

No. 75372-0-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,  
a regional transit authority, dba SOUND TRANSIT,

Respondent,

v.

STERNOFF L.P.,

Appellant.

FILED  
Sep 16, 2016  
Court of Appeals  
Division I  
State of Washington

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APPEAL FROM THE SUPERIOR COURT  
FOR KING COUNTY  
THE HONORABLE SUZANNE R. PARISIEN

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BRIEF OF APPELLANT STERNOFF L.P.

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## I. INTRODUCTION

The Washington Constitution, Article I, Section 16 requires this Court to closely scrutinize the government’s attempt to take private property for an asserted public use—both in substance and process. The processes that condemning authorities must follow under the United States Constitution, Washington Constitution and statutes exist to protect Washingtonians from unnecessary or unjust deprivation of their private property under the commanding authority of government entities. Sound Transit’s disregard for these protections should not be condoned.

Sternoff L.P. (“Sternoff”) appeals the trial court’s First Amended Findings of Fact, Conclusions of Law, Order and Judgment Adjudicating Public Use and Necessity (the “Order”). The Order is not supported by substantial evidence and erroneously finds that Sound Transit’s condemnation of Sternoff’s property (the “Sternoff Property” or the “Property”) meets the “public use and necessity” requirements of Washington’s Constitution and condemnation law.

Sound Transit’s Petition in Eminent Domain (the “Petition”) seeks certain fee interests and permanent and temporary easements on the Property for two separate projects: (1) for Sound Transit’s construction and operation of its East Link Light Rail (the “East Link”); and (2) for the

separate and independent City of Bellevue street improvement project to widen 124<sup>th</sup> Avenue NE (the “City Project”).

Sound Transit’s condemnation for the City Project violates the Constitution. The uncontroverted evidence establishes that there has never been a legislative finding that the City Project is a public use for which condemnation of the Sternoff Property is necessary: not by Sound Transit, and not by the City. Neither Sound Transit nor the City ever made the fundamental, required legislative determination for the exercise of eminent domain and condemnation of the Sternoff Property for the City Project.

Sound Transit’s condemnation for its own East Link project also violates the Constitution. The uncontroverted evidence establishes that Sound Transit failed to consider the facts and circumstances regarding the Sternoff Property in its perfunctory finding of public necessity to take portions of the Property.<sup>1</sup> Sound Transit’s abject failure to consider those facts and circumstances violates Washington law and precludes the proposed condemnation.

Sound Transit’s flawed exercise of its eminent domain authority violated Washington’s Constitution, condemnation laws, and the procedural protections for property owners. These violations preclude a decree of

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<sup>1</sup> Sternoff does not challenge Sound Transit’s determination of public *use* with respect to the East Link.

public use and necessity, require dismissal of Sound Transit's Petition, and entitle Sternoff to an award of reasonable costs and attorney fees.

## **II. ASSIGNMENTS OF ERROR**

- A.** The trial court erred in entering the Order because Findings of Fact 7, 8 and 10 pertaining to Sound Transit's and the City of Bellevue's failure to make any legislative finding of public use and necessity regarding the City Project are not supported by substantial evidence. CP 574. In turn, Conclusions of Law 5, 6, 7 and 8 are not supported by the Findings of Fact. CP 575.
  
- B.** The trial court erred in entering the Order because Findings of Fact 7, 8 and 10 pertaining to Sound Transit's failure to consider the facts and circumstances relevant to condemnation of the Sternoff Property are not supported by substantial evidence. Clerk's Papers (CP) 574. In turn, Conclusions of Law 6, 7 and 8 are not supported by the Findings of Fact. CP 575.

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### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A.** Is the Sound Transit Board's and City of Bellevue's failure to make a determination of public use and necessity for the City Project fatal to Sound Transit's Petition in Eminent Domain with respect to the portions of Sternoff property being taken for the City Project?
- B.** Is the Sound Transit Board's failure to consider any substantive facts and circumstances concerning the Sternoff Property fatal to its Petition in Eminent Domain?
- C.** Is Sternoff entitled to costs, including reasonable attorney and expert witness fees, pursuant to RCW 8.25.075(1), which provides that the condemnee shall be awarded costs if there is "final adjudication that the condemnor cannot acquire the real property by condemnation"

### **IV. STATEMENT OF THE CASE**

#### **A. Statement of Facts**

1. The Sternoff Property. The Sternoff Property is located at 1750 124<sup>th</sup> Avenue NE in Bellevue, Washington. Clerk's Papers (CP) 156 at ¶ 3. An aerial photo of the Property is in the record at CP 181. Mr. William R. Sternoff is the General Partner of the limited partnership. CP 155 at ¶ 2.



The Property comprises two buildings, each with office space and warehouse space. Tenants require 24-hour access to, from and within the Property to conduct business including shipment and receipt of goods by long-haul, tractor-trailer. CP 156-57. The only access to and from the Property is two driveways on 124<sup>th</sup> Avenue NE. *See* CP 181.

2. Sound Transit's East Link and the City Project Are Separate, Independent Projects. Sound Transit's own testimony establishes that the East Link extension across 124th Avenue NE can be constructed and operated without the City Project. CP 251 (Dep. Don Billen, 16:4-12) and 264 (Dep. McGhee, 10:13-16). Kent Melton, Sound Transit's 30(b)(6) witness and Real Property Manager, unequivocally testified that Sound Transit does not need to acquire property inside the west boundary of the Sternoff Property (to widen 124th Avenue NE) in order to construct or operate East Link:

Question (Counsel for Sternoff): From a real property perspective, Sound Transit does not need to acquire the property to widen 124th Street, correct?

Answer (Sound Transit). Yes.

CP 277 (Dep. Melton, 11:23-12:1). Accordingly, Sound Transit testified that the East Link is a separate, independent project from the City Project. CP 229 (Dep. Balducci, 14:5-14), CP 251 (Dep. Billen, 15:11-20) and 277 (Dep. Melton, 11:5-8).

Question (Counsel for Sternoff): So the City’s longstanding 124th Street project is separate from the Sound Transit East Link line project, correct?

Answer (Sound Transit). Correct.

CP 263 (Dep. McGhee, 9:18-21).

The City also views its project as separate from Sound Transit’s East Link. In the City of Bellevue’s April 26, 2013 letter to Sternoff, Deputy City Attorney Mary Kate Berens referred to “Sound Transit’s *separate* East Link project.” CP 166 (emphasis added).

3. The Access Agreements with Sternoff (2011 and 2013). In 2011, the City of Bellevue entered into a Right of Entry Agreement (“City Access Agreement”) with Sternoff to access the Property for predesign work on the City Project. CP 156 at ¶ 5, 161-64.<sup>2</sup> Two years later in 2013, Sound Transit entered into a separate Right of Entry Agreement (“Sound Transit Access Agreement”) to enter the Property for engineering investigations on the East Link. CP 157 at ¶ 10, 168-70.

a. City of Bellevue Access Agreement. The City entered into its Access Agreement with Sternoff in December 2011. CP 156 at ¶ 5 161-64. The City wanted access to the Sternoff Property to conduct survey work in

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<sup>2</sup> The City of Bellevue-Sternoff Access Agreement at Clerk’s Papers 161–64 concerns the City Project (Capital Improvement Project (CIP) PW-R-166), but also contains reference to a different Capital Improvement Project that the City of Bellevue was undertaking at that time (CIP D-86) in the Recitals. Please see Section 4, “Purpose and Equipment” of this Access Agreement for a description of the work applicable City Project. CP 162.

connection with its widening of 124th Avenue NE along the west side of the Sternoff Property. CP 162. The City's planned improvements to 124th Avenue NE under its Comprehensive Plan include widening the road, and upgrading the sidewalks, landscaping and signalization. CP 341, 484-85.

The only access to the Sternoff Property is via two driveways along 124th Avenue NE, so Mr. Sternoff was particularly concerned with the impact the City Project would have on access to, from and within the Property, both during and after construction. CP 181 and 156 at ¶ 6. A key tenant on the Property relies on 24-hour access, and all of the tenants rely on uninterrupted access for customers, employees, shipments, deliveries and parking. CP 156 at ¶ 4.

In consideration for allowing the City entry onto the Property for its pre-design work, Sternoff requested, and the City agreed to, access provisions that would apply during the pre-design work and, most significantly, during the future construction and operation of the City Project. CP 156 ¶ 7, 163. Section 7 of City's Access Agreement defines the "Adequate Access" that the City promised to maintain:

#### 7. Access to Business Park

7.1 Adequate Access. As used in this Agreement the term "Adequate Access" means two points of ingress/egress from 124<sup>th</sup> Avenue N.E. to the Property, including, but not limited to, location, length, width and slope, reasonably suited to accommodate

passenger vehicles and eighteen-wheel semi-trailer trucks up to 80 feet long, 9 feet wide and 14 feet tall to enter, circulate and leave the Property. One point of ingress/egress must be located to the north of the northern building on the Property.

7.2 Improvements. During design and construction of the CIP PW-R-166, the City will ensure that Adequate Access is provided to the Property.

7.2(sic) Design and Construction. The City has advised that, due to profile changes (vertical raising and lowering), it is likely that an ingress/egress adjustment will be needed to connect the new roadway to the Property. The final design and construction will provide Adequate Access to the Property.

CP 163 (Emphasis added.)

In April 2013, the City restated its commitment to Sternoff, ensuring Adequate Access to the Property throughout the City's design *and* construction of the City Project. CP 157 at ¶ 9, 166. The City's attorney, Mary Kate Berens, wrote to Mr. Sternoff's attorney and stated "...with this letter the City is reiterating its commitment in the [Access Agreement] dated December 5, 2011 to ensure 'adequate access' to the Sternoffs' Property throughout the City's activities in design and construction of the 124<sup>th</sup> widening project." *Id.* The letter also referenced Sound Transit's "separate East Link project." *Id.*

b. Sound Transit Access Agreement. Two years later, Sound Transit entered into a separate Access Agreement with Sternoff in April

2013. CP 157 at ¶ 10, 168-70. Sound Transit wanted access to the Property to conduct survey work for the East Link. *See, id.* *See also*, CP 2 at ¶ 2. The East Link will run along and through the south portion of the Property. *See*, CP 31-33, 183.

Sound Transit staff was informed by Mr. Sternoff and understood the concerns about Adequate Access on the Property. Sound Transit staff also knew of the earlier City Access Agreement. CP 157 at ¶ 12, 172.

Sound Transit's Senior Real Estate Property Agent at the time, Kent Melton, attended an April 24th, 2013 meeting on the Property with Mr. Sternoff, the City, and Sound Transit's Senior Counsel, to negotiate Sound Transit's proposed Access Agreement. Sound Transit was seeking access to study the Property, and as with the City, Mr. Sternoff wanted an agreement to preserve access and circulation on the Property before, during and upon completion of construction of the Sound Transit project—and they came to an agreement. CP 276 (Deposition of (“Dep.”) Melton, 9:7-10:4). *See also*, CP at 166, 174-75.

Sound Transit agreed to access provisions similar to those in the City Access Agreement. Section 1, Paragraph 3 of the Sound Transit Access Agreement says:

Active Business Park. Sound Transit understands and acknowledges that the Property is an active business park with tenants, clients and vendors going to and from the buildings at all hours and requiring unobstructed access for vehicles including long, over the road trucks that need to circulate the buildings (“access”). During and after expiration of the Term, except as needed and temporarily, Sound Transit will not block access to the business park or buildings or impede access around the buildings needed for tenants, clients and deliveries, and will not otherwise interfere with the day to day business operations on the Property.

CP 168. (Emphasis added.)

On the same day Sound Transit signed its Access Agreement with Sternoff, Sound Transit’s Senior Counsel provided written assurances to Sternoff that it would be a “high design priority to ensure that the access and circulation around the building can be maintained throughout the project, whenever construction takes place.” CP 175.

Mr. Sternoff negotiated both Access Agreements to address the impact the City’s and Sound Transit’s separate projects would have on access to, from and within the Property both during construction after completion. Mr. Sternoff would not have granted (and did not grant) the City or Sound Transit entry onto the Property without the specific, valuable consideration of adequate access during and after construction of both the Sound Transit and City projects. CP 157-59 at ¶¶ 8 and 15.

4. Sound Transit’s Resolution to Condemn the Sternoff Property—R2013-21 Is Limited to the East Link Project. With design work for the East Link underway, Sound Transit sought the legislative authority required to condemn properties along the East Link corridor. In 2013, Sound Transit staff proposed Board of Directors Resolution R2013-21 (“R2013-21”), which proposed acquisition of the Sternoff Property and 59 other properties for the East Link. CP 7-29.

R2013-21 states that Sound Transit’s Chief Executive Officer may “acquire, dispose, or lease certain real property interests, including acquisition by condemnation and pay eligible relocation and re-establishment benefits to affected owners and tenants *as necessary for East Link Extension.*” CP 8 (emphasis added). R2013-21 also states that the East Link Extension is a “public purpose” and the acquisition of the 60 properties identified in R2013-21 is necessary for that purpose. CP 10. R2013-21 was the only legislative resolution concerning the Sternoff Property, and it does not refer to, mention or in any way concern the City Project.

The Sound Transit Board of Directors (the “Board”) adopted R2013-21 on September 26, 2013 by means of a summary vote on its “consent agenda.” CP 11, 190-91, 231 (Balducci Dep. 23:8-12 and 24:8-13).

a. *The Sound Transit Board Did Not Consider Any Facts or Circumstances Concerning the Sternoff Property Prior to Voting to Condemn.* The Board’s approval process for R2013-21 began less than five months after Sound Transit negotiated and signed the access agreement with Sternoff and provided the written assurances that access and circulation around the building would be maintained throughout the project, whenever construction takes place.

The approval process started with a September 12, 2013 staff presentation to the Board’s Capital Committee (the “Committee”). CP 177-78 at ¶¶ 6–7, 188. *See also*, CP 277 (Dep. Melton 12:12-22). Sound Transit’s Real Property Director, Roger Hansen, accompanied by Kent Melton, presented the R2013-21 Staff Report, which included the proposed Resolution and provided information about staff’s research and public outreach. Neither the staff presentation nor the staff report disclosed the Access Agreement between Sound Transit and Sternoff. *Id.*

Within 6 minutes, the Committee had heard the staff presentation, finished discussions, and voted to forward R2013-21 to the full Board with a “do pass” recommendation. CP 177-78 at ¶¶ 6 and 7. Neither Sound Transit staff nor any member of the Capital Committee engaged in discussions about the Sternoff Property or the necessity of taking the Sternoff Property. *Id.*



Sound Transit's Kent Melton attended the Committee meeting and had direct, personal knowledge of the Sternoff Access Agreement and its requirements during and after East Link construction. Yet, he did not disclose that key information to the Committee, or say anything about the Sternoff Property. CP 277 (Dep. Melton, 13:21-24).

The Staff Report also makes no mention of the Sternoff Property, the Sound Transit Access Agreement, or the written assurances to Sternoff by Sound Transit's Senior Legal Counsel. CP 198-223.

Mr. Melton testified that no specific facts or circumstances concerning the Sternoff Property, including Sound Transit's obligations regarding access, were disclosed to the Committee at the September 12, 2013 meeting. CP 277 (Dep. Melton, 12:19-22).

On September 26, 2013, the Sound Transit Board of Directors summarily approved R2013-21 at the beginning of its Board meeting as part of a consent agenda. CP 190-91. Motions and Resolutions on the consent agenda typically receive a collective "approve" vote, without discussion of the individual items thereon. CP 231 (Dep. Balducci, 23:8-16).

Neither Sound Transit staff nor the Board engaged in any substantive discussion concerning R2013-21, the Sternoff Property, or the necessity of taking the Sternoff Property. CP 178 at ¶ 9. Sound Transit staff did not disclose the existing Access Agreement between Sound Transit and

Sternoff to the Board. CP 277-78 (Dep. Melton, 12:19-22, 13:21-14:4). In total, the Board spent just over 4 minutes on the consent agenda (which included 3 Resolutions, 2 Motions, and approval of prior Board meeting minutes). *Id.* at ¶ 10. The Board did not address any facts or circumstances whatsoever underlying the proposed taking of the Sternoff Property. *Id.* at ¶ 9. Sound Transit Board Member Claudia Balducci, who has been on the Board for approximately 6 years, testified she does not recall ever voting against a resolution to condemn property for a Sound Transit project. CP 229 (Balducci, 15:2-10).

b. *R2013-21 Does Not Authorize Sound Transit to Acquire Property for the City Project.* R2013-21 does not authorize the Chief Executive Officer to acquire property for the City Project. CP 7-29.

There was absolutely no mention of the City Project at either the Capital Committee meeting or the subsequent full Board meeting. CP 178 at ¶ 9. None of the publicly available Sound Transit documents or recordings concerning adoption of R2013-21 to acquire the Sternoff Property, including the R2013-21 Staff Report, mentions the City Project or the acquisition of property for that purpose. *See*, CP 177 at ¶¶ 6 and 9; 185-223.

Sound Transit's CR 30(b)(6) witnesses unequivocally testified that R2013-21 does not relate in any way to the acquisition of property interests for the City Project:

Question (Counsel for Sternoff): R2013-21, in September of 2013, did it relate to Sound Transit acquiring property interests for the City of Bellevue's 124<sup>th</sup> Street widening project?

Answer (Sound Transit). No, not that I'm aware of, it did not.

CP 278 (Dep. Melton, 16:12-15).

Sound Transit staff testified that Sound Transit's agreement with the City to acquire property for the City Project did not arise until nearly two years after R2013-21 was drafted and adopted by the Board. *See*, CP 251 (Dep. Billen, 16:8-12).

5. Sound Transit-City of Bellevue 2015 Memorandum of Understanding Concerning the City Project. In May 2015, two years after the passage of R2013-21, the City of Bellevue and Sound Transit entered into an inter-local agreement for the East Link Project—the “Amended and Restated Umbrella Memorandum of Understanding for Intergovernmental Cooperation Between the City of Bellevue and the Central Puget Sound Regional Transit Authority for the East Link Project” and a Cost Sharing Agreement (collectively the “2015 MOU”). CP 178-79 at ¶ 12; CP 316-482, 484-544. The 2015 MOU amended and updated a 2011 MOU between the City and Sound Transit. CP 178-79 ¶ 12; CP 316-482. The 2015 MOU

added provisions regarding coordination of the City Project and Sound Transit's East Link and, for the first time, it established a Cost Sharing Agreement for those coordinated efforts. CP 178-79 at ¶¶ 12 and 13; CP 316-482, 484-544.

Don Billen, Sound Transit's High Capacity Transit Project Development Director, testified that Sound Transit's obligation to acquire property for the City Project did not arise until adoption of the 2015 MOU. CP 251 (Dep. Billen, 16:4-12). The 2015 MOU was signed more than 2 years *after* passage of R2013-21 authorizing condemnation of the Property for the East Link.

6. Neither Sound Transit Nor the City of Bellevue Has Ever Taken Legislative Action Authorizing Condemnation of the Sternoff Property for the City Project. The Sound Transit Board of Directors did not pass any resolutions authorizing the exercise of eminent domain for the City Project. The Board never made any finding of public use or public necessity regarding the acquisition of the Sternoff property for the City Project.

Moreover, the City of Bellevue did not, itself, pass any ordinance authorizing the exercise of eminent domain to condemn the Sternoff Property for the City Project—and apparently never even discussed it. CP 179 at ¶ 14. The City has never made a legislative finding of public use or

public necessity for the acquisition of the Sternoff Property for the City Project. *See, id.*

7. Petition in Eminent Domain (April 2016). Sound Transit filed its Petition on April 15, 2016 seeking to take certain areas of the Property in fee as well as temporary and permanent easements for construction and operation of the East Link across and along the Property's south boundary. CP 2-4. *See*, CP 31-33.

The Petition also includes fee and easement acquisitions on behalf of the City *for the City Project*. CP 2-4, 35-37. The Petition calls out the property interests being acquired for the City Project by using the prefix "COB" on the proposed easements. *See e.g.*, CP 48 and 101.

The proposed taking includes two separate temporary construction easements ("TCEs") that cover vast areas of the Property for over four years and block ingress and egress to and from the Property. (Depicted at Appendix A as TCE #1 (City of Bellevue) and TCE #2 (Sound Transit). *See also*, CP 177 at ¶ 4; CP 183). The proposed TCE's cover both driveways, and circulation within the Property, for over four years (38 months plus a 12-month extension). CP 92-109.

Contrary to the City and Sound Transit Access Agreements with Sternoff, the proposed TCEs grant the City of Bellevue or Sound Transit *exclusive* possession of their respective TCEs. *See*, CP 92-109. The TCEs

do not contain any provisions requiring Sound Transit or the City to comply with their respective, pre-existing Access Agreements with Sternoff or otherwise provide access to and from, or circulation within, the Property during construction. *Id.*

**B. Procedural History.**

Sound Transit filed both its Petition and its Motion for Order and Adjudication of Public Use and Necessity (the “Motion”) on April 16, 2016. CP 1-109 and 110-118. Sternoff opposed the Motion, requesting dismissal of Sound Transit’s Petition, or in the alternative, dismissal of all portions of the Petition seeking to condemn Property for the City Project. CP 136-152. (Sound Transit’s and Sternoff’s subsequent replies are at CP 293 and CP 560, respectively.) The trial court heard oral argument on June 6, 2016. Verbatim Report of Proceedings (VRP) 1. The trial court took the matter under advisement and entered the Order the following day, on June 7, 2016. VRP 25; CP 571.

**V. LEGAL STANDARDS**

**A. Standard of Review.** At the trial court level, the condemning authority bears the burden of proving public use and necessity in the condemnation process. *Pub. Util. Dist. No. 2 of Grant County. v. N. Am. Foreign Trade Zone Indus. (“NAFTZI”), LLC*, 159 Wn.2d 555, 565, 151

P.3d 176, 181 (2007) (internal citation omitted). On appeal, this court reviews the record to determine whether the trial court's findings are supported by substantial evidence. *Central Puget Sound Regional Transit Authority v. Miller* ("Miller"), 156 Wn.2d 403, 418, 128 P.3d 588, 597 (2006). Substantial evidence is evidence that would persuade a fair-minded, rational person of the truth of the finding. *Id.* at 419 (internal citation omitted).

**B. Attorney Fees.** RCW 8.25.075(1) provides that a superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs, including reasonable attorney fees and reasonable expert witness fees, if there is a final adjudication that the condemnor cannot acquire the real property by condemnation. *Miller*, 156 Wn.2d 403, 638.

**C. Eminent Domain.** The power of eminent domain is an inherent attribute of sovereignty. *NAFTZI*, 159 Wn.2d 555, 565 (internal citations omitted); *Miller*, 156 Wn.2d 403, 410 (internal citations omitted). But this sovereign power is limited and constrained by the Constitution and *must be exercised under lawful procedures*. *NAFTZI*, 159 Wn.2d 555, 565 (internal citation omitted). Before the judicial process for condemnation may begin, a city or regional transit authority must adopt an ordinance authorizing the condemnation. *Id.* citing RCW 8.12.040; RCW 8.12.050. *See also*, RCW

81.112.080 (regional transit authorities are authorized to acquire property by eminent domain in same manner as provided for first class cities).

Once an agency with the power of eminent domain has made the initial determination to authorize a condemnation action, the matter moves into court on a petition in eminent domain for a three-stage proceeding. *NAFTZI*, 159 Wn.2d 555, 565; *Miller*, 156 Wn.2d 403, 410. The first stage is court-issuance of a decree of public use and necessity (*i.e.*, the Order on appeal in this matter, CP 571). Absent the legislative finding of public use and necessary, the condemning authority may not proceed to lawfully condemn the subject property. *Miller*, 156 Wn.2d 403, 410.

Under the provisions of Washington Constitution art. I, § 16 (amendment 9) and the courts' interpretation thereof, the issue of whether a proposed acquisition is for a *public use* is a judicial question. *HTK Management, LLC v. Seattle Popular Monorail Authority* ("Monorail"), 155 Wn.2d 612, 629, 121 P.3d 1166, 1174 (2005); *City of Bellevue v. Pine Forest Properties, Inc.* ("Pine Forest"), 185 Wn. App. 244, 259, 340 P.3d 938, 945 (2014).

On the other hand, the issue of whether the contemplated acquisition is *necessary* to carry out the proposed public use presents a legislative question. *Monorail*, 155 Wn.2d 612, 629; *Pine Forest*, 185 Wn. App. 244, 262 (internal citations omitted). A determination by a condemning authority



as to the type and extent of property interest necessary to carry out the public purpose is analyzed as a legislative declaration of necessity. *Pine Forest*, 185 Wn. App. 244, 261 citing *Monorail*, 155 Wn.2d 612, 630; *NAFTZI*, 159 Wn.2d 555, 575-76. A declaration of necessity by the appropriate legislative body must be invalidated where there is fraud or such arbitrary and capricious conduct as would amount to constructive fraud. *Monorail*, 155 Wn.2d 612, 629.

“Arbitrary and capricious” conduct on the part of a legislative agency in connection with an eminent domain proceeding is defined as “willful and unreasoning action without consideration and regard for facts and circumstances.” *Petition of Port of Seattle*, 80 Wn.2d 392, 398, 495 P.2d 327, 331 (1972) (constructive fraud requires showing of willful and unreasoned action without regard to facts or circumstances); *City of Tacoma v. Weckler*, 65 Wn.2d 677, 684-85, 399 P.2d 330, 335 (1965); *Pine Forest*, 185 Wn. App. 244, 262. A court will not disturb the legislative body’s decision that public necessity exists so long as it was reached “honestly, fairly, and upon due consideration” and deliberation of the facts and circumstances. *Miller*, 156 Wn.2d 403, 417, 419 (internal citation omitted). A trial court’s findings of public use and necessity may only be upheld if those findings are supported by substantial evidence. *Miller*, 156 Wn.2d 403, 419.

## VI. ARGUMENT

### **A. Condemnation of the Sternoff Property for the City Project Is Unconstitutional Because There Has Never Been a Finding That Acquisition of the Property Is Necessary for a Public Purpose.**

To lawfully exercise the power of eminent domain, the condemning authority's legislative body must first make a finding of the public use and necessity regarding the property at issue. *See, Pine Forest*, 185 Wn. App. 244, 259. The uncontroverted, substantial evidence below shows that neither the Sound Transit Board nor the Bellevue City Council discussed, made findings, or passed legislation declaring that the City Project is a public use for which acquisition of the Sternoff Property is necessary. CP 179 at ¶ 14. By seeking to condemn the Sternoff Property for the City Project, Sound Transit exceeded constitutional limits and the legislative authorization provided by R2013-21. The substantial evidence shows that the most basic constitutional element required for the exercise of eminent domain has not been established. Neither Sound Transit nor the City can constitutionally take the Sternoff Property for the City Project.

1. Sound Transit's R2013-21 Resolution Does Not Establish Public Use and Necessity to take the Sternoff Property. Resolution R2013-21 authorizes the Chief Executive Officer to acquire properties by condemnation *only* "for the East Link Extension." CP 8. The only evidence in the record proves that the City Project is *not* included in R2013-21—the

R2013-21 staff report and presentation did not mention the City Project; neither the Capital Committee nor the Board discussed the City Project during its meetings about R2013-21; and Sound Transit's own witnesses testified that the City Project is not covered by the finding of public use and necessity in R2013-21.

Question (Counsel for Sternoff): R2013-21, in September of 2013, did it relate to Sound Transit acquiring property interests for the City of Bellevue's 124<sup>th</sup> Street widening project?

Answer (Sound Transit). No, not that I'm aware of, it did not.

CP 278 (Dep. Melton, 16:12-15).

The uncontroverted evidence leads only to one conclusion: the trial court's Order finding public use and necessity to take the Sternoff Property for the City is not supported by substantial evidence.

2. The 2015 MOU Cannot Retroactively Authorize the Condemnation for the City Project. At the trial court hearing, Sound Transit pointed to the 2015 MOU, which post-dates R2013-21 by nearly two years, as its authority to condemn the Property on the City's behalf. VRP 18:24-20:24. Sound Transit attempted to conflate the East Link and the City Project into a single, "overall" Sound Transit project, based upon the 2015 MOU. VRP 20:17-24. The Board and the City, Sound Transit explained, should thus be excused from any obligation to make a legislative finding of

public use and necessity with respect to the City Project. *See*, VRP 21:18-22:19.

The 2015 MOU is authorized under Washington's Interlocal Cooperation Act, which allows Washington government agencies to exercise their powers, privileges or authority jointly with any other public agency of the state having those same powers. RCW 39.34.030(1). But contrary to Sound Transit's argument, an interlocal agreement cannot be used to take action that would not otherwise be authorized under Washington law. RCW 39.34.030(5).

The 2015 MOU does not relieve either agency from its constitutional and statutory obligations to pass an ordinance or resolution authorizing the acquisition of the Sternoff Property for the City Project. *See, Harvey v. County of Snohomish*, 124 Wn. App. 806, 813-814, 103 P.3d 836, 840 (2004) (rev'd on other grounds). *See also*, RCW 8.12.040 and .050. The 2015 MOU is an intergovernmental contract that coordinates the two agencies' separate projects; *it is not a legislative action that can stand in for the requisite notice, hearings, process and resulting ordinance or resolution for the exercise of eminent domain.*

Further, in 2013 when the Board passed R2013-21, the Board did not even have the obligation to acquire property for the City Project. The 2015 MOU, signed two years after R2013-21, does not cause the separate

East Link project and City Project to be conflated such that the Board's prior 2013 Resolution can be retroactively expanded to include the City Project.

Sound Transit's argument that the East Link and City Project have somehow morphed into an "overall" project is further undermined by Sound Transit's repeated admissions that the City Project is distinct from the East Link and was *never* part of R2013-21. CP 229 (Dep. Balducci, 14:5-14), CP 251 (Dep. Billen, 15:11-20), CP 263 (Dep. McGhee, 9:18-21), 277 and 278 (Dep. Melton, 11:5-8 and 16:12-15). The City of Bellevue has long considered the Projects separate, referring to the East Link as "Sound Transit's *separate* East Link Project" in its April 26, 2013 letter to Sternoff. CP 166 (emphasis added).

In contravention of the Washington Constitution, Washington laws and procedures, either Sound Transit nor the City of Bellevue ever put the acquisition of the Sternoff Property through the requisite legislative process—including public notice and comment—required for the exercise of eminent domain to take property for the City Project. The substantial evidence in this case requires dismissal of the Petition with respect to the City Project.

3. The Pine Forest Case is Directly On Point and Requires Dismissal of the Petition. In *Pine Forest*, the City of Bellevue sought to condemn property in connection with a City project to widen 120th Avenue

NE and Sound Transit's East Link under the 2011 MOU. *Pine Forest*, 185 Wn. App. 244, 248-249. As noted by the *Pine Forest* court, and in direct contrast to the case here, the Bellevue City Council made a specific legislative finding that condemnation of the Pine Forest property was necessary to: (1) implement the 2011 MOU; and (2) for construction of *both the East Link and the City's 120<sup>th</sup> Avenue NE project*. *Id.* at 250.

In the Sternoff case, the Sound Transit Board made no such finding of public use and necessity with respect to the City Project or the 2015 MOU (which arose two years after the Board passed R2013-21). Sound Transit's reliance on the *Pine Forest* case in its trial court briefing is wholly misplaced. The City never passed an ordinance establishing public use and necessity to take the Sternoff Property. The *Pine Forest* case is directly on point and requires reversal of the trial court Order.

The substantial, uncontroverted evidence establishes that neither Sound Transit nor the City passed any legislation authorizing the acquisition of the Sternoff Property for the City Project or ever made a finding of public use and necessity regarding the City Project. CP 179 at ¶ 14. The substantial evidence leads to one inescapable conclusion: R2013-21 does not authorize Sound Transit's Chief Executive Officer to acquire any portion of the Sternoff Property for the City Project.

The condemnation of the Sternoff Property for the City Project is an unconstitutional and *ultra vires* act that must fail. The trial court's Order on public use and necessity should be reversed as it relates to property that Sound Transit seeks to acquire for the City Project and Sound Transit's Petition with respect that acquisition should be dismissed.

**B. The Sound Transit Board of Directors' Determination of Public Necessity, Without Due Consideration of the Facts and Circumstances Relevant to Taking the Sternoff Property, Was Arbitrary and Capricious Conduct Amounting to Constructive Fraud.**

Sound Transit did not present a scintilla of evidence that the Board considered the facts or circumstances relevant to acquisition of the Sternoff Property prior to the Board's passage of R2013-21. To the contrary, Sternoff submitted substantial evidence establishing that prior to making its finding of public necessity and passing R2013-21 authorizing condemnation of the Property, the Board never considered the negotiations with Sternoff, the pre-existing Sound Transit Access Agreement, or the subsequent written assurances regarding access.

Sternoff presented unrefuted Sound Transit testimony proving that staff never disclosed to the Board the Sound Transit Access Agreement and related promises made to Sternoff, and that the Board did not—in fact, could not have—considered those facts and circumstances prior to voting to acquire the Property.

The Access Agreements and related negotiations and assurances are exactly the “facts and circumstances” that Sound Transit was obligated to evaluate in reaching an honest, fair and reasoned decision regarding the “necessity” of the Sternoff Property.

Sound Transit’s Petition now seeks to take *exclusive* TCEs that are contrary to, and violate, both the Sound Transit and City Access Agreements. By their express terms, the exclusive TCEs do not provide *any* limitations on Sound Transit’s or the City’s exclusive use of the Property, including closing both driveways, for over four years.

The courts must assume that Sound Transit will exercise its rights under the exclusive TCEs to their full extent. *See, Tacoma Mill Co. v. Northern Pac. Ry. Co.*, 89 Wn. 187, 208, 154 P. 173 (1916) citing *Western Union Tel. Co. v. Polhemus*, 178 Fed. 904 (1910). Applied here, this Court must assume that Sound Transit and the City of Bellevue will exclude all others from TCE area, effectively shutting down all access to and from the property and circulation within the Property for over four years.

The evidence shows that the Sound Transit Board of Directors—the legislative body responsible for exercising Sound Transit’s power of eminent domain—“rubber stamped” R2013-21, including the determination to take the Sternoff Property, on a consent agenda vote. From start to finish, the total Board consideration of R2013-21 amounted to four minutes of



time—to take 60 properties. There was no fair, honest or due consideration of any facts or circumstances regarding the Sternoff Property.

In *Central Puget Sound Regional Transit Authority v. Miller*, property owners challenged the Sound Transit Board’s finding of public necessity based upon the Board’s evaluation of several facts and circumstances regarding environmental studies. 156 Wn.2d 403, 421. The court refused to “take a second look” at the Board’s various considerations, stating that “as long as Sound Transit *considered* the environmental impacts, it is not for the court to substitute its judgment.” *Id.* (emphasis added).

In this case, Sternoff submitted substantial evidence showing that the Board *never considered any facts and circumstances* relevant to the Sternoff Property. Thus, there is no risk of this Court substituting its judgment for the Board’s because the Board exercised none.

At the trial court hearing, Sound Transit’s counsel argued that the Board’s adoption of R2013-21 was not arbitrary and capricious because it considered the properties to be acquired during earlier alignment selection processes. CP 286-87. Sound Transit’s own witnesses contradict this position. Sound Transit’s High Capacity Transit Project Development Director, Don Billen, was heavily involved in developing the East Link alignment alternatives and preparing the Environmental Impact Statement

that explored alternative alignments. Mr. Billen testified that the Board did *not* review facts and circumstances relevant to the properties proposed for acquisition during the earlier alignment discussions, and was not even aware of the facts and circumstances of the properties that would be impacted, even at these earlier stages of the East Link project. CP 249 (Dep. Billen at 7:4-11:16).

Mr. Billen's testimony directly contradicts Sound Transit's suggestion that the Board should be relieved of its obligation to review the facts and circumstances of impacted properties during consideration of R2013-21 because it had done so earlier in the East Link process. In fact, substantial evidence shows that the Board did not consider the facts and circumstances of the Sternoff Property *at any point* during selection of the East Link alignment and *could not* have because it was not aware of any such facts and circumstances, including the Sound Transit Access Agreement. Staff never provided that information even though it was readily available.

While judicial deference to agency decisions is appropriate when those decisions are heavily based on factual matters, the agency must first *actually consider the facts*. See, *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 396, 932 P.2d 139, 151 (1997) (internal citation omitted). In this case, the record below provides substantial, uncontroverted evidence that the Sound

Transit Board of Directors never considered the facts and circumstances relevant to the taking the Sternoff Property, let alone fairly and honestly.

The Board exercised its power to take private property as a perfunctory process to be dispensed with on a consent agenda without satisfying its legal obligation to fairly and honestly consider the facts and circumstances relevant to taking the Sternoff Property. Sound Transit staff's knowing failure to disclose, and the Board's failure to consider, these facts and circumstances was arbitrary and capricious conduct amounting to constructive fraud.

The Board's determination of public necessity should be rejected, and the trial court's Order on public use and necessity reversed. Sound Transit's Petition should be dismissed in its entirety.

**C. Sternoff Should Be Awarded Costs, Including Reasonable Attorney Fees and Reasonable Expert Witness Fees, Incurred In Litigating This Case.**

Sternoff is entitled to an award of the costs incurred in litigating this case, including reasonable attorney and expert witness fees, if this court reverses the Order. *See, Monorail*, 155 Wn.2d 612, 638 citing RCW 8.25.075(1). "A superior court having jurisdiction of a proceeding instituted by a condemnor to acquire real property shall award the condemnee costs including reasonable attorney fees and reasonable expert witness fees if... [t]here is a final adjudication that the condemnor cannot acquire the real

property by condemnation.” RCW 8.25.075(1). If this Court reverses the Order and dismisses the Petition in whole or in part, then Sternoff is entitled to, and respectfully requests, an award of its costs including reasonable attorney fees.

## **VII. CONCLUSION**

Sternoff’s constitutionally protected private property rights are at issue in this case. *See*, Wash. Const. art. I, § 16. The protections afforded property owners by the Washington Constitution, the state’s statutory processes, and case law are at issue. Sound Transit should not be allowed to disregard, ignore, shortcut or overlook these processes and protections for any reason. Sound Transit’s exercise of eminent domain authority must be scrutinized to ensure that the Constitutional protections for private property owners are safeguarded.

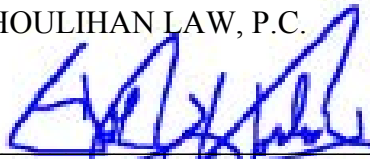
The substantial, uncontroverted evidence in this case shows that the City and Sound Transit never made a legislative finding of public use and necessity regarding condemnation of the Sternoff Property for the City Project. Such legislation is *absolutely required* in order to lawfully exercise the power of eminent domain. Both Sound Transit and the City thus failed to establish the most basic prerequisite element to exercise the power of eminent domain.

The substantial, uncontroverted evidence in this case establishes that the Sound Transit Board's action in passing R2013-21 was arbitrary and capricious as the Board did not consider the Access Agreements or any underlying facts and circumstances concerning condemnation of the Sternoff Property. The record below provides no evidence to support Sound Transit's argument to the contrary. Sound Transit's failure to give fair and honest consideration to the facts and circumstances is arbitrary and capricious conduct amounting to constructive fraud.

Sternoff respectfully requests that this Court reverse the trial court's Order on public use and necessity and direct dismissal of the Petition in its entirety or, in the alternative, dismissal as to the acquisition of the Property for the City Project; and award attorney fees and costs in accordance with RCW 8.25.075(1).

Respectfully submitted this September 16, 2016.

HOULIHAN LAW, P.C.



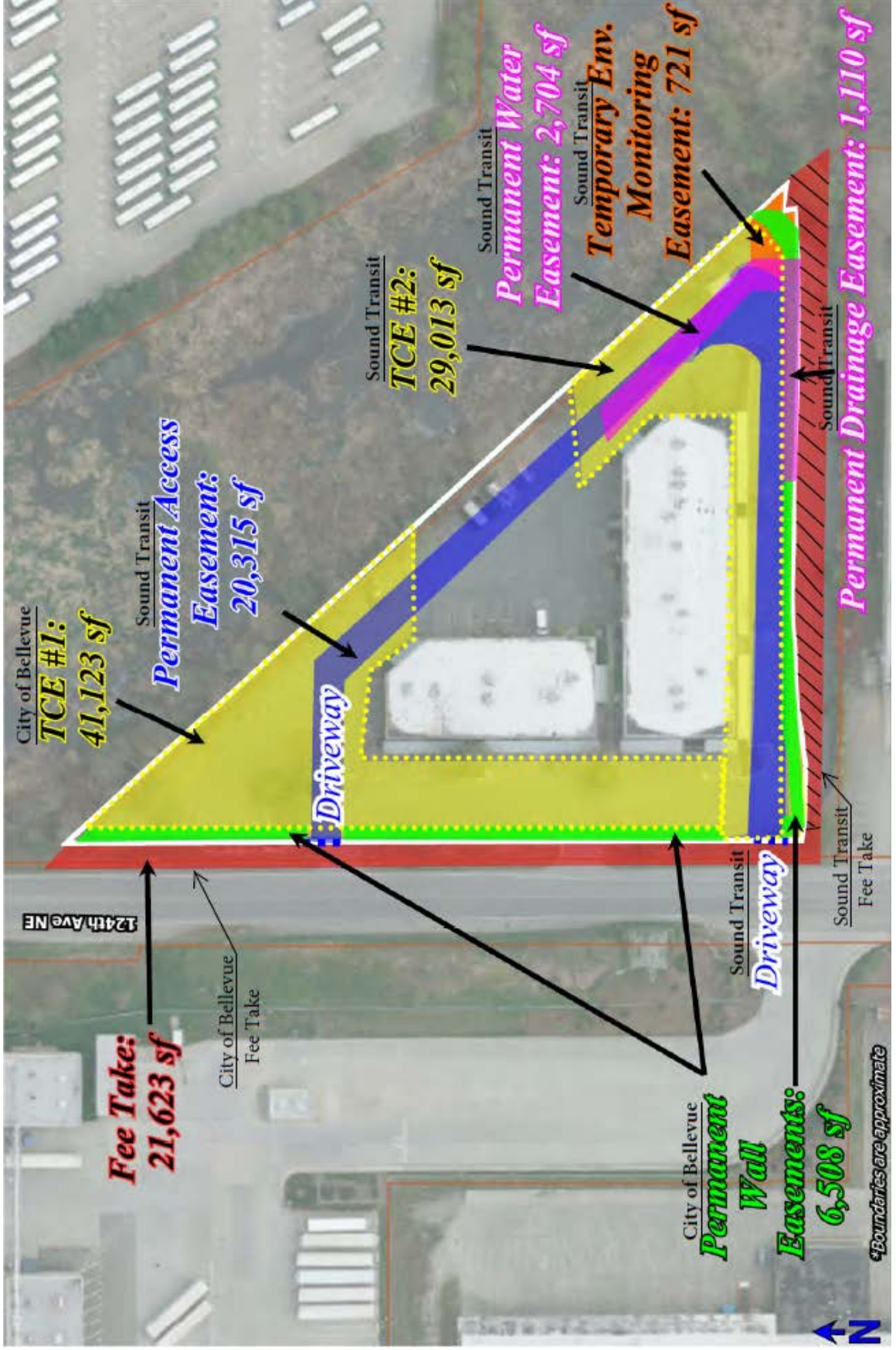
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Attorneys for Appellant Sternoff L.P.

## APPENDIX A

### Depiction of Property in “After” Condition

Image is best viewed in color. Both the Sound Transit and City of Bellevue Temporary Construction Easement are depicted in yellow. The Permanent Access Easement/Driveway, depicted in blue, is included in the TCE areas.



City of Bellevue  
**TCE #1:**  
**41,123 sf**

Sound Transit  
**Permanent Access  
 Easement:**  
**20,315 sf**

Sound Transit  
**TCE #2:**  
**29,013 sf**

Sound Transit  
**Permanent Water  
 Easement:**  
**2,704 sf**

Sound Transit  
**Temporary Env.  
 Monitoring  
 Easement:**  
**721 sf**

Sound Transit  
**Permanent Drainage Easement:**  
**1,110 sf**

**124th Ave NE**

**Fee Take:**  
**21,623 sf**

City of Bellevue  
 Fee Take

**Driveway**

**Driveway**

Sound Transit  
 Fee Take

City of Bellevue  
**Permanent  
 Wall  
 Easements:**  
**6,508 sf**

*\*Boundaries are approximate*



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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE

CENTRAL PUGET SOUND REGIONAL  
TRANSIT AUTHORITY, a regional transit  
authority, dba SOUND TRANSIT,

Respondent-Petitioner,

vs.

STERNOFF L.P., a Washington limited  
Partnership,

Appellant-Respondent.

Washington State Court of Appeals, Div. I  
Case No.: 75372-0-I

DECLARATION OF SERVICE

Tax Parcel No.: 282505-9003

I, Donya W. Burns, affirm that on this day I caused to be served *Brief of Appellant Sternoff L.P.* in the above-entitled matter (Case No.: 75372-0-I) to each of the following parties by the method indicated below:

<u>Party Contact Information</u>	<u>Delivery Method</u>
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DECLARATION OF SERVICE - 1

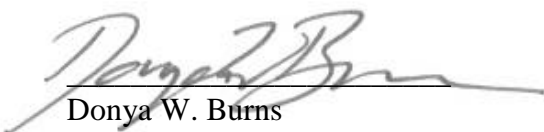
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21 I declare under penalty of perjury under the laws of the State of Washington, that the  
22 foregoing is true and correct to the best of my knowledge.

23 EXECUTED September 16, 2016, in Seattle, King County, Washington.

24   
25 Donya W. Burns