69515-1

No. 69515-1-1

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

SIMONA VULETIC and MICHAEL HELGESON,
husband and wife,

Appellants

v.

DARRELL R. McKISSIC,

Respondent

APPELLANTS' REPLY BRIEF

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I. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

In Section E. entitled "Facts Surrounding the Attorneys and the Pleadings" beginning at the bottom of p. 4 of the Respondent's Brief there are several "facts" that are either incorrect or merit clarification. Without citation to support in the record, it is asserted that "[s]ubsequent to Sheriff Hillard leaving the Summons and Complaint [on January 3, 2012] with nanny Corr, McKissic's insurance carrier retained counsel (Mr. Bendele) to represent him." In his deposition, McKissic testified to having been forewarned by Mr. Bendele before he was served that he would be served with legal papers arising out of the accident of March 1, 2009. (CP 60-61.) Thus, on January 3, 2012, when deputy Hilliard left the summons and complaint intended for McKissic with the nanny who agreed to deliver them, McKissic actually knew what they were and for that reason did not bother to review them at that time. (*Id.*) It should also be noted that McKissic's wife, Leslie Nellermoe, an attorney whose practice of over thirty years includes litigation, was also made aware of the summons and complaint by nanny Corr on the date of delivery. (CP 196.)

Respondent's Brief at p. 6, asserts that "up until April 18, 2012, McKissic's counsel relied upon the Return of Service filed by Sheriff Hillier (sic)" and that it was not until that date that McKissic's counsel "turned" his attention to answering the complaint or the Plaintiffs'

Interrogatories. Those interrogatories, served on McKissic's attorney on February 2, 2012, included Interrogatory #23 which specifically inquired as to any allegation of insufficiency of process or of service of process. (CP 74-76.) The implication that McKissic wants to convey to this Court is that the defense counsel did not communicate with his client until April 18, at which time he (attorney Bendele) first learned that the nanny was not a resident of the household and then within two days called this to the attention of Vuletic's counsel. However, as noted above, McKissic stated that he was forewarned by Bendele that he would be served with a lawsuit before January 3, 2012, thus showing that client and attorney were in contact long before April 18, 2012. Furthermore, McKissic himself testified in deposition taken May 11, 2012, not long after these events, that he became aware that there was an issue as to the validity of service from "Mr. Bendele or his office." (CP 62.)

The correspondence exchange (CP 41-51) shows that someone in defense counsel's office was working on preparing stipulations for medical and employment records as well as preparing Interrogatories and Requests for Production and Requests for Statements of Damages along with proposing a timetable for deposing Vuletic so that the case could be expeditiously moved along. These efforts are confirmed in the letter of March 22, 2012, from McKissic's counsel reiterating the insurance

carrier's interest in gathering medical records and deposing Vuletic so the parties "can start talking sooner (sic) than later regarding potential resolution" of the claims, and he apologized for the "oversight" in not forwarding Vuletic's discovery requests to McKissic, promising that answers would be provided as "quickly as possible". (CP 49-50.) Those discovery requests had been served on McKissic's counsel on February 2, 2012, some 52 days prior to the expiration of the ninety day period to serve and have it date back to filing. (CP 74.)

II. REPLY TO RESPONDENT"S ARGUMENT

Reply to Argument that Service was Insufficient

McKissic cites Salts v. Estes, 133 Wn.2d 160, 170, 943 P.2d 275 (1997), as holding that service upon a neighbor who happened to be in the defendant's house checking on it while the defendant was on vacation, was insufficient. Vuletic takes no exception to that case and discussed it at length in Appellants'Opening Brief at pp. 9-10. We simply point out that Salts was a 5-4 decision, where the four Justice dissent would have upheld service under facts significantly less compelling than the facts in the instant case.

Respondent's Brief at p. 11-12 asserts that Wichert v. Cardwell, 117 Wn.2d 148, P.2d 858 (1991) sets the "outer boundaries" of what service facts will be deemed sufficient under the service statute. The

words "outer boundaries" are taken from the 5-4 Salts decision in describing the Wichert and the Sheldon v. Fettig, 129 Wn.2d 601, 919 P.2d 1209 (1996) decisions. We submit that finding the service valid under the facts of the instant case does not go outside those "boundaries" considering the connection of Ms. Corr to the McKissic residence and the other compelling facts detailed at length in Appellants' Opening Brief.

The Wichert Court noted:

> We recognize that this decision does not establish a "bright line" rule, but a case-to-case determination is necessitated by the fact-specific requirements of the statute. "[T]he practicalities of the particular fact situation determine whether service meets the requirements of [the federal rule relating to service of process]." (Citations omitted.)
>
> We also note that the inquiry in any case is upon the method of attempted service, i.e., was it reasonably calculated to provide notice to the defendant? "It is hornbook law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice . . . ." (Citations omitted.)

117 Wn.2d at 152. Of course there is no due process issue in the instant case because, as in Wichert, McKissic received actual notice and an appearance was filed on his behalf. It is Vuletic's position that the nanny in the instant case had significantly more connection to the McKissic residence than the adult step-daughter in Wichert who, by happenstance, was spending the night at the defendant's residence or the adult daughter

in Sheldon who had moved to another city eight months prior. Nanny Corr spent at least six hours per weekday at McKissic's residence, likely more awake time than McKissic himself, and the nanny's connection to McKissic's children, his home and his family are strong, significant and of considerable duration (a total of at least six years.)(CP -78.)

Reply to Arguments Related to Wavier

It Is No Excuse that McKissic's Attorney Did Not "Turn His Attention" to the Case Until After the Time to Perfect Service Had Expired.

McKissic is making the argument that he should be forgiven for not timely raising the service of process issue because his attorney did not turn his attention to the case until after April 18, 2012, some three and one-half months after the service events of January 3, 2012, and the January 5, 2012, verbal notice of appearance by Mr. Bendele's partner. (CP 5, 32.) Respondent's Brief at p. 6, states:

> Up until April 18, 2012, McKissic's counsel relied upon the Return of Service filed by Sheriff Hillier. The service of process issue was discovered thereafter when McKissic counsel turned its attention to working on its Answer. Vuletic's counsel was notified immediately thereafter.

McKissic's counsel is asserting that despite the fact that: (1) he forewarned McKissic to expect to be served; (2) the Return of Service that counsel says he relied upon on its face showed service upon Ms. Corr designated as a resident; and (3) McKissic's wife being an attorney and litigator who was told by the nanny about the service on the day it occurred, it was not until

April 18, that counsel got around to discussing it with his client and became aware of the claimed defect. This is the reason they should be excused for not timely raising the issue! The "injustice" argument of McKissic aside, to reward this kind of "hiding one's head in the sand" would encourage all defense counsel hired by an insurance company to ignore the duty to timely and diligently represent the client and encourage such defense counsel to practice with planned ignorance concerning their case. A defendant should not be allowed to escape responsibility for his or his attorney's inactions through their own disinterest in the case.

Should this Court finds service insufficient and consider the waiver issue, the following analysis from Blankenship v. Kaldor, 114 Wn. App. 312, 320, 57 P.3d 295 (Div. Three, 2002), is relevant to this particular argument by McKissic:

> In the process server's subsequent affidavit, Mr. Kaldor reportedly gave assurances he would turn the matter over to his insurance company and notify Ms. Kaldor. While, as discussed above, such assurances do not turn the tide in Ms. Blankenship's actual notice arguments, the circumstances still have some bearing on waiver. Implicitly, Mr. Kaldor discussed the circumstances of service with his daughter and when turning the process over to his insurance company. In this sense, the defense had access to and under its control the necessary facts to contest service well prior to the end of the 90-day period following attempted service. Further, if defense counsel had seasonably attempted to contact his client, he would have learned she resided in Portland and not at her father's house at the time of service.

> While it does not appear the defense was necessarily "lying in wait" as discussed in Lybbert, the defense was tardy in asserting the insufficient service defense when it had the necessary facts within its control to make the critical assessment and failed to act earlier; in this sense, the defense was dilatory within the spirit of Lybbert. Lybbert, 141 Wn.2d at 39-41, 1 P.3d 1124. Ms. Kaldor's argument that her counsel should be excused from contacting her and ignoring Mr. Kaldor's role in the attempted service because he was retained by the insurance company and not Ms. Kaldor personally is unpersuasive.

(Emphasis added.) Here the nanny testified that the deputy told her the papers were important and asked if she would be sure that Mr. McKissic got them if he gave them to her and she assured him she would (CP 81). McKissic in fact within a few minutes picked up the papers from where the nanny placed them. (CP 61-62.) As in Blankenship, these facts should have bearing on the question of waiver. In the instant case there is the added fact that McKissic's counsel, Mr. Bendele, had advised McKissic prior to his being served, to expect to be served. (CP 61.) And as noted above, McKissic's wife, an attorney with litigation experience was aware of the service on the nanny. As in Blankenship, McKissic's counsel had free and easy access to all the facts necessary to timely contest service.

Instead, McKissic asserts the position that Vuletic should have either motioned for default or to compel answers to interrogatories to surface the service issue. (Respondent's Brief at pp. 7, 26, 32.) Yet at the same time, McKissic asserts that until he was properly served, he had no

duty to respond neither to the complaint nor to the interrogatories. (Respondent's Brief at pp. 23-25.) If service was no good, the defense had the option of ignoring the proceedings and later seeking to vacate any order or judgment based upon the trial court not having jurisdiction over him, or of appearing and raising the service issue either in an answer or by CR 12(b) motion. McKissic chose the latter course. While McKissic's Notice of Appearance contained a reservation with "respect to all 12(b)(6) defenses" (Respondent's Brief at p. 5), such is without any significance as Washington did away with "special" as opposed to "general" notices of appearance with the adoption of CR 4(d)(5) in 1967. In Lybbert, *supra*, the defendant county actually used the words "without waiving objections to improper service" in its Notice of Appearance but the Court found such to be of no significance stating:

> That is so because we have said that the mere appearance by a defendant does not preclude the defendant from challenging the sufficiency of service of process. Adkinson v. Digby, Inc., 99 Wn.2d 206, 209, 660 P.2d 756 (1983); . . . Since the filing of a notice of appearance without including the caveat cannot constitute a waiver of the defense, we see no reason why filing the notice of appearance with the caveat should serve as a vehicle to preserve it."

141 Wn.2d at 43. While CR 4(d)(5) preserves the appearing party's right to challenge jurisdiction, sufficiency of process or sufficiency of service of

process, there is no support for McKissic's proposition that a party can appear and then ignore its obligations under the said CRs.

Further, there is no mention of either a motion for default or to compel responses to discovery in the facts of any of these cases, yet such did not preclude Division Three from finding waiver in Blankenship, *supra*, nor in Romjue v. Fairchild, 60 Wn. App. 278 , 803 P.2d 57 (Div. Three, 1991)(rev. den. 116 Wn.2d 1026 (1991). Likewise, the apparent absence of any such motions by the plaintiff in the lead case of Lybbert, *supra*, made no difference to the Supreme Court's finding waiver.

McKissic's Defense Conduct Was Both Dilatory and Inconsistent With the Later Assertion of Insufficient Service of Process

As noted in Appellants Opening Brief at p. 21, Lybbert, stands for the proposition that waiver can occur in two ways: (1) defendant's assertion of the defense is inconsistent with the defendant's previous behavior; or (2) if the defense has been dilatory in asserting the defense. McKissic repeatedly comments that his discovery efforts in the instant case were "routine, rote, and perfunctory" or "generic and routine" (Respondent's Brief at pp. 5, 17, and 20); seemingly thinking such supports his position that the late raising of the service of process defense was not "inconsistent". Such actually supports Vuletic's position because it confirms that McKissic's defense team was only interested in gathering the

medical records and information to evaluate the claim for resolution "sooner than later" as McKissic's counsel noted in his letter to Vuletic's counsel. (CP 49.) It is seeking discovery by the defendant which is aimed at developing the facts regarding service that can negate the waiver argument because obviously then the plaintiff's side is made aware that service is an item of defense focus. See the discussion on this point from Blankenship v. Kaldor, infra at pp. 13-15. Whether intentional or not, this conduct deceived Vuletic's counsel.

McKissic relies upon two cases for the proposition that an untimely answer to the complaint does not waive service of process defenses: French v. Gabriel, 116 Wn.2d 584, 806 P.2d 1234 (1991) [affirming French v. Gabriel, 57 Wn. App. 217, 788 P.2d 569, (1990)] (Respondent's Brief at pp. 25-27); and Gerean v. Martin-Joven, 108 Wn. App. 963, 33 P.3d 427 (2001) (Respondent's Brief at pp. 28-31). In French, a decision that predates the waiver cases we rely upon, while the answer was not timely filed, as both the Supreme Court (116 Wn. 2d at 595) and Court of Appeals (57 Wn. App. at 222) noted, the answer left the plaintiff over a year to perfect timely service of the lawsuit. Such is simply not the case in

this appeal. As for Gerean v. Martin-Joven[1], it involved attempted service at the residence of the defendant's father, where the defendant had not resided for a year. In declining to apply the waiver doctrine, the Court of Appeals noted:

> Moreover, in a January 5, 2000 letter, Ms. Martin-Joven alerted the plaintiff that the method of service was a matter of interest to the defense. She asked for a copy of the affidavit of service. This request was ignored.

108 Wn. App. at 973. Thus, the plaintiff in Gerean was on notice that service was being investigated by the defense leaving the plaintiff on notice with plenty of time to correct any deficiency in service.

In the instant case, not only did the defense not alert Vuletic that service was a "matter of interest", the exchange of communications between counsel made it clear that the defense wanted to get the case resolved expeditiously, if possible. Gerean noted that:

> This is in contrast to the facts in Lybbert. In that case, the defendant never mentioned service and proceeded with general discovery for nine months before pleading the affirmative defense of insufficient service of process.

Id., citing, Lybbert v. Grant County, 141 Wn.2d 29, 35-36, 1 P.3d 1124 (2000). The primary fact distinction between Lybbert and the instant case

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[1] Gerean is a Division Three case, a fact that according to McKissic makes it "only persuasive" on this court. (Respondent's Brief p. 18).

is that the defense in Lybbert waited three and one-half months after the time to perfect service had expired to raise the affirmative defense whereas in the instant case the defense waited a month. It really does not matter if it is a month or three or six months, if the defense sits quiet and thus lets the time to perfect service run out.

The accident in Lybbert was on March 6, 1993. The lawsuit was filed on August 30, 1995, and thus the statute of limitations expired three years after the accident, on March 6, 1996, as the statute allowing the service to date back to filing if served within 90 days (RCW 4.16.170) would not be relevant. The instant case is stronger than Lybbert in a significant particular. Lybbert served interrogatories on the defendant county on February 29, 1996. One of the interrogatories, as was true in the instant case, inquired specifically as to any service of process defense. However, the time to perfect service in Lybbert expired on March 8, 1996, so that the defendant county could have responded timely and still the time to serve would have already expired. In the instant case, the critical interrogatory was served on McKissic on February 2, 2012, making the responses due on March 3, 2012, some 23 days before the expiration of the time to perfect service on McKissic. Thus the instant case is a stronger one than Lybbert for application of waiver.

McKissic's argument would be exactly the same if the case had continued in the same cooperative vein and he had "innocently" discovered the service issue several months later. The Court noted in Lybbert:

> Of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process. Had the County timely responded to these interrogatories, the Lybberts would have had several days to cure the defective service. The County did not answer the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense.

141 Wn.2d at 42.[2] Vuletic's position is stronger than the plaintiff's position in Lybbert in another important particular. In Lybbert, plaintiff's counsel would have known it served the wrong county office by simply reading the statute and comparing that to the return of service. In the instant case, reading the service statute and the return of service would not alert Vuletic's counsel to any service issue. And finally, while McKissic complains of the absence by Vuletic of any motion for default or to

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[2] As noted in our recitation of the timeline in Lybbert in this Brief at p. 13, the county defendant actually was not obligated to respond the plaintiff's interrogatories until after the statute of limitations would have expired. To figure out the timeline, one must review both the Supreme Court (141 Wn.2d 29) and the Court of Appeals (93 Wn. App. 627) decisions to determine the timeline.

compel interrogatory answers (*supra* at p. 8), there is no indication that the plaintiff in Lybbert made any such motions.

McKissic correctly asserts that engaging in discovery is not always inconsistent with later asserting a challenge to the service of process. (Respondent's Brief at pp. 17-18). This is true insofar as it goes. In Blankenship v. Kaldor, *supra*, 114 Wn. App. at 319, the court states:

> Regarding discovery, this court in Romjue v. Fairchild, 60 Wn. App. 278, 281, 803 P.2d 57, *review denied,* 116 Wn.2d 1026, 812 P.2d 102 (1991) noted the mere act of engaging in discovery "is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient service." "This is so because in some circumstances it may be entirely appropriate for a party to engage in discovery to determine if the facts exist to support a defense of insufficient service." Lybbert, 141 Wn.2d at 41, 1 P.3d 1124.
>
> However, the defendants' discovery efforts in Romjue were inconsistent with an insufficient service of process defense because it was not geared toward revealing facts relating to the service of process. We held that the defendant waived the defense of insufficient service. Romjue, 60 Wn. App. at 282, 803 P.2d 57. Our Supreme Court rendered the same holding in Lybbert, based on similar facts. Lybbert, 141 Wn.2d at 45, 1 P.3d 1124. Further, our Supreme Court recently stressed the importance of raising procedural defenses "Before any significant expenditures of time and money had occurred and at a time when the [plaintiff] could have remedied the defect." King v. Snohomish County, 146 Wn.2d 420, 426, 47 P.3d 563 (2002).
>
> Ms. Kaldor's conduct was similar to that of the defendants in Romjue and *Lybbert.* Both parties propounded interrogatories and requests for production; Ms. Kaldor deposed Ms. Blankenship and took photographs of her

> residence. Ms. Kaldor's discovery efforts were not aimed at determining whether facts existed supporting the defense of insufficient service of process. Indeed, the process server's original affidavit stated that Ms. Kaldor's father was served on behalf of Ms. Kaldor.

While Blankenship may be a Division Three case and thus not "binding" on this Court, the reasoning is sound and McKissic provides no reason to ignore the ruling. In fact, McKissic misstates the holding by stating that: "The Blankenship Court held that by engaging in extensive discovery requiring 'significant expenditures of time and money,' defendant waived the service of process defense." Respondent's Brief at p. 19. The discovery in Blankenship was the exchange of Interrogatories and Request for Production, taking the deposition of plaintiff Blankenship and the taking of photographs of her house. These discovery efforts were not "extreme" and were more modest than in the instant case where the parties exchanged Interrogatories and the defense served a Request of Statement of Damages as to both plaintiffs and both plaintiffs served their Statement of Damages on the defense. (CP 203-208.) The defense was pointed toward early deposition of Vuletic to try to resolve the claim as stated in the letter of McKissic's counsel. (CP 49.) In addition, both plaintiffs Vuletic and Helgeson executed stipulations prepared by the defense (CP 51) to enable the defense to gather ten years of their medical records to assist the defense in evaluating the damages, a significant

invasion of privacy. Furthermore, Dr. Vuletic provided extensive answers to the interrogatories from McKissic. (CP 180-187.)

But the critical point is that, as in Romjue cited above in the quote from Blankenship, McKissic's discovery effort was "inconsistent with an insufficient service of process defense because it was not geared toward revealing facts relating to the service of process." As McKissic notes numerous times in the Respondent's brief, his discovery was "generic and routine". Romjue likewise is a Division Three decision and it was cited with favor by the Supreme Court in Lybbert, *supra*. Thus, Romjue is more than simply "persuasive" as McKissic argues, it has already been looked upon with favor by our Supreme Court, and by logical extension so has Blankenship, decided after both Romjue and Lybbert but relying upon both for its reasoning in finding waiver.

Conspicuous by its absence is any discussion in the Respondent's Brief of Butler v. Joy, 116 Wn. App. 291, 65 P.3d 671 (2003), relied upon in Appellants' Opening Brief at p. 25. In Butler the court found that because the process server's affidavit of service was on file (as in the instant case) the defendant county knew or should have known of the availability of the defense of insufficient service of process. 116 Wn. App at 298, citing Lybbert, 141 Wn.2d at 42. McKissic concedes at p. 6 of the Respondent's Brief that "up until April 18, 2012, McKissic's counsel

relied upon the Return of Service filed by Sheriff Hillier (sic)". Here the defense without wanting to say so, is really asserting what the court found lacking in Blankenship, *supra* at p. 8, that the defense should be forgiven because the defendant was provided an attorney by the insurance company. Vuletic and their attorney had no reason to question the return of service which was regular on its face and is presumptive evidence of valid service unless and until the defense shows by competent evidence that it is incorrect. Lee v. Western Processing Co., 35 Wn. App 466, 469, 667 P.2d 638 (1983). The McKissic defense team was the side that was in position to know whether or not nanny Corr resided at McKissic's residence. They alerted the Vuletic side, but not until after it was too late to attempt timely re-service on McKissic.

Striking the Insufficiency of Service Was Within the Trial Court's Authority and Appropriate

Vuletic stands by its reading of Amy v. Kmart of Washington LLC, 153 Wn. App 846, 223 P.3d 1247 (2009), that the case stands for the proposition that the trial court can hear a discovery motion despite the absence of a CR 26(i) conference of counsel. McKissic asserts (Respondent's Brief at p. 36) that Amy involved only a defective certification and McKissic quotes from the portion of the Amy decision that treats with the defective certification as to the plaintiff Amy's, motion to compel and to supplement

discovery. However, the decision also dealt with Amy's later separate motion for sanctions pursuant to CR 37. 153 Wn. App. at 862-864. As to sanctions, there is no discussion by the court of any effort on the part of plaintiff Amy's counsel to meet and confer. But most importantly, this Court made clear that a trial court has jurisdiction to entertain such a motion even absent compliance with the "meet and confer" rule under the appropriate circumstances. This Court noted with approval the dissent of Judge Morgan in Case v. Dundom, 115 Wn. App 199, 58 P.3d 919 (Div. Two, 2002), that the "rule should be a shield that protects the court from becoming involved in half-baked discovery disputes, not a sword for the discovery violator to wield against the court." 153 Wn. App. at 863. For Vuletic to have to motion the trial court to compel answers to King County's Pattern Interrogatories which were adopted by the judges of that court, would have been to involve the trial court in "half-baked discovery disputes". Under the facts of the instant case, the appropriate sanction for McKissic's failing to respond to interrogatories was to strike the affirmative defense as to insufficiency of process.

III. CONCLUSION

Vuletic has asserted four grounds for reversing the trial court's ruling: (1) service of process substantially complied with RCW 4.28.080(15); (2) waiver of the defense of insufficient service of process;

(3) estoppel from asserting the defense of insufficient service of process; and (4) striking the defense of insufficient service of process as a discovery sanction for failing to respond to interrogatories. Vuletic believes any one of the four grounds can stand on its own as a reason for reversing the trial court, but taken as a whole, the facts and the law present a compelling case for reversal. McKissic's cry that a significant injustice is done him if he is not dismissed from this case is the epitome of crying "crocodile tears". Dismissal would allow McKissic to evade responsibility for causing the accident and significant injuries to the plaintiffs, and would unjustly reward his and his counsel's inaction and failure to honor the Civil Rules.

RESPECTFULLY SUBMITTED this 28th day of February 2013.

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By: _____

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DECLARATION OF SERVICE

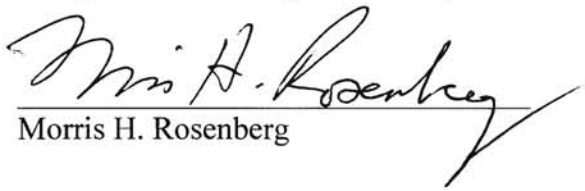
I, Morris H. Rosenberg, declare as follows: on this day, I caused to be served upon Respondent, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

APPELLANTS' REPLY BRIEF

Attorney for Defendant/Respondent: Levi Bendele Bendele & Mendel, PLLC 200 West Mercer Street, # 411 Seattle, WA 98119	☒ Via Legal Messenger ☐ Via U.S. Mail ☐ Via Email ☐ Via Facsimile

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 28th day of February 2013.



Morris H. Rosenberg