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25 Attorneys for Plaintiffs  
26 (Additional counsel on next page)

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15 MARTHA RIVERA, MAO HER, ALICIA ) No. CIV F-99-6443 AWI SMS  
16 ALVAREZ, EVA ARRIOLA, PEUANG )  
17 BOUNNHONG, ROSA CEJA, CHHOM CHAN, ) **PLAINTIFFS' SUPPLEMENTAL BRIEF IN**  
18 BEE LEE, PAULA MARTINEZ, MARIA ) **OPPOSITION TO DEFENDANTS' REQUEST**  
19 MEDINA, MAI MEEMOUA, MARGARITA ) **FOR RECONSIDERATION**  
20 MENDOZA, BAO NHIA MOUA, ISIDRA )  
21 MURILLO, MARIA NAVARRO, VATH ) [Fed.R.Civ.P. 72(a); Civ. L.R. 72-303]  
22 RATTANATAY, OFELIA RIVERA, SARA )  
23 RIVERA, MARIA RODRIGUEZ, MARIA RUIZ, ) Date: December 10, 2001  
24 MARIA VALDIVIA, SY VANG, YOUA XIONG, ) Time: 1:30 p.m.  
25 SEE YANG, and XHUE YANG, ) Ctrm: 3  
26 )  
27 Plaintiffs, ) [Hon. Anthony W. Ishii]  
28 )  
29 v. )  
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32 )  
33 NIBCO, INC., an Indiana corporation, and R. M. )  
34 WADE & CO., an Oregon corporation, )  
35 )  
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37 Defendants. )  
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28 **PLAINTIFFS' SUPPLEMENTAL BRIEF IN OPPOSITION  
TO DEFENDANTS' REQUEST FOR RECONSIDERATION**

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## I. INTRODUCTION

Plaintiffs file this Supplemental Brief in Opposition to Defendants' Request for Reconsideration of a protective order issued by Magistrate Judge [Sandra M. Snyder](#) on June 18, 2001. This matter came before the Court on October 1, 2001, at which time the Court requested supplemental briefing. In finding good cause to issue an order limiting discovery into plaintiffs' immigration status and place of birth, Judge Snyder carefully examined the applicable law to reach a correct and equitable result.

For the reasons set forth in detail below, Judge Snyder's decision to issue the protective order was not in clear error or contrary to law:

- (1) The discovery that defendants seek is barred by the Immigration Reform and Control Act of 1986, the regulations implementing that statute, and Equal Employment Opportunity Commission's Enforcement Guidance.
- (2) Judge Snyder's order is supported by well-established case law.
- (3) Plaintiffs' immigration status is not needed to determine remedies.
- (4) The after-acquired evidence doctrine (which defendants rely upon almost exclusively) does not authorize this discovery.

## II. THE STANDARD OF REVIEW

The sole question before this Court is whether Magistrate Judge Snyder's finding of good cause for granting the protective order was "clearly erroneous or contrary to law." Civ. L.R. 72-303; *see* Fed.R.Civ.P. 72(a). A central aspect of the protective order granted by Judge Snyder was that defendants should be barred from asking questions regarding plaintiffs' immigration status and place

1 of birth.<sup>1</sup> Allowing defendants, instead, to *pursue* discovery as to such matters would constitute a  
2 reversal of the Magistrate Judge's decision. As such, this Court is now required to determine  
3 whether her decision was clear error or contrary to law.

4 For the reasons that follow, plaintiffs submit that the result reached by Judge Snyder was  
5 mandated by the law, and was carefully tailored to achieve a manifestly just resolution in the context  
6 of the circumstances before the Court. It should therefore be affirmed.

7  
8 **III. DEFENDANTS' DISCOVERY AMOUNTS TO PROHIBITED**  
9 **REVERIFICATION UNDER IRCA, AND MUST BE DENIED FOR**  
10 **THAT REASON**

11 Because the discovery defendants seek is barred by the Immigration Reform and Control Act  
12 of 1986 ("IRCA"), it cannot be undertaken. Permitting that discovery to go forward would be to  
13 contradict IRCA's carefully crafted statutory scheme – including that statute's painstaking and  
14 detailed balancing of the rights and responsibilities of employees and employers alike in the highly  
15 complex immigration law context. The protective order is required for this reason alone.

16 **A. To Prevent Abuses, Congress Established Strict Limitations on**  
17 **the Employment Verification Process, Including Employer**  
18 **Attempts to "Reverify."**

19 When it enacted IRCA, Congress sought to reduce illegal immigration but, at the same time,  
20 to prohibit abusive employer practices that would unlawfully discriminate against non-citizen  
21 immigrant workers and discourage immigrant workers from asserting their rights in the workplace.  
22 Because of substantial evidence<sup>2</sup> that those controls could be used by employers to selectively deny  
23 employment opportunities to minority group members<sup>3</sup> – particularly including Latinos and Asians –

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24 <sup>1</sup> It is plaintiffs' understanding from the Court's remarks at the October 1, 2001 hearing that the Court has no  
25 concerns with the substance of Section B of plaintiffs' [Proposed] Protective Order, lodged with the Court on May 21,  
26 2001. That aspect of the Order is therefore not addressed in this brief.

27 <sup>2</sup> *See, e.g.*, H.R. Conf. Rep. No. 682, 99<sup>th</sup> Cong., 2d Sess., pt. I at 70, *reprinted in* 1986 U.S.C.C.A.N. 5649, 5672  
(testimony regarding impact of employer sanctions on minority groups).

28 <sup>3</sup> *Id.* (noting concerns that "employers, faced with the possibility of civil and criminal penalties, will be reluctant  
to hire persons because of their linguistic or physical characteristics.").

1 Congress added antidiscrimination provisions to complement IRCA’s “employer sanctions.”<sup>4</sup> Key  
2 among these provisions are prohibitions against “document abuse” or “document discrimination” –  
3 that is, employers’ asking for “the production of any other document” [*i.e.*, other than those required  
4 by the I-9 employment verification process].” 8 U.S.C. § 1324a(b)(1)(A). *See also* 8 U.S.C. §  
5 1324b(a)(6) (prohibition against requesting “more or different documents than are required under  
6 section 1324a(b) of this title”).

7 These prohibitions make it an “unfair immigration-related employment practice” under IRCA  
8 for an employer *to require anything more than those documents the I-9 process requires*. *Id.* Unless  
9 the employee’s initial work authorization has expired (*e.g.*, as in the case of a temporary work visa),  
10 or if the employer has actual knowledge that an employee is undocumented, the employer is  
11 categorically barred from requiring her to present those documents again (*i.e.*, “reverification”).<sup>5</sup> 8  
12 U.S.C. § 1324b(a)(6); 8 USC § 1324a(a)(2); 8 CFR § 274a.2(b)(1)(vii). Aside from those two  
13 narrowly-defined situations, IRCA’s regulations make it unlawful for an employer to reverify in  
14 other circumstances, such as when an individual is not considered a “new hire” but rather  
15 “continuing in employment.” An employee is deemed to be “continuing in his or her employment”  
16 *inter alia* when:

- 17 (4) *An individual is on strike or in a labor dispute; [or]*  
18 (5) *An individual is reinstated after disciplinary suspension [ ]or wrongful termination,*  
19 *found unjustified by any court . . . or otherwise resolved through reinstatement or*  
20 *settlement.*

21 8. C.F.R. § 274a.2(b)(viii)(A)(4), (5).

22 The document abuse and reverification provisions are plainly integral to effectuating the  
23 intent of Congress that undocumented workers would – even under IRCA – continue to be able to  
24 avail themselves of employment statutes such as Title VII.<sup>6</sup> Vigorous enforcement of those laws

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24 <sup>4</sup> Immigration Act of 1990, §§ 531-39, amending the Immigration and Naturalization Act (“INA”), § 274B, 8  
25 U.S.C. § 1324b.

26 <sup>5</sup> *See U.S. v. Padnos Iron & Metal Co.*, 3 OCAHO 414, 1992 WL 535554 (finding document abuse committed  
27 during reverification process, and rejecting respondent’s defense of good faith compliance with statute).

28 <sup>6</sup> *See, e.g.*, the report of the House Education and Labor Committee on the Immigration Reform and Control Act  
of 1986 (“IRCA”) (“[T]he Committee does not intend that any provision of this Act would limit the powers of State or

1 furthers the intent of IRCA by ensuring that employers gain no economic advantage by hiring  
2 undocumented workers.<sup>7</sup> Local 512, Warehouse & Office Workers' Union v. NLRB (Felbro), 795  
3 F.2d 705, 719-20 (9th Cir. 1986), *citing* Sure-Tan v. NLRB, 467 U.S. 883, 893 (1984).

4 **B. IRCA's Prohibitions Against Reverification Apply With Equal**  
5 **Force in the Litigation Context.**

6 The discovery defendants seek concerning plaintiffs' immigration status and closely related  
7 matters would, if permitted by the Court, plainly violate IRCA's carefully-designed employment  
8 verification process. Any argument that the civil litigation context magically renders these inquiries  
9 benign -- let alone totally immunizes them from IRCA's bar on "reverifying" inquiries -- is meritless  
10 because it would allow them to engage in the very practices proscribed by Congress. Were this  
11 Court to permit this discovery to proceed, it would be setting a very dangerous legal precedent: that  
12 immigrant workers who wish to assert their legal rights can be stripped of their IRCA protections  
13 once they step into the judicial system. Such a precedent would severely undermine the purposes of  
14 IRCA itself.<sup>8</sup>

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15 Federal labor standards agencies such as the [EEOC] to remedy unfair practices committed against undocumented  
16 employees for exercising their rights . . . To do otherwise would be counterproductive of our intend to limit the hiring of  
17 undocumented employees and the depressing effect on working conditions caused by their employment. "), Educ. & Lab.  
18 Comm., H.R. Rep. No. 682 (II), 99th Cong., 2d Sess. 8-9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5758, and that of  
19 the House Judiciary Committee, Jud. Comm., H.R. Rep. No. 99-682 (I), 99th Cong., 2d Sess. 58 (1986), *reprinted in*  
20 1986 U.S.C.C.A.N. 5662 (employer sanctions provisions of IRCA should not "be used to undermine in any way" legal  
21 protections for undocumented employees).

22 <sup>7</sup> Judge Coyle noted in Tortilleria that enforcing the employment rights of undocumented workers furthers the  
23 purpose of IRCA by reducing the incentive for employers to hire undocumented workers. *See e.g. Tortilleria*, 758 F.  
24 Supp. at 593. As a result, retaliation against workers who file claims against their employers is illegal. *See e.g.*  
25 Contreras v. Corinthian Vigor Insurance Brokerage, Inc., 25 F.Supp.2d 1053, 1059-60 (N.D. Cal. 1998) (finding  
26 allegedly undocumented plaintiff entitled to seek punitive damages under the Fair Labor Standards Act when employer  
27 retaliated against her for filing a wage claim).

28 However, by themselves the statutory coverage and retaliation provisions do not address the reluctance of  
undocumented workers to bring Title VII cases due to their "fear of deportation" that Judge Coyle referred to in  
Tortilleria, if workers suspect that they will have to reveal their documentation status in the process of litigation. *See e.g.*  
Tortilleria, 758 F. Supp. at 593.

<sup>8</sup> Not surprisingly, the issue reverification tends to arise in the employment or labor context where workers have  
attempted to avail themselves of their workplace rights. By identifying reinstatement after wrongful termination as a  
situation in which an employer may not reverify an individual's work authorization, the IRCA regulations explicitly  
contemplate and prohibit reverification in the context of litigation. It would be illogical for Congress to have prohibited  
reverification upon reinstatement after a wrongful termination case if employers could nonetheless reverify that same  
worker's status during the discovery process of the underlying employment case.

1           Moreover, since the majority of the plaintiffs have been rehired by defendant R.M. Wade &  
2 Co. after Wade acquired the plant from defendant NIBCO, Inc. in 1999, IRCA excludes them from  
3 reverification even in the absence of this litigation by virtue of being current employees. 8 U.S.C. §  
4 1324b(a)(6); 8 USC § 1324a(a)(2); 8 CFR § 274a.2(b)(1)(vii); 8 C.F.R. § 274a.2(b)(viii)(A)(4), (5).  
5 Allowing defendants to nonetheless reverify their work eligibility would single them out due to their  
6 having filed a discrimination claim against defendants -- contravening the intent of IRCA that  
7 reverification not be used to discourage workers from asserting their rights.<sup>9</sup>

8           The importance of those protections to the integrity of workplace statutes, and indeed to the  
9 integrity of the federal courts themselves, is difficult to overstate. Were employers permitted to  
10 engage in IRCA-prohibited inquiries, it would – as this Court itself noted during the October 1  
11 hearing on this matter – deter and intimidate employees who, through their claims, would advance  
12 the enforcement of important employment laws such as Title VII.

13           In sum, Magistrate Judge Snyder reached exactly the right result in issuing an order that takes  
14 those protections into account. By so doing, Judge Snyder clearly understood the need to craft a  
15 solution fully consonant with the IRCA statutory scheme that was established by Congress. Far  
16 from being “contrary to law,” therefore, her decision is entirely consistent with the law and, indeed,  
17 dictated by it.

#### 18 19           **IV. THE IMPORTANCE OF ADHERING TO IRCA’S SAFEGUARDS** 20           **FINDS EXTENSIVE SUPPORT IN THE LAW**

21           As did Magistrate Judge Snyder, the federal agencies charged with administering federal  
22 workplace laws have recognized the important purposes of IRCA’s protections. The U.S. Equal  
23 Employment Opportunity Commission, in an 1999 enforcement guidance on this subject, cites to  
24 IRCA and its implementing regulations to conclude that “employers may not request or reexamine I-  
25 9 documents of workers returning from a discriminatory discharge” unless the employer *knows* that  
26 the worker is unauthorized (emphasis supplied). EEOC Enforcement Guidance on Remedies

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27           <sup>9</sup> See footnote 6, *supra*.

1 Available to Undocumented Workers Under Federal Employment Discrimination Laws, No.  
2 915.002, issued October 26, 1999 (“EEOC Guidance”).<sup>10</sup> Likewise, in a recent opinion of its  
3 General Counsel, the National Labor Relations Board reiterated IRCA’s prohibition on reverification  
4 in the context of a discrimination case against an employer:

5 [Q]uestions concerning reinstatement are only appropriately raised in a [NLRB]  
6 compliance proceeding. Such evidence concerning a discriminatee’s work  
7 authorization status is relevant at compliance proceedings *only* if the respondent  
8 has a reasonable basis independent of the compliance proceeding for knowing that  
9 the discriminatee cannot lawfully work in the country. In this regard, we would  
10 object to the compliance proceeding being used as a fishing expedition to try to  
11 determine whether someone is unlawfully working in the country.<sup>11</sup>

12 Likewise, Magistrate Judge Snyder's order prohibiting the use of discovery to probe into  
13 plaintiffs’ immigration status is equally well supported by established federal case law. The Ninth  
14 Circuit, in reversing a National Labor Relations Board decision conditioning back pay on proof of  
15 work authorization, upheld the administrative law judge's decision to permit discriminatees to testify  
16 under assumed names and to refuse to answer questions relating to their immigration status. Felbro,  
17 795 F.2d at 710. More recently, consistent with Felbro, a materially identical protective order was  
18 granted by another district court within this Circuit. In Acevedo-Valdovino v. Vander Houwen, No.  
19 CY-98-3074-RHW (W.D. Wash. 1999) (action under the Migrant and Seasonal Agricultural Worker

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20 <sup>10</sup> The EEOC’s administrative interpretations of Title VII are “entitled to great deference.” Albemarle Paper Co. v.  
21 Moody, 422 U.S. 405, 431 (1975). A true and correct copy of this Guidance is appended for the convenience of the  
22 Court at Exhibit A.

23 <sup>11</sup> Memorandum GC 98-15, “Reinstatement and Backpay Remedies for Discriminatees Who May be  
24 Undocumented Aliens in Light of Recent Board and Court Precedent,” December 4, 1998 (emphasis supplied). “Courts  
25 must defer to the requirements imposed by the Board if they are “rational and consistent with the [National Labor  
26 Relations] Act.” Allentown Mack Sales & Serv. v. NLRB, 522 U.S. 359, 394 (1998); *see also* Auciello Iron Works v.  
27 NLRB, 517 U.S. 781, 787 (1996) (NLRB due considerable judicial deference by virtue of its charge to develop national  
28 labor policy).

29 Since the NLRA was the model for Title VII's remedial provisions, cases interpreting the NLRA are persuasive in  
30 construing those provisions of Title VII. Lorance v. AT&T Technologies, Inc., 490 U.S. 900, 909 (1989). *See also*  
31 EEOC Guidance at n.3 and associated text (looking to decisions applying the NLRA for guidance in interpreting Title  
32 VII back pay provisions). A true and correct copy of the General Counsel’s opinion is appended hereto for the  
33 convenience of the Court as Exhibit B.

1 Act and citing to, *inter alia*, Felbro, 795 F.2d at 719; In re Reyes, 814 F.2d 168, 170 (5th Cir. 1987),  
2 *cert. denied sub nom. McAllen v. Reyes*, 487 U.S. 1235 (1988)), the court noted that “[i]f  
3 documented and undocumented workers are to be treated identically, their status as documented or  
4 undocumented becomes immaterial. Discovery on alienage issues cannot lead to admissible  
5 evidence because it cannot lead to relevant evidence.” (citations omitted.)<sup>12</sup>

6 Like the Ninth Circuit, the Fifth Circuit has placed limitations on defendant-employers’  
7 ability to conduct invasive discovery regarding workers' immigration status and related issues. In In  
8 re Reyes, *supra*, the court reversed a district court's order permitting discovery into *inter alia*  
9 plaintiffs’ citizenship status, places of birth, and immigration status. The Fifth Circuit noted that  
10 plaintiffs could be deterred from pursuing their rights if the discovery were permitted, due to the  
11 “embarrassment and inquiry into their private lives” and potential collateral consequences.<sup>13</sup> Id., 814  
12 F.2d at 170. *See also* Montelongo v. Meese, 803 F.2d 1341, 1352 n.17 (5th Cir. 1986) (district court  
13 barred inquiry into the immigration status of class members in an action under Farm Labor  
14 Contractor Registration Act).

15 In addition to being required by IRCA, therefore, Magistrate Judge Snyder’s order finds wide  
16 support in the authoritative agencies interpreting that statute and in the courts that have addressed the  
17 question of discovery in the immigration context. Far from being “contrary to law,” her result was  
18 the correct one.

## 19 **V. DEFENDANTS’ DISCOVERY IS NOT NEEDED TO DETERMINE** 20 **REMEDIES**

21 Because no discovery is required for the determination of plaintiffs’ remedies if they prevail  
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23 <sup>12</sup> The decision in Acevedo-Valdovino is appended as Exhibit C. Plaintiffs respectfully request that the Court  
24 take judicial notice thereof pursuant to Fed.R.Evid. 201.

25 <sup>13</sup> The In re Reyes court reasoned that such information:

26 was completely irrelevant to the case before it and was information that could inhibit petitioners in  
27 pursuing their rights in the case because of possible collateral wholly unrelated consequences,  
because of embarrassment and inquiry into their private lives which was not justified, and also  
because it opened for litigation issues which were not present in the case.

1 on the merits of their action, the proposed protective order is appropriate.

2 **A. The Calculation of Plaintiffs’ Monetary Damages Does Not Require A**  
3 **Determination of Their Immigration Status**

4 Both the Ninth Circuit and the courts of the Eastern District have consistently found that the  
5 entitlement of plaintiffs to monetary relief for employment claims is unaffected by their immigration  
6 or employment authorization status. *See, e.g., Felbro*, 795 F.2d 705 (granting NLRB petition for  
7 enforcement containing back pay award); *Bevles Co., Inc. v. Teamsters Local 986*, 791 F.2d 1391  
8 (9<sup>th</sup> Cir. 1986) (upholding arbitration awards granting back pay to undocumented employees); *EEOC*  
9 *v. Hacienda Hotel*, 881 F.2d 1504 (9<sup>th</sup> Cir. 1989) (following *Felbro* regarding back pay  
10 availability);<sup>14</sup> *EEOC v. Tortilleria “La Mejor,”* 758 F.Supp. 585 (E.D. Cal. 1991) (scope of Title  
11 VII not diminished by passage of IRCA).

12  
13 These courts are in accord with the EEOC’s Guidance on Remedies Available to  
14 Undocumented Workers Under Federal Employment Discrimination Laws, which states  
15 “[E]mployers who discriminate against unauthorized workers are liable for monetary relief,  
16 including compensatory, punitive, or liquidated damages, to the same extent as for authorized  
17 workers.” EEOC Guidance, III.B.3. *See also Contreras v. Corinthian Vigor Insurance Brokerage,*  
18 *Inc.*, 25 F.Supp.2d 1053, 1059-60 (N.D. Cal. 1998) (finding allegedly undocumented plaintiff  
19 entitled to seek punitive damages under the Fair Labor Standards Act, and noting “the Ninth  
20 Circuit’s historically expansive view of remedies under federal labor laws”).  
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*In re Reyes*, 814 F.2d at 170. Such a result cannot be foreclosed in the instant action.

26 <sup>14</sup> Although *Felbro* and *Hacienda Hotel* concerned claims filed prior to IRCA’s enactment in 1986, their reasoning  
27 has been adopted in cases postdating IRCA, including in cases decided by the Eastern District. *See, e.g., EEOC v.*  
28 *Tortilleria “La Mejor,”* 758 F.Supp at 593-94 (*citing Felbro, Apollo Tire, and Hacienda Hotel*, regarding scope of Title  
VII’s coverage of undocumented workers); *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, 25 F.Supp.2d at  
1059 (*citing Felbro, Hacienda Hotel, and Bevles* on the issue of monetary damages). *See also NLRB v. Kolkka*, 170  
F.3d 937 (9<sup>th</sup> Cir. 1999); *EEOC Guidance* at n.13 and 29 (*citing to Felbro and Hacienda Hotel*).

1 Only in situations where an employer has “actual” or “constructive” knowledge than an  
2 employee is undocumented is any reverification of employment authorization appropriate, and then  
3 only through the established I-9 process and at the time remedies were awarded. NLRB v. A.P.R.A.  
4 Fuel Oil Buyers Group, 134 F.3d 50 (2d Cir. 1997) (*citing* extensively to Felbro as basis for  
5 reinstatement conditioned on presentation of I-9 documents within reasonable period prior to time of  
6 rehire, and noting that “[C]ongress . . . [in enacting IRCA] expressly approved the view of the  
7 Supreme Court in Sure-Tan [v. NLRB], 467 U.S. 883 (1984)] (that undocumented workers are  
8 entitled to labor protections.”); 8 USC § 1324a(a)(2). Since, as already noted, defendants have no  
9 basis for believing any of the plaintiffs to be undocumented, even this post-trial procedure would not  
10 be applicable.

12 For these reasons, defendants cannot point to remedies calculations as a basis for the  
13 discovery they seek.

15 **B. Likewise, Awards of Reinstatement Do Not Require A Determination of**  
16 **Plaintiffs’ Immigration Status**

17 Undocumented workers are presumptively entitled to reinstatement, unless the employer has  
18 actual knowledge that a given worker is undocumented.<sup>15</sup> EEOC Enforcement Guidance on  
19 Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws,  
20 No. 915.002, issued October 26, 1999. Thus, for essentially the same reasons as those concerning  
21 monetary remedies, pre-trial discovery into plaintiffs’ immigration or employment authorization  
22 status is not required. Moreover, plaintiffs’ post-trial reinstatement need not be conditional  
23 inasmuch defendants have no “actual” or “constructive” knowledge that any of them are  
24 undocumented. Sure-Tan v. NLRB, 467 U.S. 883, 902 (1984) (approving NLRB order of  
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27 <sup>15</sup> Similarly, the NLRB has stated that without an affirmative showing that a discriminatee is unauthorized to work  
in this country, unconditional reinstatement is required. NLRB Memorandum GC 98-15.

1 conditional reinstatement of undocumented employees); A.P.R.A., *supra*, 134 F.3d at 57 (ordering  
2 reinstatement, conditioned upon presentation within a reasonable time, of I-9 documents). In this  
3 way, courts are not put in the position of having to determine plaintiffs' work eligibility, and the  
4 employer is not required to reinstate a worker whom it knows to be undocumented.

5  
6 As plaintiffs apprised the Court during the October 1, 2001 hearing on this matter, plaintiffs  
7 have already supplied defendants with information they currently have concerning their mitigation  
8 efforts, such that any back pay award this Court may make can be appropriately adjusted as needed.  
9 As the foregoing authorities make clear, however, this Court is not charged with the task of delving,  
10 for remedies purposes, into the technical intricacies of plaintiffs' immigration status.<sup>16</sup> Nor are the  
11 plaintiffs themselves necessary capable to make legal determinations as to their status.<sup>17</sup> As such,  
12 this provides no basis for defendants' discovery requests.  
13  
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## 15 VI. THE AFTER-ACQUIRED EVIDENCE DOCTRINE DOES NOT AUTHORIZE 16 THE DISCOVERY AT ISSUE

17 The foregoing reasons demonstrate that the discovery that defendants seek, and the way they  
18 seek it, are flatly impermissible. Moreover, defendants' heavy reliance upon the "after-acquired

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20 <sup>16</sup> Even assuming *arguendo* some remotely imaginable reason for obtaining the requested information, the  
21 intricate and complex nature of immigration law has led the Ninth Circuit to conclude that questions concerning the  
22 immigration status of workers should be left to the appropriate authorities instead of trying to determine such matters in  
23 an unrelated court proceeding where such workers are attempting to assert their rights. Referring to its earlier decision in  
24 Apollo Tire, the Ninth Circuit noted, "We hesitate to require the (NLRB) to delve into immigration matters, out of its  
field of expertise. Questions concerning the status of an alien and the validity of his papers are matters properly before  
the Immigration and Naturalization Service." Felbro, 795 F.2d at 717-18. The EEOC has likewise determined that it is  
"not charged with the enforcement of IRCA and should not participate in 'the process of determining an employee's  
immigration status.'" EEOC Enforcement Guidance on Remedies Available to Undocumented Workers Under Federal  
Employment Discrimination Laws, No. 915.002, issued October 26, 1999.

25 <sup>17</sup> Asking plaintiffs to testify as to their immigration status requires them to draw a legal conclusion that they may  
26 not be fully qualified to draw, in part because these intricacies. Many individuals are not aware that they may have a  
27 legal right to be in the United States, and it is not uncommon for some individuals from families of blended alienage to  
be unaware that they are U.S. citizens through birth or through derived or acquired citizenship, or are entitled to  
28 derivative legal status. *See generally*, 8 U.S.C. 1431, 1433. In addition, the immigration status of individuals who are  
the process of legalizing may be difficult to determine with certainty.

1 evidence” doctrine is wholly misplaced on two grounds: 1) no such evidence is present here; and 2)  
2 even assuming *arguendo* that this doctrine applied here, it would not permit defendants to engage in  
3 the groundless “fishing expedition” they wish to undertake without regard to statutory schemes such  
4 as IRCA, or the appropriate limits imposed by the Federal Rules of Civil Procedure.

5 **A. The Doctrine Does Not Apply Here, Because There Is No “After-  
6 Acquired Evidence” To Begin With.**

7 McKennon is inapplicable to the present dispute for the plain reason that there is no “after-  
8 acquired evidence” here. For a defendant to properly invoke the after-acquired evidence doctrine, “it  
9 must prove that . . . the employee *actually committed the misconduct.*” (emphasis supplied) *See,*  
10 *e.g., Bullock v. Balis & Co., Inc.*, 2000 U.S. Dist. LEXIS 18207 (E.D. Pa. 2000); Johnson v. City of  
11 Elgin, 2001 U.S. Dist. LEXIS 2109 (N.D. Ill. 2001) (defendants must allege existence of after-  
12 acquired evidence). Defendants do not allege that there is evidence before the parties or the Court of  
13 any “employee wrongdoing that would lead to a legitimate discharge,” McKennon, 513 U.S. at 362.  
14 Indeed, defendants have *no* legitimate reason whatsoever to believe that this discovery would in fact  
15 reveal any evidence of “employee wrongdoing.”

16 Thus, even as a threshold matter, defendants’ virtually exclusive reliance on the after-  
17 acquired evidence doctrine must fail.

18 **B. McKennon Does Not Authorize Defendants To Embark Upon A  
19 Discovery “Fishing Expedition” That Would Trammel IRCA**

20 Even assuming *arguendo* that McKennon were somehow determined to apply to the instant  
21 situation, it does not sanction the discovery defendants seek.

22 Defendants would have the Court believe that McKennon’s after-acquired evidence doctrine  
23 constitutes an unstated license to conduct discovery otherwise barred by statute – including IRCA --  
24 or limited pursuant to the protections against discovery abuses contained in the Federal Rules of  
25 Civil Procedure. Indeed, defendants turn the doctrine on its head, contending that it presumptively  
26 justifies any attempts to obtain (alleged) evidence necessary to even invoke the doctrine in the first  
27

1 place.<sup>18</sup> But nowhere does McKennon authorize a different, more invasive discovery standard  
2 wherever a defendant speculatively postulates the possible existence of after-acquired evidence. To  
3 the contrary, McKennon only addresses the impact of such evidence *after* it has been obtained.  
4 Nothing in McKennon gives defendants license to disregard Congressionally-enacted statutory  
5 schemes such as IRCA, or the appropriate limits imposed by the Federal Rules. Notably, the  
6 McKennon Court itself pointed out the possibility that the doctrine could be subject to abuse by  
7 employers, stating, “The concern that employers might as a routine matter undertake extensive  
8 discovery into an employee's background or performance on the job to resist claims under the [Age  
9 Discrimination in Employment] Act is not an insubstantial one,” *id.* at 363 (recommending *inter alia*  
10 use of Rule 11 sanctions to counter such abuses).

11 The Court’s concern in this regard is echoed in the decisions applying McKennon,<sup>19</sup> Indeed,  
12 several courts have expressly criticized employers’ use of discovery “fishing expeditions” in pursuit  
13 of after-acquired evidence. *See, e.g., Miller v. AT&T*, 83 F.Supp.2d 700, 706 (S.D.W.V. 2000)  
14 (“Even if the after-acquired evidence doctrine applies, it is not intended to be used as a fishing  
15 expedition by employers to find wrongful conduct on the part of their terminated employees for the  
16 purpose of limiting their damages.”); Washington v. Lake County, 969 F.2d 250, 255 (7<sup>th</sup> Cir. 1992)  
17 (approving of application of doctrine in a manner “that . . . weakens the incentive for an employer to  
18 engage in a fishing expedition”), *citing O’Driscoll v. Hercules, Inc.*, 745 F.Supp. 656, 659 (D. Utah  
19 1990); Dodge v. Hunt Petroleum Corp., 1998 U.S. Dist. LEXIS 9963, 3 (N.D. Tex. 1998) (finding  
20 that broad scope of defendant’s efforts to discover after-acquired evidence may support inference of

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21  
22 <sup>18</sup> In fact -- despite defendants’ virtually exclusive reliance on the “after-acquired evidence” doctrine to legitimate  
23 the disputed discovery -- *none* of defendants’ recently proposed interrogatories are geared toward such evidence. Six of  
24 the eight interrogatories request information about whether plaintiffs have been “lawfully entitled to work in the U.S.”  
25 *after* their termination from NIBCO. *None* of the interrogatories bear upon plaintiffs’ status at the time they applied to  
NIBCO for employment or, indeed, at any time during that employment. *See* [Proposed] Defendants’ Set of  
Interrogatories Submitted Pursuant to the Hearing on October 1, 2001, and cover letter thereto, dated November 1, 2001.  
True and correct copies of these materials are appended hereto as Exhibit D. *See also* plaintiffs’ response thereto dated  
November 9, 2001, a true and correct copy of which is appended hereto as Exhibit E.

26 <sup>19</sup> *See, e.g., Frazier Industrial Co., Inc. v. NLRB*, 213 F.3d 750, 760 (D.C. Cir. 2000); Watson v. Riverside  
27 Osteopathic Hospital, 78 F.Supp.2d 634, 646 (E.D. Mich. 1999); McCray v. DPC Industries, Inc., 875 F.Supp. 384, 389  
(E.D. Tex. 1995).

1 retaliatory purpose). Here –particularly where defendants have no factual basis whatsoever to  
2 believe that any of the plaintiffs have engaged in “wrongdoing,” *supra* -- there can be no grounds for  
3 permitting the unprecedented discovery they so vigorously pursue.<sup>20</sup>

4 Notwithstanding defendants’ strained construal of McKennon, the after-acquired evidence  
5 doctrine does not create an independent justification for the discovery defendants seek – discovery  
6 that would flout the prohibitions established by IRCA. To the contrary, the courts have pointed out  
7 myriad ways in which such evidence may be obtained short of such invasive discovery. For  
8 example, the court in Watson, *supra*, observed:

9 [T]he present case does not implicate McKennon’s concern that ‘employers might as  
10 a routine matter undertake extensive discovery into an employee’s background or  
11 performance on the job to resist claims’ asserted by discharged employees. [Citation  
12 omitted] [I]n this case, much of the after-acquired evidence came from the testimony  
13 of Plaintiff herself, other evidence was provided to [the defendant] by co-workers  
14 after Plaintiff’s discharge and well before this suit, and all of this merely corroborated  
15 [defendant’s] prior determination [of the plaintiff’s wrongdoing.]

16 Id., 78 F.Supp.2d at 646. Defendants cannot be heard to complain that the after-acquired  
17 evidence doctrine requires this Court to permit discovery prohibited by IRCA.

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25 <sup>20</sup> The concerns raised by the chilling effect of these highly sensitive yet irrelevant inquiries certainly fall within  
26 the “extraordinary equitable circumstances” noted by the U.S. Supreme Court in McKennon that counsel a modification  
27 in the application of the “after-acquired evidence” doctrine – that is, even assuming *arguendo* that the doctrine had any  
28 application here, which plaintiffs obviously dispute. Indeed, as Magistrate Judge Snyder observed, unlike cases where  
employees who have committed application fraud or engaged in wrongdoing merely face a cap on damages,  
“undocumented employees face a much more serious ramification from background discovery -- -- possible deportment  
[sic] and criminal prosecution.” Rivera v. NIBCO, Inc., 2001 U.S. Dist. LEXIS 8335, 14 (E.D. Cal. 2001).

1 **VII. CONCLUSION**

2 For the foregoing reasons, Magistrate Judge Snyder’s issuance of the protective order was  
3 neither “clearly erroneous” nor “contrary to law.” Civ. L.R. 72-303. Plaintiffs therefore respectfully  
4 request that the Magistrate Judge’s decision be affirmed, and that this Court accordingly enter  
5 plaintiffs’ proposed protective order.

6  
7 Dated: November 13, 2001

Respectfully submitted,

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