 2016, the District Court granted Allen's motion to vacate the Final Judgement and certified two questions to this Court.<sup>76</sup>

### III. CERTIFIED QUESTIONS

The District Court certified the following two questions to this Court:

Is an officer, vice principal or agent of an employer liable for a deprivation of wages under RCW 49.52.050 when his or her employment with the employer (and his or her ability to control the payment decision) was terminated before the wages became due and owing?

Does an officer, vice principal, or agent's participation in the decision to file the Chapter 7 bankruptcy petition that effectively terminated his or her employment and ability to control payment decisions alter the analysis? If so, how?<sup>77</sup>

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<sup>72</sup> See Dkt. No. 71

<sup>73</sup> See Dkt. No. 72.

<sup>74</sup> See Dkt. No. 73.

<sup>75</sup> See Dkt. No. 74 and Dkt. No. 75, respectively.

<sup>76</sup> See Dkt. No. 83 (Order Vacating Judgment and Certifying Questions to the Washington Supreme Court).

<sup>77</sup> See *id.* at 3-4.

#### IV. ARGUMENT

##### A. Standard of Review and Power to Reformulate Certified Questions

Certified questions are matters of law reviewed de novo and in light of the record certified by the federal court. *Saucedo v. John Hancock Life & Health Ins. Co.*, 185 Wn.2d 171, 178, 369 P.3d 150 (2016) (citing *Carlsen v. Global Client Solutions, LLC*, 171 Wn.2d 486, 493, 256 P.3d 321 (2011)).

Where, as here, the questions pertain to a motion for summary judgment, the Court performs the same inquiry as the District Court. *Id.* (citing *Smith v. Safeco Ins. Co.*, 150 Wn.2d 478, 483, 78 P.3d 1274 (2003)).

At its discretion, this court may reformulate a certified question. *Danny v. Laidlaw Transit Servs., Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008) (citing *Broad v. Mannesmann Anlagenbau AG*, 196 F.3d 1075, 1076 (9th Cir. 1999)); *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 762, 344 P.3d 661 (2015); *Parents Involved in Community Schools v. Seattle School Dist, No. 1*, 294 F.3d 1085, 1087 (9th Cir. 2002).

As noted in Introduction and Summary of Argument, above, and as detailed below, this Court should reformulate the certified questions to include consideration of whether and to what extent non-officer directors such as Respondents are even within the class of individuals falling within the scope of RCW 49.52, such that individual liability for wages may attach to their actions as Board members.

**B. The Court Must Interpret RCW 49.52 in a Manner Consistent with the Legislature’s Volitional Decision to Exclude Directors From the List of Individuals who can be held Liable**

The Washington Legislature has enacted more than 1,000 statutes that refer to both “officers” and “directors.”<sup>78</sup> Notably, RCW 49.52.070 is not one of them. Its language is clear: it extends personal liability only to three distinct types of individuals; namely: an “officer, vice principal or agent” of an employer. This list is exclusive, not illustrative. The conspicuous omission of “directors” from RCW 49.52.070 means that individual liability cannot be imposed based on an individual’s conduct as a director.

When interpreting statutory language, the Court’s goal is to carry out the Legislature’s intent. *Ellerman, supra*, 143 Wn.2d at 519. This Court has repeatedly acknowledged that there is no better indicator of legislative intent than the actual language adopted by the Legislature, and that where, as here, “the words in a statute are clear and unequivocal, this court is required to assume the Legislature meant exactly what it said and apply the statute as written.” *Roe v. TeleTech Customer Care Mgmt. (Colo.), LLC*, 171 Wn.2d 736, 746-47, 257 P.3d 586 (2011) (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997)). Here, this Court must give effect to the Washington Legislature’s deliberate decision to omit

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<sup>78</sup> See Declaration of Mia Tucker Klarich, Dated September 8, 2015 (“Klarich Decl.”), Dkt. No. 37 at ¶¶ 3-5 (establishing that 1,278 Washington statutes include the terms “Officer” and “Director” and that there are more than 3,000 Washington laws and statutes that reference “Officer” but not “Director.”).

employer directors from this statute's list of individuals who can be personally liable when an employer fails to pay an employee's wages.

In this regard, the Washington Court of Appeal's analysis from *Davenport v. Washington Educational Association*, 147 Wn. App. 704, 718-719, 197 P.3d 686 (2008) is instructive. *Davenport* holds, in essence, that omissions from a statute are as important as the language that is included, and one should not be confused with the other; i.e., that it must be presumed that the legislature "would not have made such an obvious and glaring omission inadvertently." *Davenport*, 147 Wn. App. at 704. These same principles apply with equal or greater force to the present case.

Indeed, the "glaring omission" in this case is underscored by a comparison of RCW 49.52 with the multitude of statutes in which our Legislature recognized the distinct legal difference between an officer, on the one hand, and a director, on the other. Simply put, if our Legislature had intended the law as advocated by Appellant, it would have done what it had done on countless other occasions and expressly included directors within its scope. But it didn't—and that speaks volumes, as any assessment of legislative intent must start with the plain language of the statute itself.

This Court has repeatedly recognized that "[u]nder *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other." *In re Dependency of M.H.P.*, 184 Wn.2d 741, 756, 364 P.3d 94 (2015) (quoting

*In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002)). More pointedly, “[o]missions are deemed to be exclusions.” *In re Dependency of M.H.P.*, 184 Wn.2d at 756-57 (quoting *In re Det. of Williams*, 147 Wn.2d at 491) (emphasis added).

In his argument before the District Court, Allen asserted the cases analyzing personal liability under RCW 49.52 do not turn on the individuals’ job titles, but instead focus on their actual roles.<sup>79</sup> However, this argument is undone by the very cases Allen cited. For example, the individual defendants in *Jumamil v. Lakeside Casino, LLC*, 179 Wn. App. 665, 683, 319 P.3d 868 (2014), and *Morgan, supra*, 166 Wn.2d at 531, were the actual employer (in *Jumamil*) and the employer’s officers (in *Morgan*). They, therefore, were explicitly covered by the statute. Similarly, in *Ellerman*, the only individual defendant found liable was the employer’s president and sole owner—a person clearly within the zone of liability under the statute’s plain language. *Ellerman*, 143 Wn.2d at 516-17, 523-24.

Despite the statute’s unambiguous language, Allen argued that Respondents, who were members of AIS’s Board of Directors, but who were *not* company officers, vice principals, or agents, should be personally liable because they allegedly functioned as AIS’s *de facto* officers for a period of time.<sup>80</sup> Appellant offered no legal authority to support this theory because it does not exist. While Washington case law is replete

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<sup>79</sup> Plaintiff’s Opposition to Defendants’ Motion for Summary Judgment (“Pl. Opp.”), Dkt. No. 45, at 3:8-11. (All citations to motion papers and responses use the ECF-stamped page numbers, not the documents’ internal page numbers.)

<sup>80</sup> Appellant’s Response to Motion for Summary Judgment, Dkt. No. 41, at 3:14-15.

with references to the liberal construction to be afforded to the wage withholding statutes, this judicial prose does not authorize courts to rewrite the underlying statutes to impose liability more broadly than the Legislature's enactment.

To the contrary, the Washington Supreme Court has clearly stated that “in order to prevail on a wage claim, the employee must show that the party withholding the wages was *both* an agent and had control over the payment of wages.” *Rekhter, supra*, 180 Wn.2d at 123 (italics in original) (citing *Ellerman*, 143 Wn.2d at 522-23, where the Court opined that “the statutes in question require *more than* the establishment of an agency relationship. Rather, there must be a showing that an agent had some control over the payment of wages before personal liability attaches to the agent . . .” (italics added.)). The Washington Supreme Court has also expressly adopted the agency analysis from the Restatement (Second) of Agency,<sup>81</sup> which clearly and unambiguously states that “[n]either the board of directors nor an individual director of a business is, as such, an agent of the corporation or its members.” Restatement 2d of Agency, § 14C (1958). Moreover, an individual director, such as each of the Respondents herein, “has still less resemblance to an agent than has the board as a body.” Restatement 2d of Agency, § 14C, cmt. b. “**He has no power of his own to act on the corporation’s behalf**, but only as one of the body of directors acting as a board.” *Id.* (emphasis supplied).

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<sup>81</sup> See, e.g., *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 794, 797-798, 363 P.3d 587 (2015).

Against this backdrop, the reasoning of *Ellerman* is instructive. There, the Washington Supreme Court rejected the plaintiff's argument "that personal liability should be imposed on any manager under the statute because their managerial decisions may affect the company's financial ability to pay wages." 143 Wn.2d at 521. Despite the principle that "the wage withholding statutes . . . are to be liberally construed to protect wages of employees and to assure payment," the Court concluded that "holding any person who manages the daily operations of a business liable under the statute, even if they do not have the *individual authority* to pay the actual wages, does not . . . further the intent of the Legislature." *Id.* at 521-522 (italics added). Instead, the Court stated, "[w]e think it is reasonable to conclude [the Legislature] intended to impose personal liability on only vice principals who *directly* supervise or control the payment of wages." *Id.* at 522 (italics added).

As this Court noted, "[t]he liberal construction of the term 'vice principal' that Ellerman maintains could result in substantial unfairness by imposing personal liability on managers or supervisors who had no direct control over the payment of wages." *Id.* That is exactly the type of unfairness for which Allen advocates against the non-officer directors herein.

As a matter of corporate law, individual Board members like Respondents are not empowered to act by themselves on behalf of the organization the Board governs. Rather, by definition, Board action is collective action, not individual action. This likely is why the Legislature

chose not to list “directors” as *individuals* who might potentially be liable under RCW 49.52. While equitable considerations are not presently before this Court, it does bear mention that Allen had been expressly advised, and knew this to be the case.<sup>82</sup>

As explained by the court in *Coley v. Vannguard Urban Improvement Assoc., Inc.*, No. 12-CV-5565, 2014 U.S. Dist. LEXIS 135608, \*12-\*13 (E.D.N.Y. Sept. 24, 2014):

an individual board member is not empowered to act on behalf of its organization—only the board as a whole is—and voting members of boards are not liable for the acts of the board merely by virtue of their status as board members. *See, e.g., DeWald v. Amsterdam Housing Auth.*, 823 F. Supp. 94, 103 (N.D.N.Y. 1993) (stating that a board member may not act on behalf of the organization in connection with employment matters unless ‘vested with independent authority to effectuate employment decisions’); *Walker v. Windsor Court Homeowners Ass’n*, 35 A.D.3d 725, 727–28, 827 N.Y.S.2d 214 (2d Dep’t 2006) (noting that, although the defendants were members of the board, ‘none of them acted individually without the authority of a vote by the Board. Thus, they could not be held liable in their individual capacities[.]’).

*Id.* at \*12-13 (discussing the federal Fair Labor Standards Act (“FLSA”)).<sup>83</sup>

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<sup>82</sup> *See, e.g.*, Declaration of Karen P. Kruse Dated October 2, 2015 (“Supp. Kruse Decl.”), Dkt. No. 57, at Exhibit A (a March 4, 2013 email exchange between Dameron and Allen, with copies to Dameron’s fellow AIS Board members (among others), in which Dameron states that “It is not up to me individually to decide on how to allocate any of AIS’ remaining cash.”).

<sup>83</sup> The FLSA is persuasive authority in the State of Washington, as the Washington Minimum Wage Act (“WMWA”) is based on the FLSA. *Becerra Becerra v. Expert Janitorial, LLC*, 181 Wn.2d 186, 189, 332 P.3d 415 (2014) (relying on FLSA authorities in evaluating who may be held liable under the FLSA as a joint employer).

Similarly, under corporate law, an individual Board member is not empowered to act alone on behalf of the organization. For example, for an action to be on behalf of a corporate Board, Washington law requires that a quorum (i.e., no less than one-third of the Board) be present and vote to take the action. RCW 23B.08.240. An individual who votes as a corporate Board member is “not liable for the acts of the board merely by virtue of their status as board members.” *Vanguard* at \*12-13.

In the absence of legal authority to the contrary, and in light of the verity that Dameron and Standen were directors of AIS, acting as part of a collective group and not as individuals with their own autonomous, volitional decision making authority, Respondents submit that they are outside the reach of RCW 49.52 and that the District Court properly granted summary judgment in their favor. This is true both because they were AIS directors only and, therefore, were not the type of persons who can be held liable under RCW 49.52, and because the alleged decisions for which Allen seeks to hold Respondents liable were decisions by the AIS Board of Directors as a body, not the individual actions of either Standen or Dameron.

**C. The Plain Language of the Statute, as Underscored by *Ellerman* and its Progeny, Control this Court’s Answers to the Certified Questions**

This Court has previously established two fundamental, baseline requirements that must be satisfied for individuals falling within the scope of RCW 49.52 in order for individual liability to attach; namely: (1) agency; and (2) control. *Rekhter*, 180 Wn.2d at 123 (italics in original)

(citing *Ellerman*, 143 Wn.2d at 522-23) (“in order to prevail on a wage claim, the employee must show that the party withholding the wages was *both* an agent and had control over the payment of wages.”); *Ellerman*, 143 Wn.2d at 522-23 (italics added) (“the statutes in question require *more than* the establishment of an agency relationship. Rather, there must be a showing that an agent had some control over the payment of wages before personal liability attaches to the agent . . .”). As discussed above, neither mandatory condition is present herein due to the fact that the challenged acts of Respondents were undertaken solely in their capacity as members of the AIS Board of Directors. Thus, as a matter of law, and all issues of timing aside, Respondents were neither agents of AIS, nor had any power of their own to act on the company’s behalf. *See, e.g.*, Restat 2d of Agency, § 14C (1958) (“Neither the board of directors nor an individual director of a business is, as such, an agent of the corporation or its members.”); *Id.* at cmt. b (stating that an individual director “has no power of his own to act on the corporation’s behalf[.]”); *see also*, RCW 23B.08.240. Accordingly, there can be no liability for Dameron or Standen herein.

Even if the Court were to disregard the clear intent of the Legislature and embrace the unsupported notion that directors such as Respondents could face individual liability under RCW 49.52, the required agency and control would still be lacking. First and foremost, the statutes at issue concern the willful *withholding* of wages. As a matter of common sense and plain language interpretation, there can be no

“withholding” under RCW 49.52 when there is nothing presently due and owing to be withheld. *See, e.g.*, Oxford English Dictionary, 2nd ed., Oxford University Press, 1989, s.v. “withhold” (emphasis added) (“Refuse to give (*something that is due to* or is desired by another)[.]”).

Moreover, a claim under RCW 49.52.070, which is premised on a violation of RCW 49.52.050(2), as is the case herein, requires a showing that an employer, or its officer, vice principal or agent paid an employee “a lower wage than the wage such employer is *obligated to pay* such employee by any statute, ordinance, or contract[.]” (emphasis added). The obligations at issue herein, the payment of disputed, contract-based separation pay, vacation monies, and wages earned during the final pay period, had not arisen by the time Respondents severed their director relationship with AIS. Accordingly, under the plain language of RCW 49.52.050, they were incapable of violating the statute because the obligation to pay had yet to mature during their tenure as directors, and by the time the mandatory “obligated to pay” element of the statute was satisfied, Respondents were no longer directors and, therefore, outside the scope of the statute. Thus, the two elements of the statute, one requiring a specific type of actor, and the other requiring a specific type of action, cannot be satisfied under the circumstances herein.

The foregoing notion is underscored by the holdings of *Ellerman* and *Rekhter*, which use the parlance of “agency” and “control” to describe the required characteristics of an individual who can potentially be held liable under RCW 49.52. Thus, whether we speak in terms of the statutory

language, which requires an individual to be an “officer, vice principal or agent of any employer” at the time the employer is “obligated to pay,” or the language of *Ellerman* and *Rekhter*, which require that an individual have “agency” and “control,” it is clear that that the requisite status and power must be maintained and exist at the time payment is due.

This Court has repeatedly focused on and recognized the importance of timing in determining whether there is a violation of RCW 49.52, and has uniformly required a finding that the wages at issue were in fact due and owing to the employee at the time of the alleged violation. For example, in *Champagne v. Thurston County*, this Court considered the importance of timing in the context of a claim premised on a delayed payment of wages, and noted that RCW 49.52 “penalizes an employer who willfully withholds *wages due* under ‘any statute, ordinance, or contract[.]’” *Champagne*, 163 Wn.2d 69, 83, 178 P.3d 936 (2008) (emphasis added) (quoting RCW 49.52.050(2)); *see also, id.* at 84, fn. 13 (emphasis added; internal citation omitted) (“We agree with *Champagne* that the Court of Appeals decision would allow an employer to ‘indefinitely delay paying its employees the wages that the employees have earned’ as long as the wages are eventually paid . . . [w]hile we are not faced with such a situation at present, our holding does not foreclose the availability of damages under the WRA where an employer eventually pays its employees but a court determines that the employer withheld the wages willfully and with the intent to deprive the employees of the *wages due.*”); *Schilling, supra*, 136 Wn.2d at 154 (emphasis added) (stating that

RCW 49.52 provides a cause of action for damages “when an employer willfully withholds *wages due* an employee.”).

A similar notion was recently expressed by this Court in *LaCoursiere v. CamWest Dev., Inc.*, 181 Wn.2d 734, 339 P.3d 963 (2014), a case in which the Court considered whether the forfeiture of an unvested ownership interest in an entity could constitute an unlawful “rebate” of wages under RCW 49.52.050(1). The Court, relying on common sense notions and a plain language construction of the statute correctly noted that, because the interest had not matured, “[n]othing was ‘rebated’ when LaCoursiere forfeited the unvested portion (40 percent) of his investment at his termination.” *LaCoursiere*, 181 Wn.2d at 746. In analogizing *LaCoursiere* to the present circumstance, it can be said that none of the wages at issue herein were “withheld” because no monies were due and owing at the time Respondents took the actions forming the basis of the present dispute.<sup>84</sup>

In focusing particularly on the first certified question—and notwithstanding it being facially inapplicable to the present dispute—it is axiomatic that an officer, vice principal or agent whose employment is terminated before an employee’s wages become due and owing cannot be liable for such wages, as both the agency and control requirements of RCW 49.52 are wholly lacking. Indeed, the lack of requisite control is

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<sup>84</sup> Notably, in reaching the decision in *LaCoursiere*, this Court relied expressly on *Rekhter*’s dual requirement of *both* agency and control, and made clear that its teachings from matters involving a wrongful withholding of wages should be considered in matters involving a rebating of wages, and *visa versa*. *LaCoursiere*, 181 Wn.2d at 744-45 and fn. 2.

built into the very question presented to this Court (“Is an officer, vice principal or agent of an employer liable for a deprivation of wages under RCW 49.52.050 when his or her employment with the employer (*and his or her ability to control the payment decision*) was terminated before the wages became due and owing?”). Thus, pursuant to both the plain language of the statute and the established requirements of *Ellerman* and *Rekhter*, there can be no liability for want of agency and control and, therefore, the first certified question must be answered in the negative.

The same plain language interpretation of the statute and tenets of *Ellerman* and *Rekhter* also control the answer to the second certified question and, likewise, mandate that it be answered in the negative. Indeed, there is nothing in the statute or the holdings of *Ellerman* and *Rekhter* that would even remotely support an exception to the agency and control requirements, such that liability could attach to the actions of an individual that were taken prior to the time payment was due. Rather, the singular focus of the statute is upon those who have the status and power to “directly supervise or control the payment of wages” and *not* those “whose managerial decisions may affect the company’s financial ability to pay wages.” *Ellerman*, 143 Wn.2d at 521-22.

Against this clear backdrop, Allen cites to *Morgan* as if it were a magical elixir that could turn back time and render Respondents liable for obligations that were not due and owing at the time of their separation from the AIS Board of Directors. At its heart, *Morgan* is not in conflict with *Ellerman*, as *Morgan* addressed the different issue of whether a

“financial status” defense may be used to avoid personal statutory liability “when a party responsible for the payment of wages failed to pay wages owed to its employees.” See *Morgan*, *supra*, 166 Wn.2d at 533. Put another way, in *Morgan*, the Court assumed the presence of the very type of wage payment power and responsibility that the Court in *Ellerman* carefully explored.

Thus, despite some of its far reaching dicta, one need only look to the opening paragraph of the decision in *Morgan* to grasp its true meaning, scope, and precedential value:

This case asks us to determine whether financial status, specifically bankruptcy under chapter 7 liquidation, is a valid defense to negate the finding of a willful failure to pay wages owed to employees. . . . Here, consistent with our holding in *Schilling*, the trial court ruled financial status is not a defense to a finding of willfulness.

*Morgan*, 166 Wn.2d at 531.

In short, the Court was concerned with financial status as a defense, and grounded its decision in the tenets of *Schilling*, a notion that is confirmed by the narrow, express framing of the issue before the Court in *Morgan*; to wit: “Under RCW 49.52.070, is financial status (i.e., chapter 7 bankruptcy) a sufficient defense to avoid personal liability when a party responsible for the payment of wages failed to pay wages owed to its employees?” *Morgan*, 166 Wn.2d at 533.

The narrow scope of the issue before the Court in *Morgan* is certainly not surprising, as it was necessary to fill the gap that was left in the wake of *Schilling* with respect to whether some higher order of

“financial inability” would be sufficient to act as a bar to individual liability. As expressly noted by the Court in *Schilling*:

The most troublesome issue with respect to Bingham’s “financial inability” argument is his failure to articulate any standard for such “financial inability.” No published Washington appellate decision has held an employer’s financial status renders refusal to pay wages nonvolitional, and the facts of this case illustrate why this is so. Bingham offers no test by which we can adequately measure his or Radio Holdings’ inability to pay Schilling. Must the employer be insolvent to the point of being eligible for bankruptcy to meet the test? If the standard is a lesser one, where should the line be drawn between inability and a financial choice not to pay? For example, if a company’s accountants decide shareholders should be paid a dividend to continue investor interest in the company’s stock, and the dividend is financed by withholding wages to certain employees, is the employer financially unable to pay wages? If the employer continues to pay vendors, other creditors, or even management of the company, but does not pay employee wages, is the employer financially unable to pay? In the absence of a clearly demarcated test for financial inability to pay, we cannot conclude Bingham’s failure to pay Schilling was anything but willful under our cases.

*Schilling*, 136 Wn.2d at 165.

The Court in *Morgan* squarely addressed the unresolved issues from *Schilling*, and made clear that even an actual bankruptcy would not suffice to pave the way for an employer’s “financial inability” defense. This, of course, says nothing with respect to the issue presently before the Court, which has to do with an individual’s *authority* and *power* to pay wages. Indeed, *Schilling* necessarily mandates that these constructs be treated as distinct concepts from financial ability (or lack thereof). This

disconnect between the holding in *Morgan* and the matters actually at issue herein is made even more glaring when one carefully examines the actual question presented to the Court in *Morgan*, which, aside from being wholly framed in terms of “financial status,” also assumed the presence of “a party responsible for the payment of wages [that] failed to pay wages owed to its employees.” *Morgan*, 166 Wn.2d at 533.

To be clear, there is certainly language in *Morgan* (largely appearing in a footnote) that supports Allen’s position; however, it is clear that the particular aspects of *Morgan* that touch upon this issue were largely afterthoughts, having nothing to do with the specific question before the Court, and accorded little to nothing in the way of consideration or analysis. The defendants in that case, Kingen and Switzer, were the CEO and CFO of Funsters Grand Casino, Inc., when the company voluntarily sought bankruptcy protection under Chapter 11. Kingen and Switzer operated the casino as debtor-in-possession and chose to continue operations. At some point they stopped paying their employees, allowing unpaid wages to accrue for two pay periods. The bankruptcy court held a hearing at which it gave Kingen and Switzer the opportunity to infuse additional capital into the company and make good on the wage claims. Kingen and Switzer refused, and the bankruptcy court converted the matter to a Chapter 7 liquidation, seizing all of Funsters’ remaining assets. No wages were paid in the bankruptcy proceeding, and the employees filed a class action lawsuit.

Not surprisingly, this Court was factually and legally unimpressed with the *Morgan* defendants' arguments against liability; notwithstanding the fact that at some point the bankruptcy court deprived them of the power to pay wages. As a factual matter, the Court noted that at least one of the pay periods at issue had ended well before the conversion date. *Morgan*, 166 Wn.2d at 535 n.1.

That said, the Court did note that even if the actual pay dates were after defendants lost control of Funsters' assets, that fact was legally insignificant because the wages had been earned prior to the Chapter 7 conversion and Funsters lacked adequate cash to pay the wages at the time. 166 Wn.2d at 536 and 535 n.1. The court found that "bankruptcy of the corporation is not a means to escape personal liability by those who failed to pay wages owed" and justified the imposition of liability on the ground that Kingen and Switzer had made a number of business decisions that had left the company unable to make payroll at the time of the conversion. *Id.*

These latter elements of *Morgan* simply cannot be squared with the plain language and meaning of the text of RCW 49.52 or this Court's own, well-established precedent interpreting the same. Indeed, *Ellerman*, in no uncertain terms, established that an individual cannot be personally liable under the wage payment statutes for indirect actions that lead to an inability to pay wages. Rather, the exercise of power must be immediate and direct; to wit:

Ellerman argues that personal liability should be imposed on any manager under the statute because their managerial decisions may affect the company's financial ability to pay wages. Although the wage withholding statutes, as we have noted above, are to be liberally construed to protect wages of employees and to assure payment, holding any person who manages the daily operations of a business liable under the statute, even if they do not have the individual authority to pay the actual wages, does not appear to us to further the intent of the Legislature.

*Ellerman*, 43 Wn.2d at 521-522.

In short, the precedential value of *Morgan* should be limited to the portion of its holding directly in conformity with the question before the Court therein; namely, consideration of whether bankruptcy is sufficient indicia of financial inability such that personal liability should be excepted. To hold otherwise would do violence to the plain meaning of the statute and this Court's prior, well-reasoned precedent. While the State of Washington is a "pioneer" in the area of employee wage rights, it is not a "pirate" engaged in ad hoc takings.

**D. Public Policy Favors Respondents' Position and Helps to Foster an Orderly and Logical Transition to Bankruptcy**

Appellant contends that a failure to embrace his construction of RCW 49.52 would lead to a circumstance that encourages key corporate actors to abandon their duties to employees and use bankruptcy proceedings as a means of avoiding individual liability. This assertion does not stand up to scrutiny.

In the first instance, the wages that are potentially implicated by the certified questions before this Court are exceeding limited, comprised

solely of those that accrue or vest during the final, pre-bankruptcy pay period. That period, at most, could cover a one month time frame. See WAC 296-126-023.

Moreover, our Legislature has already put in place statutory protections for these latter-earned employee wages, which are intended to mitigate any harms attendant to employer bankruptcy. As expressly noted by the Court in *Schilling*, 136 Wn.2d at 158, fn. 1, “for more than 100 years, the Legislature has recognized a preference for certain wage claims in the event of employer insolvency, RCW 49.56.010, or death of the employer, RCW 49.56.020.” RCW 49.56.010, in turn, states “[i]n all assignments of property made by any person to trustees or assignees on account of the inability of the person at the time of the assignment to pay his or her debts, or in proceedings in insolvency, the wages of the miners, mechanics, salespersons, servants, clerks, or laborers employed by such persons to the amount of one hundred dollars, each, and for services rendered within sixty days previously, are preferred claims, and must be paid by such trustees or assignees before any other creditor or creditors of the assignor.”

In short, the Legislature has already created a remedy to address the concerns raised by Allen, and has created a measured and ordered mechanism for handling such matters in a bankruptcy context. Under those provisions, the trustee is the proper party against whom such claims may and should be brought. In other words, employees are not without

rights under the law. However, those rights do not include claims against directors.

That same sense of order is furthered by the position advocated by Respondents herein. Under Respondents' construction of RCW 49.52, an employer's controlling agents would be encouraged to stay on board and help navigate an enterprise through and into the channels of bankruptcy, rather than throwing up their hands at the first sign of rough waters ahead and making no decision whatsoever. Indeed, under Appellant's construction of the statute, an employer's controlling agents would have every incentive to abandon ship without making any kind of decision about how to address a corporation's financial distress for fear of liability attaching. It would foster a "rush for the exits" environment, which would lead to an increased environment of disorder and countless organizations having no leadership whatsoever at the precise time when guidance is needed most.

Allen will no doubt contend that the foregoing situation would not occur because such actors—even if they exited the organization prior to the bankruptcy decision—could still be held individually liable for their pre-bankruptcy management of the organization and its effect on any wages that may come due in the future. This concept, however, is antithetical to established precedent, which makes clear that "in order to prevail on a wage claim, *the employee must show that the party withholding . . . had control over the payment of wages.*" *Rekhter*, 180 Wn.2d at 123 (emphasis added) (citing *Ellerman*,

143 Wn.2d at 522-23). Prior, non-wage decisions that “may affect the company's financial ability to pay wages” are simply outside the scope of the statute. *Ellerman*, 43 Wn.2d at 521-522.

The foregoing limitation on liability exists for good reason, as our courts are simply not competent to dissect the general business decisions made by an organization outside of the well-defined and circumscribed area relating directly to the payment of wages, which RCW 49.52 was meant to address. In a like manner, any imposition of liability needs to have some rational and ordered rules, such that the underlying actor can understand the direct consequence of his or her actions—a notion clearly indicated by the fact that a violation of RCW 49.52.050 is a misdemeanor criminal offense. Thus, aside from being hostile to established precedent, Allen’s position would create an environment in which any business decision, no matter how remote or removed from the payment of wages, could be a basis for liability. This is simply not the law of the State of Washington.

## V. CONCLUSION

The Legislature of the State of Washington made an intentional and volitional decision to exclude directors from the scope of actors for whom individual wage liability could potentially attach—and for good reason. As a matter of long-standing law, directors are not agents of an employer, and cannot directly affect the payment of wages—particularly in their capacity as individual members of a Board of Directors.

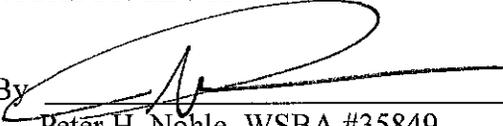
Accordingly, this Court should hold that there can be no liability herein with respect to Respondents.

Moreover, the plain language of RCW 49.52 requires that an actor charged with wage liability hold a specific level of authority or power within an organization (i.e., be an “officer, vice principal or agent”) *and* exercise that power to “pay any employee a lower wage than the wage such employer is obligated to pay such employee.” Here, Allen had been paid all monies due to him at the time Respondents lost their ability to control payment decisions. In other words, they were without the requisite agency or “control over the payment of wages” mandated by *Ellerman* and *Rekhter*. While Allen would have this Court create the prospect of liability for company actors who engage in far-ranging, non-wage decisions that may ultimately affect a company’s ability to pay wages, the weight of the prior teachings of this Court, as well as sound public policy, militate against such result. Indeed, this Court has previously recognized that imposing personal liability against managers “because their managerial decisions may affect the company’s financial ability to pay wages . . . does not appear to us to further the intent of the Legislature.” *Ellerman*, 43 Wn.2d at 521-522.

For all the foregoing reasons, Respondents respectfully ask that this Court answer both certified questions in the negative.

RESPECTFULLY SUBMITTED this 20th day of June, 2016.

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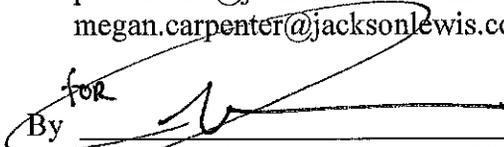
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**DECLARATION OF SERVICE**

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

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Dated this 20th day of June, 2016, at Seattle, Washington.

  
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Andrea W. Preston