

May 31, 2016, 11:34 am

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**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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*Plaintiff*  
**OPENING BRIEF OF APPELLANT MICHAEL ALLEN**

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 **ORIGINAL**

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## I. INTRODUCTION

In *Morgan v. Kingen*, 166 Wn.2d 526, 210 P.3d 995 (2009), this Court ruled that individual corporate officers were personally liable under RCW 49.52 for the willful withholding of employee wages earned prior to the corporation's Chapter 7 bankruptcy even if the pay day for those wages was after the Chapter 7 bankruptcy. This Court rejected the individual corporate officers' arguments that, as a result of the bankruptcy court's conversion of the case from a Chapter 11 to a Chapter 7, the officers had no power to pay the employee wages when they were due and, therefore, had not engaged in the willful withholding of wages.

Here, defendants Zechariah Clifton Dameron IV and Daniel Standen personally directed that Advanced Interactive System, Inc. ("AIS Inc.") file a *voluntary* Chapter 7 bankruptcy petition. They did so knowing the Chapter 7 bankruptcy would trigger termination payments contractually due to AIS Inc. Chief Financial Officer plaintiff Michael Allen (and other AIS Inc. employees). Defendants also knew at the time they directed the Chapter 7 bankruptcy that AIS Inc. owed Allen (and other AIS Inc. employees) wages for work they had performed prior to the bankruptcy filing date but with pay days after the filing. Defendants have refused to pay Allen any of the amounts owed. Defendants claim that because the filing of the Chapter 7 bankruptcy petition removed them

from their positions as the directors and *de facto* officers of AIS Inc., they have no legal liability under RCW 49.52.050 for any wages with pay days after the bankruptcy filing that AIS Inc. owes to Allen.

The United States District Court for the Western District of Washington has certified pursuant to RCW 2.60.020 two questions regarding the proper interpretation of RCW 49.52:

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?

Allen submits that this Court's decision in *Morgan v. Kingen* dictates the answers to the district court's questions. Consistent with *Morgan*, the Court should hold that where the officers of a corporate employer direct the filing of a Chapter 7 bankruptcy knowing that (1) the bankruptcy will trigger termination payments to an employee with pay days on or after the date of the bankruptcy filing and (2) the company owes the employee wages for work performed prior to the bankruptcy with pay days after the bankruptcy filing—but those officers refuse to pay the compensation due to the employee—those officers violate RCW 49.52.050.

## II. STATEMENT OF THE CASE

### A. Factual Background

AIS Inc. was founded in 1996. Deposition of John Rigas (Aug. 7, 2015) (“Rigas Dep.”), Attachment A to Declaration of Michael C. Subit (Sep. 8, 2015) (“Subit Dec.”), Dkt. No. 30, at 12:14-13:8 & NYC Ex. 2.<sup>1</sup> John Rigas is the co-founder and Chief Executive Officer of a company called “Sciens.” *Id.* at 8:8-21. Rigas joined the AIS Inc. Board of Directors in 1996 as part of Sciens’s investment in that company. *Id.* at 15:8-22.

Between 1996 and March 2012 Sciens invested more than \$45 million in AIS Inc. NYC Ex. 2. Sciens was the largest investor in AIS Inc. *Id.* Sciens ultimately controlled 63% of AIS Inc.’s stock. Rigas Dep. at 18:7-20:20; NYC Ex. 1. Sciens was the “financial sponsor” of AIS Inc. Deposition of Steven Kalmanovitz (Aug. 1, 2015) (“Kalman Dep.”), Attachment C to Subit Dec., at 27:8-12.

Sciens eventually obtained two more seats on the AIS Inc. Board. Rigas Dep. 16:20-22. In 2007 or 2008 defendant Daniel Standen, a partner at Sciens, joined the Board at the request of Rigas. Deposition of Daniel Standen (Aug. 11, 2015) (“Standen Dep.”), Attachment D to Subit Dec., at 10:8-12. Defendant Standen is an attorney. *Id.* at 9:12-19. Defendant

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<sup>1</sup> The parties used one set of exhibits for the Rigas, Dameron, McGrane and Standen depositions, which all occurred in New York City. Such exhibits are designated “NYC Ex. \_\_\_\_\_,” and are Attachment B to Subit Dec.

Zechariah Clifton Dameron IV, who is also a Sciens employee, joined the AIS Inc. Board a couple of years later. Deposition of Zechariah Clifton Dameron IV (Aug. 7, 2015) (“Dameron Dep. I”), Attachment E to Subit Dec., at 146:6-7. Dameron is also an attorney. Dameron Dep. I at 5:24-25.

AIS Inc.’s Bylaws provided that the Board “shall manage the business of the Corporation.” Bylaws, art. III, sec. 1, Attachment 1 to Declaration of Michael Allen (Sep. 5, 2015) (“Allen Dec.”), Dkt. No. 31. The Bylaws further declared that “the vote of a majority of the directors present at any meeting at which a quorum is present shall be the act of the Board of Directors.” Bylaws, art. iv, sec. 5.

In 2004 Rigas hired Steve Kalmanovitz (a/k/a Steve Kalman) as President and Chief Executive Officer of AIS Inc. Kalman Dep. at 7:16-8:1. When Kalman became President and CEO, AIS Inc. already had an Employee Manual in place. *Id.* at 29:1-16 & Kalman Ex. 5. The Employee Manual contained a “Benefits” section which included “Vacation.” Employee Manual at pp. 2-3. The Employee Manual provided that “[u]pon termination, earned and unused vacation will be paid at [the employee’s] current rate of pay.” *Id.* at p. 4.

In 2002 plaintiff Michael Allen joined a company called “AIS Ltd.” as finance director. Allen Dec. ¶ 2. AIS Ltd. was a wholly-owned United Kingdom subsidiary of AIS Inc. *Id.* In 2009, after AIS Inc.’s then-

CFO resigned, Allen began performing AIS Inc. CFO duties but still worked abroad. *Id.* at ¶ 3.

On April 20, 2010, Allen accepted the position of “interim CFO” of AIS Inc. and transferred to Seattle. *Id.* at ¶ 4 & Kalman Ex. 2. Allen’s offer letter provided that “[i]n the event of your involuntary departure while in this interim role from AIS for other than Gross Misconduct, AIS will pay you three months[’] pay in lieu of notice . . . .” Kalman Ex. 2.

Allen was also appointed Secretary of AIS Inc. Allen Dec. ¶¶ 9-10. One of Allen’s duties as Secretary was to take minutes at Board meetings. *Id.* Throughout the time Allen served as Secretary, he prepared draft Board minutes and circulated them to the Board for comment. *Id.* Allen incorporated the Board’s revisions into the final minutes. *Id.*

In August 2010 AIS Inc. borrowed \$15 million from Kayne Anderson Mezzanine Partners (“KAMP”). Allen Dec. ¶ 16. In exchange, KAMP obtained a senior secured interest in all of AIS Inc.’s U.S. assets. *Id.* KAMP also initiated control agreements over all of AIS Inc.’s U.S. bank accounts. *Id.* In May 2012 KAMP arranged an additional \$5 million loan for the benefit of AIS Inc. May 15, 2012, AIS Inc. Board Minutes (NYC Ex. 8); Kalman Dep. 48:19-49:6. As part of this transaction, Kalman was replaced as President/CEO by AIS Board member David

McGrane. Kalman Dep. 48:19-49:6. Kalman remained an AIS Inc. Board member. *Id.* at 49:15-51:1.

On February 14, 2013, KAMP gave AIS Inc. a notice of default and seized control of AIS Inc.'s U.S. bank accounts. Rigas Dep. 53:16-24. That same day Allen asked McGrane to approve certain payments to AIS Ltd., which was unaffected by KAMP's actions. Email from M. Allen to D. McGrane (Feb. 14, 2013) (NYC Ex. 65). McGrane replied that he had "been instructed by Sciens to lock everything down." *Id.* In this email McGrane used "Sciens" as a short-hand to refer to the AIS Inc. Board members who represented Sciens's interests and gave him instructions, specifically defendants Standen and Dameron. Deposition of David McGrane (Aug. 10, 2015) ("McGrane Dep."), Attachment F to Subit Dec., at 182:15-183:22.

By this point resignations had reduced the AIS Inc. Board to five members: Rigas, Standen, Dameron, McGrane, and Kalman. Allen Dec. ¶ 21. This gave Sciens control of the Board. McGrane Dep. at 90:8-91:11. On February 15 the Board informed KAMP that the seized bank accounts contained moneys that were earmarked "for payment of AIS Inc.'s payroll due today and other employee obligations." Letter from AIS Inc. Board of Directors to KAMP (2/15/13) (NYC Ex. 12) at ¶ 1. The Board wrote:

We remind you that under Washington state law, any individual or person (in this case, including Lender and its employees) that is in a position to control payment of wages is liable to the employees for the unpaid wages, double damages, and attorneys' fees (see RCW 49.52.050-070); we note that under applicable Washington case law, there is in effect strict liability for failure to pay.

*Id.* The Board also told KAMP: "Unless AIS is in a position to meet payroll on Monday morning . . . AIS's board will have no choice but to terminate all of its employees. AIS is unwilling to continue operations unless it can meet these very basic obligations." *Id.* at ¶ 5.

On February 16 KAMP responded that it would be willing to release the money needed for payroll if AIS Inc. provided appropriate documentation of the amounts due to each employee. Feb. 16, 2013, Letter from KAMP to AIS Inc. (NYC Ex. 13). KAMP noted that it was the AIS Inc. Board that faced "potential liability under Washington state law for unpaid wages." *Id.* At the AIS Inc. Board meeting the following day "the Board authorized[] Mr. Allen and Mr. McGrane to take such actions as are necessary to pay employees in accordance with the [KAMP] Response Letter." Feb. 17 AIS Inc. Board Minutes (NYC Ex. 11).

Allen and McGrane provided KAMP the current payroll information it had requested. Allen Dec. ¶ 22. Allen informed the AIS Inc. Board that the data did not include accrued vacation pay or any other termination benefits. Email from M. Allen to C. Dameron *et al.* (Feb. 18,

2013, 3:14 p.m.) (NYC Ex. 14). Allen told the Board the available funds would not pay the wages due to all AIS Inc. employees and “the Board needs to make a decision on who[m] to pay immediately.” Email from M. Allen to C. Dameron *et al.* (Feb. 18, 2013, 3:14 p.m.) (NYC Ex 14).

On February 20 the Board sent another letter to KAMP stating it would retain AIS Inc.’s employees at least through February 22, while it waited to hear whether KAMP would provide an additional \$2.15 million in funding. Feb. 20, 2013, Letter from AIS Inc. Board to KAMP (NYC Ex. 12), ¶¶ 3-4. The Board reiterated its prior statements regarding the scope of liability for withheld wages under RCW 49.52. *Id.* ¶ 4. The Board concluded its letter thus: “Unless AIS is in a position to meet payroll on Friday morning through the provision by the Lender of the commitments and funding described above, AIS’s board will have no choice but to terminate all of its employees and wind down its operations.” *Id.* ¶ 7.

In a February 22 letter to KAMP, the Board announced that it had “decided to defer its earlier decision to terminate its U.S. employees at the beginning of this week” “in reliance of the Lender’s apparent willingness to provide financing.” Feb. 22, 2013, Letter from AIS Inc. to KAMP (NYC Ex. 12), ¶ 2. The Board now threatened to shut down operations on February 24. *Id.* ¶ 7. The Board again invoked KAMP’s possible liability for wrongfully withheld wages under RCW 49.52 to entice it to release its

hold on AIS Inc.'s bank accounts. *Id.* ¶ 8. On February 26 KAMP lifted its hold on AIS Inc.'s bank accounts. Email from M. Allen to K. Taylor *et al.* (Feb. 26, 2013) (NYC Ex. 32).

At the February 27 Board meeting, defendant Dameron proposed, and defendant Standen seconded, "that the Company should make prompt preparations for a Chapter 7 filing . . . ." Feb. 27, 2013, AIS Inc. Board Minutes (NYC Ex. 11). The Board also approved another letter to KAMP. *Id.* There the Board noted that AIS Inc. had employee payroll obligations due on March 1. The Board threatened to cease operations on March 1 if KAMP didn't agree to provide additional funding necessary to make payroll or allow AIS Inc. to sell its two international subsidiaries to pay its employees. Feb. 27, 2013, Letter from AIS Inc. to KAMP (NYC Ex. 12), ¶¶ 3, 6. Rigas subsequently resigned from the Board retroactive to February 27. March 3, 2013, AIS Inc. Board Minutes (NYC Ex. 11).

On March 1 KAMP rejected all of AIS Inc.'s February 27 proposals and refused to provide any new financing. March 1 Letter from KAMP to AIS Inc., Attachment 3 to Allen Dec.

At the Board's March 3 meeting it "had a discussion and review of outstanding payrolls and taxes for current employees." March 3, 2013, AIS Inc. Board Minutes (NYC Ex. 11). Dameron then proposed, and Standen seconded, a Board resolution that directed *inter alia* the

preparation of a Chapter 7 filing; the cessation of the activities of AIS Inc. and its U.S. subsidiaries; and the termination of all employees “with the exception of critical employees required to aid in the preparation of the Chapter 7 filing.” *Id.* The Board unanimously approved the resolution and directed the officers of the company to take all actions “necessary or advisable” to implement the resolution. *Id.* The Board made the decision to terminate the majority of AIS’s U.S. employees and instructed Allen to carry out its directives. McGrane Dep. 127:7-15.

McGrane resigned the following day leaving Standen, Dameron, and Kalman as the remaining Board members. March 5, 2013, AIS Inc. Board Minutes (NYC Ex. 11). Following McGrane’s resignation, the AIS Inc. Board functioned as the CEO of the company. Kalman Dep. 94:9-95:3. Following McGrane’s resignation, the Board collectively approved every AIS Inc. financial expenditure including all wage payments. *Id.*; Allen Dec. ¶ 28.

Pursuant to the Board’s March 3 directive, Allen sent termination letters to most of AIS’s U.S. employees, excepting only those necessary for preparation of the Chapter 7 bankruptcy. Allen Dec. ¶ 25. The letters included AIS’s obligation to pay accrued vacation. Letter from M. Allen to C. Ueland (Mar. 4, 2013), Attachment 4 to Allen Dec. That same day Allen informed the Board of the wage payment obligations of the states in

which the terminated employees worked. Allen Dec. ¶ 26. He told the Board that the most immediate issue was the wages due to a terminated Nevada employee. Email from M. Allen to J. Madron (Mar. 4, 2013), Attachment 5 to Allen Dec. Allen asked the Board if it was “OK to pay?” *Id.* Dameron responded the Board needed to have “a call to discuss the financial situation and the payment of employees.” Email from C. Dameron to M. Allen (Mar. 5, 2013), Attachment 5 to Allen Dec.

At the Board meeting that afternoon, Standen, Dameron, and Kalman “discussed certain obligations of the Company including its financial obligations to its employees.” March 5, 2013, AIS Inc. Board Minutes (NYC Ex. 11). The Board estimated AIS Inc. owed \$120,000 in payroll and \$350,000 in vacation pay. *Id.* The Board directed Allen to present “a detailed calculation” of the amounts due to retained employees and information regarding their directors and officers (“D&O”) insurance. *Id.* Dameron was concerned about the personal liability of the individual Board members for all of the unpaid employee wages. Emails from C. Dameron to M. Allen (Mar 5, 2013) (NYC 34); Dameron Dep. I 99:6-100:17. The Board decided to put off until the next meeting a “decision regarding paying the retained employees in advance for this week.” March 5, 2013, AIS Inc. Board Minutes (NYC Ex. 11).

At its March 6 meeting the Board resolved “that Mr. Allen should be henceforth instructed to disburse the funds available to the company in the following order: (1) Retained employees (\$9.7k); (2) Payroll taxes; (3) State sales taxes; (4) Employees. March 6, 2013, AIS Inc. Board Minutes (NYC Ex. 11); Kalman Dep. 97:11-98:12. The Board also directed Allen to hold back \$25,000 “for insurances.” *Id.* The “insurances” were the Board member’s personal D&O insurance. Allen Dec. ¶ 29.

The next day the Board enacted a resolution authorizing Allen to disburse between \$7,000 and \$10,000 to secure the Seattle assets of the Company. March 7, 2013, AIS Inc. Board Minutes (NYC Ex. 11); Dameron Dep I. 110:3-111:4. On March 8 Dameron asked Allen to “break out the liability per US company on Vacation pay and the other liabilities we have been discussing.” Email from C. Dameron to M. Allen (Mar. 8, 2013), Attachment 6 to Allen Dec.

At its March 12 meeting, the Board ordered payment of \$19,837.08 for AIS Inc.’s April insurance premiums; \$13,953.00 for a D&O insurance tail; and \$7,853.96 as an advance against the current payroll to the individuals retained to prepare the Company’s Chapter 7 filing. March 12, 2013, AIS Inc. Board Minutes (NYC Ex. 11). These were instructions from the Board to Allen. Dameron Dep. I 111:24-112:1.

On March 13 Allen transmitted to the Board an email entitled “Amounts Due Employees v3 (excluding Kalman).” Email from M. Allen to D. Standen, C. Dameron, and S. Kalman with attachments, Attachment 7 to Allen Dec. The Board had requested Allen provide it with all of AIS Inc.’s wage obligations including those that would arise as a result of the termination of operations from filing the Chapter 7 bankruptcy petition. Allen Dec. ¶ 32.

For the pay period that had ended March 10, 2013, Allen listed a wage obligation of \$5,716.42 to himself. See March 10, 2013, spreadsheet enlargement, Attachment 8 to Allen Dec.<sup>2</sup> The regular pay day for these wages was March 15, 2013. See Attachment 5 to Allen Dec. With respect to the current pay period, which would end on March 24, 2013, Allen listed the wage obligations AIS Inc. would incur from filing for Chapter 7 and terminating the remaining employees. Allen Dec. ¶ 33. For that pay period, Allen listed for himself “gross wages” in the amount of \$80,953.10. See March 24, 2013, spreadsheet enlargement, Attachment 9 to Allen Dec. That amount comprised (1) a severance obligation of \$50,000; (2) forty days/320 hours of accrued vacation pay totaling \$26,659.20; and (3) \$4,230.90 in “regular” and “other” wages. *Id.* After the deduction of a salary advance for that pay period in the amount of

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<sup>2</sup> This figure represents the \$7,613.06 “gross wages” figure listed less the \$1,896.66 salary advance Allen had received for that pay period. Allen Dec. ¶ 35.

\$2,494.29, the listed gross amount of wages due to Mr. Allen for the March 24, 2013, pay period was \$78,458.81. *Id.* The regular pay day for Allen's \$4,230.90 in unpaid salary wages for the March 24, 2013, pay period was March 31. See Attachment 5 to Allen Dec.

The total AIS Inc. wage obligation to Allen listed on the spreadsheets he provided to Standen, Dameron, and Kalman on March 13, 2013, was \$84,175.21. Allen Dec. ¶ 37.<sup>3</sup>

The Board used Mr. Allen's March 13 email as a basis to decide which employees to pay and how much. Kalman Dep. 103:18-104:18. On March 14 the Board asked Allen "to prepare schedules of the pay due to employees omitting the vacation and holiday pay due to them." March 14, 2013, AIS Inc. Board Minutes (5:30 p.m.) (NYC Ex. 11); Kalman Dep. 107:11-108:24. Allen informed the Board it "didn't make any sense" to omit the Company's holiday and vacation pay obligations to its employees from the schedules, but he would comply with the Board's directive. Emails between M. Allen and S. Kalman *et al.* (Mar. 14, 2013) (NYC Ex. 38 & NYC Ex. 39); Kalman Dep. 109:5-11. Once Allen provided the Board with the revised payroll figures, Standen sent an email to Dameron

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<sup>3</sup> The \$72,280 figure for Allen listed on the first page of the attachments to his March 13 email refers to the net amount of pay due to him after the deduction of all federal and state taxes and withholdings. *Id.*

asking: "Shall we get back on the phone to approve this?" Email from D. Standen to C. Dameron (Mar. 14, 2013) (NYC Ex. 39).

Ten minutes later, the AIS Board held a telephonic meeting in which it adopted a resolution to pay \$31,423.72 towards "[n]et payroll to employees from February 25th until their termination[s] as per the list appended to these minutes." March 14, 2013, AIS Inc. Board Minutes (8:15 p.m.) (NYC Ex. 40) with attachment. This constituted a directive from the Board to Mr. Allen to pay the people on the list in the amounts specified. Kalman Dep. 110:23-111:3. The amounts on the attachment represented only a small fraction of the wages that AIS Inc. employees were due. Allen Dec. ¶ 38. None of the money went towards paying Allen's wages. See Attachment to March 14, 2013, AIS Inc. Board Minutes (8:15 p.m.).

At this meeting, which was the final meeting of the AIS Inc. Board of Directors, the Board reviewed the Board minutes dating back to January 11, 2013. March 14, 2013, AIS Inc. Board Minutes (8:15 p.m.); Allen Dec. ¶ 40; Kalman Dep. 111:4-14. The Board then authorized the filing of AIS Inc.'s Chapter 7 bankruptcy petition. March 14, 2013, AIS Inc. Board Minutes (8:15 p.m.). The petition was filed that same day. Allen Dec. ¶ 41. The filing of AIS Inc.'s Chapter 7 bankruptcy petition immediately terminated the remaining AIS Inc. employees including Allen. *Id.*; Kalman

Dep. 23:1-9. Allen has not received any of the unpaid salary, accrued vacation pay, or severance benefits owed to him. Allen Dec. at ¶ 47.

### **B. Procedural Background**

On March 25, 2013, three former employees of AIS Inc. (Lance Hansche, Carl Ueland, and Scott Martin) filed in King County Superior Court a class action lawsuit for willful withholding of wages under RCW 49.52 against Dameron, Standen, Rigas, McGrane, and Kalman. See Complaint in *Hansche v. Dameron* (March 25, 2013), Attachment G to Subit Dec. Allen was a member of the putative class in that case. Allen Dec. ¶ 52.

In early August 2014 the *Hansche* plaintiffs and the remaining defendants entered into a class-wide settlement agreement. See Settlement Agreement in *Hansche v. Dameron*, Case No. 13-2-14587-1 KNT, Attachment H to Subit Dec. (Kalman had been dismissed as a defendant in May 2014. *Id.* at p. 3.). The *Sciens* defendants (Rigas, Standen, and Dameron) insisted on Allen's exclusion from the class as a condition of settlement. Allen Dec. ¶ 53.

The *Hansche* Settlement Agreement obligated defendants Rigas, Standen, and Dameron, but not defendant McGrane, to fund the \$356,500.00 settlement. Settlement Agreement at p. 6. In January 2015 the defendants made the monetary payments required under the Settlement

Agreement, but Sciens wrote the checks. See letter from M. Subit to L. Hansche (Jan. 23, 2015) & check stub, Attachment I to Subit Dec.

On August 15, 2014, Allen filed the complaint in the instant action in the United States District Court for the Western District of Washington against Dameron, Standen, Rigas, and McGrane for violation of RCW 49.52. Dkt. No. 1. On December 12, 2014, defendants Dameron, Standen, and Rigas filed a third-party complaint against Kalman. Dkt. No. 16. On August 31, 2015, the Court approved a stipulation among the parties dismissing Rigas and McGrane as defendants. Dkt. No. 28.

On September 28, 2015, Allen and defendants Standen and Dameron filed cross-motions for summary judgment. Allen moved the district court to enter judgment in his favor for the willful withholding of \$84,175.21 in wages. Dkt. No. 29. Standen and Dameron moved for dismissal of Allen's claims. Standen and Dameron asserted first and foremost that they were not proper defendants under RCW 49.52 because they were members of the AIS Inc. Board of Directors and not officers, vice-principals, or managing agents. Dkt. No. 36, pp. 8-11. Dameron and Standen secondarily argued that they could not be liable for the willful withholding of any Allen's unpaid wages under RCW 49.52 because, as a result of AIS's Chapter 7 filing on March 14, 2013, they no longer had any role within the Company on the pay days for the wages at issue. *Id.* at 11-

12. The parties submitted their summary judgment oppositions on September 28, 2015. Dkt. Nos. 45 & 58. They submitted their summary judgment replies on October 2. Dkt. Nos. 53 & 56.

On March 3, 2016, the district court granted Dameron and Standen's motion for summary judgment and denied Allen's. Dkt. No. 68. The district court granted defendants' motion for summary judgment solely because the court concluded that as a matter of law they could not have engaged in willful withholding with respect to wages with pay days (on or) after the filing of the AIS Chapter 7 bankruptcy petition on March 14, 2013. *Id.* at pp. 5-7. The district Court recognized that *Morgan v. Kingen* directly supported Allen's argument that defendants were liable for the willful withholding of wages earned before the filing of the Chapter 7 petition but with pay days after the filing. *Id.* at pp. 5-6. The district court nevertheless rejected the analysis in *Morgan* as "unpersuasive in that it conflicts with both the language of the statute and prior decisions of the Washington Supreme Court." *Id.* at p. 6. Instead, the Court held that defendants Standen and Dameron did not violate RCW 49.52 because they "did not have the authority to pay plaintiff's wages on the date they came due." *Id.* at p. 7.

The district court dismissed as moot Dameron and Standen's third-party claims against Kalman. Dkt. No. 69. The district court entered final judgment in favor of Standen and Dameron on March 4, Dkt. No. 71.

On March 15 Allen filed a timely motion for the district court to vacate the final judgment it had entered on March 4 and reconsider its order granting Dameron and Standen's motion for summary judgment. Dkt. No. 72. Allen argued that the district court was bound by this Court's construction of RCW 49.52, whether the district court agreed with it or not. *Id.* at p. 2. Allen argued that if the district court believed there were a conflict between *Morgan* and other decisions of this Court, the district court should have certified the relevant questions of state law pursuant to RCW 2.60. *Id.* at p.3. Allen proposed a specific question for the district court to certify. *Id.* at p. 6.

On March 17 the district court ordered defendants Dameron and Standen to file a brief in response to Allen's motion for reconsideration. Dkt. No. 73. Defendants filed their opposition on March 23, Dkt. No. 74. Allen filed his reply on March 24, Dkt. No. 76.

On April 22 the district court granted Allen's motion to vacate the final judgment entered in favor of defendants on March 4 and reconsider the March 3 order granting their motion for summary judgment. Dkt. No. 83. The district court then certified 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?

*Id.* at pp. 3-4.

On May 17, 2016, Standen and Dameron dismissed with prejudice their third-party claims against Kalman. Dkt. No. 87.

### III. ARGUMENT

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). Because the questions in this case pertain to a motion for summary judgment, this Court performs the same inquiry as the district court. *Id.* This Court may reformulate the questions certified. *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200, 205, 193 P.3d 128 (2008).

#### **A. This Court Should Once Again Liberally Construe RCW 49.52 to Assure that the Employee Receives the Full Amount of Wages Due from the Employer.**

RCW 49.52 prohibits an employer, or an officer, vice-principal, or managing agent of an employer, from willfully withholding employee

wages due by statute, ordinance, or contract. To prevail, the employee must show simply that the defendant (1) willfully withheld (2) wages. *See, e.g., Morgan*, 166 Wn.2d at 533. “Wages” under Washington law includes any compensation due by reason of employment. *Dice v. City of Montesano*, 131 Wn. App. 675, 689, 128 P.3d 1253 (2006). “Wages” are not limited to compensation for specific hours of work performed. *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 284, 202 P.3d 1009 (2009). “Wages” include severance pay due under an employment contract. *Dice*, 131 Wn. App. at 689. They also include accrued but unused vacation that the employer is contractually obligated to pay at termination. *McGinnity*, 149 Wn. App. at 284-85; *Walters v. Center Electric, Inc.*, 8 Wn. App. 322, 326-27, 506 P.2d 883 (1973).

The test for whether the failure to pay wages is willful is not stringent. *Schilling v. Radio Holdings Inc.*, 136 Wn.2d 152, 159, 961 P.2d 371 (1998). The refusal must simply be volitional. *Id.* “Willful means merely that the person knows what he is doing, intends to do what he is doing, and is a free agent.” *Morgan*, 166 Wn.2d at 534 (internal quotations omitted). RCW 49.52 provides for payment of twice the amount of wages willfully withheld “by way of exemplary damages.” RCW 49.52.070.

RCW 49.52 reflects the strong policy in favor of the payment of employee wages and prevents abuses by employers. *Jumamil v. Lakeside*

*Casino LLP*, 179 Wn. App. 665, 682-83, 319 P.3d 868 (2014) (citing *Ellerman v. Centerpoint Prepress Inc.*, 143 Wn.2d 514, 519, 22 P.3d 795 (2001) and *Schilling*, 136 Wn.2d at 157, 159). The payment of wages holds a “preferential statutory position.” *Morgan*, 166 Wn.2d at 538. Courts must liberally construe RCW 49.52 to assure payment of the “full amount of the wages” the employee is entitled to receive from his employer. *Schilling*, 136 Wn.2d at 159 (internal quotation omitted). The “statutory directive” of RCW 49.52.070 is “to hold personally liable the party responsible for paying wages who willfully failed to pay the wages owed.” *Morgan*, 166 Wn.2d at 536. An individual corporate officer faces personal liability under RCW 49.52 for the willful withholding of wages once he learns of the employer’s obligation to pay wages but fails to honor it. *Jumamil*, 179 Wn. App. at 685-686.

Here the Court should once again construe RCW 49.52 liberally to assure that Allen receives the full amount of the wages to which he was entitled.

**B. *Morgan v. Kingen* Holds that Individual Corporate Officers are Personally Liable under RCW 49.52 for the Willful Withholding of Employee Wages Earned Prior to the Corporation’s Chapter 7 Bankruptcy even if the Pay Day for the Wages was after the Chapter 7 Bankruptcy.**

The opening sentence of this Court’s opinion in *Morgan* stated that “[t]his 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.” 166 Wn.2d at 531. Affirming the court of appeals, 141 Wn. App. 143, 169 P.3d 487 (2007), this Court held that a Chapter 7 bankruptcy is not a valid defense to an RCW 49.52 action against individual corporate officers for the willful withholding of employee wages. 166 Wn.2d at 538.

The facts of *Morgan* were as follows: Former employees of Funsters Grand Casino filed an action under RCW 49.52 against Gerald Kingen and Scott Switzer. Kingen and Switzer controlled the payment of wages to employees, which included authority to prioritize payment of wages and other corporate obligations. 166 Wn.2d at 531. Funsters had opened its doors in poor financial condition. *Id.* Kingen, Switzer, and the other owners of Funsters made capital contributions in order to allow the casino to meet its financial obligations. 141 Wn. App. at 150.

Only a year after opening, Funsters voluntarily filed for bankruptcy protection under Chapter 11. 166 Wn.2d at 532. Kingen and Switzer continued to operate the casino as debtors-in-possession. *Id.* Funsters’ financial situation continued to decline. The casino’s Chapter 11 bankruptcy trustee moved to convert the proceeding to a Chapter 7 liquidation (or dismiss it). *Id.* During the hearing on the motion, Kingen and Switzer made clear they were unwilling to inject additional capital

sufficient to satisfy the casino's unpaid debts, including wages owed. *Id.* The bankruptcy court converted the matter to a Chapter 7 liquidation on April 7, 2003. *Id.*

At the time of the conversion, Funsters' employees had unpaid wages for two pay periods<sup>4</sup>: March 10 to 23, 2003, and March 24 to April 6, 2003. *Id.* The combined unpaid wages for these two pay periods exceeded \$179,000. *Id.* Funsters, however, had only \$85,823.23 in cash assets. *Id.* The bankruptcy court refused to allow any of this money to satisfy Funsters' employee wage obligations. *Id.* Former Funsters' employees filed a class action against Kingen and Switzer alleging they had wrongfully withheld wages in violation of RCW 49.52. The trial court granted summary judgment to the employees "because their earned wages were not paid by either the company or Kingen and Switzer." 141 Wn. App. at 149.

On appeal, Kingen and Switzer argued that the bankruptcy court's conversion of Funsters' Chapter 11 reorganization proceeding to a Chapter 7 liquidation proceeding relieved the company and them of any ability to willfully deprive the employees of their wages. *Id.* at 154. They argued that due to the conversion to a liquidation proceeding they lost the ability

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<sup>4</sup>A "pay period" is "a defined timeframe for which an employee will receive a paycheck. A pay period may be daily, weekly, bi-weekly, semi-monthly or monthly." WAC 296-126-023(2)(d).

to pay the earned wages from company assets. *Id.* at 156. In particular, they argued that they should not be liable for the \$156,000 in employee wages earned during the March 24 to April 6 pay period because those wages had a pay day of April 11,<sup>5</sup> which was four days after the bankruptcy court's conversion of the matter to a Chapter 7. *Id.* at 156-57.

The court of appeals rejected Kingen and Switzer's arguments. The court of appeals held that it made no legal difference whether Kingen and Switzer had control over the payment of wages on the established pay day for the \$156,000 the employees had earned during the second pay period. *Id.* at 158. What mattered instead was that due to Kingen and Switzer's prior management decisions, including but not limited to their decisions to pay other creditors instead of employees, Funsters did not have sufficient funds on hand to pay its employees on the pay day. *Id.* at 155-156, 158. Critically, the court of appeals recognized that acceptance of Kingen's and Switzer's arguments "would severely undercut the strong legislative policy to ensure wages are paid if the employer files for bankruptcy." *Id.* at 156.

This Court affirmed, 6-3. The Court held that the "bankruptcy of the corporation is not a means to escape personal liability by those who failed to pay wages owed." 166 Wn.2d at 536. The Court concluded that

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<sup>5</sup> A "pay day" is "a specific day or date established by the employer on which wages are paid for hours worked during a pay period." WAC 296-126-023(2)(b).

“[t]he legislature intended, under RCW 49.52.070, to impose personal liability in cases like this because the officers control the financial decisions of the corporation.” *Id.* The Court then gave “many examples that highlight the need for such risk of personal liability”:

The officers decide whether to pay one debt over another (e.g. wages). The officers have the choice to file bankruptcy, or say, close the business and pay its debts (including wages). The officers decide whether to continue running an inadequately capitalized corporation while hoping for a change in financial position.

*Id.* at 536-37. This Court summarized its reasoning thus:

In other words, the officers control the choices over how the corporation’s money is used, and (in cases of unpaid wage claims) RCW 49.52.070 imposes personal liability when the officers choose not to pay wages owed. Such a choice is willful and intentional.

*Id.* at 537.

This Court read its prior decision in *Schilling v. Radio Holdings, Inc.*, to stand for the proposition that “a corporation’s insolvency does not negate a finding of willfulness, especially where the corporate officer is financially solvent.” 166 Wn.2d at 537. Like the court of appeals, this Court rejected Kingen and Switzer’s argument that they were not legally responsible for paying the wages with a pay day after the bankruptcy court’s conversion of the case from Chapter 11 to Chapter 7. *Id.* at 535-536 & n.1. This Court reasoned that (1) Kingen and Switzer had authority

over the payment of wages prior to the Chapter 7 conversion and (2) all of the wages owed had accrued prior to the Chapter 7 conversion. *Id.* at 536. This Court recognized that the “business decisions that create the insolvency are voluntary under” RCW 49.52. *Id.* at 537-38. In particular, Kingen and Switzer had engaged in “a willful business decision . . . that caused the wages owed to remain unpaid” by refusing to invest additional capital into Funsters, which would have kept the business running and avoided the Chapter 7 conversion. *Id.* at 537. This Court concluded that Kingen and Switzer’s failure to pay wages was “willful” and they were personally liable under RCW 49.52 for both the full amount of unpaid wages and exemplary damages. *Id.* at 537-38.

**C. *Morgan* Controls This Court’s Answers to the Questions the District Court Certified.**

*Morgan* holds that where the unpaid wage obligations at issue in an RCW 49.52 action accrued prior to the employer’s Chapter 7 filing, the statute imposes personal liability on those individuals who had authority over the payment of wages before the bankruptcy, regardless of whether the pay day for the wages was after the Chapter 7 filing date. *Id.* at 535-38. *Morgan* all but answers the two questions the district court has certified to this Court. Indeed, *Morgan* applies a *fortiori* here.

Standen and Dameron took many of the same actions that this Court held in *Morgan* were sufficient to create liability for the willful withholding of the employees' wages regardless of whether they had a pay day following the Chapter 7 conversion. Like the defendants in *Morgan*, Standen and Dameron made the decision to continue running an inadequately capitalized corporation while hoping for a change in financial circumstances. Like the defendants in *Morgan*, Standen and Dameron chose not to cease operations and terminate all of the company's employees. Like the defendants in *Morgan*, Standen and Dameron made payroll decisions and determined which bills would be paid and when. Like the defendants in *Morgan*, Standen and Dameron controlled how AIS Inc.'s money was used. Like the defendants in *Morgan*, Standen and Dameron chose whether and when the company should file for bankruptcy. Like the defendants in *Morgan*, Standen and Dameron were "the decision-makers." See Pl. SJ. Mot., Dkt. No. 29, at 16-17.

The defendants in *Morgan* did not, however, make an affirmative decision to file a Chapter 7 bankruptcy petition. The bankruptcy court converted the case from Chapter 11 reorganization to Chapter 7 liquidation because the defendants had refused to infuse new capital. The *Morgan* majority deemed that refusal to be a willful business decision that deprived the corporation of the ability to pay the employee wages at issue,

which was sufficient to create individual liability under RCW 49.52. 166 Wn.2d at 537-38. Here, on March 14, 2013, Standen proposed and Dameron seconded a Board of Directors resolution that AIS Inc. should immediately file a Chapter 7 bankruptcy petition. The AIS Inc. Board of Directors comprised only three individuals. In short, Standen and Dameron directed AIS Inc. to file a Chapter 7 bankruptcy petition on March 14, 2013.

When a corporation files a Chapter 7 bankruptcy petition, all corporate property passes to an estate represented by a trustee. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 352 (1985). The Bankruptcy Code gives the trustee wide-ranging control over the debtor's business. *Id.* "Congress contemplated that when a trustee is appointed, he assumes control of the business, and the debtor's directors are completely ousted." *Id.* at 352-53 (internal quotation omitted). Defendants' argument they are not responsible for paying the wages AIS Inc. owed to Allen because they did not have managerial authority over the corporation on the pay dates for those wages epitomizes legal *chutzpah*. See, e.g., *Embury v. King*, 361 F.3d 562, 566 (9<sup>th</sup> Cir. 2004).<sup>6</sup> The only reason Standen and

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<sup>6</sup> "The classic definition of *chutzpa* is of course this: *Chutzpa* is that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan." *Id.* at n. 22 (quoting Leo Rosten, *The Joys of Yiddish* 94 (1971)).

Dameron lost their managerial authority within AIS Inc. is that they had directed the Company to take an action that removed that authority.

The law is well-established that where an individual puts it out of his power to perform an obligation to another, that is tantamount to a positive refusal to perform the obligation. *E.g., Trompeter v. United Ins. Co.*, 51 Wn.2d 133, 140, 316 P.2d 455 (1957); *McFerran v. Heroux*, 44 Wn.2d 631, 640, 269 P.2d 815 (1954); *Hunter v. Wenatchee Land Co.*, 50 Wn. 438, 443, 97 P. 494 (1908). The law deems the obligation breached at the moment the individual puts it out of his power to perform it. *Id.* Here, by directing AIS Inc. to file a Chapter 7 bankruptcy petition defendants removed the Company's ability to pay the wages owed to Allen (and the other employees). Consistent with *Morgan*, this Court should hold that defendants took a volitional act that constituted willful withholding of wages in violation of RCW 49.52 and, therefore, they were personally required to pay the wages when due. *See* 141 Wn. App. at 149.

Defendants also made a volitional decision to terminate Allen's employment as CFO of AIS Inc. through the filing of a Chapter 7 bankruptcy petition. Indeed, after deciding on March 3, 2013, to immediately terminate most of AIS Inc.'s workforce, defendants (and the other AIS Board members) decided to retain Allen so he could assist the Company in the preparation of its Chapter 7 bankruptcy filing. Defendants

knew that under AIS Inc.'s written policies Allen was entitled to payment of his earned but unused vacation hours at termination. By the time they directed Chapter 7 bankruptcy filing on March 14, defendants also knew that Allen was entitled to a \$50,000 severance payment and had not been paid for all of the hours he had worked over the past two pay-periods. Defendants, however, made a volitional decision not to terminate Allen's employment until the Company filed for bankruptcy.

As in *Morgan*, all of the wages at issue here were earned prior to the Chapter 7 bankruptcy filing. Allen's unpaid wages claim comprises (1) unpaid salary for work performed prior to AIS's chapter 7 bankruptcy filing on March 14, 2013; (2) vacation accrued prior to March 14, 2013, and due to him at termination under AIS Inc.'s employment manual; and (3) severance pay due at termination under his AIS Inc. employment agreement. All three of these components constitute wages earned prior to AIS Inc.'s Chapter 7 petition. *Morgan* itself establishes that Allen's unpaid salary for the work performed on or before March 14 was earned prior to bankruptcy filing. 166 Wn.2d at 536.

*Walters v. Center Electric, Inc.*, 8 Wn. App. 322, 326-27, 506 P.2d 883 (1973), establishes that vacation accrual is a form of employee compensation. Where, as here, the employer has a contractual obligation to pay accrued but unused vacation at termination, that payment is extra

employee compensation akin to overtime pay. *Id.* at 327. An employee's contractual right to a vacation pay cash-out "constitutes an entitlement to compensation for services performed." *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 285, 202 P.3d 1009 (2009). In short, Allen earned the vacation pay at issue here because of the work he performed for AIS Inc. prior to its bankruptcy filing on March 14, 2013, just as much as he earned his salary.<sup>7</sup>

Similarly, severance pay due under an employment contract constitutes "remuneration for services rendered during the period covered by the agreement." *Dice v. City of Montesano*, 131 Wn. App. 675, 689, 128 P.3d 1253 (2006) (quoting *Barrett v. Weyerhaeuser Co. Severance Pay Plan*, 40 Wn. App. 630, 633, 700 P.2d 338 (1985) (internal quotation omitted)). In *Barrett* the court of appeals recognized that severance pay constituted "terminal compensation" that the employer contractually provides as "a means of recompense for the economic exigencies and privations and detriments resulting from the permanent separation of the employee from service." 40 Wn. App. at 633 (internal quotation omitted).

In *Dice* the court of appeals held that a three-month severance payment contractually due to an employee at termination constituted "compensation due by reason of employment." 131 Wn. App. at 689. As

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<sup>7</sup> In its vacated order, the district court ruled Allen did not earn the vacation pay until his March 14 termination. Order at pp. 4-5. The court cited no authority for this ruling.

in *Dice*, the severance payment at issue here “derives solely” from Allen’s employment contract and “the amount was calculated according to his employment earnings at the time of discharge.” *Id.* Accordingly, Allen earned his severance pay because of the work he performed for AIS Inc. prior to its bankruptcy filing on March 14, 2013, just as much as he earned his salary on account of services he performed prior to that date.<sup>8</sup>

To be sure, AIS Inc.’s contractual obligations to pay Allen his accrued but unused vacation and severance matured only upon his involuntary termination from the Company on March 14, 2013, as a result of AIS Inc.’s Chapter 7 bankruptcy that day. That does not meaningfully distinguish this case from *Morgan*. Funsters’ obligation to pay its employees for the work they had performed during the second pay period matured only upon the occurrence of the next pay day, which was four days after the Chapter 7 conversion. AIS Inc.’s obligation to pay Allen his salary for the work he performed during the pay period ending March 10 matured only when the pay day for that pay period occurred on March 15, 2013. AIS Inc.’s obligation to pay Allen his salary for work he performed during the pay period ending March 24 matured only when the pay day for that pay period occurred on March 31, 2013. *Morgan* teaches that corporate officers cannot use the fortuity of the pay day for compensation

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<sup>8</sup> The district court also ruled that Allen did not earn his severance until termination. Order at pp. 4-5. The court also cited no authority for this ruling.

earned by reason of employment to avoid their individual liability for payment of all of the wages the employer owes to an employee.

*Morgan* recognized “the strong legislative policy to ensure wages are paid if the employer files for bankruptcy.” 141 Wn. App. at 156. That policy applies at least as strongly to wages in the form of termination payments contractually owed to an employee as a result of the employer’s decision to file bankruptcy. Here, defendants, who are both attorneys, knew that their decision to file the AIS Inc. Chapter 7 bankruptcy on March 14 would automatically terminate all of the Company employees that the AIS Inc. Board had retained solely for the purpose of preparing the bankruptcy petition. Defendants also knew that terminating these employees would obligate AIS Inc. to pay them their accrued vacation pay and, in the case of plaintiff Allen, his \$50,000 severance as well.

Consistent with *Morgan* and the legislative policies animating RCW 49.52, this Court should hold that where, as here, corporate officers know that their decision to put their company into Chapter 7 will trigger wage obligations to employees who will be terminated as a result of the bankruptcy filing—but have refused to pay those wages—those defendants have willfully withheld wages in violation of RCW 49.52. *Morgan* leaves no doubt that such defendants’ individual liability for the unpaid wages does not depend on whether the officers continued to

exercise management authority within the corporation on the contractual pay date for the wages at issue. That is especially true when the sole reason the officers no longer exercise such management authority is their own decision to put their company into Chapter 7 bankruptcy.

**D. A Ruling that Dameron and Standen are Not Individually Liable for all of Allen's Unpaid Wages Would Severely Undermine the Efficacy of RCW 49.52.**

The district court's now-vacated order granting defendants' motion for summary judgment described this Court's opinion in *Morgan* as "unpersuasive" and contrary to the language of RCW 49.52. The district court essentially adopted the analysis of the three dissenting Justices. Allen respectfully disagrees with the district court's characterization of *Morgan*. In *Morgan* this Court interpreted RCW 49.52 in a liberal rather than a mechanical fashion to prevent corporate officers from subverting the purposes of the statute by using the employer's Chapter 7 bankruptcy as a defense to their personal liability for unpaid employee wages. A ruling that defendants here are not liable for unpaid salary, accrued vacation, and severance pay AIS Inc. owed to Allen would rip a giant hole in the employee-protective fabric of RCW 49.52.

Washington law allows employers to pay their employees as infrequently as monthly. WAC 296-126-023(3). This district court's original ruling would have provided employers with a powerful incentive

to keep their workers on the payroll despite having no ability to pay them. The ruling would have incentivized company officers to file corporate Chapter 7 liquidation petitions the day before the employer's established pay day, thereby depriving employees of any remedy against the officers under RCW 49.52 for up to one month of wages. Providing such an incentive to employers and their officers defeats the fundamental purpose of RCW 49.52, as a majority of this Court recognized in *Morgan*.

The district court's original ruling also provided employers with a strong incentive to use a Chapter 7 bankruptcy filing as a means to avoid paying accrued vacation, severance, and all other payments contractually due to employees at termination. The district court's original ruling immunized the very individuals who direct the bankruptcy filing from personal liability for such termination payments. If the district court's ruling were the law, corporate officers whose company lacks the financial ability to honor the contractual commitments it has made to provide employees with termination payments will know that if they just retain those employees until the day they direct the filing of a Chapter 7 bankruptcy, they can escape personal liability for the termination payments. Such an incentive would frustrate the strong public policy to ensure the payment of all compensation due by reason of employment.

Furthermore, the district court's original ruling would have given employees a corresponding disincentive to continue working for a company in financial distress. Employees will not run the risk of providing up to 30 days of unpaid labor to a struggling employer if they cannot look to the company's officers and managing agents for payment of their wages following the filing of a Chapter 7 bankruptcy petition. Employees who are contractually entitled to vacation cash-outs will have an additional incentive to voluntarily terminate their employment at the first sign of a corporate financial downturn rather than run the risk of losing their termination payments through bankruptcy. A ruling that defendants are not liable for all the wages that AIS Inc. owed to Allen will have the perverse effect of decreasing the chances that a financially struggling company will be able to retain enough employees to survive, which will in the long run result in an increased number of corporate bankruptcies.

Most critically, however, a ruling that corporate officers can use their decision to file a Chapter 7 bankruptcy as means to immunize themselves from personal liability for any wages due to employees would severely undermine the efficacy of RCW 49.52 and conflict with this Court's decision in *Morgan*. Therefore, the Court should answer the district court's certified questions in a manner that makes clear that

defendants are personally responsible under RCW 49.52 for the payment of all of the wages that AIS Inc. owes to Allen.

**E. There is No Conflict between *Morgan* and *Ellerman*.**

In its original summary judgment ruling, the district court determined that there was a conflict between *Morgan* and this Court's earlier decision in *Ellerman v. Centerpoint Prepress Inc.*, 143 Wn.2d 514, 22 P.3d 795 (2001). The *Morgan* defendants principally relied on *Ellerman* both in this Court and in the court of appeals to support their argument that they had not willfully withheld wages in violation of RCW 49.52. See 166 Wn.2d at 535; 141 Wn. App. at 157. Both this Court and the court of appeals rejected that argument.

As this Court stated in *Morgan*, the issue in *Ellerman* was whether Centerpoint's business was a "vice-principal" or "agent" within the meaning of the wage claim statutes. 166 Wn.2d at 535. "Because the court found the business manager not to be a vice-principal or agent, she lacked control over the payment of wages, and was, therefore, not personally responsible." *Id.* at 535-36. Here, the district court rejected Dameron and Standen's argument that they were not proper RCW 49.52 defendants. S.J. Order at pp. 4-5.

In perceiving a conflict with *Morgan*, the district court focused on this Court's statement in *Ellerman* that to be held personally liable under

RCW 49.52 a defendant must “have the individual authority to pay the actual wages.” S.J. Order at 7 (quoting *Ellerman*, 143 Wn.2d at 122). The district court misapprehended the import of the language it cited. As the court of appeals recognized in *Jumamil v. Lakeside Casino LLP*, 179 Wn. App. 665, 319 P.3d 868, 877 (2014), *Ellerman*’s statement that only persons who have direct control over the payment of wages may be held liable under RCW 49.52 applies only to “low-level employees responsible for payroll.” *Id.* at 683-84.

In *Ellerman* the plaintiff sued two individuals under RCW 49.52 for willful withholding of wages: (1) the corporation’s sole stock holder, board member, and president and (2) an employee who was paid \$16.50 an hour to manage the business. 143 Wn.2d at 517. The plaintiff settled with the board member and went to trial against the hourly-paid manager. This Court held that the latter was not a proper RCW 49.52 defendant because she was not a “vice-principal” or “agent” under “a sensible interpretation” of the statute. *Id.* at 521. Nothing in *Ellerman* limits the liability of individuals like defendants Standen and Dameron who had authority over the financial decisions of the corporation and refused to pay a known employee wage obligation. Indeed, the “sensible interpretation” this Court gave to RCW 49.52 in *Ellerman* supports the imposition of

individual liability upon the defendants both here and in *Morgan* for the full wages due.

In short, there is no conflict between *Morgan* and *Ellerman*. *Morgan* not *Ellerman* controls this case.

#### IV. ORAL ARGUMENT

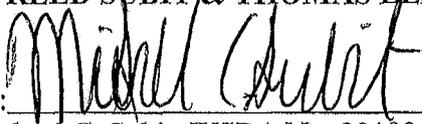
Allen requests oral argument pursuant RCW 2.60.030(5).

#### V. CONCLUSION

This Court should answer the certified questions in a manner that reaffirms its ruling in *Morgan*. The Court should hold that individual corporate officers are personally liable under RCW 49.52 for the willful withholding of employee salary and all other compensation due by reason of employment that is earned prior to a corporate employer's Chapter 7 bankruptcy, regardless of whether the pay day for any of the unpaid wages was after the date of the Chapter 7 bankruptcy filing. Any other ruling would severely undermine the legislative mandate that employees receive payment of all wages due from their employer.

RESPECTFULLY SUBMITTED this 31st day of May 2016.

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 31, 2016, I emailed a copy of  
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I hereby declare under the penalty of perjury of the laws of the  
State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington on this 31<sup>st</sup> day of May 2016.

  
\_\_\_\_\_  
Nancy French

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Dear Clerk,

Attached is the Opening Brief of Appellant Michael Allen for filing in the above matter. Thank you.

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