No. 95747-9
COA No. 76577-9-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON,

ALEXANDRA BRAATZ,

Respondent,

v.

MICHAEL BRAATZ,

Petitioner.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This case illustrates the difficulties encountered by a victim of domestic violence when her abuser fails to fully comply with court orders to surrender his weapons. Michael Braatz (Michael), a domestic violence abuser, was ordered to surrender his firearms. Alexandra Braatz (Alexandra), sought to ensure her ex-husband Michael surrendered all his guns by participating in court-initiated hearings held to determine if Michael complied with the court's weapon surrender orders. When the trial court incorrectly found that Michael had surrendered all his firearms, Alexandra appealed.

The Court of Appeals found Michael had not accounted for all his firearms and held the trial court's decision was not supported by substantial evidence. Michael argued on appeal that he did not have the burden to prove he had surrendered all his firearms, but the Court of Appeals held that persons restrained by domestic violence protection orders have the burden to prove they have surrendered their weapons.

This case does not warrant Supreme Court review for three reasons. First, it does not involve a significant question of law under our state or federal Constitutions because (1) no Fifth Amendment protection issues were raised or preserved by Michael in the trial court, (2) Michael waived his Fifth Amendment rights by testifying, and (3) Michael's claim

that the Fifth Amendment protects restrained parties from the burden of proof does not raise a constitutional question. Second, this case does not involve a substantial public interest because the case is limited to its facts, does not involve any constitutional questions, does not invite unnecessary litigation, and does not create confusion. Third, the decision of the Court of Appeals is not in conflict with any Supreme Court or published Court of Appeals decisions.

II. MICHAEL'S ISSUES FOR REVIEW

Michael presents three issues for review: (1) should the Court of Appeals have issued a decision regarding the burden of proof when Alexandra failed to brief the issues adequately; (2) should this Court adopt the usual rule that the plaintiff has the burden of proof; and (3) was there substantial evidence to support the trial court's decision that Michael had complied with the weapon surrender order?

III. RESTATEMENT OF THE CASE

A. The 2014 Weapons Surrender Statute

In 2014, Washington State enacted legislation to address the tragic consequences occurring when domestic abusers have access to guns and other dangerous weapons.[1] First, the legislation made it a criminal offense for any person to own, possess or control a firearm while subject to certain

[1] Engrossed Substitute House Bill 1840.

court orders, including domestic violence protection orders, meeting defined criteria. RCW 9.41.040(2)(a)(ii). Second, when a court issues a protection order meeting the defined criteria, it must require the restrained person to surrender any firearms, other dangerous weapons and concealed pistol license the restrained person may have, and the court must prohibit the restrained party from obtaining or possessing these items. RCW 9.41.800(3). The court is authorized to require that these items be surrendered to the local sheriff, the local chief of police, the restrained person's counsel, or any person designated by the court. RCW 9.41.800(7). The Order to Surrender Weapons requires the restrained person to surrender these items "immediately." CP 54, 61.

The statute directed the administrative office of the courts to develop two forms: The first is a "proof of surrender and receipt pattern form to be used to document that a [restrained person] has complied with a requirement to surrender firearms, dangerous weapons and his or her concealed pistol license, as ordered by a court under RCW 9.41.800." RCW 9.41.802. The second form is a "declaration of nonsurrender pattern form to document compliance when the [restrained person] has no firearms, dangerous weapons or concealed pistol license." RCW 9.41.802. A restrained person ordered to surrender firearms, other dangerous weapons and concealed pistol license must file with the clerk of the court

a "proof of surrender and receipt form" or a "declaration of nonsurrender form" within five judicial days of entry of the weapons surrender order. RCW 9.41.804. Accordingly, compliance with the statute consists of two requirements: first, surrendering any firearms, other dangerous weapons, and concealed pistol license to the proper recipient if the restrained person has any of these items; and second, filing paperwork with the court within five judicial days declaring the above items have been surrendered and attaching a receipt therefor, or declaring the restrained person does not have any of these items.

B. Factual and Procedural Background

On November 30, 2016, a domestic violence protection order (DVPO) was issued protecting Alexandra and her three children from Michael, for one year.[2] CP 11-18. One of the grounds upon which the DVPO was based was Alexandra's report that Michael owned 40 firearms and "anytime Michael threatens to kill me, he says he will shoot me."[3] CP

[2] Michael neither sought revision of, nor appealed, that decision. As such, that determination is conclusively established and binding. *See Buckner, Inc. v. Berkey Irr. Supply*, 89 Wn. App. 906, 911, 951 P.2d 338, 341 (1998). On February 28, 2018, the protection order was renewed for another year until February 28, 2019. RCW 26.50.060(3).

[3] On September 26, 2016, Michael admitted he owned "close to 40 guns." CP 113. Once the DVPO issued, Michael was prohibited from owning, possessing or controlling any firearm pursuant to RCW 9.41.040(2)(a)(ii) and from possessing or receiving any firearm or ammunition pursuant to 18 U.S.C. § 922(g)(8).

4, 6. Subsequently, orders were issued on January 4, 2017 and January 18, 2017 ordering Michael, a resident of Oregon, to "immediately surrender (turn in) all firearms and other dangerous weapons in your possession or control" to the Union County, Oregon Sheriff's Office. CP 54. On January 6, 2017, Michael surrendered three firearms to the Union County Sheriff's Office and filed a document entitled "Proof of Surrender," certifying his surrender of the three firearms. CP 58-59.

At the next hearing on January 18, 2017, Michael's attorney reported Michael had not surrendered all his firearms to the Union County Sheriff and that there remained "some other firearms" in Lane County—Oregon 350 miles away from Michael's location in Union County—that "need to be surrendered as well." RP 56. Alexandra agreed to allow Michael to surrender these weapons to the Lane County Sheriff's Office. RP 57. Michael did not provide an inventory identifying the firearms claimed to be located in Lane County. Concerned that Michael had not surrendered all his weapons, Alexandra obtained an inventory of firearms from the Emerald Valley Armory listing 34 firearms by make, model and serial number owned by Michael as of November 13, 2014 and submitted it to the court. CP 63-66. The three guns surrendered earlier to the Union County Sheriff's Office were on the inventory of 34 firearms. That meant there were 31 of Michael's firearms unaccounted for.

When the next hearing occurred on February 1, 2017, Michael's attorney informed the Court that neither the Lane County Sheriff's Office nor the Union County Sheriff's Office would accept Michael's firearms. RP 67. His lawyer represented that Michael's firearms were located in a gun safe at his mother's house in Lane County and that Michael did not have the combination to the safe. RP 67-70. Michael's lawyer proposed that this "be the arrangement for as long as the weapons are required to be surrendered." RP 68. Once again, Michael did not offer any proof identifying what firearms, if any, were in the alleged gun safe. In fact, Michael's lawyer claimed not to "know how to handle an inventory of these firearms." RP 77.

Alexandra objected to this proposed arrangement because there was no proof that any of Michael's firearms were in a gun safe at Michael's mother's house in Lane County. RP 71. Alexandra asserted Michael was stalling and asked the court to initiate a contempt proceeding under RCW 7.21.040. RP 74. The judge declined to do so but said Alexandra could file for contempt on her own. RP 78. The court entered an order finding Michael *not* in compliance with the court's weapons surrender order. RP 78, CP 67-68.

That same day, Alexandra filed an ex parte motion seeking to have

Michael held in civil contempt.[4] CP 69-72. Alexandra believed the only way to force Michael to surrender his weapons was to seek a remedial sanction of a $250 a day fine for every day Michael did not surrender all weapons in his possession or control. RP 83, CP 83. The motion was granted and a show cause order was issued requiring Michael to "go to court" on February 15, 2017. CP 75-76. On February 10, 2017, Alexandra filed a memorandum in support of holding Michael in civil contempt. CP 77-84. She asked that Michael be required to account for all 34 of his firearms listed in the Emerald Valley Armory inventory and she asked to cross-examine Michael. The memorandum argued that Michael had waived his Fifth Amendment privilege against self-incrimination. CP 83.

On February 13, 2017, Michael filed a declaration reporting he had surrendered 32 firearms to the Union County Sheriff's Office on February 3, 2017. CP 85-87. He attached a receipt listing 32 firearms by make, model, caliber and serial number. CP 88-91. These 32 guns were in addition to the three firearms Michael had surrendered on January 6, 2017. Michael represented "I have surrendered my firearms-all firearms listed in [Alexandra's] declaration are surrendered except for one which was owned by and in the possession of Dylan Hillman." CP 86. Finally,

[4] A criminal prosecution of Michael in Washington for the unlawful possession of a firearm was unlikely because his firearms were located in Oregon.

Michael declared "I have no concealed pistol license (it is expired) and no dangerous weapons to surrender." CP 87. Michael did not invoke the Fifth Amendment or raise any Fifth Amendment issues.

At the hearing on February 15, 2017, Michael did not appear but his counsel did and claimed Michael had "turned in all firearms." RP 89. Alexandra's counsel disagreed stressing there were "discrepancies" between the two gun lists. RP 90. A comparison of the Emerald Valley Armory inventory of firearms with the list of firearms turned in by Michael to the Union County Sheriff's Office showed that two of the guns on the Emerald Valley Armory inventory list "were not turned in." *Id.* Counsel noted there was no testimony that Michael had sold or transferred these firearms "so there's at least two guns missing." *Id.* Counsel concluded, "he's not supposed to have any guns, and there's still two guns unaccounted for. So until we resolve that, there is a problem." *Id.*

Michael's counsel responded that Michael had turned in 35 guns (three guns surrendered on January 6, 2017 and 32 surrendered on February 3, 2017). RP 91. Immediately, the trial court said "I'm going to find that he is in compliance at this point in time. He has made substantial efforts to turn in the guns that he has and I don't have any information that the 2014 list is accurate at this point in time." *Id.* Alexandra's counsel immediately objected and repeated the need to resolve the discrepancies

between the two gun lists. *Id.* The court issued an order finding Michael in compliance with the weapons surrender order. CP 98-99. The court did not address Alexandra's contempt motion. Alexandra appealed the trial court's ruling that Michael complied with the order to surrender weapons.

On March 19, 2018, the Court of Appeals held that "the restrained person has the burden to prove by a preponderance of the evidence that they have surrendered their firearms and other dangerous weapons," and that "the trial court erred in finding that Michael complied with the order to surrender [his] weapons" because the "finding is not supported by substantial evidence." Slip Op. at 1 and 13. The court reversed and remanded for further proceedings indicating "[t]he motion for contempt is before the trial court on remand." *Id.* at 14. The court acknowledged that placing the burden of proof on the restrained party to prove they have surrendered their firearms is subject to the right to invoke the Fifth Amendment privilege against self-incrimination. *Id.* at n.9.

IV. THIS COURT SHOULD DENY REVIEW

This Court should deny review because (1) Michael fails to present a significant constitutional question, (2) there is no substantial public interest implicated, and (3) the Court of Appeals' decision is not in conflict with precedent.

A. There Are No Significant Constitutional Questions Under RAP 13.4(b)(3)

Michael did not raise any Fifth Amendment protection issues or any burden of proof issues in the trial court.[5] Nonetheless, Michael now claims that restrained parties have a Fifth Amendment privilege against self-incrimination that shields them from testifying about firearms surrender. According to Michael, placing the burden of proof on restrained persons to show they have surrendered all their weapons is "not only wrong, but also impractical." Petition at 16. Michael argues that placing the burden of proof on the restrained party constitutes a significant constitutional question that justifies the Supreme Court in granting review and that the "burden of proving non-compliance" with a weapons surrender order should be "on the party that does not have a constitutional privilege to remain silent." *Id.* Michael's argument fails for at least three reasons. First, Michael did not preserve a Fifth Amendment challenge in the trial court. Second, Michael waived any right to claim the Fifth Amendment in this case. Finally, even if Michael had not waived any Fifth Amendment protections, the Constitution does not prohibit placing the burden of proof on individuals who may assert the Fifth Amendment.

[5] Michael's assertion that Alexandra raised the weapons surrender burden of proof in the trial court is incorrect. Petition at 10; CP 77.

1. Michael Did Not Preserve Any Fifth Amendment Issues in the Trial Court

RAP 2.5(a) provides that this Court may refuse to review any claim of error that was not raised in the court below. Here, Michael said not a single word about the Fifth Amendment in the trial court. Thus, the trial court made no findings or rulings on the issue. This Court should not now consider Michael's belated Fifth Amendment argument where he failed to preserve it and thereby prevented the trial court from making any factual findings regarding its applicability. *See Eastham v. Arndt*, 28 Wn. App. 524, 532, 624 P.2d 1159 (1981) ("There is no blanket Fifth Amendment right to refuse to answer questions based on an assertion that any and all questions might tend to be incriminatory. The privilege must be claimed as to each question and the matter submitted to the court for its determination as to the validity of each claim.").[6]

2. Michael Has Waived His Fifth Amendment Privilege

Even if Michael had properly presented his Fifth Amendment argument to the trial court in the first instance—which he did not—Michael's reliance on the Fifth Amendment to justify discretionary review is misplaced. Michael waived his Fifth Amendment rights. CP 83. Indeed, Michael waived his Fifth Amendment privilege against self-incrimination

[6] Michael does not claim "manifest error affecting a constitutional right."

by voluntarily testifying on his own behalf about his possession and surrender of firearms. "[W]hen a witness voluntarily testifies," the "witness himself, certainly if he is a party, determines the area of disclosure and therefore of inquiry." *Brown v. United States*, 356 U.S. 148, 155 (1958). "Such a witness has the choice, after weighing the advantage of the privilege against self-incrimination against the advantage of putting forward his version of the facts and his reliability as a witness," to testify "or not to testify at all." *Id.* And a witness who voluntarily testifies waives his privilege against self-incrimination to the full extent of relevant cross-examination. *Id.* at 154-55. This is because "[i]t is well-established that a witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Rogers v. United States*, 340 U.S. 367, 373 (1951). In this case, Michael made his choice and testified about the possession and surrender of his firearms.[7] CP 85-87. He testified extensively about the status of his firearms, including by submitting the Proof of Surrender form (though altered to omit some

[7] Michael suggests the statutory scheme embodied in RCW 9.41.800 et seq. may run afoul of a line of U.S. Supreme Court cases in which the Court has allowed witnesses to exercise their Fifth Amendment privilege through silence where assertion of the privilege would itself tend to incriminate. Petition at 12-13. Since Michael did not remain silent, these cases are plainly distinguishable.

required information) and by submitting a detailed declaration. Because of his extensive testimony on the subject, Michael waived any claim he might have to the protections of the Fifth Amendment when assessing the status of his firearms or his compliance with the Order to Surrender Weapons. This Court should reject Michael's argument accordingly.

3. Placing the Burden of Proof on Restrained Parties Does Not Raise a Significant Constitutional Question

Not only does Michael lack any Fifth Amendment protections because of his waiver, this case does not implicate a significant constitutional question. Michael argues that the Fifth Amendment protects restrained parties from the burden of proof. He claims the "burden of proving non-compliance" should be placed "on the party that does not have the constitutional privilege to remain silent." Petition at 16. He makes this claim based on his speculation that "if someone falsely signs a declaration of surrender, and is then ordered to come to court and be examined under oath as to what happened to all of their firearms, the person at that point should normally be advised not to say a word and to assert the right to remain silent." *Id.* at 12. Michael argues placing the burden of proof on the restrained party is "wrong" and "impractical." *Id.* at 16. Michael's argument legally incorrect. It also fails because it is merely hypothetical and not implicated by the facts of this case.

In *United States v. Rylander*, 460 U.S. 752 (1983), the U.S. Supreme Court rejected the precise argument Michael now asserts. In *Rylander,* the Ninth Circuit Court of Appeals had held that a respondent's invocation of the Fifth Amendment in a civil contempt proceeding shifted the burden of proof to the government. The Supreme Court reversed, holding that the invocation of the Fifth Amendment is **not** a substitute for evidence that would assist in meeting the claimant's burden of proof. The Supreme Court recognized its precedent that "squarely rejected the notion . . . that a possible failure of proof on an issue where the defendant had the burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." *Id.* at 758. In addition, the Court held that the Ninth Circuit's view would convert the privilege from a shield to a sword "whereby a claimant asserting the privilege would be freed from adducing proof in support of a burden which would otherwise have been his." *Id.*

Consistent with this authority, this Court has not hesitated to place the burden of proof of compliance with a court order on a party who claims a Fifth Amendment right.[8] *See King v. Dep't of Social and Health*

[8] The burden of proof is allocated irrespective of the Fifth Amendment. "It is generally recognized that the defendant bears the burden of proving an affirmative defense by a preponderance of the evidence." *State v. Deer,* 175 Wn.2d 725, 734, 287 P.3d 539 (2012).

Services, 110 Wn.2d 793, 804-05, 756 P.2d 1303 (1988) (holding that a contemnor had the burden of proof (the "burden of production" and the "burden of persuasion") and that the party with the burden of proof could invoke his or her Fifth Amendment privilege against self-incrimination in "situations where the failure to comply with an order may be constitutionally protected"). The Court of Appeals followed this authority in the instant case by making clear that restrained persons have the legal right to invoke the Fifth Amendment privilege against self-incrimination, assuming they have not waived that right. Slip. Op. n. 9. The Court's acknowledgement of this axiom is uncontroversial. It is not uncommon (much less unconstitutional) in civil cases—as is this case—for respondents to be required to sustain a burden of proof or invoke the Fifth Amendment and face an adverse inference for doing so. *See, e.g.*, *Ikeda v. Curtis*, 43 Wn.2d 449, 458-59, 261 P.2d 684 (1953) ("[O]nce a witness in a civil suit has invoked his or her Fifth Amendment privilege against self-incrimination, the trier of fact is entitled to draw an adverse inference from the refusal to testify."). While a respondent is certainly entitled to weigh the benefit versus the detriment of invoking the Fifth Amendment, this difficult choice does not offend the Constitution. As the *Rylander* Court explained, "That the defendant faces such a dilemma demanding a choice between complete silence and presenting a defense has never been thought

an invasion of the privilege against compelled self-incrimination." *Rylander*, 460 U.S. at 759 (quoting *Williams v. Florida*, 399 U.S. 78, 83-84 (1970)). "[T]he legal system . . . is replete with situations requiring the making of difficult judgments as to which course to follow, and . . . there is no constitutional prohibition against requiring parties to make such choices." *Demore v. Hyung Joon Kim*, 538 U.S. 510, 530 n.14 (2003) (internal quotation marks omitted). In short, there is no constitutional prohibition on assigning a burden of proof to a restrained person on the basis that the individual *might* wish to invoke the Fifth Amendment. Rather than be "impractical," the weapons surrender statute logically and appropriately places the burden to show the whereabouts of firearms on the restrained person where this information is uniquely within the restrained party's knowledge and ability to establish.

In addition to being legally inaccurate, Michael's Fifth Amendment argument fails because is not implicated by the facts of this case. Michael theorizes that individuals will be advised to invoke the Fifth Amendment when they have made false claims about their weapons surrender. But Michael does not suggest that he perjured himself when he submitted his Proof of Surrender form. And even Michael's hypothetical example does not present significant constitutional concerns. There may well be innocent explanations for the locations of weapons possessed or

controlled by restrained parties that do not require the restrained party to invoke the Fifth Amendment. Further, there is no showing (because there is no trial court record on this issue) how frequently restrained parties would invoke the Fifth Amendment in weapons surrender proceedings. The hypothetical potential for a restrained party to invoke the Fifth Amendment—which again is not at issue in this case because Michael waived any Fifth Amendment right—does not justify imposing the burden of proof on victims of domestic violence who are in a less advantageous position to meet the burden of proof than their abusers.

B. There Is No Substantial Public Interest Under RAP 13.4(b)(4)

Michael also fails to show a substantial public interest at issue. "A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue." *In re Flippo*, 185 Wn.2d 1032, 380 P.3d 413 (2016). A substantial public interest is not present in cases, as is this case, that is limited to its specific facts. *Hart v. Dep't of Soc. & Health Servs.*, 111 Wn.2d 445, 451, 759 P.2d 1206 (1988).[9] A substantial public interest in this case is lacking for several reasons.

[9] In the context of the mootness doctrine, an exception is made for cases involving issues of "continuing and substantial public interest." In

First, this case is limited to Michael's persistent efforts to resist surrendering his many firearms in Oregon and Alexandra's pertinacity in a Washington courtroom to account for all of Michael's firearms. No issues other than the identification, location, and surrender of Michael's guns were raised in the trial court. Second, as explained, there is no constitutional issue presented here. The Fifth Amendment does not protect restrained parties from the burden of proof. And the Court of Appeals decision makes clear that placing the burden of proof on the restrained party to prove they have surrendered their firearms is subject to the right to invoke the Fifth Amendment privilege against self-incrimination. Third, the Court of Appeals decision does not invite unnecessary litigation. Placing the burden of proof on the restrained party is the most efficient means of ensuring weapons surrender because the restrained party is uniquely qualified to identify and account for the location of his firearms. Fourth, the Court of Appeals decision does not create confusion. The

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assessing whether there is continuing and substantial public interest, courts consider (1) the public or private nature of the question presented, (2) the desirability of an authoritative determination for the future guidance of public officers, and (3) the likelihood of future recurrence of the question. *State v. Hunley*, 175 Wn.2d 901, 907, 287 P.3d 584 (2012).

Court's thoughtful analysis addressed the narrow issue presented in this case and reached the conclusion compelled by law.[10]

C. There Is No Conflict With Decisions of the Supreme Court or Court of Appeals Under RAP 13.4(b)(1) and 13.4(b)(2)

Finally, this case is not in conflict with prior precedent. Michael attempts to create a conflict by alleging that the Court of Appeals engaged in de novo review of the evidence in violation of prior precedent giving fact-finding deference to family law courts. Michael alleges "[t]he Court of Appeals' decision conflicts with decisions of this Court such as *Rideout* and *Jannot* that do not allow for the *de novo* review of the evidence on appeal." Petition at 19. Not so.

The Court of Appeals did not apply a de novo standard of review. It applied the correct standard—the substantial evidence test—and held that the trial court's finding that Michael had complied with the weapons surrender order was not supported by substantial evidence. In reviewing the evidence, the Court of Appeals found it apparent that Michael failed to account for two guns and the "discrepancy in the evidence is visible on the face of the documents." Slip. Op. at 12. As the Court of Appeals acknowledged, the factual determination of compliance with an order to

[10] Michael also argues that there was inadequate briefing on the issue of burden of proof. Petition at 10. This is unpersuasive. Alexandra addressed the subject in her reply brief at pages 5-9 and the Court of Appeals thoroughly and thoughtfully addressed the issue.

surrender weapons is not left to the trial court's discretion. Rather, the court must simply determine, as a factual matter, whether an abuser has surrendered all his firearms as required by the statute. As with all other factual findings, the trial court's assessment of this factual question is reviewed for substantial evidence. *See In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003) ("the substantial evidence standard of review should be applied here where competing documentary evidence had to be weighed and conflicts resolved."); *In re A.W.*, 182 Wn.2d 689, 711, 344 P.3d 1186 (2015) (recognizing the well-established standard that challenges to findings of fact are reviewed for substantial evidence).[11]

V. CONCLUSION

There is no basis to accept review in this case. The delay associated with Supreme Court review of this case, however, will postpone Michael's accounting for the weapons he did not surrender and leave Alexandra and her family in danger of gun violence.

[11] Michael's cited cases are not to the contrary. Each involved a decision classically left to the trial court's discretion. *See, e.g.*, *In re Parengage of Jannot*, 149 Wn.2d 123, 126, 65 P.3d 664 (2003) (abuse of discretion standard applied to adequate cause determination regarding modifying a parenting plan and custody arrangement); *In re Marriage of James*, 79 Wn. App. 436, 903 P.2d 470 (1995) (recognizing that a court will not reverse a contempt order absent an abuse of discretion).

RESPECTFULLY SUBMITTED this 11th day of May, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 11, 2018, I caused to be served true and accurate copies of:

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I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

EXECUTED on May 11, 2018, at Seattle, Washington.

/s Jan Howell
Jan Howell

FOSTER PEPPER PLLC

May 11, 2018 - 1:55 PM

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